CITATION: KHADR *V.* CANADA (PRIME MINISTER), 2009 FC 405, [2010] 1 F.C.R. 34 T-1228-08

Omar Ahmed Khadr (*Applicant*)

v.

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** (*Respondents*)

INDEXED AS: KHADR V. CANADA (PRIME MINISTER) (F.C.)

Federal Court, O'Reilly J.—Toronto, October 28, 2008; Vancouver, April 23, 2009.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Judicial review of Canadian government's refusal to seek applicant's repatriation from Guantánamo Bay Prison in United States to Canada — Applicant Canadian minor during period at issue herein, interviewed in prison by Canadian officials — Canadian government having duty to protect applicant in accordance with principles of fundamental justice by taking appropriate steps to ensure treatment in prison according with international human rights norms — Canadian officials' knowing involvement in mistreatment of applicant in prison compelling basis on which to find Canadian Charter of Rights and Freedoms applying to Canadian officials — Conclusion with respect to duty to protect also informed by particular circumstances in which Charter, s. 7 claim made — Application allowed.

Administrative Law — Judicial Review — Prime Minister's public statement applicant's repatriation to Canada would not be sought, Government's ongoing policy against requesting applicant's repatriation constituting "decision" that could be subject of application for judicial review.

Crown — Prerogatives — While decisions about foreign affairs falling to executive, executive's prerogative subject to review under Canadian Charter of Rights and Freedoms — As such, Government's decision not to request applicant's repatriation amenable to judicial review, but opinion on how to deal with matters affecting international relations, foreign affairs entitled to "particular weight".

Practice — Res Judicata — In Canada (Justice) v. Khadr, Supreme Court of Canada dealing with disclosure of documents relevant to charges applicant facing — Although some overlap between that case and present instance, issues here broader, different — Nonetheless, issue of disclosure fully considered by Supreme Court, could not be relitigated herein.

Constitutional Law — Charter of Rights — Enforcement — Remedy of repatriation only remedy capable of mitigating effect of Canadian Charter of Rights and Freedoms violations in issue or to accord with Government's duty to promote applicant's physical, psychological, social rehabilitation, reintegration.

This was an application for judicial review of the Canadian government's refusal to seek the applicant's repatriation from the United States to Canada. At the time the events herein took place, the applicant was a Canadian minor. He has been imprisoned at Guantánamo Bay since October 2002, awaiting trial on charges of murder, conspiracy and support of terrorism. The applicant attended training camps in Afghanistan associated with Al-Qaida. In 2002, he was present during a gun battle there and is alleged to have thrown a grenade that caused the death of a United States soldier. The applicant was mistreated during his detention, including being subjected to sleep deprivation techniques, and was given no special status as a minor. He was detained without legal representation, with no access to his family and with no Canadian consular assistance. Canadian officials became aware of this mistreatment before they proceeded to interrogate him for purposes of law enforcement and intelligence gathering. The applicant claimed that his rights under the *Canadian Charter of Rights and Freedoms* (sections 6, 7, and 12) were infringed and sought a remedy under subsection 24(1). He has launched a number of other judicial proceedings before the Court with respect to his detention.

The issues were: (1) whether the case was governed by the doctrine of *res judicata*; (2) whether there was any "decision" that could be judicially reviewed; (3) whether the Canadian government has a legal duty to protect the applicant; and (4) what is the appropriate remedy if such a duty exists and it is breached?

Held, the application should be allowed.

(1) There was some overlap between the Supreme Court of Canada's decision in *Canada (Justice) v. Khadr* (*Khadr*) and the present instance. However, in *Khadr*, the Supreme Court, which addressed the question of whether the respondents were required to disclose certain documents, did not find it necessary to decide whether Canadian officials had actually violated the Charter by interviewing the applicant and sharing the information with U.S. authorities. Also, the issues in the present instance were broader and different, in particular as to whether the respondents have a duty to seek the repatriation of the applicant. Nonetheless, the issue of disclosure was fully considered and could not be re-litigated again.

(2) The Prime Minister's public statement that he would not be requesting the applicant's repatriation to Canada, and the Government of Canada's ongoing policy against requesting the applicant's repatriation was clearly a decision that could properly be the subject of an application for judicial review. As to whether it was reviewable by the Court, while decisions about foreign affairs fall naturally and properly to the executive, Canadian courts have determined that the executive's prerogative therein is subject to review under the Charter. The Government's decision not to request the applicant's repatriation was amenable to judicial review under the Charter. However, its view as to how best to deal with matters that affect international relations and foreign affairs was entitled to "particular weight".

(3) The Canadian government had a duty to protect the applicant in accordance with the principles of fundamental justice by taking appropriate steps to ensure that his treatment accorded with international human rights norms. Canada's knowing involvement in the mistreatment of the applicant provided a compelling basis on which to find that the Charter applied to Canadian officials at Guantánamo Bay. The duty to protect met the three criteria needed to be recognized as a principle of fundamental justice. This conclusion was informed by Canada's international obligations, and the particular circumstances in which the claim for section 7 rights was made. In the applicant's case, some of the relevant factors to consider were his youth, his need for medical attention and his lack of education.

(4) In conclusion, the ongoing refusal of Canada to request the applicant's repatriation to Canada offended a principle of fundamental justice and violated the applicant's rights under section 7 of the Charter. The respondents were ordered to request the applicant's repatriation from the United States, as that remedy appeared to be the only remedy in this case capable of mitigating the effect of the Charter violations in issue or to accord with the Government's duty to promote the applicant's physical, psychological and social rehabilitation and reintegration.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6, 7, 12, 15, 24(1).

Geneva Conventions Act, R.S.C., 1985, c. G-3, Schedules I-IV, Art. 3.

Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

TREATIES AND OTHER INSTRUMENTS CITED

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Arts. 1 "torture", 15.

Convention on the Rights of the Child, November 20, 1989, [1992] Can. T.S. No. 3, Arts. 1, 19, 37, 39, 40.

Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000, [2002] Can. T.S. No. 5, preamble, Arts. 1, 4.

CASES CITED

APPLIED:

Copello v. Canada (Minister of Foreign Affairs), 2003 FCA 295, 3 Admin. L.R. (4th) 214, 308 N.R. 175; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, 92 O.R. (3d) 399, 293 D.L.R. (4th) 278.

DISTINGUISHED:

Gosselin v. Quebec (Attorney General), 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1.

CONSIDERED:

Khadr v. Canada, 2005 FC 1076, [2006] 2 F.C.R. 505, 257 D.L.R. (4th) 577, 113 C.R.R. (2d) 189; *Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145, 123 C.R.R. (2d) 7, 266 F.T.R. 20; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, 293 D.L.R. (4th) 629, 232 C.C.C. (3d) 101, affg *sub nom. Khadr v. Canada (Minister of Justice)*, 2007 FCA 182, [2008] 1 F.C.R. 270, 280 D.L.R. (4th) 469, 67 Admin. L.R. (4th) 75, revg 2006 FC 509, 290 F.T.R. 313; *Khadr v. Canada (Attorney General)*, 2008 FC 807, 59 C.R. (6th) 284, 175 C.R.R. (2d) 345, 331 F.T.R. 1; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385, 220 C.C.C. (3d) 16; *Al Rawi & Ors, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Anor*, [2006] EWCA Civ 1279, [2007] 2 W.L.R. 1219; *Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3; *Abbasi & Anor, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ 1598; *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs*, [2008] EWHC 2048 (Admin); *Hicks v. Ruddock*, [2007] FCA 299; *Kaunda and Others v. President of the Republic of South Africa* (CCT 23/04), [2004] ZACC 5; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 37 Admin. L.R. (3d) 152; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) 1, [2001] 3 W.W.R. 193; *Public Committee against Torture in Israel v. State of Israel*, HCJ 5100/94, (1999), 38 *I.L.M.* 1471; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173.

REFERRED TO:

Rasul v. Bush, 542 U.S. 466 (2004); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 323, 272 D.L.R. (4th) 55, 143 C.R.R. (2d) 161; *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215; 199 D.L.R. (4th) 228, 147 O.A.C. 141 (C.A.); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, (1999), 216 N.B.R. (2d) 25; 177 D.L.R. (4th) 124.

AUTHORS CITED

Canada. Parliament. House of Commons. Committee on Foreign Affairs and International Development. Subcommittee on International Human Rights. *Omar Khadr: Report of the Standing Committee on Foreign Affairs and International Development*, June 2008, online: <http://www2.parl.gc.ca/content/hoc/Committee/392/FAAE/Reports/RP3572352/faaerp07/faaerp07-e.pdf>.

APPLICATION for judicial review of the Canadian government's refusal to seek the applicant's repatriation from the Guantánamo Bay prison in the United States to Canada. Application allowed.

APPEARANCES

Nathan J. Whitling and *Dennis Edney* for applicant.

Doreen C. Mueller for respondents.

SOLICITORS OF RECORD

Parlee McLaws LLP, Edmonton, for applicant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment and judgment rendered in English by

[1] O'REILLY J.: Mr. Omar Khadr, a Canadian citizen, was arrested in Afghanistan in July 2002 when he was 15 years old. He is alleged to have thrown a grenade that caused the death of a U.S. soldier. He has been imprisoned at Guantánamo Bay since October 2002 awaiting trial on serious charges: murder, conspiracy and support of terrorism.

[2] Mr. Khadr challenges the refusal of the Canadian government to seek his repatriation to Canada. He claims that his rights under the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (sections 6, 7 and 12) have been infringed and seeks a remedy under subsection 24(1) of the Charter. More particularly, Mr. Khadr asks me to quash the decision of the respondents not to seek his return to Canada and order the respondents to request the United States government to repatriate him. Mr. Khadr also asks me to overturn the respondents' decision on the grounds that it was unreasonable and taken in bad faith. Finally, Mr. Khadr seeks further disclosure of documents in the respondents' possession.

[3] I am satisfied, in the special circumstances of this case, that Mr. Khadr's rights under section 7 of the Charter have been infringed. I will grant his request for an order requiring the respondents to seek his repatriation from the United States. Given my conclusion regarding section 7, it is unnecessary for me to deal with the other grounds Mr. Khadr raised before me. The issue of disclosure has already been conclusively decided by the Supreme Court of Canada and, therefore, cannot be re-litigated before me.

[4] These are the questions that arise in this case:

1. Have the issues already been decided in other judicial proceedings; that is, is this case governed by the doctrine of *res judicata*?

2. Is there any "decision" that can be judicially reviewed?

3. Does the Canadian government have a legal duty to protect Mr. Khadr?

4. What is the appropriate remedy if that duty is breached?

(Provisions of the *Canadian Charter of Rights and Freedoms* and the international instruments cited below are set out in Annex A.)

I. Factual Background

(a) Events Leading to Mr. Khadr's Arrest and Detention

[5] Mr. Khadr was born in Canada in 1986. He moved with his family to Pakistan in 1990. In 1995, his father, Mr. Ahmad Khadr (Ahmad), was arrested for alleged involvement in a bombing of the Egyptian embassy in Islamabad. The rest of the family returned to Canada. They moved back to Pakistan in 1996 after Ahmad was released. They came back to Canada again in 2001 for a number of

months while Ahmad recuperated from an injury caused by a landmine. The family moved to Afghanistan in July 2001. After the events of September 11, 2001, Mr. Khadr and his brothers attended training camps associated with Al-Qaida.

