Court File No. 33289

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PRIME MINISTER OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, AND THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE,

Appellants (Respondents),

- and -

OMAR AHMED KHADR,

Respondent (Applicant),

- and -

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH), HUMAN RIGHTS WATCH, UNIVERSITY OF TORONTO, FACULTY OF LAW - INTERNATIONAL HUMAN RIGHTS PROGRAM AND DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN COALITION FOR THE RIGHTS OF CHILDREN AND JUSTICE FOR CHILDREN AND YOUTH, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN BAR ASSOCIATION, AVOCATS SANS FRONTIÈRES CANADA, BARREAU DU QUÉBEC ET GROUP D'ÉTUDE EN DROITS ET LIBERTÉS DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ LAVAL, CANADIAN CIVIL LIBERTIES ASSOCIATION, NATIONAL COUNSEL FOR THE PROTECTION OF CANADIANS ABROAD,

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I. STATEMENT OF FACTS

1. When a Canadian citizen, detained abroad, asks that his/her own government take steps to secure that citizen's repatriation, s. 7 of the Charter of Rights and Freedoms requires that the government consider the request in accordance with the rules of natural justice and do so in a manner that actively seeks to conform to Canada's international human rights obligations. At a minimum, these rules require that the detained citizen be afforded the right to be heard and to receive adequate reasons when a decision is made on the repatriation request. Further, any such decision is reviewable on the merits on a reasonableness standard.

2. Other parties or interveners argue that s. 7 includes a "duty to protect" and/or that s. 24 of the Charter justifies a *mandamus*-like order compelling the Appellants to seek Mr. Khadr's repatriation. This intervener, Amnesty International (Canadian Section, English Branch) ("Amnesty"), supports these arguments. In the event that this Honourable Court does not accept the "duty to protect" and/or the submissions of the Respondent on s. 7, Amnesty provides an alternative s.7 argument to justify the "repatriation order." It is submitted that this case should be seen through an "administrative law" lens. Mr. Khadr's request for repatriation was not considered in a fair manner. He was not afforded a meaningful right to be heard and the reasons provided were inadequate. Further, the decision made was unreasonable.

3. With respect to remedy, Amnesty submits that a s. 24 repatriation order is the logical extension of the simple administrative law remedy of *certiorari*. If a decision is quashed because it was unreasonable, it is open to this Honourable Court to make a s. 24 order to take the "next step" and compel the government to request a detained citizen's repatriation as opposed to remitting the matter back for reconsideration by the decision-maker. Accordingly, this appeal should be dismissed.

II. QUESTIONS IN ISSUE

4. With respect to the issues raised by the Appellants, Amnesty's position is that Mr. Khadr's s. 7 rights were violated on the basis that the process used to consider Mr. Khadr's request for repatriation was contrary to the rules of natural justice. Further, the remedy ordered was appropriate.

III. ARGUMENT

A) "Life, Liberty and Security of the Person" Interests are Engaged

5. Amnesty contends that the s. 7 "life, liberty, and security of the person" interests of Canadian citizens detained abroad, like Mr. Khadr, are engaged in this case. The trigger for s. 7 is a request by the detained citizen for repatriation. In this particular case, Mr. Khadr made his desire to return home clear to Canadian officials. On March 19, 2005, Canadian officials visited Mr. Khadr in Guantánamo Bay (GTMO). The officials wrote, "[Mr. Khadr] admitted that he had thoughts of suicide at the beginning of his incarceration, but he no longer feels that way. *He has hope for the future with a desire of someday being transferred to Canada*."[1] Further, on December 15, 2005, another visit occurred. There are two matters of importance in this Welfare Visit Report. The Canadian officials wrote:

> "[Mr. Khadr] believed that the [Government of Canada] is not doing anything for him. *He wants his government to bring him back home. He wonders why Canada cannot help him like the Brits helped their detained citizens*. He indicated that the UK did not believe that the Military Commission would be fair to their citizens and they took care of it by bringing them back to their country of nationality."[2]

> "[Mr. Khadr] wants his country to support him and help him get out. *He wants the [Government of Canada] to take him back to Canada and give his rights back to him. He feels that there are no doubts that he would be better off in Canada even in a Canadian jail*. He asked, 'how does the Government of Canada feel about the Military Commission? How is the GOC going to help me?' He wants me to bring him information on what the GOC is doing for him in securing his safe return."[3]

