Date: 20071105

Docket: T-324-07

Citation: 2007 FC 1147

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants

and

CHIEF OF THE DEFENCE STAFF
FOR THE CANADIAN FORCES,
MINISTER OF NATIONAL DEFENCE and
ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Amnesty International Canada and the British Columbia Civil Liberties Association ("the applicants") have brought an application for judicial review with respect to "actions or potential actions" of the Canadian Forces deployed in the Islamic Republic of Afghanistan. Specifically, the application seeks to review the conduct of the Canadian Forces with respect to detainees held by the Canadian Forces in Afghanistan, and the transfer of these individuals to Afghan authorities.

[2] The Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence and the Attorney General of Canada ("the respondents") now seek an order striking the applicants' Notice of Application. The respondents assert that the applicants do not have standing to advance the issues identified in the Notice of Application. The respondents further contend that the application is bereft of any chance of success.

[3] For the reasons that follow, I am satisfied that the applicants should be granted public interest standing in this case. I am further satisfied that while a number of the issues raised by this case are novel, I cannot say that they are clearly bereft of any chance of success. As a consequence, the motion to strike will be dismissed.

Background

[4] There is an issue as to the extent to which evidence may be led on a motion such as this. While I will discuss this question further on in this decision, I do not understand there to be any dispute between the parties as to the following background facts relating to this application for judicial review.

[5] Canadian Forces personnel are currently deployed in Afghanistan, both as part of the multi-national International Security and Assistance Force ("ISAF"), and as part of the American-led "Operation Enduring Freedom" ("OEF").

[6] On December 19, 2005, the Afghan Minister of Defence and the Chief of the Defence Staff for the Canadian Forces, General Rick Hillier, signed an agreement entitled "*Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*" (the "first Arrangement"). The first Arrangement was meant to establish procedures to be followed in the event that a detainee was transferred from the custody of the Canadian Forces to a detention facility operated by Afghan authorities.

[7] On February 1, 2007, the applicants filed a Notice of Application for Judicial Review "in respect of actions or potential actions of Canadian Forces deployed in the Islamic Republic of Afghanistan." Amongst other relief requested in the Notice of Application, the applicants sought to prohibit further transfers of detainees until adequate safeguards were put in place. To this end, the applicants also sought an interim injunction restraining the transfer of detainees until the hearing of the application for judicial review.

[8] On May 3, 2007, the day before the applicants' motion for an interim injunction was to be heard, Canada and Afghanistan concluded a second Arrangement governing the transfer of detainees held by the Canadian Forces (the "second Arrangement"). This Arrangement states that it supplements the first arrangement, which continues to remain in effect.

[9] The second Arrangement provides that members of the Afghanistan Independent Human Rights Commission and Canadian Government personnel have access to persons transferred from Canadian to Afghan custody. The second Arrangement also requires that approval be given by

Canadian officials before any detainee who had previously been transferred from Canadian to Afghan custody is transferred on to a third country.

[10] As a result of the negotiation of the second Arrangement, the applicants' motion for an interim injunction was adjourned *sine die*.

[11] In the meantime, the respondents had filed their motion to strike out the applicants' Notice of Application. It is this motion that forms the subject matter of this decision.

The Notice of Application

[12] In order to address the respondents' motion to strike, it is first necessary to understand the facts asserted in, as well as the issues raised by the applicants' Notice of Application.

[13] The Notice of Application asserts that the first Arrangement does not provide adequate safeguards to ensure that detainees transferred by Canadian Forces to Afghan Forces will not be tortured by the Afghan authorities.

[14] The Notice of Application further asserts that there are substantial grounds to believe that Afghan Forces are torturing detainees, and that the United States of America - "a likely third country to which detainees may be transferred" - is engaging in "cruel, degrading and inhuman treatment of detainees", contrary to the assurances that the American government has given to other governments.

[15] Finally, the Notice of Application states that the Canadian Forces continue to capture and detain individuals in Afghanistan, and to transfer these individuals into the custody of Afghan authorities, without providing the detainees with access to counsel before being transferred out of Canadian custody.

[16] According to the Notice of Application, Canada's international obligations, including the *Convention Against Torture*, and the *Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment* obligate Canada to protect individuals from torture and other forms of cruel, degrading and inhuman treatment.

[17] By way of relief, the applicants seek a declaration that the first Arrangement violates sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, as it provides for the transfer of detainees to the custody of other countries without adequate substantive and procedural safeguards against a substantial risk of torture.

[18] The applicants further ask for a writ of prohibition preventing further transfers of detainees to the custody of other countries without the creation of adequate substantive and procedural safeguards to protect against the risk of torture. The applicants also seek a writ of *mandamus* requiring that a formal inquiry be held into the condition of all detainees transferred from Canadian custody, and that all detaining countries return the individuals in question to the custody of Canada.

