Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date:20100722

Docket: A-260-10

Citation: 2010 FCA 199

Present: BLAIS C.J.

BETWEEN:

THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS, and
THE MINISTER OF JUSTICE

Appellants (Respondents)

-and-

OMAR AHMED KHADR

Respondent (Applicant)

AND BETWEEN:

THE PRIME MINISTER OF CANADA and
THE MINISTER OF FOREIGN AFFAIRS

Appellants (Respondents)

-and-

OMAR AHMED KHADR

Respondent (Applicant)

Heard by teleconference on July 16, 2010.

Order delivered at Ottawa, Ontario on July 22, 2010.

REASONS FOR ORDER BY: BLAIS C.J.

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REASONS FOR ORDER

BLAIS C.J.

[1] This is an application by the Prime Minister of Canada, the Minister of Foreign Affairs and the Minister of Justice (the "Appellants") seeking a stay of enforcement of the judgment of Justice Zinn, dated July 5, 2010 (2010 FC 715) pending conclusion of the Appeal.

[2] The Appellants have filed and served a Notice of Appeal of Justice Zinn's judgment on July 12, 2010.

RELEVANT FACTS

[3] The factual background was not in dispute before the trial judge and is not either in dispute before the Court of Appeal. Mr. Khadr (the "Respondent") has adopted the summary of facts reflected in the trial judge's reasons for judgment (paragraphs 2 to 34); so do I.

[4] To succeed, the Appellants must meet the tripartite test established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*] at 334:

> *Metropolitan stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, preliminary assessment must be made of the merits of the case to ensure that there is serious question to be tried. Secondly, it must be determined whether the Applicant would suffer irreparable harm if the Application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[5] Before applying the tripartite test to the present case, it is useful to quickly review the most recent steps taken in this file since January 2010.

[6] In reviewing the judgment rendered by Justice O'Reilly (*Khadr v. Canada (Prime Minister)*, 2009 FC 405, [2010] 1 F.C.R. 34) that ordered that the Canadian government "must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as

practicable", the Supreme Court of Canada (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr II*]) held at paragraphs 39, 44 and 47:

> [39] Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.
>
> […]
>
> [44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, (2004) ZACC 5, 136 I.L.R. 452: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal" (para. 77). <u>It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights</u>. [My emphasis]
>
> […]
>
> [47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

[7] Following that Supreme Court of Canada judgment rendered on January 29, 2010, the Canadian government on February 16, 2010, sent a Diplomatic note to the government of the United States requesting that it not use any of the information provided to it by Canada in its prosecution of Mr. Khadr.

[8] The government of the United States responded to the Canadian note by a Diplomatic note dated April 27, 2010:

> "The Department of State has provided the referenced Diplomatic note to the Department of Defense Office of Military Commissions prosecutors in Mr. Khadr's case. In presenting their case, these prosecutors will be governed by the Military Commissions Act of 2009 (MCA), specifically MCA § 948r, which provides safeguards against the admission in military commission proceedings of evidence obtained through improper means.
>
> Relevant safeguards include the exclusion of all statements obtained by torture or cruel, inhuman, or degrading treatment, "except against a person accused of torture or such treatment as evidence that the statement was made." MCA § 948r(a). Other statements of the accused may be admitted in evidence only if the military judge finds "that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and that - (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given". MCA § 948r(c).

[9] Finally, to keep the situation in context, I will reproduce the judgment of Justice Zinn dated July 5, 2010:

> **JUDGMENT**
>
> **THIS COURT ORDERS that**:
>
> 1. These applications are allowed;
>
> 2. The Court declares that Mr. Khadr is entitled to procedural fairness and natural justice in Canada's process of determining a remedy for its breach of Mr. Khadr's section 7 *Charter* rights in that (a) he is entitled to know what alternative remedies Canada is considering, if any, and (b) he is entitled to provide written submissions to Canada as to other potential remedies and as to whether, in his view, those being considered by Canada are potential remedies that will cure or ameliorate its breach;
>
> 3. The respondents are to advise the applicant within 7 days of the date of this judgment of all untried remedies that it maintains would potentially cure or ameliorate its breach of Mr. Khadr's *Charter* rights as has been determined by the Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3;

4. The applicant shall have 7 days after receiving the respondents' advice as to potential remedies to provide the respondents with his written submissions as to other potential remedies that may cure or ameliorate the breach of his *Charter* rights, and as to whether those being considered by Canada, in his view, are potential remedies that may cure or ameliorate the breach;

