

Repatriating Omar Khadr: Prime Minister Asks Supreme Court to Consider Final Appeal

On August 25, 2009, the Government of Canada applied for leave to appeal the latest court decision in the case of Canadian citizen and Guantanamo Bay detainee Omar Khadr.^[1] Eleven days earlier, the Federal Court of Appeal had upheld an order (dated April 23, 2009) requiring the government to “present a request to the United States for Mr. Khadr’s repatriation to Canada as soon as practicable.”^[2]

The Supreme Court has announced that it will issue its decision on the application for leave to appeal on Friday, September 4.^[3] If the Court agrees to hear the appeal, it will have the opportunity to clarify a fundamental constitutional issue that has arisen in a spate of recent cases: the application of *Charter* standards to government activity under the royal prerogative. If the Court declines to hear the case, the government will have to comply with the Federal Court’s order and ask the United States to repatriate Khadr to Canada.

Omar Khadr in Canadian Courts, 2004-09

Mr. Khadr was arrested in Afghanistan in 2002, when he was fifteen years old. He was charged with murder, conspiracy, and support of terrorism. He has been detained awaiting trial at Guantanamo Bay, Cuba, for almost seven years.^[4] Canadian courts have been ruling on various aspects of Khadr’s case since 2004. In March 2004, Khadr commenced an action in the Federal Court of Canada against the Government of Canada, alleging that his rights had been violated under seven different sections of the *Charter*, and seeking damages.^[5] This case has not yet been argued in court. A breakthrough came last year when key questions of access to evidence were resolved. In May 2008, the Supreme Court of Canada unanimously held that the Government of Canada must disclose to Khadr the records of interviews Canadian officials held with him at Guantanamo Bay.^[6] The next month, the Federal Court of Canada issued a specific order for release of these records.^[7] Armed with this previously secret information, Khadr’s lawyers made two new *Charter*-based applications to the Federal Court. The first Federal Court application claimed that Canadian officials violated Khadr’s section 7 *Charter* right to life, liberty and security of the person. The disclosed records showed that the Government of Canada knew U.S. officials were using stress-inducing techniques, and that these techniques amounted to torture under the law. Canadian officials nonetheless questioned Khadr and shared the information he gave them with the Americans. (The Canadian Security Intelligence Service has denied that Khadr was “mistreated by U.S. authorities – including sleep deprivation – prior to those 2003 interviews with CSIS.”^[8]) In April 2009, the Federal Court accepted Khadr’s arguments – that Canada had violated his section 7 rights when it interviewed him in this way – and ordered that the Government of Canada ask the United States to repatriate

Khadr to Canada.[\[9\]](#) The order was upheld by a majority of the Federal Court of Appeal on August 14, 2009, over a vigorous dissent.[\[10\]](#) This split decision is now under appeal to the Supreme Court by the Government of Canada, which continues to argue that it is under no obligation to seek Khadr's repatriation. The second Federal Court application was to reinstate a claim in the original 2004 suit: that Khadr's section 12 *Charter* right not to be subjected to cruel or unusual treatment or punishment had been violated by the Government of Canada. This part of his claim had been removed in 2004 at the instigation of the government, which successfully argued that any such treatment had occurred outside Canada, under U.S. control.[\[11\]](#) In May 2009, the Federal Court considered the newly disclosed records and agreed to reinstate the section 12 claim, reasoning that Khadr *may*:

...be able to establish a sufficient causal connection between the actions of the Canadian officials and the treatment he experienced at the hands of the American military. The information disclosed last year was to the effect that he was subjected to sleep deprivation in preparation for the visit of the Canadian officials, to soften him up for their interrogation.[\[12\]](#)

The government has not appealed this order. It will argue the section 12 claim, along with the other *Charter* claims, when the case reaches trial. Meanwhile, the Security Intelligence Review Committee, the body that oversees Canada's domestic spy agency, issued a [report](#) dated July 8, 2009. Its review of the Canadian Security Intelligence Service's interviews with Khadr in Guantanamo Bay in 2003 criticized the agency's involvement:

In light of public allegations of mistreatment of detainees, SIRC believes that CSIS failed to give full consideration to Khadr's possible mistreatment by US authorities before deciding to interact with them on this matter.... SIRC believes that had CSIS followed policy on investigative activities abroad and prepared a detailed request for approval, it would have compelled a discussion and consideration of factors such as Khadr's age, detention conditions and legal status before deciding to travel to Guantanamo Bay.[\[13\]](#)

The appeal of the repatriation order to the Supreme Court of Canada is now the focus of activity in the Khadr litigation.