[19] As grounds for the Application, the applicants assert, amongst other things, that the Canadian *Charter of Rights and Freedoms* applies to the actions of the Canadian Forces in Afghanistan.

[20] The applicants further state that individuals detained by the Canadian Forces have the right to counsel pursuant to subsection 10(b) of the *Charter*. In addition, the applicants say that sections 7 and 12 of the *Charter* mandate that the Canadian Forces may not take actions that place individuals at risk of torture or death.

[21] Finally, the applicants seek relief under subsection 24(1) of the *Charter* and section 18.1 of the *Federal Courts Act*.

Legal Principles Governing Motions to Strike

[22] Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.

[23] Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial Review.

[24] As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial Review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for discovery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at ¶10.

[25] In contrast, the full hearing of an Application for Judicial Review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.

[26] As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".

[27] The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at ¶15.

[28] Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." (*David Bull*, at ¶10. See also *Addison & Leyen Ltd. v.*

Canada, [2006] F.C.J. No. 489, 2006 FCA 107, at ¶5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).

[29] The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at ¶5.

[30] By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at ¶6.

[31] However, the Court is not obliged to accept as true allegations that are based upon assumptions and speculation. Nor is the Court obliged to accept as true allegations that are incapable of proof: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at ¶27.

[32] There is an exception to the general principle that no evidence may be led on a motion such as this. That is, where the jurisdiction of the Court is contested, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting the attribution of jurisdiction: see *MIL Davie Inc. v. Hibernia Management & Development Co.* (1998), 226 N.R. 369.

[33] Finally, in deciding whether an Application for Judicial Review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle*, at ¶14.

Standing

[34] The first reason why the respondents say that the applicants' Notice of Application should be struck out is that the applicants lack the requisite standing to bring the application.

[35] The applicants and the respondents agree that there is sufficient information before the Court to allow for a final determination on the issue of standing to be made, and both sides ask that such a determination be made at this time. The parties also agree that while the burden of demonstrating that the applicants lack standing is on the respondents on a motion to strike, it is the applicants who bear the ultimate burden of demonstrating that they are entitled to standing.

[36] In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, the Supreme Court of Canada considered whether the issue of standing could be decided in the context of a motion to strike. In this regard, the Supreme Court observed that it may be preferable to have all the issues in a case, including questions of standing, decided at the same time. That said, the Court went on to note that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether the question of standing should be determined with final effect as a preliminary matter, or to reserve it for consideration on the merits: *Finlay*, at page 616.

[37] In this case, I am satisfied that the record before me is sufficient to allow me to make a final determination in relation to the issue of standing, and that it is in the interests of justice that I do so.

[38] Subsection 18.1(1) of the *Federal Courts Act* allows for an application for judicial review to be brought by anyone "directly affected" by the matter in respect of which relief is sought. All of the parties agree that the applicants are not directly affected by the conduct of the Canadian Forces in Afghanistan. However, the applicants submit that they satisfy the criteria to be granted public interest standing to allow them to pursue this matter.

[39] There is also no dispute between the parties as to the criteria that must be satisfied in order to establish a basis for public interest standing. In cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, and *Finlay v. Canada (Minister of Finance)*, previously cited, the Supreme Court of Canada has recognized that courts have the discretion to grant standing to litigants who have no personal interest in an issue of constitutional or public law where the litigants in question can establish that:

1. The action raises a serious legal question;
2. The party seeking standing has a genuine interest in the resolution of the question; and
3. There is no other reasonable and effective manner in which the question may be brought to court.

[40] In this case, the respondents concede that the applicants meet the second branch of the tripartite test: that is, that they have a genuine interest in the resolution of the questions raised by the application. However, the respondents submit that the application does not raise a serious issue, and that there are other reasonable and effective ways in which these issues may be brought before the Court.

[41] Insofar as the serious issue component of the test is concerned, the respondents submit that the determination of the existence of whether an application raises a serious issue requires an inquiry not only into the importance of the issue, but also into the likelihood of the matter being resolved in favour of the applicants.

[42] In this regard, the respondents point to the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at ¶38-39, where Justice Evans observed that in deciding whether public interest standing should be granted in a given case, the Court should not probe more deeply into the issues other than to assess whether, on the basis of the materials before the Court, an applicant has "a fairly arguable case or, putting it the other way, has no reasonable cause of action".

[43] As Justice Evans observed, having regard to the discretionary nature of public interest standing, it is necessary to determine whether an application raises a fairly arguable case in order to ensure that scarce public resources are not squandered, and other litigants are not subjected to further delay: *Sierra Club*, at ¶38.