[6] The events surrounding Mr. Khadr's arrest in July 2002 are disputed. Clearly, he was present at a gun battle near Khost, Afghanistan, during which a United States soldier was killed by a grenade. Mr. Khadr is alleged to have thrown that grenade. He maintains that he did not.

[7] Mr. Khadr was himself seriously injured during the gun battle by both bullets and shrapnel. He received medical treatment and was held in custody at Bagram Air Base for several weeks thereafter, and then transferred to Guantánamo Bay on October 28, 2002.

(b) Conditions at Bagram and Guantánamo Bay

[8] In his affidavit, Mr. Khadr describes various forms of mistreatment both at Bagram and Guantánamo Bay. For purposes of these proceedings, it is unnecessary for me to make any definitive factual findings about the conditions of Mr. Khadr's imprisonment. However, there are three significant facts that are relevant to this application and on which there is agreement between the parties.

[9] First, on detention, Mr. Khadr was "given no special status as a minor" even though he was only 15 when he was arrested and 16 at the time he was transferred to Guantánamo Bay.

[10] Second, Mr. Khadr had virtually no communication with anyone outside of Guantánamo Bay until November 2004, when he met with legal counsel for the first time.

[11] Third, at Guantánamo Bay, Mr. Khadr was subjected to the so-called "frequent flyer program", which involved depriving him of rest and sleep by moving him to a new location every three hours over a period of weeks. Canadian officials became aware of this treatment in the spring of 2004 when Mr. Khadr was 17, and proceeded to interrogate him.

(c) Actions of the Canadian Government

[12] After Mr. Khadr's arrest, Canadian authorities asked United States officials for consular access to him while he was being held at Bagram. It was denied. Canada also made clear that it believed that Guantánamo Bay was not an appropriate place for a child to be kept in custody. A diplomatic note dated September 19, 2002 stated:

> The Embassy of Canada would further urge the American authorities to consider the fact that Mr. Omar Khadr, at the time the events in question took place, was less than sixteen years of age. Under various laws of Canada and the United States, such an age provides for special treatment of such persons with respect to legal or judicial processes. As such, the Government of Canada believes that it would be inappropriate for Mr. Omar Khadr to be transferred to the detention facilities at the American naval base at Guantanamo Bay, Cuba. From the information that is available to the Government of Canada, such a facility would not be an appropriate place for Mr. Omar Khadr to be detained.

[13] While Mr. Khadr was at Guantánamo Bay, Canadian consular officials made inquiries about him beginning in November 2003. They also sought assurances that the death penalty would not be imposed on Mr. Khadr and that detainees generally would be treated in accordance with international law. Canada also expressed its concern about allegations that Mr. Khadr and other detainees were being mistreated. Beginning in 2005, Canadian officials visited Mr. Khadr a number of times to check on his welfare. In general, they found that he appeared to be healthy and well-fed. When he

complained that his gunshot wounds were bothering him and still bleeding, Canadian officials requested medical treatment for him, and it was provided.

[14] In addition, Canadian officials, including agents of the Canadian Security Intelligence Service (CSIS), visited Mr. Khadr a number of times and questioned him. In particular, in February 2003, CSIS agents and an officer from the Department of Foreign Affairs and International Trade (DFAIT) interviewed Mr. Khadr over the course of four days. Additional interrogations followed in September 2003 and March 2004. These visits were for purposes of law enforcement and intelligence gathering, not consular assistance to Mr. Khadr. Indeed, Canadian officials told Mr. Khadr in 2003 that they could not do anything to help him.

[15] A report on the March 2004 visit by a DFAIT official states (referring to Mr. Khadr as "Umar"):

> In an effort to make him more amenable and willing to talk, [blank] has placed Umar on the "frequent flyer program." [F]or the three weeks before [the] visit, Umar has not been permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continued change of neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again.
>
> …
>
> Certainly Umar did not appear to have been affected by three weeks on the "frequent flyer" program. He did not yawn or indicate in any way that he was tired throughout the two hour interview. It seems likely that the natural resilience of a well-fed and healthy seventeen-year old are keeping him going.

[16] Even before it came to light that Mr. Khadr had been subjected to sleep deprivation, Justice Konrad von Finckenstein had issued an interim injunction preventing further interviews with Mr. Khadr in order "to prevent a potential grave injustice" (*Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at paragraph 46).

[17] By the spring of 2004, then, Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Mr. Khadr as a means of making him more willing to provide intelligence. Mr. Khadr was then a 17-year-old minor, who was being detained without legal representation, with no access to his family and with no Canadian consular assistance.

[18] It cannot fairly be said, however, that Canada abandoned Mr. Khadr entirely. Clearly, officials were concerned about his treatment and welfare and, beginning in 2005, checked on him regularly.

II. Legal Framework

[19] According to orders issued by then-President George W. Bush, detainees at Guantánamo Bay were considered unlawful combatants, with no standing to seek remedies in any court and no protection under the Geneva Conventions [of 1949, see *Geneva Conventions Act*, R.S.C., 1985, c. G-3, Schedules I–IV]. In June 2004, the United States Supreme Court ruled that Guantánamo Bay detainees were entitled to bring *habeas corpus* applications in United States federal courts (*Rasul v. Bush*, 542 U.S. 466 (2004)). The Court found the presidential order to the contrary to be unlawful.

