In the Court of Appeal of Alberta

Citation: Bowden Institution v Khadr, 2015 ABCA 159

Date: 20150507
Docket: 1503-0118-A
Registry: Edmonton

Between:

Dave Pelham, Warden of Bowden Institution and Her Majesty the Queen

Applicants
(Appellants)

- and –

Omar Ahmed Khadr

Respondent
(Respondent)

Oral Reasons for Decision of The Honourable Madam Justice Myra Bielby

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Application for Order for Stay of Enforcement of Judicial Interim Release Pending Appeal

Oral Reasons for Decision of
The Honourable Madam Justice Myra Bielby

[1] The applicants, Dave Pelham, Warden of Bowden Institution and Her Majesty the Queen ("the Crown") apply for a stay of an order of Justice June Ross of the Court of Queen's Bench dated April 24, 2015 which granted the Respondent, Omar Khadr, judicial interim release pending the hearing of his appeal to the Court of Military Commission Review of the United States of America in Alexandra, Virginia. He is appealing his convictions, after a guilty plea to a United States Military Commission, of five offences, including murder in violation of the law of war and the resulting sentence imposed on him of eight years' incarceration.

[2] Khadr's counsel consented to the matter being heard on short notice, and to the Crown having filed a supporting memorandum exceeding the prescribed maximum.

[3] This matter comes before this Court as a result of Khadr being transferred from the United States to Canada, his home, to serve his eight year sentence here, pursuant to the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences* (the *Treaty*) and the *International Transfer of Offenders Act*, SC 2004 c 21 (*ITOA*). Khadr was thus placed in the custody of the Correctional Service of Canada (CSC) which is administering his sentence on the basis that his statutory release date is October 20, 2016 and his warrant expiry date is October 30, 2018.

[4] Subsequent to launching his appeal to the United States Court of Military Commission Review, in January 2015 he applied to the Court of Queen's Bench of Alberta for judicial interim release, sometimes called bail, pending determination of that appeal. Although he sought bail in Canada, he was not appealing from convictions imposed in Canada, but rather from those imposed in the United States. The parties agree that there is no mechanism under American or under Canadian law which would have permitted Khadr to ask an American court or tribunal to grant him judicial interim release from custody in Canada.

[5] Khadr's bail application was successful. He obtained an order for judicial interim release on April 24, 2015 from Justice Ross, supported by lengthy, considered written reasons; that order is now subject to a Crown appeal launched on May 4, 2015. The Crown launched its application to stay the bail order on May 4, 2015, returnable May 5, 2015 at 9:30 am before me. Khadr was originally to remain in custody until 2:00 pm that same day, May 5, 2015, pending the receipt of oral submissions before Justice Ross and her direction as to the terms of his release.

[6] At the conclusion of oral submissions during the morning of May 5, 2015, I stayed the bail order for a further 48 hours to permit me time to consider the application, and the parties' written and oral submissions as well as their authorities. I directed the parties to return to receive my decision on the stay application today, Thursday, May 7 at 9:30 am, as they have now done.

[7] In the decision under appeal Justice Ross observed that there was unchallenged expert evidence before her showing that Khadr's appeal is not barred by his having earlier signed a waiver of appeal rights, and that he has a strong probability of success on that appeal in the United States. She observed, however, that it is likely that the appeal, together with further appeals, will still be pending at the time of his statutory release date, and perhaps even at his warrant expiry date. Thus, if she did not grant bail, his appeal could be rendered nugatory; he would have served the entire custodial portion of his entire sentence by the time the appellate tribunal in the United States heard his appeal.

[8] Usually a candidate for bail pending appeal makes that application to a single judge of the Court of Appeal, as that is the court in which the appeal will be heard, pursuant to s 679 of the *Criminal Code*, RSC 1985, c C-46 or s 37(1) of the *Youth Criminal Justice Act*, SC 2002, c 1. Khadr did not make his application directly to a judge of this court because those statutory provisions do not apply here. He is not appealing his conviction pursuant to either of these statutes, or, indeed, to a Canadian court.