[44] I will review each of the respondents' arguments as to what they say the problems are with the applicants' case in my consideration of whether the application is bereft of any chance of success. Suffice it to say at this juncture that the applicants have satisfied me that the application raises one or more serious issues and that the applicants have a fairly arguable case.

[45] As to whether there is any other reasonable and effective way in which the questions raised by this application may be brought to court, the respondents say that it is always open to the individuals in Afghanistan who are directly affected by the actions of the Canadian Forces to initiate their own legal proceedings in Canada.

[46] In support of this contention, the respondents point to the fact that the family of a deceased resident of Kandahar province has evidently instituted proceedings against the government of Canada in the Ontario Superior Court. This action evidently arises out of actions of the Canadian Forces in Afghanistan.

[47] I cannot agree that individuals who have been handed over to the custody of the Afghan government have any meaningful or realistic ability to mount a challenge in this country with respect to the conduct of the Canadian Forces in Afghanistan.

[48] Firstly, the fact that the family of one deceased resident of Kandahar province has been able to commence an action against the Canadian Forces in Ontario is, in my view, of limited value in establishing that legal action by the individuals directly affected is a realistic alternative in this case.

We have no information as to the circumstances surrounding the Ontario action. In particular, the respondents could not say whether, for example, the action was brought by individuals still in Afghanistan, or by relatives of the deceased individual who are living in Canada.

[49] It is not disputed that the individuals whose situation is in issue in this case are on the other side of the world, in a desperately poor country – a country whose infrastructure is in tatters. Quite apart from any logistical, educational, linguistic, cultural or economic considerations that might limit the ability of these individuals to assert whatever rights they may have in this country, as far as we know, the individuals in question may well still be in detention in Afghanistan.

[50] Moreover, it is also not disputed that while these individuals were in the custody of the Canadian Forces, they were denied access to legal counsel.

[51] In these circumstances, I am satisfied that there is no other reasonable and effective way in which the questions raised by this application may be brought before the Court.

[52] Having found that the applicants satisfy all three components of the test for public interest standing established by the Supreme Court of Canada, I am therefore prepared to exercise my discretion and grant the applicants public interest standing to pursue this matter.

Is There any Basis for Judicial Review Under the *Federal Courts Act*?

[53] Assuming that the applicants have standing to bring this application, the respondents say that the application is bereft of any chance of success as it does not raise a "matter" in respect of which a remedy is available under section 18.1 of the *Federal Courts Act*.

[54] To reiterate, subsection 18.1(1) of the *Federal Courts Act* allows for an application for judicial review to be brought by anyone directly affected by "the matter" in respect of which relief is sought.

[55] In this case, the respondents submit that the application does not identify any administrative or executive action that violates or is likely to violate the *Charter* rights of any specific individual or individuals. As such, it does not involve a "decision, order, act or proceeding", as contemplated by subsection 18.1(3) of the *Federal Courts Act*.

[56] Rather, the respondents say that the Court is being asked whether a policy - namely the first Arrangement - is sufficient to protect the rights of unknown individuals in unknown circumstances. The Court is also being asked to address unspecified "potential actions" relating to unknown individuals, and to identify the elements of a constitutionally permissible practice.

[57] The respondents contend that the first Arrangement is not an "act or proceeding". Moreover, it does not compel the Canadian Forces to transfer detainees to the custody of

Afghanistan or any other country. Rather, the document merely establishes procedures to be followed, in the event of a transfer.

[58] Moreover, the respondents say that the first Arrangement contains explicit terms designed to protect detainees from abuse or torture. According to the respondents, the first Arrangement does not violate the *Charter* rights of any individual, nor does it provide for the violation of such rights. As such, the respondents say, it is not reviewable.

[59] While the Notice of Application asserts that existing transfer procedures are insufficient because they do not provide for adequate safeguards, the applicants have not demonstrated how the rights of specific individuals have been violated. According to the respondents, the Court should not be asked to intervene in an abstract debate, without the benefit of a live dispute on the basis of concrete facts: see *P.I.P.S.C. v. Canada (Customs & Revenue Agency)*, 2004 FC 507, at ¶77 and *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342.

[60] Finally, the respondents say that if the decision under review is the decision of the Chief of the Defence Staff to enter into the first Arrangement on December 18, 2005, the applicants were aware of the existence of the first Arrangement by April of 2006. As such, the application for judicial review is out of time.

[61] The applicants argue that what is in issue in this application is not a specific decision, but rather the ongoing policy or practice of the Canadian Forces in transferring detainees to Afghan

authorities in circumstances where the individuals in question face a substantial risk of torture. As such, the time limits set out in section 18.1 of the *Federal Courts Act* do not apply: see *Krause v. Canada*, [1999] 2 F.C. 476.

