Date: 20081217

Docket: A-149-08

Citation: 2008 FCA 401

CORAM: **RICHARD C.J.**
DESJARDINS J.A.
NOËL J.A.

BETWEEN:

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellants

and

CHIEF OF THE DEFENCE STAFF FOR THE CANADIAN FORCES,
MINISTER OF NATIONAL DEFENCE and
ATTORNEY GENERAL OF CANADA

Respondents

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on December 10, 2008.

Judgment delivered at Ottawa, Ontario, on December17, 2008.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: RICHARD C.J.
NOËL J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This is an appeal from an order of Mactavish J. (the motions judge) of the Federal Court (2008 FC 336) made pursuant to rule 107 of the *Federal Courts Rules* (S.O.R./98-106).

[2] The appellants brought an application for judicial review with respect to detainees held by the Canadian Forces (the CF) in the Islamic Republic of Afghanistan and to the transfer of these individuals to Afghan authorities. The appellants sought various forms of declaratory relief,

including a declaration that sections 7, 10 and 12 of the *Canadian Charter of Rights and Freedoms* (the Charter) apply to the detainees. The respondents in this application are the Chief of Defence Staff for the CF, the Minister of National Defence, and the Attorney General of Canada.

[3] As both parties agreed that the application for judicial review would fail if the Charter is not found to apply to the actions of the CF in these circumstances, they jointly decided to have this issue determined by rule 107 motion on the basis of the following questions:

> 1. Does the Charter apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
>
> 2. If the answer to the above question is "NO" then would the Charter nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?

[4] After answering both of these questions in the negative, the motions judge dismissed the application for judicial review.

[5] For the reasons that follow, I am in agreement with her reasons for judgment and with her disposition of the case.

Question 2

[6] The appellants addressed the second question first.

[7] They submit that in *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 (*Hape*), the Supreme Court of Canada adopted a new test for determining when the Charter should apply to Canadian authorities' action abroad. They say (at para. 36 of their memorandum) that the majority opinion indicated that "the principles of sovereign equality and comity supported a general rule that the application of the *Charter* to Canadian authorities on foreign soil was prohibited 'absent either the consent of the other state or, in exceptional cases, some other basis under international law'" (underlined in the text). The appellants claim (at para. 37 of their memorandum) that "the majority's reasons in *Hape* also seemed to suggest that, in addition to consent, violations of fundamental human rights could constitute another exception to its exclusionary jurisdictional rule".

[8] The motions judge, the appellants say, reviewed these passages in *Hape*, but ultimately she concluded that the Supreme Court of Canada did not create a fundamental human rights exception to the general rule against territoriality. Not long after her ruling, add the appellants, a unanimous Supreme Court of Canada in *Canada (Justice) v. Khadr*, 2008 SCC 28 (*Khadr*), "confirmed that *Hape* did indeed find that the Charter applied extraterritorially in respect of fundamental human rights violations at international law" (appellants' memorandum at para. 37).

[9] In my view, *Khadr* has not changed the principles applicable to the concepts of territoriality and of comity set out by the Supreme Court of Canada in *Hape*.

[10] Khadr was a Canadian citizen who was claiming access to all documents in the possession of Canadian authorities that were relevant to his defence in proceedings before a U.S. military tribunal.

[11] The Supreme Court of Canada held that, subject to ss. 38 ff. of the *Canada Evidence Act* (R.S.C. 1985, c. C-5), Khadr should be given access to the records and information that Canadian officials gave to the U.S. military authorities as a result of the interviews the Canadian officials conducted with Khadr at Guantanamo Bay (*Khadr* at para. 37). The basis for the Court's decision was that Canada had participated in U.S. procedures that, pursuant to the decision of the U.S Supreme Court in *Rasul v. Bush* (542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548), denied the detainees access to *habeas corpus* contrary to U.S. laws and were in violation of the Geneva Conventions to which the U.S. were signatories. The Supreme Court of Canada held that the holdings of the U.S. Supreme Court were based on principles consistent with the Charter and Canada's international obligations (*Khadr* at para. 21). Consequently, the participation of Canadian officials in the illegal U.S. military procedures was, to the extent of that participation, in violation of Canada's international obligations and with the principles embodied in the Charter. Khadr's rights under section 7 of the Charter had been violated and he was entitled to a remedy under subsection 24(1) of the Charter. The disclosure order granted by the Supreme Court of Canada remained territorial and was the following (*Khadr* at para. 37):

> The appellants must disclose (i) all records in any form of the interviews conducted by Canadian officials with Mr. Khadr, and (ii) records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him. This disclosure is subject to the balancing of national security and other considerations as required by ss. 38 ff. of the *Canada Evidence Act.*

[12] The order did not refer to any possible U.S. document which might have been given to Canadian authorities by U.S. authorities. While the assistance of the Canadian officials had been extraterritorial, the Supreme Court of Canada made it clear that “the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here" (*Khadr* at para. 26).

