Federal Court Rules Again on Omar Khadr's Ongoing Detention

On July 5, 2010, the Federal Court of Canada ruled on the obligations the Canadian government owes to Omar Khadr. Khadr is a Canadian citizen. He has been in American custody in Guantanamo Bay since his arrest in 2002, when he was fifteen years old. He is awaiting trial by a military tribunal for war crimes, conspiracy, supporting terrorism, and spying. During his detention, and without access to a lawyer or parent, he was questioned by Canadian government officials. The officials knew that he had been subjected to extensive sleep deprivation. Information from these sessions was shared with American officials. Khadr tried to obtain a court order that the Canadian government must ask the United States to repatriate him to Canada. Ultimately, the Supreme Court of Canada considered Khadr's case and ruled in January 2010 that his *Charter* rights had been violated. The Court, however, did not order the government to request his return to Canada. Ordering the government to make this diplomatic request, it said, could interfere with the government's ability to make foreign affairs decisions in complex and changing circumstances. The Court also said that an order would be inappropriate because the courts lacked information, for example, on any negotiations between the U.S. and Canada. As well, the Court doubted the effectiveness of a *request* as a remedy, as Canada could not require the U.S. to comply. Rather than making a specific order, the Supreme Court issued a declaration that Khadr's rights had been violated and left it to the government to decide how to redress the *Charter* breach. In February 2010, after the Supreme Court decision, the government announced it would not ask the U.S. for Khadr's return to Canada.[1] Khadr's lawyers then wrote to the government lawyers, asserting that Khadr was entitled to procedural fairness and natural justice in the government's consideration of a remedy, including formal notice about the issues being considered and the opportunity to present submissions in advance of the government's decision.[2] There was no response to this request and no opportunity to provide submissions.[3] Instead, Canada sent a diplomatic note asking that information from the Canadian interrogations not be used in his prosecution. The U.S. government refused that request, saying that the decision of whether to exclude the evidence would be left to the military tribunal.[4] In the most recent case – launched in February 2010, after the government's diplomatic request – Khadr's lawyers claimed that the Canadian government's actions in the aftermath of the Supreme Court's declaration violated principles of procedural fairness and natural justice. Specifically, they argued that Khadr must be provided with a way to participate in the government's decision on how to respond to the Supreme Court's declaration. The Federal Court's ruling of July 5, 2010 considered these arguments from Khadr and the government's counter-arguments. This case required the Federal Court to answer several questions.

- First, whether the court could review the government's response to the Supreme Court's declaration.

- Second, whether Khadr was entitled to procedural fairness and natural justice in Canada's response to the declaration and, if so, whether he received it.
- And finally, if procedural fairness and natural justice were owed and not provided, the court had to consider what order it should make.

Is the Government's Response Reviewable?

The government argued that the statements made by government officials in February about its intentions were merely statements, not decisions that the court could review. Justice Zinn dismissed this argument: the statements themselves were not under review, but rather the court was considering the decision by the government that was reflected in these statements.[5] The government also argued that Khadr's case had already been litigated to the Supreme Court and a final ruling had been issued, so the issue should not be reconsidered. Justice Zinn, however, pointed out that the statements reflected a *new* decision by the government in response to the Supreme Court's declaration. It was that new decision that the Federal Court was now reviewing.[6] The declaration that Khadr's rights had been violated dramatically changed the circumstances in which the government determined how to address Khadr's ongoing detention. Consequently, the government decision in the current case is different from the decision the Supreme Court considered.[7] As well, the government argued that Khadr's *Charter* rights were not engaged when the government responded to the Supreme Court ruling. Justice Zinn also rejected this argument. While the *Charter* breach first arose from the Canadian officials questioning Khadr, the Supreme Court had ruled that the *Charter* breach was ongoing: Khadr remains in detention and Canada's illegal acts had contributed to that ongoing detention. Any decision the government made in response to the Supreme Court's declaration was intended to cure or ameliorate the ongoing *Charter* breach, so Khadr's rights are still engaged.[8] Justice Zinn stated: In my view, if it had been found that a person's rights under the *Charter* have been infringed by the government and that infringement is ongoing, then the *Charter* remains engaged until the government has taken steps to cure the breach or has satisfied a court of competent jurisdiction that it cannot be cured and that it has taken all reasonably practicable steps to provide a remedy for its breach.[9]

Was Khadr Entitled to Procedural Fairness, and Did He Receive It?