[62] The applicants further submit that there is a sufficient evidentiary basis upon which the application can be determined. In this regard, the applicants point to the fact that the respondents do not dispute that specific individuals have been detained by the Canadian Forces, and have subsequently been transferred to Afghan custody.

[63] While the applicants may not be able to identify these individuals by name, the applicants contend that there is nothing hypothetical about the individuals or their plight.

[64] Moreover, the applicants argue that the individuals in question are not part of an amorphous group, as was the case in the *Canadian Bar Association* decision relied upon by the respondents. Rather, the detainees in question are part of a finite and readily identifiable group.

[65] In addition, the applicants state that the only reason they have been unable to identify specific individuals affected by the Canadian Forces' policy or practice in their Notice of Application is because the respondents have thus far refused to identify the individuals in question. Indeed, the applicants' request for this information is currently the subject of a proceeding in this Court under section 38 of the *Canada Evidence Act*, R.S., c. E-10, s. 1.

[66] The essence of the applicants' allegations is contained in the following statement in the Notice of Application:

> Canadian Forces continue to capture and detain individuals in Afghanistan. Canadian Forces continue to transfer these individuals into the custody of Afghan authorities, despite the substantial risk that these individuals shall be subject to torture. General Hillier has refused to allow these detainees to have access to legal counsel before being transferred to the Afghanistan authorities.

[67] As was noted earlier in this decision, for the purposes of this motion, these allegations must be taken as true.

[68] Moreover, read generously, as the jurisprudence dictates should be done, I am satisfied that the application for judicial review is directed not just to the first Arrangement, but also to the policy or practice of denying detainees access to counsel, and transferring them to the custody of Afghan authorities, where they face a substantial risk of torture. As the policy or practice is ongoing, I am not persuaded that the application for judicial review is bereft of any chance of success on the basis that it is out of time.

[69] Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of this Court has been found to extend beyond the review of formal decisions, and to include the review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a

statutory agency of a public programme.": see *Markevich v. Canada*, [1999] 3 F.C. 28 (T.D.), at ¶11, rev'd on other grounds, [2001] 3 F.C. 449, 2001 FCA 144, rev'd [2003] 1 S.C.R. 94, 2003 SCC 9. See also *Nunavut Tunngavik Inc. v. Canada (Attorney General)* [2004] F.C.J. No. 138, 2004 FC 85, at ¶8.

[70] For the purpose of this motion, it is neither necessary nor appropriate for me to reach any conclusion with respect to the actions of the Canadian Forces in relation to detainees in Afghanistan. It is sufficient for me to find, as I do, that the applicants' argument that the policy or practice in issue in this proceeding is amenable to judicial review is not bereft of any possibility of success on the basis that it does not raise a "matter" in respect of which a remedy is available under section 18.1 of the *Federal Courts Act*.

Extraterritorial Application of the *Charter*

[71] As this application for judicial review is framed entirely under the Canadian *Charter of Rights and Freedoms*, the respondents say that it is therefore clearly bereft of any chance of success.

[72] In this regard, the respondents point to subsection 32(1) of the *Charter*, which the respondents say is determinative of the application. Subsection 32(1) provides that:

> 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.

[73] The respondents contend that the Canadian Forces in Afghanistan are not acting as Canadian "state actors". In this regard, the respondents rely on the affidavit of Christopher Greenwood, which is tendered as an expert opinion in matters of international law.

[74] The Greenwood affidavit discusses facts relating to the nature of Canada's participation in Afghanistan as part of ISAF and OEF, and includes as exhibits a number of documents relating to the nature of, and terms governing Canada's involvement in Afghanistan.

[75] Professor Greenwood further considers documents such as various resolutions of the United Nations Security Council, and the "*Afghan Compact*". These documents address the nature and ambit of Canada's involvement in Afghanistan, as well as that of the international community.

[76] Given their position that the Canadian Forces in Afghanistan are not acting as Canadian "state actors", the respondents submit that the activities of the Canadian Forces in Afghanistan fall outside of the ambit of subsection 32(1) of the *Charter*. Moreover, the respondents say that it would be absurd to attempt to impose a particular country's laws on a multi-national international effort.

[77] Even if the Canadian Forces deployed in Afghanistan can properly be viewed as Canadian state actors, the respondents say that the *Charter* still has no application, as there is no exception to the principle of state sovereignty that would justify giving the *Charter* an extraterritorial effect in this case.

[78] The respondents point to evidence in the record such as the "*Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*", which the respondents assert, demonstrates that Canada and Afghanistan have agreed to the application of a limited range of Canadian laws in Afghanistan. According to the respondents, this agreement does not extend to include the application of Canadian domestic law to Canadian Forces' detention and transfer activities.

