The Top Five 2011

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28

http://scc.lexum.org/en/2010/2010scc27/2010scc27.html

In this case, the Supreme Court of Canada (SCC) considered whether government actors can be made to pay financial damages to individuals after infringing upon their rights under the Canadian Charter of Rights and Freedoms.

Date Released: July 23, 2010

Ruling

Where it is appropriate and just to do so, a breach of an individual's rights by state actors is subject to an award of financial damages pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

Facts

The Vancouver police received information that someone intended to throw a pie at the Prime Minister at a public event. The police mistakenly identified Mr. Ward as the potential pie-thrower, chased him down and handcuffed him. After being removed from the street, Mr. Ward became loud and aggressive and was eventually arrested for breach of the peace. Upon arrival at the police lockup, he was strip-searched and his vehicle was impounded so it could later be searched. He was released four and a half hours after his arrest since there was not enough evidence to charge him for attempted assault or to obtain a search warrant for his car. Mr. Ward brought an action against the Province of British Columbia and the City of Vancouver in tort, and also for the breach of his s. 8 right to be secure against unreasonable search and seizure, under the *Canadian Charter of Rights and Freedoms*.

> *Canadian Charter of Rights and Freedoms*
>
> 8. Everyone has the right to be secure against unreasonable search and seizure.

At trial, the Province and the City were found not liable in tort. However, even though the Province and City did not act in bad faith, the Province's strip search and the City's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. Pursuant

to s. 24 of the *Charter*, the judge granted damages in the amount of $100 for the seizure of the car and $5,000 for the strip search. The British Columbia Court of Appeal upheld this decision.

Decision

The Supreme Court of Canada (SCC) unanimously decided that damages could be awarded for a breach of an individual's *Charter* rights even where public officials were not acting in bad faith. In other words, even though the police had reason to suspect Mr. Ward, they and the city were still responsible for their actions against him. Section 24(1) of the *Charter* gives courts broad discretion to grant remedies deemed "appropriate and just" according to the specific facts and circumstances of each case. It provides as follows:

> ***Canadian Charter of Rights and Freedoms***
> 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.

According to jurisprudence, an "appropriate and just" remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made.

The Court then set out a four-step process when granting s. 24(1) damages. First, there must be proof of a *Charter* breach. In this case, Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* was violated.

Second, the claimant must provide evidence demonstrating that awarding damages under s. 24 will serve one of the following objectives: compensation, vindication and deterrence. The purpose of compensation is to place the claimant back in the position he was in prior to the *Charter* breach, whether the loss is financial, physical, psychological or intangible. Vindication recognizes that *Charter* rights must be maintained to uphold the *Charter*'s integrity. Deterrence helps prevent government actors from committing future *Charter* breaches.

Third, once the claimant has met his evidentiary burden, the onus shifts to the state to provide evidence against awarding damages. This could include the existence of alternative remedies such as private law remedies or other *Charter* remedies. Also, concern for effective governance could negate the granting of s. 24 damages, as courts would not want to discourage effective enforcement of the law for fear of risking damages.

The final step focuses on an appropriate and just amount of damages. In tort law, compensation is awarded to restore the claimant to the position he was in prior to the breach. However, with *Charter* breaches, the SCC recognized that depending on the seriousness of the breach, vindication and deterrence may also be considered. Further, individual damages need to be considered in light

of the public interest; society should not have to suffer tremendous losses in order to compensate individuals.

In this case, the SCC held that the "appropriate and just" remedy for the strip search was $5,000. Strip searches are inherently degrading and humiliating and "minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative." Accordingly, this violation touches on all three objectives of compensation, vindication and deterrence. However, the SCC held that Mr. Ward had not established that damages were appropriate for the vehicle seizure, as he did not suffer any injury and the objects of vindication and deterrence were not compelling given the non-serious nature of the breach.

Discussion

1. In this novel decision, the SCC ruled that financial damages can be awarded for breaches of *Charter* rights. Do you think these rights are easy to assign a monetary value to? Why or why not?

