Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090814

Docket: A-208-09

Citation: 2009 FCA 246

CORAM: **NADON J.A.**
EVANS J.A.
SHARLOW J.A.

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

and

OMAR AHMED KHADR

Respondent

Heard at Ottawa, Ontario, on June 23, 2009.

Judgment delivered at Ottawa, Ontario, on August 14, 2009.

REASONS FOR JUDGMENT BY: EVANS and SHARLOW JJ.A.

DISSENTING REASONS BY: NADON J.A.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090814
Docket: A-208-09
Citation: 2009 FCA 246

CORAM: **NADON J.A.**
EVANS J.A.
SHARLOW J.A.

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

and

OMAR AHMED KHADR

Respondent

REASONS FOR JUDGMENT

EVANS and SHARLOW JJ.A.

[1] Since 2002, the respondent Omar Ahmed Khadr has been imprisoned by the United States at Guantánamo Bay pending his trial before a United States military commission or a United States federal court. In *Khadr v. Canada (Prime Minister)*, 2009 FC 405, Justice O'Reilly of the Federal Court found that Canadian officials breached Mr. Khadr's rights under section 7 of the *Canadian Charter of Rights and Freedoms*, when they interviewed Mr. Khadr at the Guantánamo Bay prison and shared the resulting information with the United States. As a remedy pursuant to subsection 24(1) of the Charter, Justice O'Reilly ordered the Crown to request the United States to return Mr.

Khadr to Canada as soon as practicable. The Crown has appealed. At the root of the Crown's appeal is its argument that the Crown should have the unfettered discretion to decide whether and when to request the return of a Canadian citizen detained in a foreign country, a matter within its exclusive authority to conduct foreign affairs. For the reasons that follow, we have concluded that the Crown's appeal should be dismissed with costs.

Preliminary Issues

Appeal books

[2] In accordance with the usual practice of this Court, the parties agreed to the contents of an appeal book and the Crown, as appellant, prepared and filed appeal books that conformed to that agreement. Later, counsel for Mr. Khadr noticed that the agreement excluded a number of documents that were exhibits to the affidavit of Lieutenant Commander William C. Kuebler sworn on August 4, 2008, as well as the affidavit of April Bedard sworn on August 8, 2008. Both of those affidavits, with all of their exhibits, were filed in the Federal Court on behalf of Mr. Khadr and were before Justice O'Reilly when he rendered the judgment under appeal.

[3] Counsel for Mr. Khadr sought the consent of the Crown to file a supplementary appeal book containing the excluded documents. The Crown agreed to the filing of a supplementary appeal book, but objected to the inclusion of some of the exhibits to the affidavits.

[4] With leave of this Court, counsel for Mr. Khadr prepared and filed two volumes of a supplementary appeal book, so that the merits of the Crown's objection could be determined by

the panel hearing the appeal. Volume I contains the previously excluded documents that the Crown agrees are properly part of the appeal book. Volume II contains the previously excluded documents that the Crown argues should not be part of the appeal book.

[5] The Crown objects to the inclusion of the documents in Volume II of the supplementary appeal book because they were not footnoted in the memorandum of fact and law submitted on behalf of Mr. Khadr at the hearing in the Federal Court. This objection is not well founded. The documents in Volume II were before Justice O'Reilly. Even if counsel for Mr. Khadr did not refer to them in his argument in the Federal Court, it is appropriate that they be available to this Court for reference if the need arises, either in the course of the hearing or during the Court's deliberations. For that reason, both volumes of the supplementary appeal book have been accepted as part of the appeal book.

Evidence ruled inadmissible

[6] The appeal book contains the supplemental affidavit of April Bedard sworn on October 22, 2008. Appended as an exhibit to that affidavit is a DVD copy of a documentary entitled "USA versus Omar Khadr". Justice O'Reilly concluded at paragraph 90 of his reasons that the recording was not relevant to the proceeding, and as a result he did not admit it as evidence. That ruling has not been challenged in this appeal. Therefore, although the appeal book includes the recording, no reference has been made to it.

Background

[7] Mr. Khadr is a citizen of Canada. He was born in Canada in 1986. He moved to Pakistan with his family in 1990. In 1995 his father was arrested in Pakistan for alleged involvement in the bombing of the Egyptian embassy in Islamabad, after which the rest of the family returned to Canada. They moved back to Pakistan in 1996 when Mr. Khadr's father was released. In 2001 the family returned to Canada for a few months, and then moved to Afghanistan.

[8] After the attacks on New York and Washington D.C. on September 11, 2001, Mr. Khadr's father and older brothers attended training camps associated with Al-Qaeda. Counsel for Mr. Khadr says that, contrary to a statement in paragraph 5 of Justice O'Reilly's reasons, there is no evidence that Mr. Khadr attended those camps. Counsel for the Crown has not suggested that the record contains evidence that Mr. Khadr attended an Al-Qaeda training camp.

[9] Mr. Khadr was taken into custody by the United States in July of 2002 following a firefight in Afghanistan. The United States alleges that during that fight, Mr. Khadr threw a grenade that killed a United States soldier. Mr. Khadr was detained by the United States at Bagram Airbase in Afghanistan, where he received medical treatment for injuries he suffered in the fight. At that time Mr. Khadr was fifteen years of age.

[10] In diplomatic notes dated August 30 and September 13, 2002, Canada asked the United States for consular access to Mr. Khadr at Bagram. That request was refused. The United States has

continued to deny Canada consular access to Mr. Khadr with the exception of “welfare visits” beginning in 2005, which are described later in these reasons.

[11] The August 30, 2002 diplomatic note mentioned that Mr. Khadr was a minor, and that a request had been made to United States intelligence contacts that Mr. Khadr not be transferred to the Guantánamo Bay prison. The September 13, 2002 diplomatic note also urged the United States to consider that Mr. Khadr was a minor. It pointed out that the laws of Canada and the United States require special treatment for minors with respect to legal and judicial processes, and that because Mr. Khadr was a minor, it would not be appropriate for him to be detained at the prison at Guantánamo Bay.

[12] Canada continued its diplomatic efforts on behalf of Mr. Khadr during 2003. The documentary evidence of those efforts may be summarized as follows:

Diplomatic note July 9, 2003	Request for special consideration of Mr. Khadr’s status as a minor and an expression of concern that he was not being treated like other juvenile detainees.
Minister’s letter October 6, 2003	Expression of concern that Mr. Khadr could face the death penalty, indicating that Canada would seek assurances that the death penalty would not be imposed.
Diplomatic note November 11, 2003	Request that Canadian detainees at the Guantánamo Bay prison be informed prior to their release of their right to return to Canada if they wish, and that they be given the opportunity to exercise that right.
Diplomatic note November 12, 2003	Request for assurances that Mr. Khadr was receiving medical treatment for his injuries.

[13] The record contains no formal responses to any of these communications. There is no record of any assurance by the United States that the death penalty would not be sought or imposed, that

Mr. Khadr would be informed of his right to return to Canada if released, or that he would be permitted to exercise that right.

[14] Despite Canada's diplomatic efforts on Mr. Khadr's behalf, the United States sent him to the prison at the United States Naval Base in Guantánamo Bay in October of 2002, when he was sixteen years of age. There he remains to this day. Despite his age, Mr. Khadr has been detained either alone or with adult detainees, and never in the part of the prison that at one time was set apart for minors. As of the end of March, 2004, Mr. Khadr had not been permitted to contact his family. It is not clear whether family contact was permitted later, and if so when. Mr. Khadr was given no access to legal counsel until November of 2004.

[15] Mr. Khadr is awaiting trial before a United States military commission or a United States federal court on a number of serious charges, including murder. The trial has been delayed. Counsel for Mr. Khadr does not know whether or when the trial will continue.

[16] In February and September of 2003, and on March 30, 2004, officials from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) interviewed Mr. Khadr at the prison at Guantánamo Bay. All of the interviews were monitored and recorded by United States officials. As noted by Justice O'Reilly at paragraph 17 of his reasons, at the time of the last of these interviews on March 30, 2004, Mr. Khadr was "a 17-year-old minor, who was being detained without legal representation, with no access to his family, and with no Canadian consular assistance".

[17] The interviews were held for the purpose of gathering intelligence and not for the purpose of gathering evidence to assist the United States in its prosecution of Mr. Khadr (see *Khadr v. Canada (F.C.)*, 2005 FC 1076, [2006] 2 F.C.R. 505 at paragraphs 23 and 24, and *Khadr v. Canada (Attorney General)*, 2008 FC 807 at paragraph 73). However, the fruits of the interviews were shared with the United States officials, and no request was made to limit their use of that information.

