



THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Spring 2011

HER MAJESTY THE QUEEN

-V.-

RAHEEM KHAN

ONTARIO SUPERIOR COURT OF JUSTICE**BETWEEN:****HER MAJESTY THE QUEEN****(Respondent)****- and -****RAHEEM KHAN****(Applicant)****REASONS FOR DECISION****Garcia, J.****Introduction**

1. This is an application by the accused, Raheem Khan (the “Applicant”) to exclude statements made to the Afghan Border Police (ABP) in southern Afghanistan in March of 2008.
2. Despite the fact that the evidence stems from an investigation which did not take place in Canada, the Applicant submits that the *Canadian Charter of Rights and Freedoms* applies due to the direct involvement of RCMP officers in Afghanistan. In the alternative, the Applicant submits that should the *Charter* not apply to the conduct of the investigation, the admission of the statements would violate his right to a fair trial in Canada.
3. For the reasons that follow, I find that the *Charter* does apply, and that as the result of the breach of the Applicant’s rights, the evidence in question must be excluded under section 24(2) of the *Charter*.

The Facts

4. The Applicant, born and raised in Canada, is a member of a prominent Toronto family. His parents emigrated from Pakistan many years ago and became Canadian citizens. They own and operate a very successful media company based in Toronto. The family is known for its outspoken views against Canadian involvement in the war in Afghanistan and is involved in charitable work directed at improving the living conditions of the war-affected in Afghanistan. It is alleged by the Crown that members of the family have connections to individuals in Al Qaeda and the Taliban. It is these alleged connections which give rise to the charges against the Applicant.

5. On February 7, 2008, the Applicant's father and older brother were arrested and charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the *Criminal Code*. A year later, the Applicant was charged with this same offence.

6. While the charges against the Applicant's father and brother were recently stayed, the allegations against all three individuals are that they have been raising money in Canada and sending it to Pakistan in order to finance Al Qaeda and Taliban operations in Afghanistan. It is alleged these operations involve attacks on NATO forces in southern Afghanistan, which includes members of the Canadian Armed Forces.

7. In March of 2008, when the Applicant was 17 years old, he spent two weeks visiting extended family in Pakistan while on holiday from school. At that time, the Crown's prosecution was focused on the activities of the Applicant's father and older brother; the Applicant, a minor then, was not charged with any offence nor was he a suspect in the investigation.

8. On March 17, 2008, the Applicant was detained by the Afghan Border Police (ABP) just inside the border of southern Afghanistan. While the Crown asserts he was attempting to cross the border illegally, there is no evidence that would allow me to make such a finding. The

Applicant, whose extended family lives close to the Afghanistan border in Pakistan, takes the position that he did not intend to cross into Afghanistan and did so inadvertently.

9. For reasons which have never been clear to me, when the Applicant's detention came to the attention of officials at the Canadian embassy in Kabul, no Canadian consular official intervened on the Applicant's behalf or took any measures to assist him. In fact, it appears the exact opposite occurred.

10. The Crown's evidence on the precise chain of events which occurred after the Canadian embassy became aware of the Applicant's detention by the ABP is disjointed and causes me great concern. Apparently, Canadian embassy officials in Kabul contacted RCMP members responsible for the Canadian investigation of the Applicant's father and brother and informed them of the Applicant's detention. Subsequently, a decision was made by the RCMP here in Canada to have RCMP officers in Afghanistan question the Applicant in respect of the allegations against his father and brother.

11. These particular RCMP officers were present in Afghanistan as part of NATO's international mission and were responsible for training and supporting Afghanistan's various national police forces. The RCMP in Canada, who were responsible for the investigation of the Applicant's father and brother, requested that the RCMP in Afghanistan interview the Applicant in order to see whether his activities had any connection to the financing terrorism charges pending against the Applicant's father and brother.

12. However, rather than interview the Applicant directly, the RCMP decided to send two members of the ABP to question him. The reasons for the RCMP's decision were never adequately explained to me, but the circumstances are troubling.

13. For example, it appears that the Applicant was not given access to any consular officials or legal counsel. The Applicant, a minor at the time, was detained by the ABP in the company of

his cousins, who were also minors. At no point were adult family members contacted and informed of the youths' detention.

14. Additionally, the RCMP instructed the ABP not to tell the Applicant that they were questioning him in respect of a criminal prosecution against his father and brother in Canada. Nonetheless, they provided the Afghan police with a list of questions to ask the Applicant about his activities in Pakistan and his reasons for crossing the border. The RCMP also provided the ABP with an audio recording device and asked them to record their interview with the Applicant.

15. Finally, the evidence showed that the ABP would have released the Applicant (returning him to Pakistan) within 24 hours after determining his identity and satisfying themselves that he was not engaged in any illegal activity. However, as a result of the RCMP's decision to interview the Applicant, the ABP had to detain the Applicant for another two days as the RCMP travelled with officers of the ABP to the border post for the interview.