2. In private civil matters, an individual can seek compensation for losses suffered. However, in the case of violations of *Charter* rights, individuals can also seek damages for the functions of vindication and deterrence. Does this make sense to you? Why or why not?

3. Do you think that in order to be compensated for a *Charter* violation, a claimant should have to show that the state was acting in bad faith?

4. Do you agree that $5000 was appropriate compensation for Mr. Ward's strip search?

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R. v. Sinclair, 2010 SCC 35, [2010] 2 S.C.R. 310

http://scc.lexum.org/en/2010/2010scc35/2010scc35.html

In this case, the Supreme Court of Canada (SCC) considered what limitations exist on the right of an accused person to have a lawyer present during questioning by police.

Date Released: August 8, 2010

Ruling

The right to counsel provided by s. 10(b) of the *Canadian Charter of Rights and Freedoms* does not require a lawyer to be present throughout an interrogation of an accused person by the police. Where a detainee has already received legal advice prior to police interrogation, s. 10(b) only requires the police to provide a reasonable opportunity to consult a lawyer again if there is a change in circumstances.

Facts

Mr. Sinclair was arrested for murder following an altercation with another man. Upon his arrest, Mr. Sinclair was advised of his right to speak to counsel, but he declined. After processing at the police station, Mr. Sinclair was again asked whether he wanted to speak with counsel. He identified a lawyer and they spoke privately on the phone for approximately three minutes. Three hours later, Mr. Sinclair spoke again for three minutes with his lawyer. In total, he spoke to the counsel of his choice twice. Mr. Sinclair indicated he was satisfied.

Mr. Sinclair was then interrogated by police for approximately five hours. He was advised by police that he did not have to say anything and that the interview was being recorded and could be used in court. Mr. Sinclair repeatedly expressed discomfort with being interviewed in the absence of a lawyer. Police reiterated it was his decision whether or not to answer the questions. Mr. Sinclair eventually told police precisely what had happened between himself and the victim. He stated that the two of them were intoxicated and that the victim approached Mr. Sinclair with a knife looking for money. Mr. Sinclair admitted that after a struggle, he killed the victim. Police later placed Mr. Sinclair in a cell with an undercover police officer. Mr. Sinclair advised the undercover officer, "I'm going away for a long time but I feel relieved". He later accompanied police and participated in a re-enactment of the crime.

At trial, Mr. Sinclair's lawyer argued that his statements to police should not be considered on the basis that his constitutional rights had been infringed. Specifically, it was argued that his s. 10(b) right to counsel was violated by police because the interrogation continued despite his statements that he did not want to speak to police without a lawyer present.

Canadian Charter of Rights and Freedoms

10. Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right.

Decision

The purpose of s. 10(b) of the *Charter* is to facilitate a detainee's choice of whether to speak to the police by providing the opportunity to receive legal advice. Legal advice assists the detained person in understanding his options, including whether to cooperate with police.

The Supreme Court of Canada (SCC) held that facilitating a detainee's choice does not require the continued presence of a lawyer throughout an interrogation. The purpose of s. 10(b) in facilitating choice can be achieved by allowing for further consultations with a lawyer where circumstances in the interrogation change. A detainee is entitled to a further opportunity to consult with counsel if an investigation takes a "new and more serious turn as events unfold". In other words, if the situation facing the detained person becomes more serious and the person is in more jeopardy, an opportunity to consult with counsel must be given. The change of circumstances must be "objectively observable" in order to activate the requirement for further consultation.

A simple request, without something more, is insufficient to reactivate the right to counsel. A rule that requires the police to stop questioning a suspect each time a suspect asserts a desire not to speak would not strike the right balance between the constitutional rights of suspected criminals and the need for the police to investigate and solve crimes. To reactivate the right to counsel, there must be a significant change in the circumstances faced by the accused, necessitating further legal advice.