The Khadr Appeal and the Royal Prerogative

The decision *not* to ask the United States to repatriate Khadr to Canada was made under section 10 of the *Department of Foreign Affairs and International Trade Act*,[\[14\]](#) which reads in part:

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.* (2) *In exercising his powers and carrying out his duties and functions under this Act, the Minister shall (a) conduct all diplomatic and consular relations on*

behalf of Canada; (b) conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization...

This section confers a broad mandate on the Minister of Foreign Affairs, without “any statutory or regulatory constraints on the exercise of the Minister’s discretion.”^[15] On this basis, the Government of Canada takes the position that a court order to seek Khadr’s repatriation is “an improper judicial intrusion into the Crown prerogative over foreign affairs.”^[16] The Federal Court decision in April 2009 summarized the law on courts’ “intrusion” into consular and diplomatic affairs by quoting an earlier Federal Court ruling:

Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject matter is not suitable to judicial assessment. But where the subject matter of a decision directly affects the rights or legitimate expectations of an individual, a Court is both competent and qualified to review it.^[17]

The line between the “pure policy or political choices” outside the purview of courts, and “the rights or legitimate expectations of an individual” that courts may review, is the key constitutional issue the Government of Canada wants the Supreme Court to decide. The split decision of the Federal Court of Appeal sets out both sides of the issue. The majority (two judges of the appeal court) reject the government’s 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.”^[18] In his dissent, Justice Nadon accepted the government’s position and expressed his agreement in strong terms:

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.^[19]

The majority of the Federal Court of Appeal rejected this broad interpretation of the prerogative and agreed with the trial judge: the facts of Khadr’s case, the violation of his rights, and the lack evidence about international relations are factors arguing against judicial deference to the government’s exercise of its prerogative over foreign affairs. The

majority ruled that the government's position "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."^[20] They also pointed out that the government never claimed that a request to repatriate Khadr would "damage its relations with the United States."^[21] These sharply contrasting interpretations of constitutional law offer the basis for the government's final appeal.

Passports, Repatriation and the Prerogative in Recent Cases

Lately, the royal prerogative has figured in a number of high-profile consular affairs cases, none of which has reached the Supreme Court of Canada.

- Abousfian Abdelrazik, a Canadian arrested in Sudan in 2004, was denied the passport he needed to return to Canada. He spent more than a year living in the Canadian embassy in Khartoum. When he went to the Federal Court arguing that his section 6 *Charter* mobility rights had been violated, the Government of Canada argued that it was under no obligation to help him exercise his right of mobility. The court disagreed, finding that the government has the prerogative authority to deny a passport, but the decision to do so must provide procedural fairness and natural justice. The court ordered the government to take immediate action to repatriate Abdelrazik. The government considered appealing the order, but finally it relented and facilitated Abdelrazik's return to Montreal.
- Fateh Kamel, a Canadian who had returned to Canada after serving a sentence in France (for forging Canadian passports, among other things), applied for a new passport in 2005. His application was denied by the Minister of Foreign Affairs, relying on the royal prerogative and a section of the *Canadian Passport Order* that allows the minister to refuse a passport for reasons of national security. At trial, the Federal Court found the wording of the *Passport Order* so vague that it did not amount to a "law" that could limit Kamel's mobility rights. The Federal Court of Appeal disagreed; it found the Order precise enough to give the Minister the legal power to deny a passport. Nonetheless, a particular ministerial decision to deny a passport may be set aside if the decision cannot be justified as a limitation on the applicant's rights. In August 2009, the Supreme Court of Canada declined to hear Kamel's appeal.
- Ronald Allen Smith, a Canadian on death row in Montana, saw government efforts to seek clemency (commutation of his death sentence,

possibly involving a transfer to Canadian custody) curtailed in 2007. He applied to the Federal Court for an order that the government must continue to petition the Montana governor for clemency. The Government of Canada argued that the decision to seek clemency “is one of high policy falling within the royal prerogative and ... this Court has no authority to intervene.”[\[22\]](#) The trial judge agreed “that the exercise of the prerogative to develop and implement diplomatic and foreign policy initiatives is generally beyond the scope of judicial scrutiny.”[\[23\]](#) However, after reviewing the facts, the court concluded: “While the Government is generally free to change its policies there must still be a tangible and intelligible articulation of any policy before it can be applied to a case like Mr. Smith’s. Mr. Smith was entitled to know precisely what the new clemency policy was before it was applied to his situation.”[\[24\]](#) The court ordered the government to continue its efforts for Smith. The government decided against appealing the judgment, briefly raised the possibility of asking the court for a “clarification” of its decision,[\[25\]](#) then issued a new policy: *Clemency Intervention - Statement of Procedures*. The policy allows Canadians facing the death penalty abroad to apply in writing for clemency intervention by the Canadian government. It also lists examples of “Factors that May be Considered” by the government before it decides whether to intervene.