6. While the Canadian government does not hold the key to Mr. Khadr's cell, the government need not be the party actually meting out human rights abuses for s. 7 liberty or security of the person interests to be engaged. As held in *Suresh*, there need only be "a sufficient causal

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[1] Joint Record ("JR"), Vol. IV, p. 514 (Robertson Affidavit at Exhibit K, para. 7).
[2] JR, Vol. IV, p. 534 (Robertson Affidavit at Exhibit L, para 37).
[3] JR, Vol. IV, p. 535 (Robertson Affidavit at Exhibit L, para 42). In addition, after the decision was made, Mr Khadr's counsel requested that Mr. Khadr be repatriated: see July 28, 2008 letter from Parlee McLaws LLP to the Prime Minster (JR, Vol. III, p. 482-485).

connection between our government's participation and the deprivation ultimately effected" for s. 7 to be engaged.[4] The "causal connection" in this case arises in two ways. First, the government knew or ought to have known that Mr. Khadr's basic human rights were being breached. The breaches include the following:

(a) Mr. Khadr's detention at GTMO with other adults was in breach of article 37(c) of the *Convention on the Rights of the Child* (CRC) which requires that children who are "deprived of liberty...be separated from adults."[5]

(b) Mr. Khadr has been prohibited from maintaining contact with his family during his detention in GTMO in breach of Article 37(c) of the CRC.[6]

(c) Mr. Khadr could not initially challenge the legality of his detention at GTMO by *habeas corpus* contrary to Article 37(d) of the CRC and Article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR).[7]

(d) The procedural rules for the military commission where Mr. Khadr faced the possibility of trial violated Common Article 3 of the *Geneva Conventions* and Article 14 of the ICCPR.[8]

(e) Mr. Khadr was subjected to the "frequent flyer program," an abusive sleep deprivation technique intended to induce him to talk prior to his interrogation by Canadian officials in breach of the *United Nations Convention against Torture and*

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[4] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 54 (Respondent's Book of Authorities ("RBA") Tab 52]. To similar effect is *Hicks v. Ruddock*, [2007] FCA 299 [Appellants' Book of Authorities ("ABA") at paras. 36-50.

[5] *Khadr v. Canada (Prime Minister)*, 2009 FC 405 at para. 60 ("Trial Decision") (JR, Vol. I, p. 34-35). See also Article 10(2)(b) of the ICCPR.

[6] Trial Decision at para. 60 (JR, Vol. I, p. 34-35).

[7] *Canada v. Khadr*, [2008] 2 S.C.R. 125 at paras. 22, 25 (RBA Tab 12); Trial Decision, para. 60 (JR, Vol. I, p. 34-35).

[8] *Canada v. Khadr*, [2008] 2 S.C.R. 125 at paras. 23, 25 (RBA Tab 12). Military Commissions continue to fall short of international standards for reasons including: they involve military trial of civilians by tribunals that are part of the executive, notwithstanding that the ordinary civilian criminal courts continue normal operations (Article 14 ICCPR); they deprive individuals of the right to equal protection of the law on prohibited grounds of discrimination, as their lesser institutional, procedural and evidentiary protections apply only to non-nationals (Articles 2, 14, 26 ICCPR); and they can lead to imposition of the death penalty following unfair trial (Articles 6, 14 ICCPR).

Other Cruel Inhuman or Degrading Treatment (CAT),[9] Article 7 of the ICCPR and Article 37 (a) of the CRC.[10]

(f) Canadian officials passed the information obtained from this interrogation of Mr. Khadr to the United States authorities for use against him in breach of Article 15 of the CAT.[11]

(g) Mr. Khadr's right to have access to an effective remedy for these serious human rights violations has also been denied him, contrary to Article 2(3) of the ICCPR.

