Federal Court Declines to Halt Transfer of Afghan Detainees

On February 7, 2008 the Federal Court of Canada released its latest judgement on the legal issues surrounding the transfer of detainees from Canadian to Afghan authorities.

Background

The saga began in February 2007 when Amnesty International and the British Columbia Civil Liberties Association (the applicants) filed an application in the Federal Court of Canada seeking judicial review of the Canadian Forces' practice of releasing detainees to Afghan security forces. The applicants alleged violations of both Canada's international human rights obligations and sections 7 and 12 of the Canadian Charter of Rights and Freedoms.

The applicants also applied for an injunction order prohibiting the transfer of prisoners until the judicial review application was heard. The injunction application was scheduled to be heard on May 7, 2007. However, on the morning of the hearing the federal government announced a new, more stringent, agreement with Afghan officials and the Federal Court postponed the case on the basis that the injunction was no longer a pressing issue.

The Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence, and the Attorney General of Canada (the respondents) filed a motion with the Federal Court to have the applicants' request for judicial review dismissed. The respondents argued that the applicants did not have standing to advance the issue and that the application had no chance of success. On November 5, 2007, Justice Mactavish of the Federal Court found against the respondent on both these arguments and denied the motion.

The Canadian Forces are in Afghanistan primarily as part of the NATO-led International Security and Assistance Force, but also play a role in the American-led "Operation Enduring Freedom." Canadian Forces personnel are occasionally required to capture and detain insurgents who may pose a threat to the safety of Afghan nationals, members of the Canadian military, and/or members of allied forces. The decision as to whether detainees should be retained in Canadian custody, released, or transferred to the custody of another country is within the sole discretion of the Commander of Joint Task Force Afghanistan. The Commander, in making his decision, "must be satisfied that there are no substantial grounds for believing there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities." [i]

There are currently two main agreements in place governing the transfer of detainees.

1. The first agreement was signed December 19, 2005 between the Afghan Minister of Defence and the Chief of Defence Staff for the Canadian

Forces. The agreement governs the transfer of detainees from the Canadian Forces to a detention facility operated by Afghan authorities. It "reflects Canada's commitment to work with the Afghan government to ensure the humane treatment of detainees, while recognizing that Afghanistan has the primary responsibility to maintain and safeguard detainees in their custody." [ii] The agreement provides that the International Committee of the Red Cross (ICRC) has the right to visit detainees any time they are held in Canadian or Afghan custody.

2. The second agreement was signed May 3, 2007 and supplements the first. The document imposes a number of obligations:
    - Detainees transferred by the Canadian Forces must be held in a limited number of detention facilities to assist in keeping track of individual detainees.
    - Members of the Afghan Independent Human Rights Commission (AIHRC), the ACRC, and Canadian government personnel all have access to transferred persons.
    - A Canadian official must grant approval before any detainee previously transferred from Canadian to Afghanistan is subsequently transferred to the custody of another party.
    - Allegations of abuse and mistreatment of detainees in Afghan custody shall be investigated by the Government of Afghanistan. Individuals responsible for mistreating prisoners will be prosecuted in accordance with Afghan law and internationally applicable legal standards. [iii]

Concerns with the process arose despite the second, more detailed agreement; this prompted the applicants' renewed motion for an interlocutory injunction filed in November, 2007. On January 22, 2007 the Canadian Forces advised applicants that it suspended all transfers until they could resume "in accordance with Canada's international obligations," [iv] and that no transfers have taken place since November 5, 2007.

February 7, 2008: Injunction Revisited

The Federal Court's February 7, 2008 decision returned to the issue of whether the applicants' request for an interlocutory injunction should be granted. Such an injunction would temporarily prohibit the respondents from transferring detainees captured by the Canadian Forces to Afghan authorities or to the custody of any other country; the injunction would remain in effect until the application for judicial review was resolved.

Justice Mactavish of the Federal Court applied the test for injunctive relief established by

the Supreme Court of Canada in RJR-MacDonald Inc. v. Canada (Attorney General). In order to be entitled to relief the applicants must establish that:

1. (1) There is a serious issue to be tried;
2. (2) They will suffer irreparable harm if the injunction is not granted; and
3. (3) The balance of convenience favours the granting of an injunction. [v]

1. Is There a Serious Issue to be Tried?

The Court held that the applicants satisfied this component of the test, but declined to comment on the applicability of the Charter to Canadian Forces personnel acting overseas. Justice Mactavish stated that the question of whether the Charter applies will properly be the subject of the judicial review hearing:

In particular, this case requires the determination of the extent to which, if at all, a constitutional bill of rights such as the Canadian Charter of Rights and Freedoms "follows the flag" when Canadian Forces personnel are deployed outside of Canada. [vi]

Having established that the applicants' claim was not frivolous or vexatious, but rather engaged a serious issue, the Court proceeded to the second step of the test.

1. Will Irreparable Harm Result if the Injunction is Not Granted?

The applicants adduced a variety of evidence which revealed problematic aspects of the policies and procedures governing detainee transfers. On the basis of the evidence, Justice Mactavish found the following:

- Although both agreements impose obligations on Afghanistan to maintain accurate written records with respect to detainees, this does not appear to be happening.
- "Canadian personnel appear to have lost track of a number of individuals who have been handed over to Afghan authorities by the Canadian Forces… there are at least four detainees… whose current whereabouts are unknown." [vii]
- Documentation shows that on one occasion Canadian personnel attempting to visit detainees after their transfer to Afghan custody were denied access.
- The evidence suggests that there is a lack of follow up by Canadian officials, and that the obligations with respect to notification in the case of transfer to a third party (as per the second agreement) are not always fulfilled.
- Between May 3, 2007 and November 5, 2007, eight complaints of prisoner

abuse were received by Canadian personnel. The November 5, 2007 incident led to the decision to suspend transfers.

The Court also pointed out that, in light of Afghanistan's poor human rights record, it was problematic for Canada to rely on investigations carried out by Afghan officials. [viii]

Despite the aforementioned evidence, the Court found that the applicants did not met the burden of adducing clear, non-speculative evidence showing that irreparable harm would occur in the interim were the injunction not granted. Justice Mactavish focused on the fact that transfers have currently ceased, the uncertainty about whether transfers will resume, and a lack of information regarding the terms and conditions that would be in place if transfers did resume.

Because the applicants did not meet the burden at stage two of the test, the Court declined to consider stage three, the balance of conveniences.

The Court also declined the applicants' request for an order that the respondents be required to give applicants seven days notice of resumption of transfers. This order would have allowed the applicants to bring a new application for an injunction. Justice Mactavish cited concerns about requiring the Canadian Forces to disclose information that may have operational or strategic implications, and also questioned the utility of such an order. However, on February 10, 2007, Defence Minister Peter MacKay announced that the government will notify Canadians if transfers resume. [ix]

Sources:

- Amnesty International Canada v. Canadian Forces, 2008 FC 162.
- Gloria Galloway, Canadians won't be left in dark The Globe and Mail (18 February 2008).
- RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 (CanLII).

[i] Amnesty International Canada v. Canadian Forces, 2008 FC 162 at para. 14.
[ii] Ibid. at para. 17, emphasis added.
[iii] Ibid. at paras. 22-26.
[iv] Ibid. at para. 29.
[v] Ibid. at para. 55.
[vi] Ibid. at para. 63.
[vii] Ibid. at paras. 77-78.
[viii] Ibid. at paras. 102-107.
[ix] Gloria Galloway, Canadians won't be left in dark The Globe and Mail (18 February 2008).