[13] Given the holdings of the U.S. Supreme Court, no issue of deference to U.S. laws arose. *Khadr* stands therefore as a case where a Canadian citizen obtained disclosure of documents held in Canada and produced by Canadian officials for a breach of his rights under section 7 of the Charter by Canadian officials participating in a foreign process that violated Canada’s international human rights obligations.

[14] The factual underpinning of this decision is miles apart from the situation where foreigners, with no attachment whatsoever to Canada or its laws, are held in CF detention facilities in Afghanistan.

[15] This is indeed the characterization given by the appellants in their memorandum of fact and law (at para. 34), which reads:

> The present case is the first time Canadian courts have considered whether individuals detained by the Canadian military on foreign soil can claim the protections of the *Canadian Charter of Rights and Freedoms*.

[16] In his oral submission, counsel for the appellants indicated that his claim pertains to the application of the Charter on the actions of CF personnel as opposed to individuals detained by the

CF. This new characterization still supposes that the Charter would apply to foreigners since restraint of CF personnel is possible only if foreigners indeed have Charter rights.

[17] The motions judge could not have commented on *Khadr* since the Supreme Court of Canada's decision was delivered after her decision was rendered. But she did comment on *Hape.*

[18] She analysed in detail the appellants submission with regard to *Hape* and concluded (para. 324 of her reasons):

> As a consequence, it is clear that the majority decision in *Hape* did not create a "fundamental human rights exception" justifying the extraterritorial assertion of Charter jurisdiction where such jurisdiction would not otherwise exist.

[19] It is important to return to the words used by the Supreme Court of Canada in *Khadr* where the Court cites *Hape*. At para. 18 of *Khadr*, what the full bench of the Supreme Court said about *Hape* is the following:

> In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape,* at paras. 51, 52 and 101, *per* LeBel J.). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).
>
> [Emphasis is mine.]

[20] I understand the Supreme Court of Canada to say that deference and comity end where clear violations of international law and fundamental human rights begin. This does not mean that the

Charter then applies as a consequence of these violations. Even though section 7 of the Charter applies to "Everyone …" (compare with the words "Every citizen …" in section 6 of the Charter) all the circumstances in a given situation must be examined before it can be said that the Charter applies.

[21] Contrary to the appellant's position (at para. 88 of his memorandum), *Khadr* is not dispositive of this appeal. Neither is *Hape*, for the same reasons.

[22] The motions judge did not err in her conclusion on question 2.

[23] An examination of question 1 and of all the circumstances of this case is therefore necessary.

Question 1

[24] In the case at bar, the key issue in question 1 is whether the CF has "effective control" over territory in Afghanistan so that the Charter should be given territorial application over Afghan territory and over Afghan people.

[25] Although the CF authorities have command and control over the CF detention facilities at Kandahar Airfields, Kandahar Airfields is a facility shared by Canada and several International Security and Assistance Force (ISAF) countries participating in security and infrastructure operations in Afghanistan. This "control" of the detention facilities by the CF cannot be considered

"effective" within the meaning of the European Court of Human Rights (ECHR) *Banković v. Belgium* decision no. 52207/99 (December 12, 2001, at paras 71-73).

[26] The CF are not an occupying force – they are in Afghanistan at the request and with the consent of the governing authority. That authority has not acquiesced to the extension of Canadian law over its nationals.

[27] The motions judge examined the documentary evidence before her and noted the following:

> [158] … the *Afghan Compact* makes it clear that rather than having Afghanistan cede its jurisdiction to states operating within its borders, the international community has pledged to support Afghan sovereignty over its entire territory, and to ensure respect for that sovereignty, even in the context of military operations within that country.
>
> [159] Nothing in the *Afghan Compact* suggests that Afghanistan has consented to the application of Canadian law - or any other foreign law for that matter - within Afghanistan.
>
> [160] Indeed, the *Afghan Compact* specifically addresses the question of the protection of human rights within Afghan territory, providing that both the Afghan Government and the international community:
>
> > [R]eaffirm their commitment to the protection and promotion of *rights provided for in the Afghan constitution and under applicable international law, including the international human rights covenants and other instruments to which Afghanistan is a party*. [Emphasis added in original.]
>
> [Underlined emphasis is mine.]

[28] She then concluded:

> [161] This provision certainly suggests that insofar as the Government of Afghanistan is concerned, the human rights regime governing the activities of the international community within Afghanistan is that provided for in the constitution of Afghanistan, along with the applicable international law.
>
> [Underlined emphasis is mine.]