Discussion

1. If a detained person insists on speaking again to a lawyer after having already done so, should the police have to allow it? What tension might there be between the need for police to conduct full investigations and the need to respect the rights of the accused?

2. Why is receiving legal advice when there is a change in circumstances important?

3. Imagine a change in circumstances that might have necessitated further legal advice for Mr. Sinclair, and reactivated his right to counsel.

4. Does the long term Canadian interest in avoiding wrongful convictions change your thinking? Would more lawyer involvement at early stages of investigations prevent the innocent from receiving convictions?

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R. v. White, 2011 SCC 13, [2011] 1 S.C.R. 433

http://scc.lexum.org/en/2011/2011scc13/2011scc13.html

In this case, the Supreme Court of Canada (SCC) examined the issue of whether the behaviour of an accused person immediately after an alleged incident can be presented to juries as evidence of the accused's level of guilt.

Date Released: March 3, 2011

Ruling

Post-offence conduct can rightly be considered by juries in determining the level of culpability of an accused person. While it is possible that juries will misuse this type of evidence, it nonetheless ought to be considered by jurors as long as its evidentiary value exceeds its prejudicial effect. This sort of evidence should also be accompanied by a cautionary instruction from the judge to the jury to help prevent overreliance.

Facts

Lee Matasi was shot in the heart with a handgun and died instantly. Several eyewitnesses reported that he was shot by Dennis White. Mr. White immediately fled the scene. The identity of the shooter was initially an issue at trial. Later in the trial, the defence conceded that Mr. White had shot Mr. Matasi and was guilty of manslaughter, not second-degree murder.

At trial, the defence's theory was that Mr. White unintentionally shot Mr. Matasi in the course of a physical altercation. The prosecution argued that the fact that Mr. White ran away immediately after the shooting, and without any hesitation, was evidence of an intentional shooting. In other words, the prosecution suggested that a person could be expected to hesitate if the shooting was truly accidental. The only issue for the jury, therefore, was to decide whether Mr. White intended to shoot Mr. Matasi. The jury decided that he intentionally shot Mr. Matasi and thus convicted him of second-degree murder. The trial judge convicted Mr. White, and he appealed.

Decision

The Supreme Court of Canada (SCC) ruled that juries can be permitted to consider actions that occur after the offence was committed as circumstantial evidence of guilt. In most cases, however, this must be done very carefully, and post-offence conduct as evidence must be accompanied by a cautionary instruction to members of the jury. The post-offence conduct of Mr. White in this case

had probative value (i.e. it was useful) in determining whether he was guilty of the more serious offence of second-degree murder.

If Mr. White had hesitated before fleeing the scene of the shooting, it is likely that the defence would have used it as indicating that the shooting was an accident. It follows that the lack of hesitation, while not determining the matter entirely, supports the position that this was an intentional shooting. It was therefore appropriate to allow the jury to consider his flight from the scene in coming to their conclusion as to his guilt or innocence of second-degree murder.

The law assumes that juries are reasonable and intelligent fact-finders and can appropriately weigh the evidence before them, provided that the judge issues a caution based on past judicial experience. The judge at trial cautioned the jury as to the possibility of misusing this sort of post-conduct information by alerting them of the risks associated with giving it too much emphasis. As such, the SCC was not concerned that the jury *only* considered post-offence conduct in determining Mr. White's level of guilt. The SCC therefore dismissed the appeal and sustained Mr. White's conviction for second-degree murder.

Discussion

1. Do you agree with the prosecution's theory that the fact that Mr. White fled immediately and without hesitation means that he killed Mr. Matasi intentionally? Why or why not?

2. Should judges allow juries to consider the conduct of an accused person *after* an offence is committed? How could a jury misuse this sort of information?

3. What other explanations could justify Mr. White's flight from the scene of the shooting? Should the jury be required to consider those possibilities?

4. If the SCC had decided that the trial judge should not have allowed post-offence conduct to be considered, would Mr. White deserve a new trial? Why or why not?