[79] The respondents say that the applicants are asking this Court to extend *Charter* rights to Afghan detainees on Afghan soil. This would involve an unlawful extension of Canada's enforcement jurisdiction into Afghan territory, and constitute an impermissible encroachment on Afghanistan's sovereignty.

[80] According to the respondents, the Supreme Court of Canada has stated unequivocally that the *Charter* does not have such an extraterritorial effect.

[81] In this regard, the respondents refer to the recent decision of the Supreme Court of Canada in *R. v. Hape*, 2007 SCC 26. According to the respondents, the majority decision in *Hape* is "crystal clear" that absent the consent of the foreign state in issue, the *Charter* has no application outside of Canada.

[82] The respondents point out that the Notice of Application in this case does not allege that the sovereign Islamic Republic of Afghanistan has consented to the application of the *Charter* within its territory. In the absence of such consent, the respondents say, the *Charter* cannot apply.

[83] Finally, the respondents say that none of the judgments in *Hape* contemplate the extension of *Charter* rights to non-Canadians outside of Canada. To the extent that the Supreme Court in *Hape* may have left open the potential extraterritorial application of the *Charter*, the only way that this effect could be justified or recognized would be through the exclusion of evidence improperly obtained outside of Canada in a trial taking place in this country.

[84] In contrast, the applicants say that the Supreme Court's decision in *Hape* is not nearly as clear-cut as the respondents would have me believe.

[85] Firstly, the applicants note that *Hape* (and its predecessors) were all decided in the law enforcement context. Indeed, *Hape* itself involved an off-shore criminal investigation. This case arises in quite a different context - namely the overseas exercise of military power. Moreover, unlike *Hape*, which involved issues related to search and seizure, this case involves the issues related to detention. The questions raised by this case are issues of first impression, say the applicants, and it remains to be seen how they will be treated by the courts in Canada.

[86] The applicants also refer to the majority decision in *Hape*, where, they say, Justice Lebel specifically left open the possibility that the *Charter* may have extraterritorial application in cases

where fundamental human rights are at stake. In this regard, the applicants point to the following statement in the majority decision in *Hape*:

> [52] In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. **That deference ends where clear violations of international law and fundamental human rights begin.** If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations. [emphasis added]

[87] Given that this case involves the right to freedom from torture, the applicants say that fundamental human rights norms are at stake, giving rise to the exception to the general rule against the extraterritorial application of the *Charter* recognized by *Hape*.

[88] The applicants also note that Justice Binnie's concurring decision in *Hape* cautions against sweeping pronouncements as to the lack of extraterritorial effect of the *Charter*. In this regard, Justice Binnie observed that "serious questions of the utmost importance have arisen respecting the extent to which, if at all, a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory": *Hape*, at ¶184.

[89] Justice Binnie then goes on to discuss this very case, describing it as raising "the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the *Charter*": *Hape*, at ¶184.

[90] Justice Binnie further notes that cases such as this may not ultimately result in prosecutions in Canada, and would not therefore engage "the remedial potential of s. 24(2) of the *Charter* under which evidence may, in certain circumstances, be excluded from a Canadian trial": *Hape*, at ¶185.

[91] Nevertheless, Justice Binnie was prepared to leave open the question as to whether those harmed by the extraterritorial conduct of Canadian authorities should be denied *Charter* relief in situations where they did not face trial in Canada: *Hape*, at ¶187.

[92] While recognizing that Justice Binnie's comments refer to Canadian citizens harmed by the extraterritorial activities of Canadian authorities, and accepting that there is no suggestion that there are Canadian citizens amongst the Afghan detainees, the applicants nonetheless say that the implications of the decision in *Hape* for this case are by no means clear.

[93] In addition, the applicants point to jurisprudence from the House of Lords and the United States Court of Appeal for the District of Columbia which has held that domestic human rights legislation applies to individuals detained by military forces in Iraq: see *Al Skeini et al. v. Secretary of State for Defence*, [2007] UKHL 26, and *Omar et al. v. Secretary of the United States Army et al.*, 479 F.3d 1 (D.C. Cir. 2007).

[94] According to the applicants, this jurisprudence suggests constitutional rights guarantees do indeed "follow the flag" when state security authorities operate outside their home territory. As a consequence, Canadian human rights law should be extended to cover individuals such as the detainees held by Canadian Forces in Afghanistan.

[95] Finally, the applicants say that a review of the evidence relating to the terms governing the participation of the Canadian Forces in Afghanistan demonstrates that in surrendering significant powers to Canada, including giving up the state monopoly over the use of coercive power within its territory, Afghanistan has implicitly consented to the application of Canadian law within its territory.

[96] It is not appropriate on a motion such as this to enter into a detailed discussion of the relative merits of the parties' competing positions. Unless I am persuaded that the case is clearly bereft of any chance of success, that task is for the judge hearing the application for judicial review.