5. I retain jurisdiction to amend, at any time, the time provided herein for the taking of any step if satisfied that the time that has been provided is too brief for a party to fully and appropriately provide the information required or take the steps ordered;

6. Following the procedural fairness process described herein, Canada is to advance a potential curative remedy as soon thereafter as is reasonably practicable and to continue advancing potential curative remedies until the breach has been cured or all such potential curative remedies have been exhausted, following which it is to advance potential ameliorative remedies until such time as the breach has been reasonably ameliorated or all such remedies have been exhausted;

7. I retain jurisdiction to determine whether a remedy proposed is potentially an effective remedy, should the parties be unable to agree;

8. I retain jurisdiction to impose a remedy if, after the process described herein, Canada has not implemented an effective remedy within a reasonably practicable period of time; and

9. The applicant is entitled to his costs for two counsel at the high end of Column IV.

"Russel W. Zinn"
Judge

ANALYSIS

Serious issue

[10] The Supreme Court of Canada held in *RJR-MacDonald* at 337:

> "What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case".

[11] There is no doubt in my mind that this case meets the first part of the test. As mentioned by the Appellants at paragraph 24 of their written representations, "[t]his appeal raises several important legal and jurisdictional issues which include the interaction between administrative law remedies and remedies under the *Charter* and the extent of the court's ability to supervise the government's response to a declaration issued by the SCC as a section 24(1) remedy against government". (see also the Notice of Appeal issued July 12, 2010)

[12] To the contrary, the Respondent contends that the Appellants' arguments are "strictly limited to the correctness of a discretionary remedy granted by Justice Zinn pursuant to s.24(1) of the *Charter*" (Respondent's Response at paragraph 21). I do not think this is the case. The issue here is much more complex and the characterization by the Appellants quoted above is much more accurate.

[13] In my view, this case does raise many serious issues, including the kind of review (if any) that should be done by a Federal Court judge sitting on judicial review of the government's discretionary response to a declaratory relief granted by the Supreme Court under section 24(1) of the *Charter*. The Appellants are correct that Justice Zinn's order results in a kind of judicial supervision over any diplomatic action that Canada may take in relation to the Respondent. It is even more surprising that this supervision over the remedies chosen by the Crown stems from an application for judicial review for issues of procedural fairness and natural justice.

[14] I find that determining whether Justice Zinn has the power to "supervise" the exercise of the Crown's prerogative and even dictate a specific course of action under the particular circumstances of this case raises a serious question. Furthermore, in light of the Supreme Court's decision in *Khadr II* (particularly paragraphs 36, 46 and 47), I am not at all convinced that Justice Zinn does effectively have the power to "impose a remedy" (see paragraph 8 of Justice Zinn's Order). Therefore, the Appellants' arguments are not devoid of any merit. In other words, the Appellants' claims are serious questions and are neither "vexatious nor frivolous" (*RJR-MacDonald* at 337).

Irreparable harm

[15] The second element of the test is more complex:

> […] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> […] The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases. (*RJR-MacDonald* at 341)

[16] To meet the second part of the test, the Appellants must persuade the Court that it will suffer irreparable harm if the relief is not granted.

[17] Perhaps simply providing a list of possible remedies, as ordered by Justice Zinn at paragraph 3 of his Order, would not necessarily cause irreparable harm; however, the distinction

between providing Mr. Khadr with a list of remedies and actually implementing those remedies is a superficial one. In practice, providing a list of remedies that they do not intend on applying would be worthless to Mr. Khadr. If the Appellants had other useful remedies they were willing to explore, they would most likely have suggested them to the Respondent or to the United States instead of requesting a stay. It seems to me that this appeal and motion to stay are clear indicators that the Appellants feel they have done, at least for now, all that is appropriate. Asking the Appellants to come up with a list of remedies they do not intend on implementing or do not think they should be obliged to implement is not reasonable. Perhaps even more problematic is the idea that they should have to ask Justice Zinn to "impose" the remedy he finds appropriate before being allowed to request a stay.