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Ontario (Attorney General) v. Fraser, 2011 SCC 20, [2011] 2 S.C.R. 3

http://csc.lexum.org/en/2011/2011scc20/2011scc20.html

In this case, the Supreme Court of Canada (SCC) ruled that the limited rights of agricultural workers to collective bargaining do not violate their right to freedom of association under the Canadian Charter of Rights and Freedoms.

Date released: April 29, 2011

Ruling

The *Agricultural Employees' Protection Act* (*AEPA*) contains not only the right of employees to bargain collectively with their employer, but also contains an implied obligation on the part of employers to bargain in good faith. It does not guarantee a particular form of collective bargaining rights, nor that an agreement will be reached. It simply protects the right of employees to associate in order to advance collective objectives.

Facts

In Ontario, most work is governed by the *Labour Relations Act* (*LRA*). Farm workers, however, have been excluded from this legislation since 1943. In 2001, the Supreme Court of Canada (SCC) found that this violated their constitutional right to freedom of association as guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*. In response to that decision, the Ontario government at the time passed a new law, the *AEPA*.

This new law still excluded farm workers from the normal labour protections in Ontario, and granted them lesser rights. The *AEPA* granted rights to agricultural workers in dealing with their employers, such as enabling them to work together with other employees to obtain more favourable wages and working conditions. However, it did not impose any duty on employers to bargain in good faith with employees. In other words, while it granted employees the right to form working associations, in practice, these associations would have far less power than those formed under the *LRA*. Mr. Fraser challenged these new protections as not going far enough to protect agricultural workers and violating s. 2(d) of the *Charter*.

In the current case, the United Food and Commercial Workers Union (UFCW) sought to represent a number of agricultural workers collectively in bargaining with two separate employers. One employer permitted brief presentations from the union, while the other refused to recognize the

union as the employees' representative. These developments led UFCW, with Mr. Fraser, to challenge the constitutional validity of the *AEPA*. The SCC was asked to address whether the *AEPA* respects constitutional rights, and also to clarify what protection s. 2(d) offers.

Decision

Section 2(d) of the *Charter* protects the right to associate to achieve collective goals. Laws that restrict or make it impossible to achieve workplace goals through collective actions interfere with freedom of association. However, the constitutional right to freedom of association does not guarantee a particular *type* of bargaining; nor does it guarantee a particular outcome or agreement arising from an association intended to achieve collective goals. What is protected is associational activity, not a particular process or result. Therefore, legislatures are not constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations. The SCC ruled that the *AEPA* provides a process that satisfies the s. 2(d) constitutional requirement.

Association to achieve collective goals requires both employers and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. Bargaining activities protected by s. 2(d) in the labour relations context include good faith bargaining on important work place issues. Therefore, the SCC held that even though "good faith" is not specifically written into the *AEPA*, it nevertheless contains the implied requirement that employers bargain in good faith. Agricultural employers must consider employee representations in good faith, listen and consider the submissions with an open mind, and engage in meaningful dialogue with the employees. The provision in the *AEPA* that sets out the right of employees' associations to make representations to their employers must have been intended by the lawmakers to be a meaningful right.

Discussion

1. What are labour unions? What is their purpose? Why might they be a problem from the perspective of employers?

2. What does 'good faith' mean? What would be the result of negotiations between employers and employees that are not conducted in good faith?

3. Should a constitutional right given to a person or group of people impose obligations on *other* people, for example the employers? Should employers have to bargain in good faith?

4. The *AEPA* does not give farm workers the right to strike that many other workers in Ontario have. What other means could they use to ensure that employers bargain in good faith, which the SCC decision here suggests they must do?

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R. v. J.A., 2011 SCC 28, [2011] 2 S.C.R. 440

http://scc.lexum.org/en/2011/2011scc28/2011scc28.html

In this case, the Supreme Court of Canada (SCC) considered the legal meaning of "consent" to sexual activity, and determined that a person cannot give advance consent to sexual activity that will take place while they are unconscious.