The government argued that even if its decision on how to respond to the Supreme Court's declaration was reviewable, the normal requirements of procedural fairness did not apply because the decision was made pursuant to the royal prerogative over foreign affairs. On this point, Justice Zinn followed the approach taken by the House of Lords in the United Kingdom and some lower courts in Canada. He concluded that an exercise of the prerogative must comply with procedural fairness if it affects the rights or legitimate expectations of an individual.[10] Justice Zinn pointed out that Khadr's *Charter* rights were engaged and he had a legitimate expectation that Canada would take action to cure the

breach in light of the declaration issued by the Supreme Court.[11] If diplomatic or other means could not cure the breach, then Canada was under a duty to attempt to ameliorate it.[12] As a result, the option of doing nothing was not legally available in the aftermath of the Supreme Court's declaration. A passive response would only be acceptable if there was no possible action that the government could take to cure or ameliorate the breach. The Supreme Court recognized that requesting Khadr's return to Canada could potentially be an effective remedy, so doing nothing in this situation is unacceptable.[13] Rather than requesting Khadr's return to Canada – the remedy Khadr had asked for – the government attempted to come up with a different approach. Justice Zinn ruled that when the government chose to "fashion a different remedy," Khadr was entitled to procedural fairness and natural justice in the process of arriving at that remedy.[14] Justice Zinn recognized that the specific requirements of procedural fairness and natural justice vary depending on the government decision in question, and in this situation the requirements were "at the low end of the scale." Still, he concluded that Khadr did not receive procedural fairness.[15] In deciding on the remedy it would pursue, the government was obligated to "inform Mr. Khadr of that decision, the remedy it was considering, and the action it would be taking." Khadr was also entitled to provide the government with written submissions before the government "unilaterally imposed its purported remedy."[16]

What Order is Appropriate?

Having decided that the government did not live up to its duty to provide procedural fairness in its response to the ongoing *Charter* breach, Justice Zinn considered what order he should make to ensure that the breach is remedied. Justice Zinn noted that the initial breach arose from Canadian officials questioning Khadr and providing the information they obtained to the U.S. This, in turn, had contributed to Khadr's ongoing detention. While the initial breach – the questioning and sharing of information – could not be cured, the ongoing breach may be curable.[17] He emphasized that with the rejection of the diplomatic request, "Canada has not cured its breach of Mr. Khadr's rights."[18] The government is not legally entitled to stop seeking a remedy after one attempt has failed: "The *Charter* and the rule of law require that government breaches of *Charter* rights be remedied."[19] If other options are exhausted and the only available remedy for a *Charter* breach is for the government to exercise the royal prerogative, a court is "required to order that it be done."[20] Justice Zinn saw two obvious ways for the Canadian government to cure the ongoing breach: either requesting that Khadr be returned to Canada, or requesting that the U.S. not use the information Canada provided – which the U.S. has already declined to do.[21] (Khadr's lawyers pointed out that there are ways of *ameliorating* the breach, but they could not identify any other ways of *curing* it.[22]) Justice Zinn acknowledged that there may be other, less obvious ways to cure the breach of Khadr's rights, and possibly the government and/or Khadr could identify other options.[23] With these factors in mind, Justice Zinn concluded: [I]t is the role of the executive, after providing Mr. Khadr an opportunity to be heard, to decide which of the alternative potential curative remedies to choose. It must continue that process until Mr. Khadr is provided with an effective remedy that vindicates his rights.[24] Following this reasoning, the Federal Court ordered the Canadian government to come up with "at least one potentially curative remedy" in time to

allow the U.S. to respond before Khadr's hearing, scheduled for 10 August 2010.[25] Once all potentially *curative* remedies are exhausted – and only then – the Canadian government will be expected to advance potentially *ameliorative* remedies until all possible remedies have been exhausted.[26] In order to ensure this process is followed, the court reserved the right to oversee the process, and to impose a remedy if one is not forthcoming.[27] Justice Zinn stated that "if there is only one available remedy that potentially cures the breach," then he would order that remedy, even if it involves the exercise of the royal prerogative.[28] In other words, if the Canadian government is unable to craft another way of curing the breach, he is prepared to order the Canadian government to request Khadr's repatriation – the remedy the Supreme Court declined to provide in January 2010.

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[1] *Khadr v. Canada*, 2010 FC 715 at paras. 25-26. [2] *Ibid.* at para. 29. [3] *Ibid.* at para. 30. [4] *Ibid.* at paras. 27-28. [5] *Ibid.* at para. 39. [6] *Ibid.* [7] *Ibid.* at para. 45. [8] *Ibid.* at para. 50. [9] *Ibid.* at para. 51. [10] *Ibid.* at para. 61, citing *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (U.K. H.L.); *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.). [11] *Ibid.* at paras. 62-63. [12] *Ibid.* at para. 69. [13] *Ibid.* at para. 70. [14] *Ibid.* at para. 71. [15] *Ibid.* at para. 72. [16] *Ibid.* at paras. 73-75 [17] *Ibid.* at para. 77. [18] *Ibid.* at para. 89. [19] *Ibid.* at para. 90. [20] *Ibid.* at para. 91. [21] *Ibid.* at para. 78. [22] *Ibid.* at para. 80. [23] *Ibid.* at paras. 79, 92. [24] *Ibid.* at para. 92. [25] *Ibid.* at para. 95. [26] *Ibid.* at para. 96. [27] *Ibid.* at para. 94. [28] *Ibid.* at para. 92.