

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100927

Docket: A-260-10

Citation: 2010 FCA 245

Present: STRATAS J.A.

BETWEEN:

**THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS, and
THE MINISTER OF JUSTICE**

Appellants (Respondents)

and

OMAR AHMED KHADR

Respondent (Applicant)

AND BETWEEN:

**THE PRIME MINISTER OF CANADA and
THE MINISTER OF FOREIGN AFFAIRS**

Appellants (Respondents)

and

OMAR AHMED KHADR

Respondent (Applicant)

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 27, 2010.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court
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Appellants (Respondents)

and

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Respondent (Applicant)

REASONS FOR ORDER

STRATAS J.A.

[1] The respondent, Mr. Khadr, brings this motion in writing under Rule 369 for an order expediting the hearing of this appeal.

[2] The motion shall be dismissed. Twice before, Mr. Khadr has sought this relief. Twice before, this Court has refused it. I am bound by these earlier refusals, unless Mr. Khadr can demonstrate, through evidence of a significant new development, that there has been a marked change in circumstances. Mr. Khadr has not shown this.

A. *Background*

[3] The Federal Court (2010 FC 715) ordered the appellants to develop a list of potential remedies to address the Supreme Court's finding that Mr. Khadr's rights under s. 7 of the *Charter* were infringed: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3. The appellants appealed to this Court. They also moved for a stay of the judgment of the Federal Court until this Court determines the appeal.

B. The motion for a stay: Mr. Khadr's request to expedite the appeal is refused

[4] The parties filed written submissions on the motion for a stay. In his written submissions opposing the motion for a stay, Mr. Khadr emphasized “the urgency of the present matter,” the “urgent circumstances,” the “imminent war crimes prosecution” in the United States, and the commencement of that prosecution just four weeks from the date of his written submissions. At the end of his written submissions, Mr. Khadr submitted that if this Court were to grant the appellants’ motion and stay the Federal Court’s decision, it should also expedite the appeal:

If, contrary to Mr. Khadr’s submissions, this Court chooses to grant the Crown’s motion in whole or in part, Mr. Khadr respectfully submits that the merits of this appeal [be] heard and determined on an emergency basis. It is suggested that the appeal should be conducted on the basis of the Application Records filed in the Court below, together with any additional submissions which the parties may be able to assemble on short notice. This appeal could be conducted by teleconference or videoconference, and counsel for Mr. Khadr will make themselves available any time at the Court’s convenience.

[5] This Court granted the appellant’s motion and stayed the Federal Court’s decision: 2010 FCA 199. However, in granting that relief, this Court did not impose the condition that Mr. Khadr requested.

[6] It is true, as Mr. Khadr submits, that the reasons of the Court did not explicitly discuss Mr. Khadr’s request for an expedited hearing. However, reading the reasons of this Court as a whole, I conclude that this Court did consider whether the appeal should be expedited. It simply did not accept that there was the sort of urgency at that time that would justify an expedited hearing.

C. *A second request to expedite the appeal is refused*

[7] On July 27, 2010, five days after this Court rejected Mr. Khadr's request for an expedited hearing, counsel for Mr. Khadr sent a fax cover sheet to this Court. Again, he requested an expedited hearing:

In relation to the above matter, I confirm that the Respondent's military commission trial remains scheduled to recommence on August 9, 2010. Under these circumstances, we request that this appeal be heard on an emergency basis, based upon the application records filed in the Court below.

[8] On July 29, 2010, the Court responded to this request by issuing a direction to the parties. To the extent that there was any doubt after the first decision, the Court resolved that doubt. It rejected the request for an expedited hearing.

[9] In its direction dated July 29, 2010, the Court stated that it would consider expediting the appeal hearing if: (a) Mr. Khadr made his request in a formal motion; (b) he made it after complying with the *Federal Courts Rules* and serving a requisition for hearing; and (c) he provided valid reasons in support of it. This was consistent with a Practice Direction, dated April, 2000, issued by the Chief Justice concerning requests for expedited hearings:

Requests for expedited hearings

Requests for an expedited hearing must be made by motion and should normally not be made before the time provided in the Rules for the filing of a Requisition for Hearing.