[97] The applicants' argument that the government of Afghanistan has implicitly consented to the application of Canadian law to the actions of the Canadian Forces within its territory requires the examination and evaluation of the agreements and other evidence governing the participation of the Canadian Forces in ISAF and OEF. It is not the function of a judge, sitting on a motion to strike, to weigh and interpret the evidence before the Court. That responsibility rests with the judge dealing with the merits of the application for judicial review.

[98] Insofar as the respondents' other arguments relating to the *Hape* decision and the extraterritorial application of the *Charter* are concerned, suffice it to say at this juncture that this case seeks to have the *Charter* apply in a novel factual context - one that has not been the subject of prior judicial consideration. While the Supreme Court of Canada has recently articulated general principles limiting the extraterritorial application of the *Charter*, the majority has specifically left open the potential extraterritorial application of the *Charter* in cases where fundamental human rights are at stake.

[99] In the circumstances, and without opining in any way as to whether the *Charter* does or does not apply in the circumstances of this case, I cannot conclude that this application for judicial review is so clearly improper as to be bereft of any possibility of success.

[100] In this regard, I would simply echo the comments of the Supreme Court of Canada in *Hunt v. Carey*, [1990] 2 S.C.R. 959, at ¶52, where the Court stated that:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law […] will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[101] While these comments were made in the context of a motion to strike out a statement of claim, they are, in my view, equally apposite in this case.

Charter Sections not Engaged

[102] The respondents argue that even if the *Charter* has extraterritorial effect in the circumstances of this case, none of the sections of the *Charter* relied upon by the applicants are engaged on the facts alleged in the Notice of Application, with the result that the application is therefore bereft of any chance of success.

[103] Moreover, the respondents say that sections 7 to 14 of the *Charter* are intended to protect the rights of individuals engaged in the criminal process. The detentions in issue in this case are not criminal in nature, with the result that the sections of the *Charter* in issue in this case can have no application.

[104] With respect to section 7 of the *Charter*, the respondents say that the rights to life, liberty and security of the person are individual rights, and cannot be advanced by others on behalf of the individuals whose rights are in question.

[105] Insofar as subsection 10(b) of the *Charter* is concerned, the respondents submit that this section does not apply outside of the criminal process, and more particularly, does not apply in the military context. Moreover, the respondents say that requiring that detainees be provided with access to counsel on their detention by the Canadian Forces would cripple the mission in Afghanistan.

[106] Relying on extradition cases such as *United States of America v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 and *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, the respondents argue that section 12 of the *Charter* is also not engaged in this case. According to the respondents, the law is clear that section 12 does not apply where the allegedly cruel or unusual treatment or punishment is to be carried out by officials in a foreign state.

[107] Finally, the respondents contend that no subsection 24 *Charter* remedy is available to the applicants, as such relief is only available to those individuals whose rights have actually been infringed.

[108] The applicants argue that *Charter* rights are not limited to the criminal process. For example, deportation to torture has been found by the Supreme Court of Canada to give rise to section 7 rights: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1. According to the applicants, the surrender of individuals from the custody and control of the Canadian Forces to the Afghan authorities is analogous to the deportation and extradition processes.

[109] The applicants submit that the fundamental question should be whether torture by another state is a foreseeable consequence of the actions of Canadian state actors.

[110] In this case, the applicants say that detainees are subjected to a process which has many of the hallmarks of the administration of justice, the final result of which is a decision by the Canadian Forces Commander to release, transfer or continue the detention of the detainee. Nevertheless,

detainees are denied any procedural rights – a process that the applicants say cannot accord with principles of fundamental justice.

[111] Moreover, the applicants submit that the respondents' argument that the *Charter* cannot apply in the context of armed conflict ignores the reality that a number of acts of Parliament apply in just this situation. If ordinary statutes can apply, the applicants say, surely the *Charter* must as well.

[112] With respect to subsection 10(b) of the *Charter*, the applicants point out that the respondents have provided no authority to support their argument that the "detention" referred to in section 10 excludes detentions that occur within the context of an armed conflict.

[113] Furthermore, the applicants say that there is no rationale for denying counsel to an individual in the context of armed conflict. In fact, the *Prisoner-of-War Status Determination Regulations*, SOR/91-134, specifically afford the right to counsel to prisoners of war. While conceding that there may be a dispute as to whether these regulations apply to detainees in the control of the Canadian Forces in Afghanistan, the applicants say that the existence of the *Regulations* demonstrates that providing detainees with access to counsel is nevertheless workable in the context of an armed conflict.