[18] The record contains reports of the interviews prepared by Canadian officials. Except for the report of the interview of March 30, 2004, the reports are heavily redacted. It is not possible to determine whether any of the information that Canadian officials obtained from Mr. Khadr would be of assistance to the United States prosecution.

[19] In *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 (*Khadr 2008*), the Supreme Court of Canada made the following comments about the legal regime governing Mr. Khadr's detention and trial, between 2002 and 2004:

> [21] […]The United States Supreme Court has considered the legality of the conditions under which the Guantanamo detainees were detained and liable to prosecution during the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities, between 2002 and 2004. With the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. Those holdings are based on principles consistent with the *Charter* and Canada's international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.
>
> [22] In *Rasul v. Bush*, 542 U.S. 466 (2004), the United States Supreme Court held that detainees at Guantanamo Bay who, like Mr. Khadr, were not U.S. citizens, could challenge the legality of their detention by way of the statutory right of *habeas corpus* provided for in 28 U.S.C. § 2241. This holding necessarily implies that the order under which the detainees had previously been denied the right to challenge their detention was

> illegal. In his concurring reasons, Kennedy J. noted that "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status" (pp. 487-88). Mr. Khadr was detained at Guantanamo Bay during the time covered by the *Rasul* decision, and Canadian officials interviewed him and passed on information to U.S. authorities during that time.
>
> [23] At the time he was interviewed by CSIS officials, Mr. Khadr also faced the possibility of trial by military commission pursuant to Military Commission Order No. 1. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the United States Supreme Court considered the legality of this Order. The court held that by significantly departing from established military justice procedure without a showing of military exigency, the procedural rules for military commissions violated both the Uniform Code of Military Justice (10 U.S.C. § 836) and Common Article 3 of the *Geneva Conventions*. Different members of the majority of the United States Supreme Court focused on different deviations from the *Geneva Conventions* and the Uniform Code of Military Justice. But the majority was unanimous in holding that, in the circumstances, the deviations were sufficiently significant to deprive the military commissions of the status of "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples", as required by Common Article 3 of the *Geneva Conventions*.
>
> [24] The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.

[20] In addition to these issues about the lawfulness of the regime governing Mr. Khadr's detention and trial, Mr. Khadr alleges that he has been subjected to various kinds of torture during his detention. The affidavit of his United States counsel, LCDR Kuebler, provides support for those allegations. Justice O'Reilly did not consider it necessary to determine whether all of Mr. Khadr's allegations of torture were true. However, he noted that it was uncontested that on March 30, 2004, when Canadian officials interviewed Mr. Khadr at the Guantánamo Bay prison, they were aware that he had been subjected to a particular form of sleep-deprivation known as the "frequent flyer program". According to the report of that interview prepared by a DFAIT official on April 24, 2004,

the purpose of that particular form of mistreatment was to make Mr. Khadr "more amenable and willing to talk". That report describes the mistreatment of Mr. Khadr in the present tense, from which it is reasonable to infer that it began at some point before the March 30, 2004 interview and was continuing as of that date.

[21] Shortly before the March 30, 2004 interview, an action was commenced in the Federal Court on behalf of Mr. Khadr alleging a number of breaches of Mr. Khadr's rights under the Charter. In that action, which is pending, Mr. Khadr is seeking an award of damages and an injunction against further interrogation by Canadian agents. The Crown's motion to strike the statement of claim was dismissed by Justice von Finckenstein (*Khadr v. Canada (Attorney General)*, 2004 FC 1394).

[22] On August 8, 2005, Justice von Finckenstein granted the motion of Mr. Khadr for an interlocutory injunction against further interviews with Mr. Khadr until the conclusion of the trial of his action for damages (*Khadr v. Canada (F.C.)*, 2005 FC 1076, [2006] 2 F.C.R. 505). An exception was made for consular visits. By a further order dated October 17, 2005, that exception was clarified to permit "welfare visits", defined as meetings between Mr. Khadr and officials of DFAIT who are not involved in security matters as part of their regular duties, for the purpose of observing Mr. Khadr, listening to his impressions about his confinement and treatment, gaining an impression of his apparent health status, and inquiring about his ability to carry out religious observances. That order required that a report of each welfare visit be provided to Mr. Khadr's counsel within 30 days

of the visit. Welfare visits occurred in March of 2005, December of 2005, July of 2006, June, August and November of 2007, and monthly from February to June of 2008.

[23] On March 31, 2004, an application for judicial review was commenced in the Federal Court on behalf of Mr. Khadr seeking, among other things, an order requiring DFAIT to provide consular services to Mr. Khadr. The Crown moved to strike the application. Justice von Finckenstein struck the portion of the application that duplicated the relief sought in Mr. Khadr's action, but permitted the remainder of the application to continue because he concluded that Mr. Khadr had an arguable case (*Khadr v. Canada (Minister of Foreign Affairs*), 2004 FC 1145). The Crown appealed that decision but discontinued the appeal in March of 2005. Mr. Khadr discontinued his application in February of 2009.

[24] Between June of 2004 and April of 2006, Canadian officials sent further diplomatic notes to the United States. Those diplomatic notes may be summarized as follows:

Diplomatic note June 7, 2004	General request for assurances that the treatment of detainees at the prison at Guantánamo Bay is in accordance with international humanitarian law and human rights law.
Diplomatic note July 9, 2004	Request for assurances that Mr. Khadr would be provided in the near future with a judicial review of his detention by a regularly constituted court affording all judicial guarantees in accordance with due process and international law, and repeating the request that Mr. Khadr be provided with the option of returning to Canada if he is released.
Diplomatic note January 13, 2005	Repetition of the request that Canadian officials be permitted access to Mr. Khadr to confirm his well-being, that he be provided with an independent medical assessment, and that his most recent medical reports be released to his family. Expression of concern that Mr. Khadr was not getting adequate legal representation because the procedures governing access and

	information sharing prevented his Canadian counsel from getting access to him, and from being fully briefed by his United States counsel.
Diplomatic note February 11, 2005	Expression of concern about Mr. Khadr's allegations of mistreatment, and a request that Canadian officials be given access to Mr. Khadr to verify his welfare, and that Mr. Khadr be given an independent medical assessment, to be shared with Canada and Mr. Khadr's legal counsel.
	Request for formal assurances that the death penalty will not be applied to Mr. Khadr, and reminding the United States that he was only fifteen years of age when first detained.
Diplomatic note July 12, 2005	Request for medical report and for permission for a medical visit by a Canadian physician, and for permission for him to speak to his family by telephone.
Diplomatic note November 10, 2005	Acknowledgement of communication from United States authorities that the evidence currently available does not support the death penalty, noting that this stops short of the unequivocal assurances that Canada has repeatedly sought that, given Mr. Khadr's status as a minor at the time of the alleged offence, the prosecution will not seek the death penalty and Mr. Khadr will not be subject to a capital sentence by the Military Commission.
	Further request that Mr. Khadr be given the opportunity to respond in full to the allegations against him with a process that safeguards the right of due process to which he is entitled, including independent judicial oversight of the Military Commission, recognition of his status as a minor at the time of the alleged offense, choice of counsel, and a clear distinction between the prosecutorial and judicial roles.
	Request for immediate welfare access to Mr. Khadr, consistent with Article 36 of the *Vienna Convention on Consular Relations*.
	Statement of Canada's intention to attend as far as possible the proceedings against Mr. Khadr as observers, and request for permission that other independent observers be permitted to attend, and that Canada receive timely notice of hearings.
Diplomatic note April 17, 2006	Further requests for an independent medical assessment, and for assurances that Mr. Khadr will be permitted access to counsel of his choice, including Canadian counsel, without delay.

[25] On January 3, 2006, Mr. Khadr commenced an application in the Federal Court for judicial review of the decision of the Minister of Justice not to respond to Mr. Khadr's request for disclosure of all the information in the Crown's possession that might be relevant to the United States charges

pending against him. This Court ordered disclosure on the basis of the standard in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, subject to a review of the documents by a Federal Court judge pursuant to section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*Khadr v. Canada (Minister of Justice) (F.C.A.)*, 2007 FCA 182, [2008] 1 F.C.R. 270). The Crown appealed to the Supreme Court of Canada, which allowed the appeal in part (*Khadr 2008*, cited above). The Court agreed that Mr. Khadr was entitled to disclosure, but of a narrower scope than ordered by this Court. Disclosure was ordered of "(i) records of the interviews conducted by Canadian officials with Mr. Khadr, or (ii) records of information given to U.S. authorities as a direct consequence of Canada's having interviewed Mr. Khadr" (*Khadr 2008* at paragraph 40).