A fair construction of this Court's direction dated July 29, 2010 is that this Court was unwilling to permit a deviation from the normal policy expressed in this Practice Direction.

D. The motion now before this Court to expedite this appeal

[10] In this motion, Mr. Khadr offers to file his memorandum of fact and law no later than five days from the receipt of the appellants' memorandum. He seeks the earliest possible hearing date the Court can offer, at any location in Canada.

[11] Mr. Khadr's motion to expedite this appeal is based on essentially the same facts that were before the Court on the two previous occasions. Mr. Khadr points to the possibility that evidence obtained in violation of his s. 7 *Charter* rights might be used against him in his United States trial. The trial is scheduled to resume on October 18, 2010.

E. Constraints on this Court concerning this motion

[12] In dealing with Mr. Khadr's motion, I am severely constrained. Even if I were inclined to expedite the matter, I am not free to reverse the two earlier decisions denying relief merely because I disagree. A Justice of this Court does not sit in appeal over earlier interlocutory rulings made by another Justice of this Court.

[13] Nor can I review the previous decisions and determine whether they are still warranted in light of the current situation. In this regard, I disagree with the possible thrust of the submission made by the appellants in paragraph 24 of their written submissions. The appellants submit that “the decision[s]...not to expedite the appeal [remain] appropriate.” That submission might be taken to suggest that this Court can be invited to assess the ongoing circumstances and reverse the earlier decisions if they no longer remain appropriate. This Court does not have the jurisdiction to do such a thing, unless, of course, the earlier decisions in question permit it to do so.

[14] I am aware that I have a very narrow, rarely exercised jurisdiction to reverse earlier interlocutory decisions. A Justice of this Court can reverse earlier interlocutory decisions where a moving party demonstrates, through evidence of a significant new development, a marked change in circumstances: *Del Zotto v. Canada (M.N.R.)*, [1996] 2 C.T.C 22 at paragraph 12, 195 N.R. 74 (F.C.A.); *Gould v. Canada*, 2009 TCC 107 at paragraph 18, [2009] 6 C.T.C. 2165. This is a very high test: this Court in *Del Zotto* described the circumstances where that test is satisfied as “extraordinary.”

[15] I emphasize that what Mr. Khadr seeks in this motion is a complete reversal of the earlier interlocutory decisions made by this Court, and not an amendment or variation of relief that was previously granted. The very high test of requiring “extraordinary” circumstances, described above, applies to the former situation. The tests that may apply to the latter situation are not in issue here.

F. Application of these principles to the facts of this motion

[16] In accordance with the above principles, this Court considers itself bound by the two earlier decisions of this Court described in paragraphs 4 to 9, above. These decisions rejected Mr. Khadr's request for an expedited hearing. This Court is bound by those decisions.

[17] In the evidence filed on this motion, Mr. Khadr did raise a circumstance that arose after the two earlier decisions of this Court: his trial in the United States was recently adjourned owing to the illness of counsel and is now scheduled to restart on October 18, 2010.

[18] However, this is not really a new fact and it falls well short of the "marked change in circumstances" necessary for the Court to exercise its extraordinary jurisdiction. On the two previous occasions that Mr. Khadr sought an expedited hearing from this Court, Mr. Khadr invoked the imminent start of his trial in the United States. Both times, with knowledge of that circumstance, this Court declined to expedite the appeal. The circumstances now are substantially the same as before. This Court is bound by its earlier decisions.

[19] Therefore, for the foregoing reasons, this motion is dismissed, with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-260-10

STYLE OF CAUSE: The Prime Minister of Canada, The
Minister of Foreign Affairs, and The
Minister of Justice v. Omar Ahmed
Khadr
AND
The Prime Minister of Canada and
The Minister of Foreign Affairs v.
Omar Ahmed Khadr

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: September 27, 2010

WRITTEN REPRESENTATIONS BY:

Doreen Mueller FOR THE APPELLANTS
(Respondents)

Nathan J. Whitling FOR THE RESPONDENT
Dennis Edney (Applicant)

SOLICITORS OF RECORD:

Myles J. Kirvan FOR THE APPELLANTS
Deputy Attorney General of Canada (Respondents)

Parlee McLaws LLP FOR THE RESPONDENT
Edmonton, Alberta (Applicant)