[29] There was evidence before the motions judge that the Governments of Afghanistan and Canada have expressly identified international law, including international humanitarian law, as the law governing the treatment of detainees in Canadian custody. She said:

> [162] Insofar as the relationship between the Governments of Afghanistan and Canada is concerned, the two countries have expressly identified international law, including international humanitarian law, as the law governing the treatment of detainees in Canadian custody.
>
> [163] The first document manifesting this intent is the *Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*. Article 1.1 of this document states that it is intended to cover:
>
> > Canadian activities in Afghanistan, including assistance to the ongoing armed conflict, stabilization and development assistance in the form of PRT, assistance to the Government of Afghanistan in the form of a Strategic Advisory Team, training of the Afghan military, and assistance to law enforcement authorities. [at p. 2]
>
> [164] Article 1.4 of the *Technical Arrangements* then states that "In giving effect to these Arrangements, the Participants will at all times act in a manner consistent with their obligations under *international law*".
>
> [Emphasis added in original.]
>
> [165] Amongst other things, the *Technical Arrangements* deal with the status of Canadian personnel within Afghanistan. In this regard, Article 1.2 of the Annex to the *Technical Arrangements* reflects the undertaking of the Canadian government to "take measures to ensure that all Canadian personnel ... will respect *international law* and will refrain from activities not compatible with the nature of their operations or their status in Afghanistan".
>
> [Emphasis added in original.]

[30] With regard to the detainees, she found specifically:

> [166] Finally, in relation to the treatment of detainees, Article 1.2 of the *Technical Arrangements* provides that detainees are to be afforded "the same treatment as Prisoners of War", and are to be transferred to Afghan authorities "in a manner consistent with *international law* and subject to negotiated assurances regarding their treatment and transfer".
>
> [Emphasis added in original.]

> [167] Moreover, the use of the term "Prisoners of War" in the *Technical Arrangements* is significant. That is, the phrase "Prisoners of War" describes a legal status recognized in, and defined by the branch of international law governing armed conflict, namely international humanitarian law. International humanitarian law has numerous sources, including instruments such as the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Can. T.S. 1965 No. 20. The rights of individuals detained during armed conflicts are clearly spelled out by international humanitarian law.

[31] The appellants claim (at paras. 75 to 83 of their memorandum) that the motions judge erred in law by setting an unnecessarily high standard for establishing consent by a foreign state. They assert that she was looking for specific language indicating that the Government of Afghanistan had given its consent to having Canadian Charter rights conferred to its citizens within its territory. The appellants contend that she failed to have due regard to whether the conduct of the Government of Afghanistan amounted to an invitation or “acquiescence” to Charter protection being afforded to its citizens held in detention by the CF. Given that the Afghan government clearly consents to the CF exercising a wide range of powers, it would, according to the appellants, be illogical to conclude that "the Afghan government would consent to Canada exercising this kind of power over its citizens, but has drawn a line with respect to Charter protection of human rights" (at para. 77 of appellants’ memorandum).

[32] The motions judge noted that the Government of Afghanistan has expressly consented to the application of Canadian law to all “Canadian personnel”. She indicated that the words “Canadian Personnel” were defined as specifically excluding Afghan nationals. It followed logically, she said, that the Government of Afghanistan has not consented to the application of Canadian law, including the Canadian Charter in other situations (paras. 168-170 of her reasons).

[33] Considering that the motions judge decided according to the evidence, the intervention of this Court is unwarranted.

[34] The appellants submit finally that this Court should not follow the legal reasoning of the motions judge who rejected as being uncertain the notion of "effective control of the person" principle, suggested by European and British case law and other sources. She rejected this theory as being problematic (at para. 274 of her reasons) in the context of a multinational military effort since it would result in a patchwork of different national legal norms applying to detainees in different parts of Afghanistan. She gave preference to the consent-based test of *Hape*, a case which was binding on her (at para. 294 of her reasons).

[35] The motions judge did not err in so doing.

Conclusion

[36] I conclude that the motions judge made no errors in answering the way she did the two questions that were before her. The Charter has no application to the situations therein described. There is no legal vacuum, considering that the applicable law is international humanitarian law. As found by the motions judge (at para. 64 of her reasons):

> 64 Before transferring a detainee into Afghan custody, General Laroche must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.

[37] The Canadian Civil Liberties Association appeared as intervener in this case. After considering their submissions, my conclusions remain the same.

[38] This appeal will be dismissed with the respondents' costs awarded against the appellants.

"Alice Desjardins"
J.A.

"I agree.
J. Richard C.J."

"I agree.
Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-149-08

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DATED:	December 17, 2008

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