[26] The general principle established by *Khadr 2008* is that the Charter applies to constrain the conduct of Canadian authorities when they participate in a foreign legal process that is contrary to Canada's international human rights obligations (see also *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292). In addition, a number of specific determinations made in *Khadr 2008* are applicable to this case. Those determinations are discussed later in these reasons.

[27] In *Khadr 2008*, the Supreme Court of Canada expressly declined to determine whether Canadian officials breached Mr. Khadr's rights under section 7 of the Charter when they interviewed Mr. Khadr and gave the fruits of the interviews to United States authorities, because they did not consider it necessary to do so. *Khadr 2008* dealt only with an application for disclosure of information.

[28] On June 25, 2008, Justice Mosley conducted a review of the documents pursuant to section 38 of the *Canada Evidence Act* (*Khadr v. Canada (Attorney General)*, 2008 FC 807). His review led him to make the following comments that are pertinent to this appeal:

> [72] As is now well known, in February 2003 three CSIS officials and one officer of the DFAIT Foreign Intelligence Division were authorized by the US Department of Defence to visit Guantánamo Bay. They interviewed Mr. Khadr over four days; February 13-16, 2003. CSIS and DFAIT officials subsequently returned to Guantánamo to interview the applicant in September 2003. A DFAIT official went again in March 2004. The purpose of these visits was primarily to collect intelligence information. The interview notes and reports prepared by the Canadian officials were shared with the RCMP. US agencies were subsequently provided with edited versions of those reports.
>
> [73] Questions have arisen in these proceedings as to whether the visits had a law enforcement aspect, about which there is some dispute between the Attorney General and Mr. Khadr's counsel. The former Deputy Director of Operations for CSIS was cross-examined on the point in the course of earlier proceedings. From what I have seen, it appears clear that the interviews were not conducted for the purpose of assisting the US authorities with their case against Mr. Khadr or for building a case against him in Canada. I note that no law enforcement personnel were authorized to attend at that time. The information collected during the interviews was provided to the RCMP for intelligence purposes. However, it is equally clear that the US authorities were interested in having Canada consider whether Khadr could be prosecuted here and provided details about the evidence against him to Canadian officials for that purpose. Nonetheless, the interviews by Canadian officials were conducted for intelligence collection and not evidence gathering.
>
> [74] The interviews were monitored by US officials on each occasion the Canadian officials visited Guantánamo. An audio and video record was made of the February 2003 interviews. It is not clear in which format they were originally recorded but they are described as videotapes. CSIS was subsequently provided with copies of the February videotapes. Copies were filed with the Court as exhibits in DVD format. The evidence before me was that Canadian officials do not have copies of any recordings that may have been made of the September 2003 or March 2004 interviews.
>
> […]
>
> [85] The report of the March, 2004 visit to Guantánamo prepared by the DFAIT official who went on that occasion is included in the collection as document 168. The version served on the applicant is almost entirely unredacted. The respondent seeks to protect a

> paragraph on page 2 of the report as it contains information provided in confidence by a member of the US military regarding steps taken by the Guantánamo authorities to prepare the applicant for the Canadian visit. There is also a side comment by the DFAIT official that the Attorney General wishes to protect as potentially harmful to Canada-US relations.
>
> [86] As indicated in a recently published report of the Office of the Inspector General of the U.S. Department of Justice, during the period in question detainees at Guantánamo were subjected to a number of harsh interrogation techniques that would not have been permissible under American law for law enforcement purposes and have since been prohibited for use by the military.
>
> [87] Canada's international human rights obligations include the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, ("UNCAT"), to which the US is also a signatory. The application of this Convention to specific types of interrogation practices employed by military forces against detainees was discussed by the Supreme Court of Israel in *Public Committee against Torture in Israel v. Israel* 38 I.L.M. 1471 (1999). The practice of using these techniques to lessen resistance to interrogation was found to constitute cruel and inhuman treatment within the meaning of the Convention.
>
> [88] The practice described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview.
>
> [89] Canada cannot now object to the disclosure of this information. The information is relevant to the applicant's complaints of mistreatment while in detention. While it may cause some harm to Canada-US relations, that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantánamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.

[29] On May 13, 2009, Justice Mosley granted Mr. Khadr leave to amend the statement of claim in his action for damages to seek relief for a breach of section 12 of the Charter, based on the evidence that when he was interviewed by Canadian officials, they were aware that he had been

subjected to sleep deprivation in preparation for the interview (*Khadr v. Canada*, 2009 FC 497 at paragraph 14).

[30] The laws of the United States governing the detention and trial of Mr. Khadr have changed since 2004 because of the decisions of the United States Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In response to those decisions, the *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006) was enacted. It appears that under the current legal regime, Mr. Khadr has certain legal rights initially denied to him, including the right to bring an application for *habeas corpus* in the United States federal courts. Such an application was commenced on Mr. Khadr's behalf, but the proceedings have been stayed.

[31] It is not clear whether evidence of statements made by Mr. Khadr as a result of his interrogation by United States officials and others would be admissible at his trial before a United States military commission. It would appear that a military judge may admit a statement where the degree of coercion is disputed, but only if "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and "the interests of justice would best be served by admission of the statements into evidence" (§ 948r(c) of the *Military Commissions Act of 2006*, quoted at paragraph 48 of the affidavit of LCDR Kuebler).

The Current Litigation

[32] On August 8, 2008, Mr. Khadr filed in the Federal Court the application for judicial review that resulted in this appeal. He was seeking to challenge the Crown's decision and policy not to

request his repatriation. His application was granted by Justice O'Reilly, who found that Canadian officials had breached Mr. Khadr's rights under section 7 of the Charter and ordered, as a remedy under subsection 24(1) of the Charter, that Canada request the United States to return Mr. Khadr to Canada as soon as practicable. The Crown has appealed that order.

Discussion

Preliminary points

[33] Two preliminary observations are required to put this appeal into context.

[34] First, the legal issues raised in this case are narrow and the facts are highly unusual. Justice O'Reilly did not decide that Canada is obliged to request the repatriation of any Canadian citizen detained abroad. He did not decide that Canada is obliged to request Mr. Khadr's repatriation because the conditions of his imprisonment breach international human rights norms. He did not decide that Canada must provide a remedy for anything done by the United States. These issues do not arise in this case and it would not be appropriate for this Court to express any opinion on them.

[35] Justice O'Reilly focussed on specific conduct of Canadian officials, namely their interviewing Mr. Khadr at the prison at Guantánamo Bay for the purpose of obtaining information from him, and giving the fruits of those interviews to United States authorities without attempting to control their use of that information. That was potentially detrimental to Mr. Khadr's liberty and personal security and, most importantly, it occurred at a time when Canadian officials knew that Mr. Khadr was an imprisoned minor without the benefit of consular assistance, legal counsel, or contact

with his family, who had been subjected to abusive sleep deprivation techniques in order to induce him to talk. The issue before this Court is whether Justice O'Reilly erred in law in finding that conduct of Canadian officials, in those circumstances, to be a breach of Mr. Khadr's rights under section 7 of the Charter.

[36] Second, it is not legally relevant that in both *Khadr 2008* and in this case, the same conduct of Canadian officials was found to breach Mr. Khadr's rights under section 7 of the Charter. That is because the two cases concern two different decisions of the Canadian government affecting Mr. Khadr or more precisely, separate legal challenges to two different government decisions. An application for judicial review normally may be made in respect of only one decision (see *Federal Courts Rules*, SOR/98-106, Rule 302).

[37] In *Khadr 2008*, Mr. Khadr was challenging the Crown's decision not to disclose certain documents. The Supreme Court of Canada intervened in that decision because of the Crown's breach of Mr. Khadr's rights under section 7 of the Charter, and as a remedy for that breach ordered the disclosure of some of the documents that Mr. Khadr sought.

[38] The disclosure of those documents provided evidence upon which Mr. Khadr could challenge the Crown's decision not to request Mr. Khadr's repatriation. He did so in a new application for judicial review. Justice O'Reilly intervened in that decision essentially because of the same conduct of Canadian officials that was the subject of *Khadr 2008*, viewed in the light of the new evidence. The Crown does not allege in its Notice of Appeal that *Khadr 2008* rendered the

issues raised in this proceeding *res judicata*. Nor does the Crown challenge Justice O'Reilly's rejection of the Crown's argument that there was no "decision" that the Federal Court could review.

[39] The following analysis of the issues raised in this appeal begins with an outline of the constitutional and legal background, followed by a discussion of whether there was a breach of section 7 of the Charter, and if so whether the breach was justified, and if it was not whether the remedy ordered was appropriate.