7. In addition, Canada was involved in the mistreatment of Mr Khadr and in the breach of his rights. The courts below were correct to conclude that questioning a detainee for the purpose of gathering intelligence, with the awareness that he had been subjected to a particular form of sleep-deprivation in order to make him more amenable and willing to talk, constitutes knowing participation in the violation of his rights as a detainee under the Charter and international law,[12] which violations were exacerbated by the fact that Mr. Khadr was a child.[13]

8. Such conduct is certainly a violation of s. 7 of the Charter as well as s. 12 (cruel and unusual treatment). In addition, such conduct is a breach of the prohibition of torture and other cruel, inhuman or degrading treatment under international law. The International Criminal Tribunal for the Former Yugoslavia illustrates that it is not necessary that the same person who conducts the questioning of a detainee be the one to inflict the prohibited pain or suffering, in order to give rise to responsibility for participation in the torture and ill-treatment: where the act of one participant (i.e. inflicting suffering) contributes to the purpose of the other (i.e. obtaining information), and each is aware of the other's role (one inflicting the abuse, the other asking the questions), both are responsible.[14] As such, in the opinion of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "the active or passive

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[9] *Khadr v Canada (Prime Minister)* 2009 FCA 246 ("FCA Decision") at para. 35 (JR, Vol. I, p. 71-72).
[10] Trial Decision at para. 59 (JR, Vol. I, p. 34).
[11] Trial Decision at para. 57 (JR, Vol. I, p. 34).
[12] FCA Decision at paras 17, 20, 28, 29, 35, 44, 48, 50, 52, 54, 55 (JR, Vol. I, p. 63, 68, 69, 71, 75, 77, 78, 79, 80).
[13] FCA Decision at para 53 (JR, Vol. I, p. 79-80).
[14] ICTY Appeals Chamber, *Prosecutor v Furundžija*, Case No. IT-95-17/1-A (21 July 2000), paras. 115-120 (Tab 1).

participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention."[15] Canada's knowledge (actual or constructive) of the mistreatment of Mr. Khadr is sufficient to trigger s. 7 liberty and security of the person interests.

9. Second, the Federal Court of Appeal found as a fact if the government were to ask for Mr. Khadr's repatriation, there was a reasonable chance that Mr. Khadr would be released; specifically noting, for example, that "the United States has complied with the requests from all other western countries for the return of their nationals from detention in the prison at Guantánamo Bay."[16] In this way, there is a sufficient causal connection between the government's refusal to seek repatriation and the continued deprivation of Mr. Khadr's liberty in GTMO. Amnesty invites this Honourable Court to conclude that the liberty and security interests are engaged in this case.

B) The Principles of Fundamental Justice include the Rules of Natural Justice

10. When a citizen detained abroad asks the government to take steps to repatriate him/her, it is submitted that s. 7 requires that the government consider the request in accordance with the rules of natural justice. Contrary to the submissions of the Appellants, the rules of natural justice create a "duty on the part of the executive to consider a repatriation request" in a fair manner.[17]

11. In this case, the jurisdiction of the Crown to consider and decide Mr. Khadr's repatriation request arises from the Royal Prerogative, not statute. It is undoubted that the Crown has the ability to make representations to a foreign state asking for a detained Canadian citizen to be released. This jurisdiction comes within the prerogative over foreign affairs, which has been described as follows:

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[15] "Report to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," UN Doc. A/HRC/10/3 (4 February 2009), para 53-4 (Tab 11). See also House of Lords - House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture, Twenty-third Report of Session 2008-09*, HL Paper 152 - HC 230, 4 August 2009 (London: The Stationery Office Limited), p. 3,12-19 (Tab 9).

[16] JR, Vol. IV, p. 534 (Robertson Affidavit at Exhibit L, para. 37). FCA Decision at para 69 (JR, Vol. I, p. 85).

[17] See Appellants' Factum at para 88 and 92.

> The prerogative extends to the 'whole catalogue of relations with foreign nations', such as making treaties, declaring war and making peace, instituting hostilities that fall short of war (as with the Falkland Islands, the Gulf campaign and Afghanistan), the recognition of foreign states, sending and receiving ambassadors, issuing passports and granting diplomatic protection to British citizens abroad.[18]

12. At one time, courts would not review the exercise of prerogative powers, but this is no longer the case. Now, either under the common law[19] or the Charter,[20] the courts can review the exercise of prerogative powers, including on procedural fairness grounds.[21]

13. It is settled law that the "principles of fundamental justice" protected in s. 7 of the Charter include the rules of natural justice (or procedural fairness).[22] In this case, there are two factors that suggest that a high level of procedural fairness is owed to Mr. Khadr.[23] The first factor is the role of the decision in the scheme. In this case, there is no statutory scheme. There is no procedure. There is no right of appeal. Subject to judicial review, the decision of the Crown is final. This suggests a high degree of procedural fairness is required. The second factor is the importance of the decision. The decision to seek repatriation of a citizen detained abroad could lead to that citizen's release or transfer to a Canadian penal institution. As such, the decision concerns a citizen's liberty and security of the person. This too suggests that a high degree of procedural fairness is required.[24]