The Decision to Appeal Khadr Editorial boards have criticized the government’s decision to appeal to the Supreme Court and argued that Khadr should be returned to Canada as soon as possible.[\[26\]](#) The government has shed little light on its reasons for appealing the decision. In a statement issued on August 25, 2009, the Foreign Affairs department pointed out that its policy follows that of the previous government and that Khadr is charged with “serious crimes.” The department continues:

President Obama has not communicated any decision to the Government of Canada with respect to the case of Mr. Khadr. As you know the Obama administration has recently taken decisions to proceed with the closure of Guantanamo, halt the judiciary process and also to evaluate each of the cases. It is in our interest to wait for the outcome of these decisions just put forward by President Obama. The Government of Canada has taken its responsibilities with regards to Mr. Khadr, and we will also take our responsibilities when the US Government shares its decision on this case.[\[27\]](#)

The spate of recent consular cases pitting the royal prerogative against the *Charter* may offer another clue to the government’s reasons for seeking a final appeal decision. There is no guarantee, however, that the Supreme Court will decide the issues the government is

eager to raise. If it Supreme Court decides to hear the appeal in *Canada (Prime Minister) v. Khadr*, it may end up deciding the case without clarifying any constitutional issues or reconsidering the royal prerogative.

[1] Docket 33289, *Prime Minister of Canada, et al., v. Omar Ahmed Khadr*, Supreme Court of Canada Proceedings.

[2] *Khadr v. Canada (Prime Minister)*, 2009 FC 405 ("[Khadr April 2009](#)") at para. 92; *Canada (Prime Minister) v. Khadr*, 2009 FCA 246 ("[Khadr August 2009](#)") at para. 1.

[3] "Judgment to be Rendered in Leave Application" *Supreme Court of Canada* (1 September 2009).

[4] [Khadr April 2009](#) at para 1.

[5] *Khadr v. Canada* 2009 FC 497 at para. 2 ("[Khadr May 2009](#)").

[6] *Canada (Justice) v. Khadr*, 2008 SCC 28 ("[Khadr May 2008](#)").

[7] *Khadr v. Canada (Attorney General)*, 2008 FC 807 ("[Khadr June 2008](#)").

[8] News release, "Canadian Security Intelligence Service - 2003 Interviews with Omar Khadr - Media Coverage" *Canadian Security Intelligence Service* (21 July 2008).

[9] [Khadr April 2009](#).

[10] [Khadr August 2009](#).

[11] [Khadr May 2009](#) at paras. 2-3.

[12] *Ibid.* at para. 14.

[13] "[CSIS's role in the Matter of Omar Khadr \(SIRC Study 2008-05\)](#)" *Security Intelligence Review Committee* (8 July 2009) at 29-30.

[14] [R.S.C. 1985, c. E-22](#).

[15] [Khadr August 2009](#) at para. 62.

[16] *Ibid.* at para. 71.

[17] [Khadr April 2009](#) at para. 41, citing [Smith v. Canada \(Attorney General\)](#), 2009 FC 228, at para. 26.

[18] [Khadr August 2009](#) at para. 1.

[19] *Ibid.* at para. 106.

[20] *Ibid.* at para. 57.

[21] *Ibid.* at para. 59.

[22] *Smith v. Canada (Attorney General)*, 2009 FC 228 at para. 4.

[23] *Ibid.* at para. 28.

[24] *Ibid.* at para. 37.

[25] “Feds want clarification on death penalty order” *CTV.ca* (9 April 2009).

[26] Editorial, “Appealing Khadr ruling is colossal waste of effort” *Montreal Gazette* (28 August 2009); editorial, “[Ottawa’s tin ear on Khadr case](#)” *Toronto Star* (26 August 2009); editorial, “Disowning Canadians abroad” *The Globe and Mail* (31 August 2009); editorial, “Irony behind Khadr’s case” *Calgary Herald* (30 August 2009).

[27] Aaron Wherry, “[Canada v. Khadr, the Empire Strikes Back](#)” *Macleans.ca* (25 August 2009), citing “Update to Media” *Foreign Affairs and International Trade Canada* (25 August 2009).