Constitutional and legal background

[40] The decision to request the repatriation of a Canadian citizen detained in a foreign country is an aspect of the conduct of foreign affairs within the mandate of the Minister of Foreign Affairs and International Trade pursuant to section 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22. That provision reads as follows:

10. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development.	10. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à la conduite des affaires extérieures du Canada, notamment en matière de commerce international et de développement international.
(2) In exercising his powers and carrying out his duties and functions under this Act, the Minister shall	(2) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi, le ministre :
(*a*) conduct all diplomatic and consular relations on behalf of Canada;	*a*) dirige les relations diplomatiques et consulaires du Canada;
(*b*) conduct all official communication between the Government of Canada and	*b*) est chargé des communications officielles entre le gouvernement du

the government of any other country and between the Government of Canada and any international organization;	Canada, d'une part, et les gouvernements étrangers ou les organisations internationales, d'autre part;
(*c*) conduct and manage international negotiations as they relate to Canada;	*c*) mène les négociations internationales auxquelles le Canada participe;
(*d*) coordinate Canada's international economic relations;	*d*) coordonne les relations économiques internationales du Canada;
(*e*) foster the expansion of Canada's international trade and commerce;	*e*) stimule le commerce international du Canada;
(*f*) have the control and supervision of the Canadian International Development Agency;	*f*) a la tutelle de l'Agence canadienne de développement international;
(*g*) coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions;	*g*) coordonne les orientations données par le gouvernement du Canada aux chefs des missions diplomatiques et consulaires du Canada;
(*h*) have the management of Canada's diplomatic and consular missions;	*h*) assure la gestion des missions diplomatiques et consulaires du Canada;
(*i*) administer the foreign service of Canada;	*i*) assure la gestion du service extérieur;
(*j*) foster the development of international law and its application in Canada's external relations; and	*j*) encourage le développement du droit international et son application aux relations extérieures du Canada;
(*k*) carry out such other duties and functions as are by law assigned to him.	*k*) exerce tous autres pouvoirs et fonctions qui lui sont attribués de droit.

[41] There is no statute or regulation governing the exercise of the Minister's mandate under section 10 of the *Department of Foreign Affairs and International Trade Act*, or the Minister's authority to determine whether and when to request the repatriation of a Canadian citizen detained in a foreign country.

[42] Mr. Khadr's application relies on the Charter which, as part of the Constitution of Canada, constrains the exercise of governmental authority against individuals. Mr. Khadr has alleged breaches of his rights under sections 7 and 12 of the Charter, which read as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
[…]	[…]
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[43] Mr. Khadr invoked the authority of the Federal Court to grant a remedy pursuant to subsection 24(1) of the Charter, which reads as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[44] As mentioned above, Justice O'Reilly found that Canadian officials interviewed Mr. Khadr at the prison at Guantánamo Bay for the purpose of obtaining information from him, and gave the fruits of those interviews to United States authorities without attempting to control their use of that information. At that time, the Canadian officials knew the circumstances of Mr. Khadr's imprisonment. In particular, they knew that Mr. Khadr had been subjected to serious mistreatment in order to induce him to talk. Justice O'Reilly found that Mr. Khadr's rights under the Charter had been breached. As a remedy for that breach, Justice O'Reilly ordered the Crown to request the United States to return Mr. Khadr to Canada as soon as practicable. Enforcement of the judgment has been stayed on consent pursuant to the order of Chief Justice Richard dated May 13, 2009.

[45] In this appeal, the Crown argues that Mr. Khadr's Charter rights were not breached, and alternatively, if there was a breach, that it can be justified by section 1 of the Charter. The Crown also argues that, if there was an unjustified breach of Mr. Khadr's Charter rights, the remedy granted is not appropriate.

Whether there was a breach of section 7 of the Charter

[46] It is necessary at this point to refer to the specific determinations from *Khadr 2008* that must be applied in this case. Those determinations may be summarized as follows. When Canadian officials interviewed Mr. Khadr and gave the resulting information to the United States authorities, they were participating in a process that was illegal under the laws of the United States and contrary to Canada's international human rights obligations. For that reason, the Charter was engaged by their conduct. Because Mr. Khadr's liberty was at stake, section 7 of the Charter required Canadian officials to conduct themselves in conformity with the principles of fundamental justice in relation to those interviews. Section 7 is quoted above, but is repeated here for ease of reference:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[47] Given *Khadr 2008*, the Crown must accept that the conduct of Canadian officials abroad may in certain circumstances affect the rights of an individual to such an extent that the Charter is engaged. In *Khadr 2008*, the Charter was engaged when Canadian officials interviewed Mr. Khadr at the Guantánamo Bay prison. Their conduct was found to be participation in the process at that

prison, in breach of Mr. Khadr's Charter right to liberty and security of the person. Therefore, Justice O'Reilly was bound to conclude that Canadian officials participated in the process at the Guantánamo Bay prison as it related to Mr. Khadr, and that the Charter was engaged when they did so. It is not open to this Court to reach a different conclusion on those points.

[48] When *Khadr 2008* was decided, Mr. Khadr had not yet been provided with the evidence that when he was interviewed by Canadian officials, they knew of his mistreatment by sleep deprivation. That evidence became available only as a result of the disclosure of the documents reviewed by Justice Mosley following *Khadr 2008*. That evidence indicates that Canadian officials not only participated in a process that did not conform to international human rights norms, but they did so knowingly.

[49] The Crown objects strongly to the suggestion that Canadian officials participated in the mistreatment of Mr. Khadr. They argue that any mistreatment suffered by Mr. Khadr was at the hands of officials of the United States, not Canada. That argument is untenable in the face of *Khadr 2008*, but even without the authority of that case it cannot be accepted. It is true that the United States is primarily responsible for Mr. Khadr's mistreatment. However, the purpose of the sleep deprivation mistreatment was to induce Mr. Khadr to talk, and Canadian officials knew that when they interviewed Mr. Khadr to obtain information for intelligence purposes. There can be no doubt that their conduct amounted to knowing participation in Mr. Khadr's mistreatment.

[50] Questioning a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk does not accord with the principles of fundamental justice. That is well illustrated by the following comments of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2001 SCC 1, [2002] 1 S.C.R. 3 at paragraphs 50-51:

> [50] It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force. […] While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.
>
> [51] When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-73, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system: see, generally, E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at pp. 27-59. Torture is an instrument of terror and not of justice. As Lamer J. stated in *Smith*, *supra*, at pp. 1073-74, "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment". As such, torture is seen in Canada as fundamentally unjust.

[51] Section 269.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, referred to in the passage quoted above, makes it an offence for a peace officer or public officer to inflict torture on another person. In that provision, "torture" is defined to include any act by which severe pain or suffering is intentionally inflicted on a person for the purpose of obtaining information or for the purpose of

intimidating or coercing the person. Subsection 269.1(1) reflects the recognition of Parliament that freedom from such intentional mistreatment is a basic human right (see paragraph 164 of *R. v. Hape*, cited above).

[52] Canada is also a party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canada, 23 August 1985, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 (entered into force 26 June 1987). It is not necessary in this case to determine whether the *Convention against Torture* confers any enforceable legal rights on Canadian citizens. It is enough to say that, by becoming a party to the *Convention against Torture*, Canada expressed in the clearest possible way its acceptance of the general prohibition on cruel, inhuman or degrading treatment as a principle of fundamental justice, which must inform any consideration of the scope of section 7 of the Charter. It is also worth noting the discussion in paragraphs 61 to 64 of *Suresh* (cited above) explaining the basis for finding that the absolute prohibition on torture is a peremptory norm of customary international law, or *jus cogens*.

[53] In addition, the Charter breach resulting from the conduct of the Canadian officials is exacerbated by the fact that, at the relevant time, the officials knew that Mr. Khadr was a "child" as defined in the *Convention on the Rights of the Child*, Canada, 28 May 1990, 1577 U.N.T.S. 3, Can. T.S. 1992, No. 3 (entered into force 2 September 1990). It is reasonable to infer that when Canada became a party to that Convention, it was accepting that the most important international norms stated in that Convention are principles of fundamental justice. Article 37(*a*) of that Convention reads in relevant part as follows:

> 37. States Parties shall ensure that:
> (*a*) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. […]

[54] As stated above, the principles of fundamental justice do not permit the questioning of a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk. That must be so whether the abuse was inflicted by the questioner, or by some other person with the questioner's knowledge. Canada cannot avoid responsibility for its participation in the process at the Guantánamo Bay prison by relying on the fact that Mr. Khadr was mistreated by officials of the United States, because Canadian officials knew of the abuse when they conducted the interviews, and sought to take advantage of it.