Date released: May 27, 2011

Ruling

Prior consent to a sexual activity does not operate during a period of unconsciousness, as the important time period for consent is when the sexual touching is taking place. Consent for the purposes of sexual assault requires an individual to be conscious and consenting throughout the sexual activity.

Facts

The two people in this case were partners in a long-term relationship. On one occasion the two were intimately engaging in erotic asphyxiation, which is intentional deprivation of oxygen to the brain for sexual arousal. During this event, J.A (the accused) choked his partner, K.D (the complainant) until she was unconscious. K.D woke up and realized that a sexual act had taken place while she was unconscious. Two months later, she made a complaint to the police. She stated that while she had consented to the choking, she did not consent to the sexual activity that occurred while she was unconscious. She later retracted the allegation stating she made the claim because J.A was threatening to seek sole custody of their child. Nevertheless, J.A was charged with sexual assault, among other offenses.

At trial, the judge convicted J.A of sexual assault stating that one cannot consent to a sexual act that occurs while being unconscious. The majority of the Court of Appeal overturned this decision, holding that there was not enough evidence to come to the conclusion that K.D did not consent to the sexual activity before being rendered unconscious. The Court of Appeal was split on the issue of whether someone could legally consent *in advance* to a sexual activity to occur while being unconscious.

Decision

The majority of the Supreme Court of Canada (SCC) restored the sexual assault conviction. They held that consent to sex requires an individual to be conscious *throughout* the sexual act. Therefore, prior consent to a sexual activity does not operate throughout a period of unconsciousness.

According to the *Criminal Code of Canada*, the definition of consent for sexual assault requires the party to provide actual active consent throughout the entire sexual activity. According to section 273.1(2)(b) of the *Criminal Code*, no consent can be obtained if that person "is incapable of consenting to the activity." Thus, someone who is unconscious cannot meet the requirement of having "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act." Further, parliament favours the requirement of ongoing, conscious consent in order to ensure that men and women are not sexually taken advantage of and to ensure that they are able to tell their partners to stop at any time.

Dissent

In the dissent, the minority of the SCC defined the issue differently. In their view, the issue was not whether an unconscious person can consent to a sexual activity but whether an unconscious person can freely and voluntarily consent *in advance* to a sexual activity that may occur while that person is unconscious. The minority held, "It is a fundamental principle of the law governing sexual assault in Canada that no means 'no' and only yes means 'yes'", and that the law is aimed at safeguarding the autonomy of women to make sexual choices for themselves. For the dissenting justices, if someone consents in advance to a sexual activity and never changed her mind, then the only state of mind that person had was consent. The minority held that there was no evidence that J.A.'s conduct was outside the scope of what K.D. consented to.

Discussion

1. The SCC said the following about consent: "[T]his concept of consent produces just results in the vast majority of cases and has proved to be of great value in combating stereotypes that have historically existed." Discuss this statement. What are the stereotypes the court is referring to?

2. The SCC acknowledged that in some situations, the concept of consent that parliament has adopted may seem unrealistic; counsel for the accused brought up the example of a person kissing a sleeping partner. In your opinion, would this count as a sexual assault under this ruling?

3. This case raised several concerns about a woman's right to self-determination. Which opinion of the court is more respectable towards women's rights, the majority or the dissent?

4. Should courts take into account factors such as whether the two parties were in a long-term relationship during the sexual assault? Does it matter that the two parties were in the middle of a separation when the complaint was brought forward? Or, should the motive of the complainant even matter?

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Rasouli v. Sunnybrook Health Science Centre, 2011 ONCA 482

http://www.canlii.org/en/on/onca/doc/2011/2011onca482/2011onca482.html

Under the Health Care Consent Act *(HCCA), any medical treatment requires the consent of the patient or that patient's legal substitute decision-maker. In this case, the Ontario Court of Appeal (OCA) considered whether removing life support when a patient appears non-responsive is a form of medical treatment.*

Date Released: June 29, 2011

Ruling

The Ontario Court of Appeal ruled that the decision to remove life support necessarily triggers end-of-life palliative care, which is treatment that eases suffering pending imminent death. The decision to remove life support therefore constitutes "treatment" under the *Health Care Consent Act* (*HCCA*) and thus requires the consent of the patient or the patient's substitute decision-maker.