14. Where a citizen requests repatriation, the rules of natural justice (as a principle of fundamental justice) require at least two important procedural rights. First, the detained citizen requesting repatriation must be informed of the case to be met.[25] In this case, Amnesty contends that Mr. Khadr was owed the basic right that the government would fairly consider his request for repatriation. Due to the severe limits on Mr. Khadr's freedom, he was also entitled to know what the

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[18] AW Bradley and KD Ewing, *Constitutional and Administrative Law*, 13th ed. (Harlow, England: Longman) at p. 310 (Tab 5).
[19] *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007) at p. 125-128 (Tab 8).
[20] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441(ABA)
[21] Donald Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, Vol. 3, loose leaf (Toronto: Canvasback, 2008) at §13:1110 (Tab 6).
[22] *Suresh* at para. 113 (RBA Tab 52).
[23] *Suresh* at para. 115(RBA Tab 52).
[24] *Suresh* at para. 115, 117-8 (RBA Tab 52).

government would consider in making its decision (i.e. the "case to be met"). He should have been provided with documents considered by the government. He should have been able to respond to this information. Procedural fairness does not demand a full oral hearing, but it does require a right to be heard. This was not afforded to Mr. Khadr; thus it is a breach of the rules of natural justice protected in s. 7.

15. Second, the detained citizen is entitled to adequate written reasons respecting his/her request for repatriation.[26] The reasons must set out the chain of reasoning and the findings of fact on which the decision is based. With respect to each important conclusion of fact, law and policy, the reasons should answer the question, "Why did the tribunal reach that conclusion?"[27] It is submitted that in assessing the adequacy of the reasons, this Honourable Court should consider the profound importance and significant impact of the decision on Mr. Khadr.

16. It is very difficult to identify with any certainty the precise reasons for the government's refusal to seek Mr. Khadr's repatriation. The government's position has been primarily stated in response to questions during press conferences and media scrums or in the House of Commons, rather than in clear communications to Mr. Khadr himself. It is difficult to determine what, if anything, actually constitutes specific reasons for the decision as opposed to political posturing about the case and the issues it represents. Among other factors, the government has referred to the fact that Mr. Khadr faces serious criminal charges and that legal process is still unfolding in the United States and that Canada wants to be seen as a country that responds forcefully to terrorism. References to the grave human rights violations he experiences have been vague at best. The decision and related reasons that the Federal Court relies on in this case are as follows:

> On July 10, 2008, following the release of the decision of Justice Mosley discussed above, as well as the information about Canadian involvement in the imposition of sleep deprivation techniques on Mr. Khadr, *a journalist asked Prime Minister Stephen Harper whether he would be requesting Mr. Khadr's repatriation to Canada. The Prime Minister said: "The answer is no, as I said the former*

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[25] *Suresh* at para. 122 (RBA Tab 52). See also Brown and Evans at §12:5211 (Tab 6).
[26] *Suresh* at para. 126 (RBA Tab 52).
[27] Brown & Evans at 12:5310 (Tab 6). Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis, 2006) at p. 90 (Tab 4).

> *Government, in our Government with the notification of the Minister of Justice had considered all these issues and the situation remains the same. ... [W]e keep on looking for [assurances] of good treatment of Mr. Khadr."*[28]

17. Mr. Khadr should have reasons that allow him to know why the government prefers that he remain in GTMO and why the government considers the steps they have taken, such as the welfare visits he has received, to be a sufficient alternative to requesting his repatriation. Amnesty does not suggest that adequate reasons must be lengthy reasons, but at a minimum the reasons must be responsive and provide Mr. Khadr justification as to why his request for repatriation was denied.

18. Further, the reasons must specifically address the numerous breaches of international human rights law which are the basis of the repatriation request. Where internationally protected human rights are engaged, there must be a clear indication as to how the decision will conform to Canada's international human rights obligations and assist in rectifying the violations that have occurred. This is wholly absent in this case.

19. In the end, no detained citizen should have to learn his/her fate because a journalist happened to pose a question to the Prime Minister. The principles of fundamental justice require more. They require that the repatriation request be treated seriously and fairly and with due regard for Canada's international human rights obligations. This is wanting in this case.