[55] Consequently, the rights of Mr. Khadr under section 7 of the Charter were breached when Canadian officials interviewed him at the prison at Guantánamo Bay and shared the resulting information with United States officials.

[56] At paragraph 50 of his reasons, Justice O'Reilly considered whether the circumstances of Mr. Khadr's detention, and Canadian officials' questioning of him, gave rise to an obligation on the part of Canada to take steps to protect Mr. Khadr from further abuse. Justice O'Reilly reasoned that the only protection the Crown could offer Mr. Khadr at that point was to request his repatriation, which the Crown has refused to do, and therefore the refusal to request his repatriation was a breach of Mr. Khadr's rights under section 7 of the Charter.

[57] The Crown has not offered an acceptable basis for concluding that Justice O'Reilly erred in this logical extension of his principal conclusion. The Crown's challenge to this aspect of Justice O'Reilly's reasons is a variation on its main theme, namely that the conduct of foreign affairs is a matter of Crown prerogative and thus within the sole purview of the executive. However, the Crown's position on this point is not consistent with the principle that in Canada the rule of law means that all government action is potentially subject to the Charter and the individual rights it guarantees. The Supreme Court of Canada has already decided in *Khadr 2008* that the Charter was engaged because the conduct of Canadian officials in the United States towards Mr. Khadr amounted to participation by Canada in the unlawful process at the Guantánamo Bay prison.

[58] Further, Crown prerogative in the conduct of foreign affairs has already been held to be subject to the Charter. For instance, when Canada is asked pursuant to a treaty to extradite a Canadian citizen to stand trial in another country for an offence punishable by death, the Minister of Justice must refuse the request in the absence of an assurance from the prosecuting authorities that they will not seek the death penalty. Thus, in *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, the Court reviewed the constitutionality of the Minister's decision to surrender Burns, saying (at paragraph 38):

> We affirm that it is generally for the Minister, not the Court, to assess the weight of competing considerations in extradition policy, but the availability of the death penalty, like death itself, opens up a different dimension.

Similarly, the knowing involvement of Canadian officials in the mistreatment of Mr. Khadr in breach of international human rights law, in particular by interviewing him knowing that he had

been deprived of sleep in order to induce him to talk, “opens up a different dimension” of a constitutional and justiciable nature.

[59] Finally, there is no factual basis for the Crown’s argument that a court order requiring the Government to request the return of Mr. Khadr is a serious intrusion into the Crown’s responsibility for the conduct of Canada’s foreign affairs. The Crown adduced no evidence that requiring it to request Mr. Khadr’s return would damage Canada’s relations with the United States (see *Burns*, at paragraph 136). Indeed, when pressed in oral argument, counsel for the Crown conceded that the Crown was not alleging that requiring Canada to make such a request would damage its relations with the United States.

[60] Justice O’Reilly did not err in law or fact when he concluded that, in the particular circumstances of this case, the Crown’s refusal to request Mr. Khadr’s repatriation is a breach of Mr. Khadr’s rights under section 7 of the Charter.

Whether the breach was justified by section 1 of the Charter

[61] The Crown argues that if there was a breach of Mr. Khadr’s rights under section 7, the breach was justified by section 1 of the Charter. Section 1 reads as follows (emphasis added):

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits <u>prescribed by law</u> as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par <u>une règle de droit</u>, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d’une société libre et démocratique.

[62] For its justification of the Charter breach, the Crown relies on section 10 of the *Department of Foreign Affairs and International Trade Act*, quoted above. The Crown's argument is that, given the breadth of the Minister's mandate as described in section 10, and the absence of any statutory or regulatory constraints on the exercise of the Minister's discretion, any decision of the Minister that comes within the scope of section 10 justifies a Charter breach if it is rationally connected to the advancement of Canada's international interests, including its interest in combating international terrorism. The explanation offered for the Minister's decision not to request the repatriation of Mr. Khadr is that Canada's interests are best served if any such decision is deferred until after Mr. Khadr is tried by a United States military commission or a United States federal court. The Crown's argument must be rejected.

[63] First, since a reviewing court will already have taken competing state interests into account when determining the content of the principles of fundamental justice for the purpose of section 7, there is generally little scope for the kind of balancing exercise required under section 1. The Supreme Court of Canada has said that only in exceptional circumstances, including "natural disasters, the outbreak of war, epidemics, and the like" could a breach of section 7 be validated under section 1: see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp. (Toronto: Thomson Canada Ltd., 2007) at 38-46. The Crown has not alleged or adduced evidence that Canada's relations with the United States would be injured by requesting Mr. Khadr's return, or that his return would pose a threat to Canada's security. For that reason, it cannot plausibly be argued that "exceptional conditions" exist on the facts of this case so as to require a section 1 analysis of whether the breach of his section 7 rights is justified.

[64] Second, neither legislation nor Crown prerogative expressly or by necessary implication obliged Canadian officials to interview Mr. Khadr in the circumstances in which he found himself, or to refuse to request Mr. Khadr's return, in violation of his Charter rights. Mr. Khadr is challenging the Government's decision not to request his repatriation, not the validity of the law under which that decision was made. Therefore, any section 1 justification must be found in the decision itself (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at pages 1077-80). There is no legal or factual foundation upon which this Court can conclude that the decision not to request Mr. Khadr's repatriation is justified as a reasonable limit on his Charter rights.

[65] Justice O'Reilly made no error when he said, at paragraph 91 of his reasons, that the Crown did not offer any basis for its section 1 argument. Nor did he err in finding that the breach of Mr. Khadr's Charter rights was not justified by section 1 of the Charter.

Whether the remedy is appropriate

[66] Once Justice O'Reilly found that Canada had an obligation in the unusual circumstances of this case to request Mr. Khadr's repatriation, the most obvious remedy was to order Canada to discharge its obligation. In these circumstances, the Crown has a heavy onus to discharge in persuading the Court that Justice O'Reilly abused his broad remedial discretion under subsection 24(1) by failing to select a remedy other than the most obvious.

[67] Judicial discretion in the award of an appropriate and just remedy for a violation of Charter rights must be guided by the considerations set out in *Doucet-Boudreau v. Nova Scotia* (*Minister of*

Education), 2003 SCC 62, [2003] 3 S.C.R. 3. Although Justice O'Reilly does not cite *Doucet-Boudreau*, it is clear that he addressed all relevant considerations raised by the Crown.

[68] First, Justice O'Reilly considered the effectiveness of the remedy. He addressed, at paragraph 88 of his reasons, the Crown's argument that ordering Canada to request Mr. Khadr's repatriation was not an effective remedy because there was only a remote possibility that the United States would comply. Justice O'Reilly rejected that argument on the basis of an affidavit by Mr. Khadr's United States counsel, LCDR Kuebler. Paragraph 52 of that affidavit reads as follows:

> 52. Based on discussions with Omar's Canadian counsel, I am aware that the U.S. government has undertaken efforts to have the Canadian government accept the return of Omar to Canada to face a prosecution in Canada, and has shared evidence against Omar with the Government of Canada to help facilitate this repatriation process. I believe that the U.S. government would release Omar from Guantánamo Bay and allow his repatriation should the Canadian government request that this happen.

[69] The Crown has offered no basis upon which Justice O'Reilly should have rejected this evidence. The assertion of the Crown in oral argument that there is "one chance in a million" that the United States will comply with a request from Canada for the return of Mr. Khadr is not supported by any evidence. It is also contradicted by the fact that the United States has complied with requests from all other western countries for the return of their nationals from detention in the prison at Guantánamo Bay.

[70] The record provides no basis for predicting with certainty how the United States will respond to a request for Mr. Khadr's repatriation. However, the fact that Canada has no control over the response of the United States does not mean that it is inappropriate to order the request to be

made. In the circumstances of this case, making the request is the most appropriate remedy Canada can offer Mr. Khadr that has the potential to mitigate the effects of the Charter violation. The Crown argues that an effective alternative remedy would be a declaration that Mr. Khadr's Charter rights have been breached. That would leave Mr. Khadr without even a chance at the vindication of his rights.