[114] Insofar as section 12 of the *Charter* is concerned, the applicants argue that there are important differences between this case and cases of extradition or deportation. In cases of

extradition or deportation, the Supreme Court has held that the nexus between torture on the one hand, and extradition or deportation on the other, is too remote to engage section 12.

[115] In contrast, the applicants submit that there is a very close nexus between the transfer of detainees out of Canadian custody, and the exposure of the detainees to a substantial risk of torture at the hands of the Afghan authorities. According to the applicants, Afghan authorities deal with individuals at the insistence of the Canadian Forces, on the basis of evidence gathered by Canadian state actors. The context of this case is therefore distinguishable from the extradition and deportation cases relied upon by the respondents, and section 12 of the *Charter* is engaged on the facts of this case.

[116] With respect to the ability of the applicants to assert *Charter* rights on behalf of others, and to seek section 24 relief on their behalf, the applicants say that it would be perverse if the Canadian Forces could immunize its conduct from scrutiny by detaining individuals, denying them due process and the right to counsel, transferring them into a situation where they face a substantial risk of torture, and then insisting that no one else could assert the rights of the detainees on their behalf.

[117] In support of this contention, the applicants draw an analogy to *habeas corpus* cases. Even though *habeas corpus* applications are ordinarily to be brought by the individual whose rights are in issue, “strangers” have been allowed to bring applications where there were grounds to believe that detainees were being restrained from bringing the application personally: see *Boudreau v. Thaw (No 2)* (1913), 13 D.L.R. 712 (C.S.), *Hottentot Venus*, (1810) 13 East 195, 104 Eng. Rep. 344

(K.B.1810), and the dissenting judgment in *Ex Parte John Doe*, (1974) 46 D.L.R. (3d) 547 (B.C.C.A.).

[118] Moreover, the applicants point to the decision of the Supreme Court of Canada in *R. v. Gamble*, [1988] 2 S.C.R. 595, where the Court had occasion to examine the remedy of *habeas corpus* in the *Charter* era. In this regard, the Supreme Court stated that a purposive approach should be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights.

[119] Both sides have produced numerous cases to support their respective positions in relations to the specific sections of the *Charter* in issue in this application for judicial review. However, while some of the jurisprudence is arguably applicable by analogy to this case, none of the case law deals with a similar fact situation to that giving rise to this application for judicial review.

[120] As a consequence, the respondents have not persuaded me that the application for judicial review is clearly bereft of any chance of success as it relates to the specific *Charter* sections invoked by the Notice of Application. Indeed, I am of the view that the comments of the Supreme Court of Canada in *Hunt v. Carey* are again applicable, and find that the fact that the Notice of Application may involve novel or difficult points of law does not justify striking it out.

The Issues are not Justiciable

[121] The respondents argue that the conduct in issue in this application for judicial review involves the exercise of prerogative powers and matters of "high policy" that are generally not justiciable.

[122] In this regard, the respondents submit that this application would require the Court to express an opinion on the wisdom of the exercise of defence powers by the Executive Branch of government, which is not the role of the judiciary.

[123] That said, to the extent that the applicants' Notice of Application is framed in *Charter* terms, the respondents concede that the matter is justiciable, based upon the comments of the Supreme Court of Canada in *Operation Dismantle*, previously cited, at ¶63.

[124] The applicants submit that the application for judicial review does not challenge any matter of "high policy", such as Canada's decision to deploy forces into Afghanistan. Rather, the applicants say that their application involves real individuals, and decisions made by the Canadian Forces in relation to their liberty and security of the person.

[125] Whether or not this case involves a matter of high policy, I do not understand the scope of the applicants' case to extend beyond their *Charter* claims. As a consequence, the matter is not bereft of any chance of success on the basis of non-justiciability.

The Application is Moot

[126] Before addressing the issue of mootness, I note that the parties agree that an exception to the general principle that no evidence may be led on a motion to strike a Notice of Application exists where the basis for the motion is that the issue has become moot.

[127] This makes sense, as questions of mootness will generally arise as a result of intervening developments in relation to the underlying facts giving rise to the application for judicial review. If evidence relating to these intervening developments could not be put before the Court on a motion to strike, the Court could be forced to proceed with a full hearing in relation to a case in which a live controversy no longer exists.

[128] The respondents contend that there is no longer a live controversy before the Court in this case, and that the tangible and concrete dispute between the parties has now disappeared. As a consequence, the respondents say that the issues raised by the applicants' Notice of Application have become academic.

[129] In support of this contention, the respondents submit that the issue raised by the application is the perceived inadequacies in the protections afforded to detainees by the first Arrangement. According to the respondents, all of the inadequacies in the first Arrangement that have previously been identified by representatives of the applicants have now been addressed by the second Arrangement. As a result, the respondents say that the controversy that underpins the application for judicial review no longer exists, and the application is moot.