[9] Rather, he brought on his application for release under the common law provisions of *habeas corpus* and the *Canadian Charter of Rights and Freedoms* because his appeal is from convictions for offences contrary to the law of the United States and is made to an American tribunal.

[10] The Crown submitted that I had jurisdiction to grant a stay of the bail order through the combined operation of rule 14.48 of the *Alberta Rules of Court*, AR 124/2010 and rule 825 of Part 60 of the *Alberta Rules of Court*, AR 390/1968. Khadr agrees that I have jurisdiction although he disagrees that its source is rule 825 and instead argues that it arises under rule 840(3) of Part 61 of the *Alberta Rules of Court*, AR 390/368. I am satisfied that I have jurisdiction to issue a stay in this case, and I do not find it necessary to decide between the different positions as to its statutory source.

[11] The criteria for granting a stay of a decision under appeal are the same criteria as those for granting an interlocutory injunction, established by *RJR-MacDonald v Attorney General of Canada*, [1994] 1 SCR 311 [*RJR-MacDonald*]. The applicant must demonstrate that there is a serious issue to be tried, that it will suffer irreparable harm if the relief is not granted and that the balance of convenience favours the granting of a stay; see *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, 2013 ABCA 357 at para 6, 561 AR 180; *Vaccaro v Twin Cities Power, LLC*, 2014 ABCA 146. The Crown concedes that it has the onus to prove the existence of each of these factors on a balance of probabilities; see *Morrow v Zhang*, 2008 ABQB 125 at para 7, 424 AR 131; *Canada (Attorney General) v Canada (International Trade Tribunal)*, 2006 FCA 395 at para 34, 357 NR 161.

[12] In relation to the first factor, the existence of a serious issue, the questions raised by Khadr's appeal include those relating to the jurisdiction of a Canadian court to grant judicial interim release pending a Canadian offender's foreign conviction appeal, the right to seek bail

pending appeal as a principle of fundamental justice guaranteed by s 7 of the *Charter* and the chambers judge's application of the test for bail pending appeal in these circumstances. While Khadr does not concede that there is merit to any of Crown's grounds of appeal, he does concede that the threshold required for this factor has been met.

[13] The test for determining whether an appeal is arguable or not, i.e. whether it raises a serious issue, has a low threshold; see *RJR-MacDonald* at 337-38. I accept that the Crown has proven, to the required standard, that its appeal from Justice Ross's order raises serious issues to be decided.

[14] In relation to the second factor, the irreparable harm component of the test, the Crown argues that it will suffer irreparable harm if the stay is not granted, although not because Khadr is a flight or security risk if released. The Crown itself filed an affidavit from Nancy Shore, Acting Deputy Warden of the Bowden Institution where Khadr is currently housed, showing that as recently as April 20, 2015 his security level was reduced from medium security to minimum security. From all of this I therefore assume that there is little, if any, risk that he will not surrender himself back into custody when ordered to do so, should the Crown's appeal succeed. And, if it is successful, Khadr's judicial interim release will come to an end at that time, and he will return to custody. So the Crown does not claim any irreparable harm will likely arise from Khadr's actions should he be released.

[15] The Crown submits that if Khadr is released pending the Crown's appeal of Justice Ross's decision, that will (1) have a significant negative impact on the ability of other offenders in the future to secure transfer to Canada to serve the balance of sentences imposed by foreign states, or reduce the likelihood that they will agree to transfer Canadian prisoners back to Canada to serve their sentences, and (2) harm Canada's diplomatic relations with the other nations that are also parties to the *Treaty*.

[16] I am satisfied that if either of these consequences would follow Khadr's release between the date of this decision and the determination of his appeal, they would qualify as irreparable harm. The issue is whether there is adequate evidence before me to establish that these consequences will flow from Khadr's release pending appeal.