[71] Second, Justice O'Reilly considered whether the remedy he proposed would result in undue prejudice or hardship to Canada's interests. At paragraphs 84 to 86 of his reasons he discussed whether the remedy would cause any harm to Canada's foreign relations, particularly its relations with the United States. He found no evidence of any such harm. He also addressed the Crown's argument that the remedy proposed by Mr. Khadr was inappropriate because it involved an improper judicial intrusion into the Crown prerogative over foreign affairs. Again, he noted that he was given no evidence on this point. The lack of evidence of potential harm to Canada's interests is the basis for Justice O'Reilly's comment that he was imposing a remedy that was "minimally intrusive" on the Crown's prerogative (paragraph 89 of his reasons). In the unusual circumstances of this case, it was reasonable for him to conclude that being ordered to make such a request of a close ally is a relatively small intrusion into the conduct of international relations.

[72] Third, Justice O'Reilly considered whether the remedy he proposed would exceed the competence of the courts, and concluded that it would not. That conclusion is reasonable in the circumstances of this case. Justice O'Reilly's order is precise and specific, requires no special knowledge not possessed by courts, and calls for no ongoing judicial supervision. In the absence of

indications to the contrary, the Federal Court is entitled to presume that the Government will comply in good faith with a judicial order to request Mr. Khadr's return.

[73] Contrary to the submission of the Crown, Justice O'Reilly's order does not require the Attorney General to prosecute Mr. Khadr in Canada. If Mr. Khadr is returned, it will be for the Attorney General to decide, in the exercise of his or her discretion, whether to institute criminal proceedings in Canada against Mr. Khadr. While Canada may have preferred to stand by and let the proceedings against Mr. Khadr in the United States run their course, the violation of his Charter rights by Canadian officials has removed that option.

[74] When the *Doucet-Boudreau* factors and Justice O'Reilly's reasons are considered as a whole, the remedy that he awarded did not constitute an abuse of discretion. In fashioning the remedy, Justice O'Reilly considered the relevant factors in order to tailor the remedy to the facts, and cannot be said to have weighed them in such a manner as to reach an unreasonable outcome.

Conclusion

[75] For these reasons, this appeal should be dismissed with costs.

"John M. Evans"

J.A.

"K. Sharlow"

J.A.

NADON J.A. (Dissenting Reasons)

[76] I have read, in draft, the Reasons of my colleagues Evans and Sharlow JJ.A. in which they conclude that the appeal ought to be dismissed. Specifically, my colleagues propose that we endorse the conclusion reached by O'Reilly J. of the Federal Court at paragraphs 91 and 92 of his Reasons in *Khadr v. Canada (Prime Minister)*, 2009 FC 405:

> [91] I find that the Government of Canada is required by s. 7 of the *Charter* to request Mr. Khadr's repatriation to Canada in order to comply with a principle of fundamental justice, namely, the duty to protect persons in Mr. Khadr's circumstances by taking steps to ensure that their fundamental rights, recognized in widely-accepted international instruments such as the *Convention on the Rights of the Child*, are respected. The respondents did not offer any basis for concluding that the violation of Mr. Khadr's rights was justified under s. 1 of the *Charter*.
>
> [92] The ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*. To mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable.

[77] At paragraph 35 of their Reasons, my colleagues formulate the issue before us in this appeal in the following terms:

> [35] Justice O'Reilly focussed on specific conduct of Canadian officials, namely their interviewing Mr. Khadr at the prison at Guantanamo Bay for the purpose of obtaining information from him, and giving the fruits of those interviews to United States authorities without attempt to control their use of that information. That was potentially detrimental to Mr. Khadr's liberty and personal security and, most importantly, it occurred at a time when Canadian officials knew that Mr. Khadr was an imprisoned minor without the benefit of consular assistance, legal counsel or contact with his family, who had been subjected to abusive sleep deprivation techniques in order to induce him to talk. The issue before this Court is whether Justice O'Reilly erred in law in finding that conduct of Canadian officials, in those circumstances, to be a breach of Mr. Khadr's rights under section 7 of the Charter.
>
> [Emphasis added]

[78] My colleagues conclude that O'Reilly J. did not err in fact or in law in holding that the Government of Canada's ("Canada") refusal to request Mr. Khadr's repatriation was a breach of his rights under section 7 of the *Charter of Rights and Freedoms* (the "Charter"). They then go on to find that O'Reilly J. made no error in determining that the breach of Mr. Khadr's Charter rights was not justified by section 1 of the Charter. Finally, Evans and Sharlow JJ.A. conclude that the remedy awarded by O'Reilly J. does not constitute an abuse of his discretion.

[79] I cannot subscribe to my colleagues' point of view and I therefore dissent. In my view, the appeal should be allowed. However, before setting out my reasons, a brief review of the rationale which led O'Reilly J. to his ultimate conclusion will be useful.

[80] O'Reilly J. held that Canada's decision not to request Mr. Khadr's repatriation could be judicially reviewed. Although he recognized that Canada's decisions regarding foreign affairs fell to the Executive, he emphasized the fact that the Executive's prerogative in that area was subject to review under the Charter. At paragraph 49 of his Reasons, O'Reilly J. concludes on this point as follows:

> [49] … The Government's decision is amenable to judicial review under the Charter but, at the same time, its view as to how best to deal with matters that affect international relations and foreign affairs is entitled to "particular weight".

[81] O'Reilly J. then turned to the question of whether the Charter applied in the circumstances of this case. On the basis of the Supreme Court of Canada's decision in *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, he found that the Charter did apply to Canada's agents who had travelled to Guantanamo Bay to question Mr. Khadr, to the extent that their conduct involved Canada in a

process that violated Canada's international obligations. At paragraph 52 of his Reasons, O'Reilly J. concluded that Canada's "knowing involvement in the mistreatment of Mr. Khadr" constituted a compelling basis for the application of the Charter through the conduct of those officials who conducted the interviews with Mr. Khadr at Guantanamo Bay.

[82] O'Reilly J. then addressed the issue raised under section 7 of the Charter. He first determined whether the principles of fundamental justice required Canada to protect Mr. Khadr. After reviewing various international instruments – namely, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, the *Convention on the Rights of the Child* and the *Optional Protocol on the Involvement of Children in Armed Conflict* – and Mr. Khadr's particular circumstances, he concluded that the "duty to protect persons in Mr. Khadr's circumstances" was a principle of fundamental justice (see para. 71 of his Reasons). He further found that the "principles of fundamental justice obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms" (see para. 75 of his Reasons).

[83] By reason of his conclusion that Canada was in breach of Mr. Khadr's rights under section 7 of the Charter, O'Reilly J. then proceeded to determine the appropriate remedy. More particularly, he sought to determine the remedy which would "mitigate the effect of the involvement of Canadian officials in the mistreatment of Mr. Khadr at Guantanamo Bay" (see para. 77 of his Reasons). He concluded that the appropriate remedy in the circumstances was to require Canada to request Mr. Khadr's repatriation to Canada, adding that no other remedy appeared to be capable of mitigating

the effects of Canada's Charter violations "or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration" (see para. 78 of his Reasons). In so concluding, O'Reilly J. pointed out that Canada had not "identified any particular harm that might flow from requesting Mr. Khadr's repatriation" (see para. 86 of his Reasons).

[84] Finally, because of his conclusion regarding section 7 of the Charter, O'Reilly J. did not address the arguments made by Mr. Khadr regarding sections 6 and 12 of the Charter.

[85] In my view, O'Reilly J. erred in concluding as he did. First, he erred in determining that Canada had failed to protect Mr. Khadr. Second, he erred in regard to the appropriate remedy.

[86] Although I am far from convinced that Canada had a duty to protect Mr. Khadr, I need not address that issue in view of the conclusion which I have reached with regard to the steps taken by Canada to protect him. In my opinion, Canada has taken all necessary means at its disposal to protect Mr. Khadr during the whole period of his detention at Guantanamo Bay. Consequently, assuming that Canada had a duty under section 7 of the Charter to protect Mr. Khadr, it did not breach that duty in the circumstances of the case.

[87] In determining whether Canada met its obligations to protect Mr. Khadr, it is, in my respectful view, of great importance to keep in mind that he was arrested by the United States military ("the US military") in Afghanistan in July 2002, that the US military transferred him to Guantanamo Bay in October 2002 and that he has been imprisoned thereat since that time by the US

military. Canada did not participate either in his arrest, transfer or detention, nor was it consulted at any time in regard thereto by the US military or the US Government.

[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.

[89] Canada says that in identifying the relevant factors that should be considered in determining the scope of the principles of fundamental justice at issue, O'Reilly erred in failing to find that the steps taken by Canada through diplomatic channels had, in fact, addressed these factors or that these factors had changed since Mr. Khadr had been arrested in Afghanistan by the US military. In making this assertion, Canada refers, *inter alia* to paragraph 70 of O'Reilly J.'s Reasons, where he states:

> [70] In Mr. Khadr's case, relevant factors to consider are his youth; his need for medical attention; his lack of education, access to consular assistance, and legal counsel; his inability to challenge his detention or conditions of confinement in a court of law; and his presence in an unfamiliar, remote and isolated prison, with no family contact.

