

Date: 20090909

**Dockets: A-78-09
A-79-09**

Citation: 2009 FCA 259

**CORAM: SEXTON J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

Docket: A-78-09

BETWEEN:

MOHAMEDOU OULD SLAHI

Appellant

and

**THE MINISTER OF JUSTICE and
ATTORNEY GENERAL 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

Docket: A-79-09

BETWEEN:

AHCENE ZEMIRI

Appellant

and

**THE MINISTER OF JUSTICE and
ATTORNEY GENERAL 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

Heard at Ottawa, Ontario, on September 9, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on September 9, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 9, 2009)

EVANS J.A.

[1] This is an appeal from a decision of the Federal Court in which Justice Blanchard (“Applications Judge”) dismissed an application for judicial review by the appellants. Relying on *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 (“*Khadr*”), the appellants requested disclosure of the records of interviews with them by Canadian officials in the U.S. facility at Guantànamo Bay and of any material handed over to U.S. authorities as a result of those interviews.

[2] The appellants base their claim on section 7 of the *Canadian Charter of Rights and Freedoms*. However, the Applications Judge held that section 7 does not apply to the appellants because the conduct of Canadian officials of which they complain occurred outside Canada and they are not Canadian citizens. The fact that the appellants had resided in Canada at one time, he said, was an insufficient nexus to Canada to bring them within the protection of section 7.

[3] The Federal Court’s decision in these consolidated applications is reported as *Slahi v. Canada (Minister of Justice)*, 2009 FC 160.

[4] The only issue to be decided in these consolidated appeals is whether the Applications Judge erred in concluding that section 7 was inapplicable to the appellants while detained by the U.S. authorities at Guantànamo Bay because they are not Canadian citizens. Substantially for the reasons given by the Applications Judge, we are of the view that his conclusion was correct. *Khadr* is distinguishable on the ground that Mr Khadr is a Canadian citizen, whereas the appellants are not. Further, there are no proceedings pending in Canada against the appellants which might provide a nexus to Canada.

[5] We would only add this. The fact that the rights contained in some sections of the Charter are limited to Canadian citizens, while others, including section 7, are not, is not of much significance in a case where it is argued that the Charter applies extraterritorially. The Charter normally applies to governmental action within Canada and was drafted with that in mind.

[6] Counsel for the appellants advances two arguments. First, he says that the two-step inquiry for determining whether the Charter applies to an investigation conducted by Canadian officials outside Canada does not include the citizenship of the individual concerned: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 113. By adding a requirement that the individual must have a nexus to Canada, counsel argues, the Applications Judge erred by modifying the test prescribed by the Supreme Court for applying the Charter extraterritorially.

[7] We do not agree. Since Mr Hape was a Canadian citizen, it was obvious that he had a nexus with Canada and it was unnecessary for the Court to address the question. Consequently, by

requiring a nexus in a case where the individual was not a Canadian citizen, the Applications Judge cannot be said to have reached a decision that is inconsistent with *Hape*. He correctly distinguished *Khadr* on the basis that Mr Khadr is a Canadian citizen, whereas the appellants are not.

[8] Second, counsel argues that Canada's obligations in international law inform the interpretation of the Charter. He submits that the Applications Judge's interpretation of section 7 as not protecting the appellants in this case should not be accepted because it is inconsistent with Canada's obligations under the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. In particular, he notes that Article 2(1) of the Covenant provides that each State Party undertakes to respect and ensure Covenant rights to all individuals within its territory and subject to its jurisdiction, without distinction based on national origin.

[9] We are not persuaded by this argument. Apart from the fact that section 7 was found not to apply to the appellants on the facts of this case by virtue of their nationality, not their national origin, while the appellants were detained at Guantànamo Bay they were subject to the jurisdiction of the U.S., not Canada. The fact that they were interviewed by Canadian officials at Guantànamo Bay did not make them subject to Canada's jurisdiction within the meaning of Article 2(1) of the Covenant.

[10] The statements from international law opinions on which counsel relies as indicating that the phrase "subject to its jurisdiction" should be given a meaning broad enough to apply to the facts of the present case were made in very different contexts. For example, the Advisory Opinion of the

International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (ICJ Reports 2004, 180) concerned activities by the Government of Israel outside its territory, but within territory that it occupied. And, in *Lopez Burgos v. Uruguay* (U.N. Doc. CCPR/C/13D/1979 (1981)), the United Nations' Human Rights Committee was dealing with a complaint by a Uruguayan national against Uruguay.

[11] For these reasons, the appeals will be dismissed with one set of costs and a copy of the reasons will be inserted in both files.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-78-09 / A-79-09

STYLE OF CAUSE: MOHAMEDOU OULD SLAHI /
AHCENE ZEMIRI

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PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 9, 2009

REASONS FOR JUDGMENT OF THE COURT BY: Evans J.A.

DELIVERED FROM THE BENCH BY:

DATED: September 9, 2009

APPEARANCES:

Nathan Whitling

FOR THE APPELLANT

Doreen Mueller

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Parlee McLaws LLP
Edmonton, Alberta
John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPELLANT

FOR THE RESPONDENTS