[20] In September 2004, the Combatant Status Review Tribunal (CSRT) concluded that Mr. Khadr was an enemy combatant. In January 2005, the United States District Court for the District of Columbia, after receiving *habeas corpus* applications from a number of detainees, including Mr. Khadr, concluded that the CSRT had denied them due process. In particular, the Court found that the detainees had not been given access to the evidence against them, had been denied the assistance of

counsel and had evidence obtained by torture used against them (*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005)).

[21] In 2006, the United States Supreme Court held that the legal regime in Guantánamo Bay violated the Geneva Conventions [of 1949] because detainees had been denied the right to be tried by regular courts with the usual procedural protections (*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)). Subsequently, Congress enacted the *Military Commissions Act of 2006* [Pub. L. 109-366, 120 Stat. 2600] (MCA) which removed the U.S. federal courts' jurisdiction to receive *habeas corpus* applications from detainees.

[22] Mr. Khadr faces five charges under the MCA: (1) murder in violation of the law of war; (2) attempted murder in violation of the law of war; (3) conspiracy; (4) providing material support for terrorism; and (5) spying.

III. Earlier Proceedings Involving Mr. Khadr

[23] Mr. Khadr has launched a number of other proceedings in Federal Court. In 2004, he commenced an action for damages and a declaration that his Charter rights had been infringed. Justice Konrad von Finckenstein granted him an injunction against further interrogations by Canadian officials, but no further action was taken in the proceedings (*Khadr v. Canada*).

[24] Also in 2004, Mr. Khadr applied for judicial review of a decision of the Minister of Foreign Affairs not to seek further consular access to him. Again, there has been no recent action taken on this file (*Khadr v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145, 123 C.R.R. (2d) 7).

[25] In 2006, Mr. Khadr sought judicial review of a decision of the Minister of Justice not to comply with a request for disclosure of documents that would assist Mr. Khadr in defending the charges against him. The application was dismissed (*Khadr v. Canada (Minister of Justice)*, 2006 FC 509, 290 F.T.R. 313), but Mr. Khadr appealed successfully (*Khadr v. Canada (Minister of Justice)*, 2007 FCA 182, [2008] 1 F.C.R. 270). The Federal Court of Appeal found that Mr. Khadr's Charter rights were engaged by virtue of the involvement of Canadian officials in gathering evidence against him through their interrogations. The Court ordered the Minister of Justice to disclose all relevant documents to Mr. Khadr.

[26] The Supreme Court of Canada dismissed the Minister's appeal but varied the disclosure order. The Minister was ordered to disclose "(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" (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, at paragraph 40).

[27] The Supreme Court also ordered that a Federal Court judge review the disclosed documents in order to determine whether national security interests or other considerations apply to them and to make the final determination about what documents should be disclosed. Justice Richard Mosley performed that review and issued his order in June 2008: *Khadr v. Canada (Attorney General)*, 2008 FC 807, 59 C.R. (6th) 284.

[28] In 2007, Mr. Khadr commenced another application for judicial review, but it was discontinued in February 2008 (*Khadr v. Canada (Minister of Justice)*, T-1319-07).

IV. Issues

1. Have the issues in this case already been decided in other judicial proceedings; that is, is this case governed by the doctrine of *res judicata*?

[29] The respondents point to the earlier proceedings instituted by Mr. Khadr, particularly those leading to the decision of the Supreme Court of Canada, and submit that the issues raised in this application have already been heard and decided; that is, that this application falls under the doctrine of *res judicata*.

[30] The Supreme Court of Canada addressed the question of whether the respondents were required to disclose documents in their possession that were relevant to the charges Mr. Khadr was facing, including records of interviews and information turned over to U.S. officials. In the analysis of this question, the Court considered whether the Charter applied to the issue of disclosure, given that the materials sought related to interviews that had taken place outside of Canada. The Court referred to its prior decision in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 where it had concluded that the Charter generally does not apply to Canadian investigators operating outside of Canada. But *Hape* had also identified an exception to that general rule where the activities of Canadian agents violated Canada's international obligations, particularly its human rights commitments. The Court stated, at paragraph 19:

> If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

[31] The Court relied on the U.S. Supreme Court's conclusion that the Guantánamo Bay detainees had been unlawfully denied access to the remedy of *habeas corpus* and were being held under terms that violated the Geneva Conventions: *Rasul v. Bush*, above. Further, the Court noted that the U.S. Supreme Court had also found that the process of trials before military commissions violated Common Article 3 of the Geneva Conventions [of 1949]: *Hamdan v. Rumsfeld*, above. Based on these decisions, and given Canada's adherence to the Geneva Conventions [of 1949], the Court concluded 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" (at paragraph 24).

[32] However, the Court did not find it necessary to decide whether Canadian officials had actually violated the Charter by interviewing Mr. Khadr and turning over the fruits of those interviews to U.S. authorities. The Court simply noted that the Canadian officials were bound by the Charter at that point because they were participants in a process that violated international law. Accordingly, they were bound by the principles of fundamental justice that are protected by section 7 of the Charter and nourished by international human rights obligations. Section 7 imposes on state agents an obligation to disclose relevant evidence to persons whose liberty interests are at stake. In the context of Mr. Khadr's case, this meant that Canadian officials had a duty to disclose all records of the interviews they had conducted and other information given to U.S. authorities as a consequence of those interviews.

[33] I do not agree with the respondents that the issues arising in this case were decided by the Supreme Court of Canada in the earlier litigation on disclosure. True, there is some overlap. For example, the question of the application of section 7 of the Charter arises in both, and Mr. Khadr sought disclosure of information in both. However, the issues here are broader and different. In particular, the question whether the respondents have a duty to seek the repatriation of Mr. Khadr has not previously been addressed.