Facts

Hassan Rasouli required surgery to remove a benign brain tumour. After his surgery, complications resulted in a bacterial infection, leaving him with severe brain damage. Mr. Rasouli was then placed on life-sustaining measures to keep him alive, including a mechanical ventilator and feeding through a nutrition and hydration tube inserted into his stomach. Without these measures, it was expected that he would die. His doctors concluded that he was in a permanent vegetative state, meaning that he would never regain consciousness and there was no hope of recovery. Accordingly, his doctors believed it was in his best interest to be taken off life support.

The doctors argued that they did not need the permission of Mr. Rasouli's wife, Ms. Salasel, to take him off life support. Ms. Salasel, on the other hand, believed that there was still hope. She did not accept that there was no chance of recovery, and therefore opposed the doctors' position that Mr. Rasouli be taken off life support. The doctors argued that while a patient has a right to refuse treatment, there is no right to insist that treatment that has no medical value be continued. They contended that to require advance consent for withholding medically unnecessary treatment would have negative consequences for the medical profession and the limited resources of the health care system.

Decision

The Ontario Court of Appeal found that withdrawal of life support falls within the definition of "treatment" under the *HCCA*, and consent is required to proceed. The doctors' plan involved removing life support and then administering palliative care to reduce the patient's suffering at the end. Removing life support and administering palliative care cannot be separated. In this case, they are not independent of one another; one necessarily follows the other. Since palliative care immediately follows the withdrawal of life support, together they amount to an inseparable package and constitute "treatment" as contemplated by the *HCCA.* The court therefore interpreted end-of-life palliative treatment as *including* the decision to remove life support.

A distinction was made for situations where there is a gap between the withdrawal of treatment and the beginning of palliative care. An example is ceasing to give cancer drugs where a patient has minimal chance of survival, but may still live for weeks or months. Such decisions do not cause the patient's immediate death, and do not trigger immediate palliative treatment.

The court regarded the limited resources argument as not central to deciding the issue. Since financial constraints did not give rise to the appeal, they were not considered. Similarly, the court found it unnecessary to decide whether "treatment" under the *HCCA* must provide some medical value.

Discussion

1. In your opinion, did the court come to the right decision? Does the withdrawal of life support constitute "treatment" in your view?

2. Who should have the ultimate decision over the care of someone who is declared to be in a permanent, vegetative state: doctors or family members? Why?

3. Should patients have a right to medical treatment that offers no medical value? Is ceasing existing treatment the same as refusing medically unnecessary treatment in the first place?

4. Was the Ontario Court of Appeal right to ignore the possibility of increased costs to the health care system as a result of their decision?

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United States of America v. Khadr, 2011 ONCA 358

http://canlii.org/en/on/onca/doc/2011/2011onca358/2011onca358.html

In this case, the Ontario Court of Appeal (OCA) ruled that an extradition request can be denied if the requesting state has committed clear violations of the human rights of the accused.

Date Released: May 6, 2011

Ruling

The Ontario Court of Appeal ruled that Abdullah Khadr's rights were violated when he was detained in Pakistan and beaten until he cooperated with Pakistani intelligence agents paid by the United States. Given that his human rights were severely interfered with, the court refused to allow extradition to the United States to face terrorism-related criminal charges.