[90] I agree entirely with Canada that the Judge erred. More particularly, the Judge not only failed to find that the steps taken by Canada had indeed addressed the factors which he had identified, he never turned his mind to the question as to whether these steps were sufficient for Canada to meet its duty to protect Mr. Khadr. I believe the Judge erred because of the way in which he determined and defined Canada's duty.

[91] At paragraph 54 of his Reasons, the Judge indicated that he had to decide whether the principles of fundamental justice required Canada to protect Mr. Khadr. In attempting to make this determination, he turned to the international instruments which I have already listed above. First, he reviewed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*. This led him to find that by providing to US authorities "the fruits of its interrogation of Mr. Khadr", Canada had failed to prevent the possibility that statements made by Mr. Khadr

would be used against him in legal proceedings (see paragraph 57 of his Reasons). In so finding, O'Reilly J. referred to article 15 of the aforesaid Convention.

[92] O'Reilly J. then considered the *Convention on the Rights of the Child*. This led him to a number of findings and, more particularly, those found at paragraphs 63, 64 and 65 of his Reasons, which I reproduce below:

> [63] The CRC [the "*Convention on the Rights of the Child*"] imposes on Canada some specific duties in respect of Mr. Khadr. Canada was required to take steps to protect Mr. Khadr from all forms of physical and mental violence, injury, abuse or maltreatment. We know that Canada raised concerns about Mr. Khadr's treatment, but it also implicitly condoned the imposition of sleep deprivation techniques on him, having carried out interviews knowing that he had been subjected to them.
>
> [64] Canada had a duty to protect Mr. Khadr from being subjected to any torture or other cruel, inhuman or degrading treatment or punishment, from being unlawfully detained, and from being locked up for a duration exceeding the shortest appropriate period of time. In Mr. Khadr's case, while Canada did make representations regarding his possible mistreatment, it also participated directly in conduct that failed to respect Mr. Khadr's rights, and failed to take steps to remove him from an extended period of unlawful detention among adult prisoners, without contact with his family.
>
> [65] Canada had a duty to take all appropriate measures to promote Mr. Khadr's physical, psychological and social recovery.

[93] The Judge then examined the *Optional Protocol on the Involvment of Children in Armed Conflict*. As a result, he made the following remarks at paragraph 68 of his Reasons:

> [68] Clearly, Canada was obliged to recognize that Mr. Khadr, being a child, was vulnerable to being caught up in armed conflict as a result of his personal and social circumstances in 2002 and before. It cannot resile from its recognition of the need to protect minors, like Mr. Khadr, who are drawn into hostilities before they can apply mature judgment to the choices they face.

[94] Finally, at paragraph 70 of his Reasons, which I have already reproduced, he considered a number of additional factors which he felt were relevant to his determination.

[95] O'Reilly J. then went on to consider whether the duty to protect Mr. Khadr was a principle of fundamental justice. He answered that question in the affirmative and, at paragraph 75 of his Reasons, he concluded that Canada had an obligation to "protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms". However, nowhere in his Reasons does the Judge consider the steps taken by Canada, nor does he, in my respectful opinion, consider the context of Mr. Khadr's detention and the extent to which Canada's ability to protect him was limited. More particularly, in imposing obligations on Canada, on the basis of international instruments to which Canada is a party, O'Reilly J. failed to recognize the territorial limitation of these instruments.

[96] It is apparent from the Judge's Reasons that he has couched Canada's duty to protect Mr. Khadr in the most absolute terms, without regard to the actual circumstances of his detention. As a result, I find it impossible to understand how Canada could ever fulfill the duty of protection which O'Reilly J. has determined, more specifically at paragraph 64 of his Reasons. For example, how could Canada prevent Mr. Khadr, from being unlawfully detained by the US military in Guantanamo Bay? Also, how could Canada prevent the US from detaining Mr. Khadr "for a duration exceeding the shortest appropriate period of time"? And how could Canada remove Mr. Khadr from "an extended period of unlawful detention among adult prisoners".

[97] I must confess that I have serious doubts about the soundness of O'Reilly J.'s assertion, found at paragraph 65 of his Reasons, that Canada was bound "to take all appropriate measures to promote Mr. Khadr's physical, psychological and social recovery". With respect, the Judge again appears to have forgotten that Mr. Khadr was and is detained at Guantanamo Bay by the US military.

[98] The statements made by O'Reilly J. explain, in my view, why he did not give serious consideration to the steps taken by Canada from the moment it learned of Mr. Khadr's arrest in Afghanistan. In my view, these steps, when considered in their proper context, are sufficient for me to conclude that Canada met its duty to protect Mr. Khadr. In other words, the only possible steps that Canada could take, looking at the matter fairly and realistically, are the ones that it took through the diplomatic channel which I have outlined at paragraph 88 of these Reasons. To this I would add that there were, in my view, no specific means by which Canada was bound to act. As the only means available to Canada were through the diplomatic channel, the means to be employed could only be determined by Canada in the exercise of its powers regarding matters of foreign policy and national interest.

[99] In summary, Canada sought consular access for Mr. Khadr, which the US refused. It also requested the US not transfer Mr. Khadr to Guantanamo Bay, given his age, but to no avail. Further, Canada, on a separate occasion, attempted to convince the US that Mr. Khadr, given his age, should be transferred to a facility for juvenile enemy combatants. In the fall of 2003, Canada expressed its concerns to the US that Mr. Khadr could be subject to the death penalty and sought assurances with

regard to his medical situation. In June 2004, Canada sought assurances from the US that detainees in Guantanamo Bay would be treated in accordance with international humanitarian and human rights laws. Further, throughout 2004, Canada continued to monitor Mr. Khadr's situation and kept in contact with US officials in that regard. In July 2004, Canada informed the US that it expected that Mr. Khadr would be entitled to judicial review of his detention before a court of law, in accordance with due process and international law. In January 2005, upon receipt of reports that physical and psychological coercion was being used against detainees at Guantanamo Bay, Canada made it known to the US that it expected detainees to be treated humanely and that perpetrators of mistreatment would be brought to justice.

[100] During 2005 and 2006, Canada requested that Mr. Khadr be provided with independent medical attention. Although the US continued to refuse consular access to Mr. Khadr during 2005, it permitted Canadian officials to conduct welfare visits with Mr. Khadr in Guantanamo Bay. Such visits were made in March and December 2005, in July 2006, in June, August and November of 2007, as well as in February through June of 2008.

[101] Other than the fact that Canada, as determined by the Supreme Court of Canada in *Khadr*, *supra*, should not have proceeded with interviews in 2003 and 2004 and should not have provided the information obtained therefrom to US authorities, I cannot see how Canada's conduct can be criticized. Thus, in the end, it appears that what has given rise to the Judge's Order is the fact that Canadian officials questioned Mr. Khadr in 2003 and 2004. That breach, in my respectful view, has been remedied by the Order made by the Supreme Court in *Khadr, supra*. Hence, notwithstanding

the fact that the interviews should not have taken place, and considering the reality of Mr. Khadr's detention, I am satisfied that the steps taken by Canada from 2002 to 2008 are sufficient to satisfy Canada's duty to protect Mr. Khadr. The scope of Canada's duty, as I have attempted to explain, must necessarily depend on the circumstances of the case, and in the present matter, on the circumstances of Mr. Khadr's detention.

[102] I would add that I also cannot agree with the statement made by O'Reilly J. at paragraph 52 of his Reasons that, by questioning Mr. Khadr, Canada had been knowingly involved in his mistreatment. In my view, that determination cannot find any basis in the evidence before us. The fact that Canada had been made aware that US authorities were using sleep deprivation as an interrogation technique, cannot, *per se*, lead to the conclusion that Canada participated therein or was somehow culpable in regard thereto. Canadian officials did not participate in or condone Mr. Khadr's mistreatment. Nor, in my view, can it be seriously said that Canada either directly or indirectly intended to mistreat Mr. Khadr. On the contrary, as the evidence clearly shows, Canada took a number of steps, which I have already outlined, to insure Mr. Khadr's security. It should also be borne in mind that at the time that the interviews were conducted, the US neither permitted consular access nor had it yet authorized welfare visits. In fact, both before and after the interviews, Canadian officials pressed the US to have access to Mr. Khadr in order to assess his welfare. Also, various requests were made by Canada to the US regarding Mr. Khadr's treatment. It was only in March 2005 that Canadian officials were allowed to conduct welfare visits with Mr. Khadr.