[18] Regarding the possible untried remedies, we should remember the enumeration of steps taken by the Government of Canada to protect Mr. Khadr from the time it learned of his arrest in Afghanistan. See paragraph 88 of Justice Nadon's dissenting reasons (*Prime Minister of Canada, et al. v. Omar Khadr*, 2009 FCA 246):

> [88] I now turn to the steps taken by Canada to protect Mr. Khadr from the time it learned of his arrest in Afghanistan. At paragraphs 59 and 60 of its Memorandum of Fact and Law, Canada sets out the various steps that it took to protect Mr. Khadr. As the facts which are related therein are not disputed by Mr. Khadr, it will be easier for me to reproduce them rather than attempt a summary thereof. Canada has outlined the steps taken in reference to a number of topics, namely, Mr. Khadr's youth, his need for medical care, his lack of education, his lack of access to consular access, his lack of access to legal counsel, his inability to challenge his detention or conditions of confinement at Guantanamo Bay in a court of law and his mistreatment by US officials:
>
> 59. […]
> a. The Respondent's youth [the Respondent is Mr. Khadr]

- In 2002 Canada asked the US not to transfer the Respondent to Guantanamo Bay given his age.
- After the respondent was transferred to Guantanamo Bay, Canada again expressed concern to the US that consideration be given to his age in his detention, requesting urgent consideration be given to having him transferred to a facility for juvenile enemy combatants.

b. The Respondent's need for medical care:
   - Canadian interviewers asked that the Respondent be seen by a medic or doctor in February 2003.
   - Later in 2003, Canada sought assurances that the Respondent was receiving adequate medical attention.
   - On several occasions in 2005 and 2006, Canada requested that the Respondent be provided with an independent medical assessment. Continued communication with US authorities through welfare visits allowed Canadian officials to follow upon on various medical and dental issues for the Respondent.

c. The Respondent's lack of education:
   - Through welfare visits, Canadian officials provided educational materials, books and magazines to the Respondent and attempted to facilitate the provision of educational opportunities to him in communications with US officials.

d. The Respondent's lack of access to consular access:
   - Although the US has refused consular access since 2002, Canada obtained permission to conduct regular "welfare visits" with the Respondent starting in March 2005 and has since conducted over 10 visits.

e. The Respondent's lack of access to legal counsel:
   - Canada expressed concerns to the US with regard to the adequacy of the Respondent's counsel of choice in 2005 and assisted his Canadian counsel in ultimately obtaining access to the Respondent.

f. The Respondent's inability to challenge his detention or conditions of confinement in a court of law:
   a) On July 9, 2004, Canada advised the US of its expectation that the Respondent be provided with a judicial review of his detention by a regularly constituted court according all judicial guarantees in accordance with due process and international law.
   b) In 2007, the US enacted a new Military Commission Act to address the concerns identified in *Hamdan v. Rumsfeld* [126 S.Ct. 2749(2006)].
   c) In 2008, the US Supreme Court confirmed in *Boumediene v. Bush* [553 U.S. ___ (2008) S.Ct. 2229] that detainees have the constitutional privilege of *habeus corpus*.

g. The Respondent's presence in a remote prison with no family contact:
   - Canada has facilitated communication with family members.

> 60. In addition, with regard to the Respondent's mistreatment by US officials, Canada took a number of steps:
>
> a. Canada asked for and received assurances in 2003 that the Respondent was being treated humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949.
>
> b. On June 7, 2004, Canada delivered a diplomatic note seeking assurances from the US that the treatment of detainees in Guantanamo Bay would be in accordance with international humanitarian law and human rights law.
>
> c. In January 2005, Canada sent a further diplomatic note reiterating its position that allegations of mistreatment should be investigated and perpetrators brought to justice.
>
> d. Canada followed up with another note in February 2005 expressing extreme concerns regarding allegations of abuse against the Respondent and requesting information regarding the allegations and assurances that is being treated humanely.
>
> e. In the initial welfare vision in March 2005, the DFAIT official asked US authorities specific questions in connection with adherence to the Standard Minimum Rules for the Treatment of Prisoners from the Office of the High Commissioner for Human Rights. Welfare visit reports from 2005 through 2008 reflect that the Respondent has generally been in good health.

[19] In my view, for a member of the judiciary to give himself the power to "supervise" the exercise of the Crown's prerogative in a context where the Supreme Court has recognized its limited role could be seen, in itself, as an affront to the division of powers that would cause irreparable harm. This is especially so when we consider that any action that could possibly cure the *Charter* breach would require the Appellants to take some kind of diplomatic action.

[20] The Appellants suggest that they comply complies with the Federal Court judgment, the balance between the executive and the courts described by the Supreme Court of Canada in its judgment will result in improper interference by the Court in the conduct of foreign relations,

and that this harm cannot be reversed if the Appellants are successful on appeal nor be compensated by damages; I agree.

[21] I have no hesitation to conclude that if a stay is not granted, the Appellants will suffer irreparable harm.