C) Substantive Review and the Issue of Remedy

20. Amnesty supports the s. 24 order which requires the Appellants to take steps to secure Mr. Khadr's release. Amnesty supports the duty to protect, but makes no submissions in this regard. Instead, Amnesty offers an alternative argument to justify the s. 24 order should the duty to protect be rejected by this Honourable Court.

21. Amnesty submits that s. 7 and the rules of natural justice allow a court to review the merits of the exercise of the Royal Prerogative within the "standard of review" framework established in *Dunsmuir*.[29] The standard of review would be reasonableness; thus it would afford

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[28] Trial Decision at para 36 (JR, Vol. I, p. 25).
[29] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (ABA).

significant deference to executive decision making. However, the court would retain a meaningful tool to review these decisions to ensure that the decision is "exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre" permissible by the common law and "consistent with the Canadian Charter of Rights and Freedoms."[30]

22. Amnesty further submits that a deferent standard of this nature must not be applied in a manner that would deprive a victim of human rights violations, such as participation in violations of the prohibition of torture and other ill-treatment, of his or her right under international law to an effective remedy.

23. It is submitted that on the merits, the decision not to seek Mr. Khadr's repatriation is unreasonable. Canada has known about, and participated in, violations of the prohibition of torture and ill-treatment against Mr. Khadr. Canada was aware of his request to come home since at least 2005. What reasons for denying the request can be gleaned from the government's public statements, as noted above, are inadequate. Where there are serious human rights abuses which have not been and do not appear likely to be remedied, it is unreasonable not to seek a citizen's repatriation even where that citizen is facing criminal charges, especially where the criminal legal process in question does not fully comport with international standards. No one should be deprived of their basic human rights for an indefinite period (here now 7 years) awaiting trial.

24. The issue becomes remedy. This Honourable Court should quash the decision made by the government. However, where Charter rights are implicated, s. 24 allows the court to make a *mandamus*-like order for Canada to request for Mr. Khadr to come home. Other interveners have made submissions on the scope of s. 24 of the Charter as it applies to this case. Amnesty supports these submissions and emphasises that the right to an effective remedy under international human rights law is a broad one and can encompass diverse forms of relief, including the taking of measures to bring ongoing violations to an end.[31] In addition, violations of peremptory norms of international law, including the prohibition of torture, impose particular obligations on states not to recognise the

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[30] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (RBA) at para 53.

[31] ICCPR Article 2 (RBA Tab 61) and Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add. 13 (26 May 2004) paras 15-19 (Tab 10). CAT Article 14 (RBA Tab 58) and Committee against Torture General Comment 2, CAT/C/GC/2 (24 January 2008) para 3 (Tab 7)

situation as legal and to cooperate to bring the situation to an end.[32] Diplomatic representations can be important in all these respects.[33] It has also been recognised that "return to one's place of residence" can also be part of an effective remedy.[34] It is submitted that repatriation of Mr. Khadr would be part of an effective remedy for the human rights violations Mr. Khadr has suffered in the past and indeed for those he continues to suffer, and for Canada formally to request repatriation would be an important step in the direction of a full remedy.

25. In sum, upholding the decision of the majority of the Court of Appeal to leave the Order of Justice O'Reilly undisturbed would accord with all of these considerations, and Amnesty submits this Honourable Court should do so.

IV. COSTS

26. Amnesty does not seek costs and should not be subject to pay costs to any party.

V. ORDER SOUGHT

27. Amnesty invites this Honourable Court to dismiss the appeal; and grant Amnesty leave to make oral submissions not exceeding 15 minutes in length.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2009

THOMPSON DORFMAN SWEATMAN LLP

Per:	Per:	Per:
SACHA R. PAUL Counsel for Amnesty International (Canadian Section, English Branch)	VANESSA GRUBEN Assistant Professor University of Ottawa, Faculty of Law	MICHAEL BOSSIN (Ottawa-Centre) Community Legal Services

[32] Articles 40 and 41 of the "Articles on the Responsibility of States for internationally wrongful acts", UN General Assembly resolution 56/83 (Annex), 28 January 2002 (Tab 2).

[33] See Human Rights Committee, General Comment No. 31, para. 2 (Tab 10): "To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."

[34] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," General Assembly resolution 60/147, 21 March 2006, para. 19 (Tab 11).

VI. TABLE OF AUTHORITIES

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VII. STATUTORY PROVISIONS

	STATUTORY PROVISION	PARA
	None	