[103] I therefore conclude that if section 7 of the Charter imposed a duty on Canada to protect Mr. Khadr, Canada has fulfilled that duty.

[104] I now turn to the remedy granted by O'Reilly J., which, in my view, constitutes his second error.

[105] Canada argues, and I agree, that the redress granted by O'Reilly J. appears to be an attempt by him to address the fact that Canada had knowledge of his mistreatment in 2004. As I have already stated, Canada's knowledge does not constitute participation in Mr. Khadr's mistreatment. I will therefore say no more on that point.

[106] In my opinion, the remedy granted by O'Reilly J. exceeds the role of the Federal Court and is not within the power of the Court to grant. Ordering Canada to request the repatriation of Mr. Khadr constitutes, in my view, a direct interference into Canada's conduct of its foreign affairs. It is clear that Canada has decided not to seek Mr. Khadr's repatriation at the present time. Why Canada has taken that position is, in my respectful view, not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr's repatriation at the present is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people.

[107] In support of this view I wish to refer to two English decisions. The first one is *Abassi v. Secretary of State*, [2002] EWJ No. 4947, [2002] EWCA Civ. 1598. In that case, the issue before the Court of Appeal was whether the Foreign Office could be compelled to make representations on behalf of Mr. Abassi, a British national captured by the US military in Afghanistan and detained since January 2002 at Guantanamo Bay, or to take other appropriate action on his behalf. In dismissing Mr. Abassi's judicial review application, the Court, at paragraph 106 of its Reasons, made the following points:

> 106. We would summarise our views as to what the authorities establish as follows:
>
> i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.
>
> ii. Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to consider the authorities binding on this court.
>
> iii. However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason which its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectations; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.
>
> iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.
>
> v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.
>
> [Emphasis added]

[108] I wish to emphasize more particularly points no. iii., iv. and v., where the Court states that it cannot interfere with decisions affecting foreign policy, that decisions made by the Foreign and Commonwealth Office as to whether representations should be made on behalf of a citizen "will be intimately connected with decisions relating to this country's foreign policy", and that requiring the Foreign Secretary to do more than give due consideration to a request "will depend on the facts of a particular case".

[109] The fact that Canadian officials conducted interviews which ought not to have been conducted does not allow us, in my respectful view, to enter what the English Court of Appeal has characterized as constituting "the forbidden areas". The existence of circumstances much more exceptional that those of this case would be required for us to consider intruding into matters of foreign policy and national interest.

[110] In a subsequent decision, *Al Rawi v. Secretary of State*, [2006] EWCA Civ 1279, [2008] QB 1598, the English Court of Appeal reiterated the view which it had expressed in *Abassi, supra*. There, three of the appellants were residents of the United Kingdom and were detained at Guantanamo Bay. They requested the Foreign Secretary to ask the US Government to release them. Following a negative answer, the appellants sought an Order of the High Court ordering the Foreign Secretary to make such a request. The evidence before the Court was that the Foreign Secretary was of the view that such a request should not be made. As the Court puts it at paragraph 1 of its Reasons:

> **1.** […] The evidence is that it is against her [the Foreign Secretary] […] better judgment to do so. She considers that it would probably be seen by the United States as unjustified

> special pleading by the United Kingdom and would be likely to be both ineffective and counterproductive.

[111] In addition to reiterating the view expressed in *Abassi, supra*, the Court of Appeal, at paragraphs 147 and 148, made the following remarks:

> **147**. For present purposes, we would approach the matter as follows. The courts have a special responsibility in the field of human rights. It arises in part from the impetus of the HRA, in part from the common law's jealousy in seeing that intrusive State power is always strictly justified. The elected government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability. In *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153 Lord Hoffmann said at paragraph 62:
>
> > It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.
>
> **148.** This case has involved issues touching both the government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. This is the law for constitutional as well as pragmatic reasons, as Lord Hoffmann has explained. The court's role is to see that the government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject-matter, the law accords to the executive an especially broad margin of discretion. This conclusion betrays no want of concern for the plight of the appellants. At the outset we described the case as acute on its facts, and so it is. But it is the court's duty to decide where lies the legal edge between the executive and judicial functions. That exercise has been this appeal's principal theme.
>
> [Emphasis added]

[112] In the present matter, I can find absolutely no basis to justify the remedy granted by O'Reilly J. The fact that Canada has refused to request Mr. Khadr's repatriation and that Canada has

not “pointed to any particular harm that would result” from granting such a remedy is, in my respectful view, an irrelevant consideration. The remedy awarded by O’Reilly J. simply cannot be justified. In the circumstances, we must necessarily, as O’Reilly J. recognized earlier on his Reasons, allow considerable discretion to the executive in dealing with matters such as the one now before us. Canada has considered the question of whether repatriation should be requested and it has decided that it should not. That, in my view, should end the matter.

[113] I am also of the view that the remedy granted by O’Reilly J. is inappropriate in that it bears no connection to Canada’s alleged breach of Mr. Khadr’s rights under section 7 of the Charter. To repeat, it is the fact that Canadian officials interviewed Mr. Khadr in 2003 and 2004 and provided the information which they obtained to US authorities coupled with O’Reilly J.’s finding that Canada was knowingly involved in Mr. Khadr’s mistreatment which has led to the granting of the remedy.

[114] With respect, I cannot see the link between the inappropriateness of the interviews and the remedy of repatriation, a remedy which is, in my view, totally disproportionate in the circumstances. In *Khadr, supra,* the Supreme Court dealt with Canada’s breach by ordering that it provide Mr. Khadr with the information which it had passed on to US authorities. Perhaps an Order could have issued prohibiting Canada from using the information obtained from Mr. Khadr, should Canada ever decide to prosecute him in Canada. That remedy would have at least some connection to the alleged breach. It might also suffice, in the circumstances, for the Court to grant, as Canada suggests, a declaration indicating which actions of Canada are unconstitutional.

[115] I would add that the fact that O'Reilly J. believed that Canada's "request for repatriation would likely be granted by the US" (see paragraph 88 of his Reasons) is an irrelevant consideration and, in any event, is pure speculation on the part of the judge. As I have attempted to make clear, the decision as to whether such a request should be made is one which ought to be made by Canada and not by O'Reilly J. or this Court. It is up to Canada, in the exercise of its powers over foreign policy to determine the most appropriate course of action in dealing with the US with regard to Mr. Khadr's situation.

[116] One final matter. Because O'Reilly J. found that Mr. Khadr's rights under section 7 had been breached, he did not address the other grounds raised by Mr. Khadr, who argued that his rights under sections 6 and 12 of the Charter had been breached.

[117] In my view, as neither one of these sections was breached, Canada cannot be required thereunder to request Mr. Khadr's repatriation. Section 6 of the Charter provides that every citizen of Canada "has the right to enter, remain in and leave Canada". However, Canadian officials have not deprived Mr. Khadr of this right to enter the country; rather, it is US officials who are detaining him in Guantanamo Bay. If or when Mr. Khadr is released by the US, he will retain his constitutional right to enter Canada. In fact, Canada says that if he is convicted by the US Military Commission, he may make an application under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 to serve his sentence in Canada.

[118] Section 12 of the Charter provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment". However, the mistreatment suffered by Mr. Khadr in Guantanamo Bay was imposed by US officials, not by Canadian agents, and section 12 of the Charter is not applicable to charges or punishments under foreign law (see *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at paragraphs 168 and 169; see also Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented, vol. 2 (Scarborough: Carswell, 2007) at 47-25). The fact that Canadian officials interviewed Mr. Khadr cannot amount to cruel and unusual treatment, even if these officials were aware that Mr. Khadr had been deprived of sleep. Mere knowledge of Mr. Khadr's mistreatment cannot be equated with participation in such mistreatment.

[119] For these reasons, I would allow the appeal with costs and I would dismiss Mr. Khadr's judicial review application, also with costs.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-208-09
APPEAL FROM A JUDGMENT OF THE HONOURABLE JAMES W. O'REILLY DATED APRIL 23, 2009 DOCKET NO. T-1228-08	
STYLE OF CAUSE:	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 and Omar Ahmed Khadr
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 23, 2009
REASONS FOR JUDGMENT BY:	Evans and Sharlow JJ.A.
DISSENTING REASONS BY:	Nadon J.A.
DATED:	August 14, 2009

APPEARANCES:

Doreen Mueller Jonathan Martin	FOR THE APPELLANTS
Nathan J. Whitling Dennis Edney	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT
Dennis Edney Edmonton, Alberta	