Facts

Abdullah Khadr was born in Canada in 1981, and is a Canadian citizen. During his childhood, he returned several times to Pakistan with his family. His family relocated to Afghanistan by the time of the 2001 coalition invasion of Afghanistan in the aftermath of the terrorist attacks on September 11, 2001. Mr. Khadr's father was associated with Osama Bin Laden, the alleged mastermind of the 9/11 attacks. The family returned to Pakistan sometime after the invasion. The United States alleged that in 2004 and 2005, Mr. Khadr provided Al Qaeda with weapons and explosives to be used against the United States and coalition forces in Afghanistan. For this reason, the U.S. government paid $500,000 to Pakistan's Inter-Services Intelligence (ISI) to apprehend Mr. Khadr.

Mr. Khadr was then held in secret detention for 14 months, where he was subjected to mistreatment and physical abuse. He was not permitted to speak with a lawyer, nor was he charged with any crime. He was only allowed assistance from the Canadian consulate after three months of detention. During this time, Mr. Khadr was interrogated for the purpose of obtaining intelligence information. In 2005, the ISI decided that Mr. Khadr was no longer a useful intelligence source. Pakistan had no intention of charging him criminally, and asked Canadian officials to do so. Ultimately, the FBI interrogated him in July 2005 in order to advance possible criminal charges in the United States. American authorities requested that Mr. Khadr be taken to the US to face criminal charges. The ISI would not permit it without Canada's permission, which was refused. Mr. Khadr was returned to Canada, where he consented to again being interrogated by the FBI.

Criminal charges were eventually filed in the United States against Mr. Khadr, though he remained in Canada. He was then arrested in Canada. The United States sought to extradite him to face criminal charges in the United States. In other words, they asked permission from Canada to take Mr. Khadr to the United States for a trial. A Canadian judge therefore had to decide whether to permit extradition of Mr. Khadr, given the considerable human rights violations he had suffered. The extradition judge refused to permit extradition and instead granted a stay of proceedings on the basis that to permit them to continue in the face of the requesting state's misconduct would constitute an abuse of the judicial process.

Decision

The Supreme Court of Canada (SCC) had previously decided that a judge can order a stay to prevent an abuse of process if forcing an accused person to stand trial would violate the community's sense of fair play. This discretion can only be exercised in the "clearest of cases". The reason for this rule is that, even if the prosecution of the person is merited, a judge may permit a stay to maintain public confidence in the legal and judicial process. In this case, the Ontario Court of Appeal decided that an extradition judge has the residual power to stay proceedings as that power lies at the heart of the courts' integrity and independence. An extradition judge may grant a stay on these grounds where the requesting state's conduct would taint the court's integrity.

The Court of Appeal also found that this case falls into the "clearest of cases" category. Granting a stay is not only a means of disassociating the court with the requesting state's conduct, it is also a way to deter future similar conduct. The extradition judge's finding that Mr. Khadr's human rights violations were "both shocking and unjustifiable" was sufficient to bring this case into the exceptional category of "clearest" cases.

The Attorney General of Canada argued that the extradition judge did not sufficiently balance the need to prosecute an alleged terrorist against the court's need to disassociate itself from the requesting state's conduct in violating Mr. Khadr's rights. However, the court determined that this sort of balancing is only applicable in cases where it is *unclear* whether the abuse is sufficient to warrant a stay, and a compelling societal interest in having a full hearing could tip the scales in favour of proceeding. Here, the abuse is clear and well established, and no sort of balancing is required under Canadian law. Combating terrorism cannot take priority over fundamental rights and the rule of law. Canada is free to prosecute Mr. Khadr if it so chooses, and thus the argument that an admitted terrorist would walk free is unfounded.

Discussion

1. Which of the abuses of Mr. Khadr's human rights do you find most "shocking" or "unjustifiable", as the court put it?

2. Is public confidence in the justice system a sufficiently important objective to prevent an accused criminal from facing serious charges in other country? Do these objectives conflict, and if so, how?

3. Would a refusal of extradition like this actually deter countries from being party to human rights abuses in the future? In other words, is it likely that the court's decision will influence a country's future conduct?

4. In times of terrorism, should countries be given greater flexibility by courts to protect its citizens? Is there a tension between the rule of law and combating terrorism?