[34] In further support of their position, the respondents also point to the judgment of Justice Mosley arising from his review of the documents the Supreme Court ordered to be disclosed. He

justified disclosure to Mr. Khadr of certain information on the grounds that Canada had, by virtue of the DFAIT official's interrogation of Mr. Khadr at Guantánamo Bay in March 2004, become implicated in violations of the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (December 10, 1984, [1987] Can. T.S. No. 36 (CAT)), as well as the Geneva Conventions [of 1949]. As mentioned, that interrogation took place with knowledge that Mr. Khadr had been subjected to sleep deprivation in order to prepare him to be co-operative in the interview and, thereby, to reveal useful intelligence. Justice Mosley ordered the disclosure of the report of the March 2004 interrogation to Mr. Khadr, and its contents subsequently became public knowledge.

[35] Mr. Khadr raises similar arguments before me in support of his submission that Canadian officials have a duty to seek his repatriation. But that does not render the issues raised by Mr. Khadr here identical to the issues litigated previously. The contexts are quite different. This part of Mr. Khadr's application is not *res judicata*. However, it is clear that the issue of disclosure has been fully considered and decided in earlier proceedings and cannot be re-litigated before me.

2. Is there any "decision" that can be judicially reviewed?

(a) The Prime Minister's Statement and Government Policy

[36] On July 10, 2008, following the release of the decision of Justice Mosley discussed above, as well as the information about Canadian involvement in the imposition of sleep deprivation techniques on Mr. Khadr, a journalist asked Prime Minister Stephen Harper whether he would be requesting Mr. Khadr's repatriation to Canada. The Prime Minister said: "The answer is no, as I said the former Government, in our Government with the notification of the Minister of Justice had considered all these issues and the situation remains the same. … [W]e keep on looking for [assurances] of good treatment of Mr. Khadr".

[37] In addition to this specific statement, it is clear that the Government of Canada has an ongoing policy against requesting Mr. Khadr's repatriation that has been expressed publicly from time to time and can be the subject of judicial review at any given point: *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, [2007] 2 F.C.R. 325, at paragraph 72. This policy is reflected in the Government of Canada's dissent from a June 2008 report of the Standing Committee on Foreign Affairs and International Development on Mr. Khadr's case. The Standing Committee recommended that Canada demand Mr. Khadr's repatriation. The Government's dissent was based on a concern that Canada be seen to deal forcefully with terrorism. In the Government's view, Mr. Khadr's case reflects "Canada's commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country" (House of Commons, *Omar Khadr: Report of the Standing Committee on Foreign Affairs and International Development* (Communications Canada – Publishing: Ottawa, 2008), at page 15) [also available online]).

[38] Accordingly, I find that there has clearly been a "decision" that may properly be the subject of an application for judicial review.

(b) Is the Decision Reviewable by the Court?

[39] Cases such as this require the Court to find the "legal edge between the executive and judicial functions" (as expressed by Lord Laws in *Al Rawi & Ors, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Anor*, [2006] EWCA Civ 1279, at paragraph 148).

[40] Generally speaking, decisions about foreign affairs fall naturally and properly to the executive. Still, Canadian courts have determined that the executive's prerogative in that area is subject to review under the Charter. As Justice Allen Linden has stated, "the exercise of Crown prerogative is

beyond the scope of judicial review, except, of course, when a right guaranteed by the [Charter] is violated": *Copello v. Canada (Minister of Foreign Affairs)*, 2003 FCA 295, 3 Admin. L.R. (4th) 214, at paragraph 16, relying on *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.).

[41] Justice Robert Barnes expressed the situation this way (*Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3, at paragraph 26):

> 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.

[42] The courts of other countries have addressed the question whether decisions taken by governments in respect of persons detained at Guantánamo Bay are reviewable. In *Abbasi & Anor, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ 1598, Lord Phillips acknowledged that courts may review the exercise of the Government's prerogative power in relation to foreign affairs. However, he concluded that the Government does not have a general enforceable duty to protect citizens abroad. The Government has the discretion to do so, but the courts should not intervene unless the Government's position is irrational or contrary to a legitimate expectation. Lord Phillips went on to say that, while a decision whether to make diplomatic representations on a citizen's behalf falls within the conduct of foreign policy, the Government has a duty at least to consider and respond to requests for diplomatic interventions. Whether the Government might be legally required to do more would depend on the particular facts.

[43] It should be noted that the *Abbasi* decision was made at a point in time when the legal status of detainees was unclear under U.S. law. Further, the U.K. Foreign Office was in active discussions with the U.S. about the status of detainees. The timing, therefore, was "delicate" in the Court's view. While the Court held a "deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention", it could not, for the reasons outlined above, rule in his favour (at paragraph 107).

[44] In *Al Rawi*, above, the Court considered the position of persons detained at Guantánamo Bay who were residents, not citizens, of the U.K. By 2006, the Secretary of State had made representations to the U.S. seeking the return of U.K. citizens, but had refused to do so on behalf of residents. The Court concluded that, to the extent that the *Abbasi* case recognized a basis for judicial review of government decisions regarding citizens abroad, it should be confined to British nationals. And it made clear that the courts should be very careful not to intrude on the executive's responsibilities for foreign policy and national security.

[45] In *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs*, [2008] EWHC 2048 (Admin), the applicant, Binyan Mohamed, a Guantánamo Bay detainee, sought disclosure of information and documents held by the Foreign Secretary. Mr. Mohamed, a failed refugee claimant in, and resident of, the U.K., alleged that he had been arrested in Pakistan in 2002 and then kept in unlawful detention incommunicado until 2004 when he was transferred to Guantánamo Bay, where he faced serious charges. The Foreign Secretary refused disclosure on grounds of national security. Mr. Mohamed had been questioned by U.K. agents in Pakistan as part of an intelligence-gathering exercise. He was also questioned by U.S. authorities. Lord Thomas found that U.K. officials facilitated the U.S. interrogations, knowing that Mr. Mohamed's treatment and detention was unlawful. The Court specifically stated that it was not faced with the question whether the U.K. government was under a duty, in these circumstances, to protest or make representations to the U.S. government regarding Mr. Mohamed's treatment. However, in light of the involvement of

U.K. officials, the Court held that Mr. Mohamed was entitled to disclosure at common law, subject to a claim of public interest immunity.