16. I have reviewed the recording of the ABP's interview with the Applicant in its entirety. The interview lasted approximately three hours. There is no evidence of torture or other oppressive circumstances. While the ABP did not explain to the Applicant the purpose of the interview or the reason for his continued detention, it is clear that the Applicant suspected these reasons as he inquired, half-way through the interview, whether the questioning had anything to do with his family in Canada.

Legal Issues

17. The parties agree that there are four legal issues that I need to address:

- i. Does the *Charter* apply to the detention and subsequent interrogation of the Applicant?
- ii. If so, were the Applicant's *Charter* rights violated?

- iii. If the Applicant's *Charter* rights have been violated, should the statements be excluded from evidence?
- iv. In the alternative, if the *Charter* does not apply, does the admission of the statements nonetheless violate the Applicant's right to a fair trial?

1. Application of the Charter

18. Section 32(1) of the *Charter* provides:

32.(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

19. As is apparent from the plain wording of s. 32(1), the *Charter* applies to the Canadian and provincial legislatures and governments in respect of all matters within their authority. The submission made by the Crown is that the interrogation of a Canadian citizen by police in a foreign country is not a matter that is within the authority of the Canadian Parliament. It is a compelling argument, but for the reasons below, one that I must reject on the particular facts of this case.

20. Prior to the Supreme Court of Canada's decision in *R v. Hape*^a, it was clear the *Charter* could be applied to the actions of Canadian police in foreign jurisdictions^b. Canadian police officers are arms of the Canadian state and are often involved in activities in foreign states that are of little, if any, interest to that state. It would make sense, in these circumstances, to hold that the *Charter* applied to the Canadian police conduct abroad.

21. In *Hape*, the Supreme Court of Canada diverged from this principle and found that RCMP officers conducting an investigation under the authority of foreign officials did not attract

^a [2007] SCC 26.

^b *R v. Cook*, [1998] 2 S.C.R. 597.

Charter scrutiny. The Court held that to apply the *Charter* in these circumstances would violate the principle of non-intervention in a foreign country.

22. While I am, of course, bound by the Supreme Court of Canada, the unique facts in this case compel me to conclude that the detention and questioning of the Applicant was, unlike the case in *Hape*, under the control of the RCMP and therefore within the authority of the government of Canada.

23. The evidence shows that the decision to interview the Applicant was made by the RCMP in Canada and that the request for the interview was communicated by the RCMP in Canada to RCMP officers in Afghanistan. For some reason, none of the RCMP officers who testified were able explain why the RCMP officers decided to have the ABP conduct the interview instead of them.

24. Indeed, the evidence shows that the RCMP officers did everything but conduct the interview. They provided the ABP with instructions as to what not to say and the kinds of questions to ask. They requested that the interview be recorded and provided to them. This recording was then sent to the RCMP in Canada for use in a criminal prosecution here. It was, for all practical purposes, an RCMP investigation that used ABP officers to conduct the interview.

25. It is clear that in Canada the police cannot escape the requirements of the *Charter* by “outsourcing” their investigation to private citizens. In the absence of a credible explanation as to why the RCMP did not interview the Applicant directly, it is a reasonable inference they did so either to escape the application of the *Charter* or because they did not want the Applicant to know who was asking these questions.

26. As a result, based on the unique facts of this case, I find that the investigation and interview of the Applicant was a matter under the authority of the Canadian Parliament and, as a result, the *Charter* must apply.

2. Breach of the *Charter*: Sections 9, 10(a) and 10(b)

27. There is little doubt in my mind that if this detention and interrogation had taken place in Canada it would have breached the *Charter*.

28. Section 9 of the *Charter* states:

Everyone has the right not to be arbitrarily detained or imprisoned.

29. Section 10(a) and (b) of the *Charter* provides as follows:

Everyone has the right on arrest or detention to:

- (a) be informed promptly of the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right...

30. As a result of the RCMP's decision to interview the Applicant, the Applicant was detained for a period of time that exceeded what he would have experienced for the immigration violation. I find that this detention was arbitrary.

31. There is no evidence that the ABP ever informed the Applicant that he was being detained in respect of a criminal investigation into the activities of his brother, or of his right to retain and instruct counsel. There is no such conversation present on the recording and the Applicant denied in his own testimony that he was ever provided with this information.

32. While the RCMP officers testified that they instructed the Afghan police to provide the Applicant with this information, I did not find their testimony credible on this point. The Crown did not adduce any evidence from either of the ABP officers in respect of what they did or did not say to the Applicant "off camera".

33. While the Applicant was informed of the reasons for his initial detention (the unauthorized crossing of an international border), he was never informed of the reasons for his

subsequent detention – namely, to be questioned about his activities in Pakistan and Afghanistan in respect of a criminal investigation.