Balance of convenience

[22] The Supreme Court of Canada in *RJR-MacDonald* held at 346:

> "In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[23] In *Toth v. Canada (M.C.I.)* (1988), 86 N.R. 302 (F.C.A.), this Court noted that the balance of convenience requires determining "which party will suffer the greatest harm from the granting or refusal of the stay?" (more recently quoted by Justice Nadon in *Canada (Minister of Citizenship and Immigration) v. Fox*, 2009 FCA 346 at paragraph 19, 397 N.R. 222).

[24] We have already detailed the irreparable harm that would be suffered by the Appellants should the stay be granted in the previous section. Therefore, we will now look at the harm that could potentially be suffered by the Respondent. Even though the parties discussed this in the "irreparable harm" part of their representations, *RJR-MacDonald* at 341 leads me to believe it should be dealt with in this part of the analysis.

[25] The trial of the Respondent is set for August 10, 2010. Should this stay be granted, it would mean that the trial would begin without the Appellants having taken any further steps. In fact, the trial would begin and maybe even end before this Court would have a chance to decide what (if any) further steps should be taken by the Appellants. The rapidly evolving and particular nature of this case is one of the reasons why the Supreme Court expressly decided that the Appellants should be the one to craft the appropriate remedy.

[26] I do understand that the prospect of a conviction in front of a military commission that is based, at least partially, on information obtained unconstitutionally is not to be taken lightly. However, it is too hard at this point in time to even determine how the Canadian evidence might be used (if at all) in the U.S. trial and if remedies could potentially be available later on in the process.

[27] Some evidence collected by Canadian officials does in fact seem to have been discussed in a pre-trial motion brought by the defense to exclude statements made by the Respondent to the

U.S. officials. I have carefully reviewed the materials referring to the use of the videos at the pre-trial hearing. I have only a partial knowledge of what happened at that hearing on that motion, and I believe that I should be very cautious on the assessment of how and by whom the material was introduced before the U.S. Court. I don't know the final outcome of that motion, particularly on the crucial question of whether the Canadian interviews could be eventually used at the trial that will commence on August 10, 2010.

[28] It must also be kept in mind that it is not the harm resulting from the total prosecution or detention of the Respondent in the U.S. that must be taken into consideration but only the harm that results from Canada's prior unconstitutional actions. Furthermore, even though the U.S. did not give Canada the full assurance that the evidence would not be used, they did explain that the Diplomatic note would be provided to the prosecutors and that the Military Commissions Act of 2009 (MCA) provides safeguards against the admissions in military commission proceedings of evidence obtained through improper means.

[29] The harm on the Appellants on the other hand would be unequivocal if the Crown's discretionary power in foreign affairs and national security were to be usurped by the judiciary. The Appellants also argues that because, in their opinion, Justice Zinn ultimately usurps the executive's ability to make decisions such as this one (which raise issues of national interest), it "ought to therefore be assumed to be contrary to the public interest" (Appellants' Written Representations, para. 40). It is not to say that the Appellants will necessarily succeed in their

appeal but if they do and the stay had been refused, their victory would be moot since the diplomatic action would already have been taken.

[30] In his response, the Respondent argues that since the Order of Justice Zinn is presumptively valid and remains in force until it is overturned, "the balance of convenience tips in Mr. Khadr's favor" (paragraph 37). This argument in itself does not have much weight. This would mean that in any stay application the balance of convenience would automatically be tipped in favor of the Respondent.

[31] Before making a final finding on the question of balance of convenience, it is useful to take a second look at paragraph 39 of the Supreme Court judgment in *Khadr II*:

> "Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests..."

[32] The order of the Federal Court does not look consistent with the guidelines that transpire from the Supreme Court's decision. I agree with the Appellants that if we enforce the Federal Court's decision, the executive's capability to decide and execute Canada's international and diplomatic duties would be restrained and somehow usurped by the monitoring capacity of the court.

[33] When I put the interest of justice and the constitutional responsibility of the executive to make decisions on matters of foreign affairs in balance with the potential harm that could suffer the Respondent, Mr. Khadr, if the Federal Court judgment is not enforced, I have no hesitation to conclude that the balance of convenience and the interest of justice favor the Appellants.

CONCLUSION

[34] Therefore I conclude that this motion for a stay should be allowed.

[35] The enforcement of the judgment of the Federal Court dated July 5, 2010 should be stayed pending conclusion of this Appeal.

[36] Costs in the Cause.

"Pierre Blais"
C.J.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-260-10
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MOTION DEALT BY TELECONFERENCE WITH APPEARANCE OF PARTIES

DATE OF HEARING:	July 16, 2010
REASONS FOR ORDER BY:	BLAIS C.J.
DATED:	July 22, 2010

APPEARANCES:

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