[46] The Federal Court of Australia considered whether there was any chance of success in an application brought by a Guantánamo Bay detainee, Mr. David Hicks, for an order requiring the Government of Australia to seek his repatriation to Australia. Justice Tamberlin denied the Government's motion to dismiss the proceedings summarily, finding that there was at least some basis in law for Mr. Hick's application. Justice Tamberlin noted that "the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law" (*Hicks v. Ruddock*, [2007] FCA 299, at paragraph 93). The case was never decided on its merits because Mr. Hicks was, in fact, returned to Australia.

[47] These cases support the respondents' contention that there is no clear duty to protect citizens recognized under international law or under the common law. However, they do not help decide what duties Canada owes to citizens whose constitutional rights under the Charter are engaged. Further, they do not address the special circumstances that present themselves in this case—in particular, Mr. Khadr's youth and the direct involvement of Canadian authorities in his mistreatment at Guantánamo Bay.

[48] The Constitutional Court of South Africa considered whether there exists a legal duty to come to the aid of citizens who are at risk in other countries in *Kaunda and Others v. President of the Republic of South Africa*, (CCT 23/04) [[2004] ZACC 5]. There, the Court considered whether the Government of South Africa had an obligation to assist 69 South African citizens who had been arrested in Zimbabwe for purposes of extradition to Equatorial Guinea in connection with an alleged coup attempt. The question arose whether the Government of South Africa was obliged to intervene diplomatically on behalf of the detainees, given that their conditions of detention were deplorable and that they might face the death penalty in Equatorial Guinea if extradited. Chief Justice Chaskalson concluded that there is no right to diplomatic protection under international law. States have "the right to protect their nationals beyond their borders but are under no obligation to do so" (at paragraph 23). However, citizens have the right to request the Government "to provide protection against acts which violate accepted norms of international law" (at paragraph 144, No. 5). The Government must consider those requests and respond to them appropriately. Further, the Government's response is subject to judicial review under the Constitution. Still, courts will "give particular weight to the Government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters" (at paragraph 144, No. 6).

[49] In my view, the same general approach applies here. 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".

3. <u>Does the Canadian government have a legal duty to protect Mr. Khadr?</u>

(a) Application of the Charter

[50] While the Supreme Court of Canada's decision in respect of Mr. Khadr dealt with a different question (i.e., the duty to disclose the fruits of an interrogation), its approach is, nevertheless, helpful in addressing the question before me: Given Mr. Khadr's personal circumstances, as well as the conditions of his confinement and treatment at Guantánamo Bay, and in light of the involvement of Canadian authorities, does Canada have an obligation, based on the Charter, to protect Mr. Khadr?

[51] To start with, it is clear that the Charter applies to the Canadian agents who travelled to Guantánamo Bay and questioned Mr. Khadr. The Supreme Court held that 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" (at paragraph 24). Accordingly, while principles of international comity would otherwise have precluded the application of the Charter, those principles do not apply in circumstances where Canada's international human rights obligations have been contravened (at paragraph 18). Mr. Khadr's detention in Guantánamo Bay is illegal under both U.S. and international law. As such, the "*Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations" (at paragraph 26).

[52] Obviously, if the mere questioning of Mr. Khadr involved Canada in a process that violates our international human rights obligations, knowing involvement in the mistreatment of Mr. Khadr is an even more compelling basis on which to find that the Charter applied to Canadian officials at Guantánamo Bay.

(b) The Principles of Fundamental Justice

[53] When a person's life, liberty or security is at stake, section 7 of the Charter requires Canadian officials to respect principles of fundamental justice. The Supreme Court found that Mr. Khadr's liberty interest was engaged by virtue of the participation of Canadian officials in an unlawful process and that the principles of fundamental justice required Canada to disclose the materials it acquired. Canada had provided that information to U.S. authorities and, therefore, its disclosure obligation required that the materials also be provided to Mr. Khadr. Canada's refusal to grant disclosure violated principles of fundamental justice and, therefore, Mr. Khadr's section 7 rights.

[54] Here, I must decide whether the applicable principles of fundamental justice require the Canadian government to protect Mr. Khadr. To be recognized as a principle of fundamental justice, three criteria must be met. It must be (1) a legal principle, (2) for which there is a broad consensus about its fundamental character in respect of the fair operation of the legal system, and (3) which is capable of being defined with sufficient precision to be used as a manageable standard for the measurement of deprivations of life, liberty and security of the person (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3).

[55] In addition, the principles of fundamental justice are informed by Canada's international obligations. The Court must take into account "Canada's international obligations and values as expressed in '[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms'" (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 46, citing *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at paragraph 80).

(c) Relevant International Instruments

(i) The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)

[56] "Torture" is defined under the CAT as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession" (article 1). The Supreme Court of Israel has concluded that sleep deprivation "for the purpose of tiring [the suspect] out or 'breaking' him, it is not part of the scope of a fair and reasonable investigation" and harms "the rights and dignity of the suspect" (*Public Committee Against Torture in Israel v. State of Israel*, [HCJ 5100/94] (1999), 38 *I.L.M.* 1471, at paragraph 31). Based on that decision, Justice Mosley [in *Khadr v. Canada (Attorney General)*, at

paragraph 87] concluded that the subjection of Mr. Khadr to sleep deprivation techniques offended the CAT.