34. Under Canadian law, one is not obliged to submit to an arrest or detention if one does not know the reasons for it. Also, an individual can only exercise his right to retain and instruct counsel if one understands the extent of his or her jeopardy. Therefore, once the reasons for an individual's detention or arrest change, the police are obliged to inform that individual of the change in status. In this case, when the reasons for the Applicant's detention changed, the Afghan police were obliged, under Canadian law, to inform the Applicant of this fact.

35. While this is sufficient to find a breach of the *Charter*, it is also worth adding that there is no evidence that the Applicant was informed of his right to retain and instruct counsel. I do not accept the evidence of the RCMP officers that they instructed the Afghan police to provide the Applicant with this information. There is no such conversation present on the recording and the Applicant denied that he was ever given this information.

36. Finally, no evidence was led on the Applicant's rights under Afghan law. As I have already found that due to the nature of the RCMP involvement in this interrogation, the Applicant was entitled to his right under Canadian law, the state of Afghan law is irrelevant.

3. Admissibility: Section 24(2)

37. Section 24(2) of the *Charter* provides that evidence that was obtained in a manner that infringed or denied any of the rights and freedoms guaranteed by the *Charter* must be excluded if its admission would bring the administration of justice into disrepute.

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

38. It is clear from the proceeding analysis that the statements at issue were obtained in a manner that infringed or denied the Applicant's rights and freedoms under the *Charter*. It was the unlawful detention and the failure to advise and give effect to the Applicant's rights to counsel that gave rise to the statements being made.

39. As is apparent from the wording of s. 24(2), the relevant inquiry is whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.^c

40. A court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

41. I find that the conduct at issue in this case is very serious. It is appalling to me that a Canadian citizen – a minor, no less – was detained in a foreign country by a foreign police force and our government's response was not to assist that individual, but rather to use this as an opportunity to gather evidence to use against his brother and father.

42. Moreover, the fact that the RCMP choose to "outsource" the interrogation to the ABP is, in my view, another troubling aspect of the Canadian government's handling of this situation. The Applicant submitted this was evidence of bad faith on the part of the Canadian government. While there is no direct evidence of this, in the absence of any sensible explanation from the RCMP as to why they choose to proceed in this manner and not question the Applicant themselves, it is a reasonable inference.

43. The impact of the *Charter* breach on the accused is severe. The statements sought to be admitted against him arose as a direct consequence of the violation of his rights. In addition,

^c *R v. Grant*, 2009 SCC 32.

while there is no evidence of abuse, threats, inducements or any other oppressive circumstances, the violation of an individual's s. 10 rights may give rise to unreliable statements that may distort the truth-seeking function of the criminal trial process, although in this case I acknowledge that risk is minimal.

44. However, in my view, the unique circumstances of this case, the nature of the conduct of the Canadian government and the impact on the accused is sufficient for me to conclude that the admission of the statements would bring the administration of justice into disrepute.

4. Trial Fairness: Sections 7 and 11(d)

45. Regardless of whether the *Charter* applies to the detention and interrogation of the Applicant by the ABP in Afghanistan, the *Charter* does apply to his prosecution and subsequent trial here in Canada. As a result, if the admission of the statements would violate the appellant's liberty interests in a manner that is contrary to the principles of fundamental justice (s. 7) or his fair trial rights under s. 11(d), the statements must be excluded.^d

46. Since I have already determined that the *Charter* does apply to the interview of the Applicant by the ABP, I do not have to decide this issue. However, in case I am wrong about the application of the *Charter*, I would not have excluded the statements as I do not find that their admission would violate the Applicant's right to a fair trial.

47. The concern at this stage of the analysis is primarily the nature and reliability of the evidence and whether its admission would render the trial unfair. As concerning as the circumstances surrounding the Applicant's detention and interrogation in Afghanistan are, they are not sufficiently egregious to mandate the exclusion of the statement or raise concerns as to their reliability.

^d *R v. Harrer*, [1995] 3 S.C.R. 562

48. While the Applicant's *Charter* rights were clearly violated, this on its own is not enough to establish that the evidence should be excluded. Evidence cannot be assumed to be unfairly obtained or to be unfairly admitted because it was obtained in a manner that would violate a *Charter* guarantee in this country. As is often said, the Applicant is entitled to a fair hearing, not to the most favourable procedures imaginable.

49. The circumstances surrounding the interview do not raise any concerns that the statements were involuntary or obtained through some oppressive or coercive environment. There is no evidence the Applicant was forced to give these statements under some threat or inducement. There is no evidence of abuse or torture.

50. As a result, if the *Charter* does not apply to the interview of the Applicant by the ABP, I would not have excluded the statements pursuant to either s. 7 or s. 11(d) of the *Charter* as their admission would not violate the Applicant's right to a fair trial.

51. The application is granted and the statements of the Applicant to the ABP are excluded from evidence.

GARCIA, J.