[130] The applicants argue that the issues underlying their application for judicial review are not moot. They submit that the underlying application is not directed solely at the first Arrangement, but is also concerned with the transfers themselves. In this regard, the applicants say that they have always sought a remedy that would protect detainees from the risk of torture, and that goal has not changed.

[131] The applicants do concede that the protections offered by the second Arrangement may be an improvement over those afforded to detainees under the first Arrangement. Nevertheless, the applicants contend that the protections offered under the second Arrangement are still not sufficient in the context of a country with as serious a history of systematic human rights abuses as is the case with Afghanistan.

[132] In any event, the applicants say that the adequacy of the protections afforded to detainees, including those provided under the terms of the second Agreement, is a matter for the judge hearing this application for judicial review on its merits.

[133] The applicants' Notice of Application states that there are substantial grounds to believe that Afghan forces are torturing detainees. Not only must this assertion be taken as true for the purposes of this motion, the applicants also point to evidence which they say demonstrates that Canadian officials have received at least six first-hand reports of detainees who had been transferred by the Canadian Forces into the care of the Afghan authorities and had then been subjected to torture in Afghan prisons.

[134] Moreover, the applicants point to the fact that their Notice of Application makes specific reference to the failure of the Canadian Forces to provide detainees with access to counsel. There is no evidence before the Court that would suggest that this is now happening. As a consequence, the applicants say that their application for judicial review is clearly not moot.

[135] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada set out the principles to be applied in determining whether a case had become moot. In this regard, the Court said:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. According if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. [at ¶15]

[136] With these principles in mind, I find that the respondents have not met their onus of establishing that the issues raised by the applicants' application for judicial review are purely hypothetical or abstract. Nor have the respondents established that there is no longer a live controversy between the parties, such that the application for judicial review is therefore bereft of any chance of success.

The Applicants' Mis-application of International Law

[137] In their memorandum of fact and law, the respondents submit that the applicants' application for judicial review is founded on a misapprehension of the applicable principles of international law, and as such is bereft of any chance of success.

[138] According to the respondents, the individuals for whom the applicants purport to advocate are not entitled to any further safeguards at international law than those that are already being provided by the Canadian Forces. The respondents further submit that the applicants have misunderstood the legal basis for Canada's activities in Afghanistan, including the significance of United Nations' Security Council resolutions.

[139] In support of this argument, the respondents rely on the opinion of Professor Greenwood.

[140] While this argument was not developed in the course of the hearing of the motion to strike, I do not understand it to have been abandoned.

[141] In support of their argument relating to the applicable principles of international law, the applicants rely on the evidence of their own expert – Professor Michael Byers.

[142] Suffice it to say that I have concerns as to the appropriateness of looking at evidence concerning the nature of Canada's engagement in Afghanistan on a motion such as this.

[143] I do not understand the respondents to be saying that this Court has no jurisdiction to entertain the applicants' application for judicial review, but rather that it is so fatally flawed and mis-conceived that it is bereft of any chance of success. This is not a true jurisdictional challenge, and the Court should not be asked to weigh and interpret the conflicting expert evidence before the Court on a motion to strike. This is a matter to be left to the judge hearing the application for judicial review on its merits.

Conclusion

[144] For these reasons, I find that the applicants are entitled to public interest standing in order to pursue this application for judicial review. Moreover, the respondents have not persuaded me that the matter is bereft of any chance of success. As a consequence, the motion to strike is dismissed.

[145] In the interests of certainty, I wish to make it clear that nothing in these reasons should be taken as deciding any of the issues argued on the motion to strike, apart from the issue of standing. Furthermore, the decision should not be interpreted as limiting or restricting the right of the respondents to advance any or all of its arguments, save and except arguments relating to the standing of the applicants, before the judge hearing the application for judicial review on its merits.

[146] While I am satisfied that the applicants should have their costs, I am not persuaded that the circumstances are such as would warrant an award of solicitor and client costs in the applicants' favour.

Next Steps

[147] The respondents have asked that they be given a further 90 days in which to file their supporting affidavits, as contemplated by Rule 307 of the *Federal Courts Rules*, in the event that their motion to strike is dismissed.

[148] In light of the applicants' expressed intention to seek leave to amend their Notice of Application to deal with the second Arrangement, as well as the outstanding *Canada Evidence Act* proceedings, I am of the view that establishing a time limit for the filing of the respondents' affidavits is a matter best dealt with through the case management process.

[149] Accordingly, a case management conference will be scheduled to take place as quickly as possible in order to establish a schedule for the remaining steps to be taken in relation to this application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The applicants are granted public interest standing to pursue this matter; and

2. The respondents' motion to strike is dismissed, with costs.

"Anne Mactavish"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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