[57] In addition to its obligation to prevent torture within Canada and to prosecute offenders, Canada also has a duty to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings" (article 15). Canada turned over the fruits of its interrogation of Mr. Khadr to U.S. authorities for use against him, knowing that sleep deprivation techniques had been imposed on him.

(ii) *Convention on the Rights of the Child* (CRC)

[58] Canada has a duty under the CRC to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (Article 19(1)). A child is a person under the age of 18 (Article 1).

[59] In addition, Canada must ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment", that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily" and that the "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Article 37(a) and (b)).

[60] Canada must also ensure that "every child deprived of liberty shall be separated from adults" and "have the right to maintain contact with his or her family through correspondence and visits", except in exceptional circumstances (Article 37(c)). Further, every child in custody "shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" (Article 37(d)).

[61] Canada also has a duty to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts" (Article 39).

[62] Finally, Canada has recognized "the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth" (Article 40(1)).

[63] The CRC 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.

(iii) Optional Protocol on the Involvement of Children in Armed Conflict

[66] The Optional Protocol [*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, May 25, 2000, [2002] Can. T.S. No. 5] requires states to ensure that members of their armed forces who are under age 18 do not take a direct part in hostilities. Other armed groups "should not" recruit or use in hostilities persons under age 18. Thus, the Optional Protocol does not appear to contain a specific legal obligation on Canada in respect of someone in Mr. Khadr's circumstances.

[67] However, the Optional Protocol is based on broader principles that are set out in its preamble. For example, the signatories recognize the special needs of children "who are particularly vulnerable to recruitment or use in hostilities … owing to their economic or social status or gender". Further, they recognize the need to strengthen international co-operation in the implementation of the Optional Protocol, "as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict".

[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.

(d) Additional Factors

[69] In determining the scope of the principles of fundamental justice, the Supreme Court has made clear that the particular circumstances in which the claim for section 7 rights is made must be considered. Some factors may be particular to the claimant and others may be more general (*Burns*, above, at paragraph 65). For example, in deciding whether a parent is entitled to be represented by counsel at a child-custody hearing, the Court considered the seriousness of the interests at stake, the complexity of the proceedings, and the capacity of the parent to participate meaningfully in the hearing if not represented (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paragraph 74).

[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.

(e) The Duty to Protect is a Principle of Fundamental Justice

[71] I find that the three criteria from *D.B.*, above, support the recognition of a duty to protect persons in Mr. Khadr's circumstances as a principle of fundamental justice.

[72] First, it is a legal principle, expressed in clear and forceful language in the international instruments discussed above.

[73] Second, given the broad international support for those instruments, I conclude that they represent a consensus that the duties contained in them have a fundamental character. I also note that the Supreme Court of Canada has already recognized that special treatment of young persons caught up in the legal system is a principle of fundamental justice given their diminished moral culpability.

In doing so, it relied in part on the *Convention on the Rights of the Child* (*D.B.*, above, at paragraph 60). Further, the Court has also invoked the CRC in recognizing the "importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 71).

[74] Third, the scope of the duty to protect can be adequately identified and manageably applied to deprivations of life, liberty and security of the person. In this context, I rely on the special circumstances that apply to Mr. Khadr's case and the multiplicity of departures from international norms that have taken place. Certainly, the scope of the duty to protect can be clearly articulated and applied to the facts before me.

[75] I find, therefore, 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.

4. What is the appropriate remedy if that duty is breached?

[76] In some cases, a violation of section 7 will, in itself, define the appropriate remedy. That is because a failure to abide by a principle of fundamental justice can be remedied simply by imposing a duty on the Government to respect the applicable principle. In these circumstances, it may not be necessary to resort to subsection 24(1) of the Charter to find a remedy (see, e.g., *Burns*, above).

[77] Similarly, in its decision ordering disclosure of materials to Mr. Khadr, the Supreme Court of Canada stated that the remedy of disclosure "mitigated the effect" of Canada's involvement in the violation of Mr. Khadr's rights. The question to be asked here, then, is what remedy is appropriate to mitigate the effect of the involvement of Canadian officials in the mistreatment of Mr. Khadr at Guantánamo Bay?

[78] The principal remedy sought by Mr. Khadr is an order requiring Canada to request his repatriation. In the circumstances, no other remedy would appear to be capable of mitigating the effect of the Charter violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration. The respondents have not proposed any alternative remedy. In other cases, there may be alternative appropriate remedies but, given the facts and submissions before me, I will confine myself to the remedy requested by Mr. Khadr.

[79] The respondents argue that the Court should refrain from requiring them to request Mr. Khadr's repatriation because that would involve ordering Canada to take positive steps to protect Mr. Khadr, and would involve the Court in the exercise of prerogative powers relating to Canada's foreign relations with the United States. It is only in exceptional circumstances where an order to take positive steps can be made under section 7 (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429) and, naturally, as discussed above, courts should generally leave matters of foreign relations to Government.

[80] In *Gosselin*, Chief Justice McLachlin noted that section 7 protects the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. It does not create a positive obligation on the state to ensure that each person enjoys life, liberty and security—at least, the case law has not yet recognized such a duty. Chief Justice McLachlin acknowledged that someday, section 7 might be read to include positive obligations. She said: "I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" (at paragraph 83).

[81] *Gosselin* involved a challenge to a social assistance scheme in the province of Quebec, primarily on grounds of inequality under section 15 of the Charter. The argument under section 7 related to the question whether a reduced amount of social assistance provided by the province infringed the appellant's right to security of the person in a manner contrary to the principles of fundamental justice. The appellant suggested that the province had a duty to provide her sufficient social assistance to realize a certain level of security.

[82] As I see it, this case does not involve a similar request for positive action on the part of Canada. Mr. Khadr has very clearly been deprived of his liberty and Canadian agents are involved in that deprivation. The question is whether the refusal of Canada to request his repatriation offends the principles of fundamental justice. If it does, the appropriate recourse is to order Canada to seek his repatriation. That is not a "positive" obligation in the same sense that the term was used in *Gosselin*. In fact, it is not uncommon for courts to order that certain affirmative steps be taken by government officials in circumstances where there has been a violation of the principles of fundamental justice. The Supreme Court's disclosure order in the earlier *Khadr* proceeding is one example. Others would include requiring the Government to provide legal counsel (*G. (J.)*, above) or to seek assurances that the death penalty would not be imposed or carried out (*Burns*, above). In these cases, positive action on the part of the state was required to mitigate the effect of a deprivation of rights protected under section 7. In *Gosselin*, by contrast, Chief Justice McLachlin was discussing the possibility that section 7 might require, in special circumstances, positive measures on the part of the Government to prevent a deprivation of those rights.

[83] The respondents emphasize the fact that the mistreatment of Mr. Khadr was carried out by non-Canadians. Under section 7, "the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected" (*Suresh*, above, at paragraph 54). Here, the necessary degree of participation is found in Canada's interrogation of Mr. Khadr knowing that he had been subjected to treatment that offended international human rights norms to which Canada had specifically committed itself.

[84] The respondents also raised a general concern about potential harm to Canada-U.S. relations, but have not pointed to any particular harm that would result from requesting Mr. Khadr's repatriation. Similarly, the Supreme Court of Canada found that a requirement that Canada seek assurances that the death penalty would not be carried out on persons extradited to the United States did "not undermine in any significant way the achievement of Canada's mutual assistance objectives" (*Burns*, above, at paragraph 37). Further, the Court made clear that the Government's concern about a detrimental effect on foreign relations must be supported by evidence (*Burns*, above, at paragraph 136):

> With respect to the argument on comity, there is no doubt that it is important for Canada to maintain good relations with other states. However, the Minister has not shown that the means chosen to further that objective in this case — the refusal to ask for assurances that the death penalty will not be exacted — is necessary to further that objective. There is no suggestion in the evidence that asking for assurances would undermine Canada's international obligations or good relations with neighbouring states.

[85] The Court also noted that European states regularly sought and received assurances regarding the death penalty from the United States.

[86] Similarly, here, the respondents have not identified any particular harm that might flow from requesting Mr. Khadr's repatriation. Many other countries have requested the return of their citizens or residents from Guantánamo Bay and the United States has granted those requests. Further, the respondents have not identified how its firm position regarding the treatment of persons who have carried out terrorist acts would be compromised by requesting Mr. Khadr's repatriation to Canada for prosecution here. This, in fact, was one of the recommendations in the Report of the Standing

Committee on Foreign Affairs and International Development (above, at page 6). Accordingly, as discussed above, while I accept that the Court should give particular weight to governmental decisions affecting foreign relations, there is little evidence before me to be weighed.

[87] The respondents argue that, if Mr. Khadr returns to Canada, the question will arise whether he can be prosecuted under Canadian law. The respondents' concern is whether the threshold criteria for launching a prosecution—that is, whether there is a reasonable prospect of conviction and the prosecution is in the public interest—would be met in Mr. Khadr's case. To my mind, any concern in this area merely reinforces the case for repatriation. If there is doubt about whether those criteria can be met, there should also be doubt about whether Mr. Khadr's ongoing detention at Guantánamo Bay is consistent with principles of fundamental justice.

[88] The respondents also suggest that there is no reason to believe that the United States would grant a request for Mr. Khadr's repatriation, given that Canada's request for consular access to Mr. Khadr was denied. In my view, the denial of consular access made the need for repatriation more acute; it does not provide a justification not to request Mr. Khadr's return. Further, the evidence of successful requests for repatriation on the part of other countries suggests that a request presented by Canada would likely be granted by the United States. Indeed, given Canada's previous expressions of concern about Mr. Khadr's welfare and its view that Guantánamo Bay was not an appropriate place for his detention, a request from Canada for Mr. Khadr's repatriation would probably not be unexpected by U.S. authorities.

[89] The Constitutional Court of South Africa in *Kaunda*, above, noted that there is a broad range of conduct that falls within the scope of "diplomatic protection". It would include "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures" (at paragraph 27). I would regard the presentation of a request for the return of a Canadian citizen as being at the lower end of this spectrum of diplomatic intervention and, therefore, minimally intrusive on the Crown's prerogative in relation to foreign affairs.

(a) Admission of Evidence

[90] Mr. Khadr asked me to admit two items into evidence. The first is his affidavit outlining his treatment at Bagram and Guantánamo Bay. I have admitted this document, although I did not find it necessary to rely on it to any significant degree. The second item was a recording of a documentary about Mr. Khadr. I found that this recording was not relevant to this proceeding, so I did not admit it.

VI. Conclusion and Disposition

[91] I find that the Government of Canada is required by section 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 section 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 section 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.

THIS COURT ORDERS that

1. The application for judicial review be allowed, with costs.

2. The respondents request that the United States return Mr. Khadr to Canada as soon as practicable.

Annex A

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

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.

…

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

…

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

…

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.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, entry into force 26 June 1987

ARTICLE 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

…

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

…

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000, entered into force on 12 February 2002

The States Parties to the present Protocol,

…

Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender,

…

Convinced of the need to strengthen international cooperation in the implementation this Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

…

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

…

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.