[17] The Crown did not lead evidence from any representative of the United States or any other *Treaty* partner to the effect that the release of Khadr pending his appeal to this Court will have these negative consequences. Rather, in hoping to prove irreparable harm if the stay is not imposed, the Crown relied on the affidavit evidence of Lee Redpath, Acting Director, Institutional Reintegration Operations Division, Offender Programs and Reintegration Branch with CSC. She deposes that Khadr's judicial interim release pending the Crown's appeal to this Court, may have these consequences. Other states presumably agree to transfer prisoners in the belief that the terms of the sentence imposed in the foreign state will be enforced on those terms in Canada. The granting of bail to Khadr, pending appeal, might well challenge that trust and thus reduce the likelihood of their agreeing to transfer prisoners in the future.

[18] To Ms. Redpath's knowledge, the granting of judicial interim release to an offender transferred between foreign states is globally unprecedented. She opines that Khadr's judicial interim release in this fashion may thusly harm Canada's diplomatic relationships with foreign states, and specifically with the United States, which is by far the largest source of applications for prisoner transfer to Canada.

[19] It is likely that neither party anticipated Khadr would appeal his convictions, post-transfer, let alone apply for judicial interim release pending the hearing of his appeal. His ability to do so here is said to arise from an administrative slip in the United States. Pursuant to the provisions of the military system under which he entered his guilty pleas, he was entitled to have his convictions "reviewed". That did not happen. The appeal waiver he is said to have signed does not expressly waive this review. It is that review he is now seeking, and which I refer to as his "appeal". There is no evidence that any other prisoner in Canada is in the same position, so that if Justice Ross's decision is enforced the "floodgates" will not open to similar applications by other prisoners.

[20] Khadr's counsel advised that while the United States has not conceded that Khadr has a right to this appeal, the tribunal to which it has been launched has not struck it. Rather, it is currently ordered held in abeyance, awaiting the release of the tribunal's decision in another matter; argument has been made in that other matter and the decision reserved. It could issue any time, and Khadr's appeal then permitted to proceed.

[21] The time needed to resolve the Crown's appeal to this Court is relevant to whether Khadr's release pending that appeal will result in the irreparable harm alleged. Khadr's counsel, Mr. Whitling, advised that he would not object to the Crown seeking a direction that this appeal proceed on an expedited basis. If the appeal proceeds in this fashion, noting that the time needed to prepare an Appeal Record will be reduced over that required from a trial decision because all the evidence before Justice Ross was entered in affidavit, transcript or documentary form, the appeal could realistically be argued as early as September 1, 2015. The Registry advises that we have several dates available for argument in early September.

[22] The issue of irreparable harm arising from Khadr's release must, therefore, be addressed in the context of his release from today to the date the Crown's appeal will be heard, likely about four months from now. Any chilling effect caused by his judicial interim release on the applications of other Canadian offenders in American prisons, or on Canada's diplomatic relationship with the United States, must be assessed only in the context of this four month period. If the Crown's appeal is ultimately successful, and he is re-incarcerated pending the completion of his sentence or success on his appeal in the United States, that will go some distance to alleviate any concerns Canada's *Treaty* partners might have developed about its enforcement of the *Treaty*.

[23] Ms. Redpath acknowledged when questioned on her affidavit earlier this week, that if Justice Ross's decision was to be overturned by the Court of Appeal such that transferred prisoners could no longer apply for bail pending appeal, her concern would be addressed. I take from this that she believes that any harm to the integrity of the prisoner transfer system will be caused by

Ross J's recognition of the legal right to seek bail, not Khadr's release in accordance with that right. It could be cured by this Court's decision on appeal.

[24] The Crown argues that transferring countries may not take such a careful view of Canadian jurisprudence and the simple knowledge that a transferred prisoner in Canada has obtained release on bail may cause those countries to hesitate in repatriating Canadian prisoners. That is mere speculation, and contrary to the views of its own witness, upon which it otherwise urges me to rely.

[25] Khadr's counsel argues that evidence of irreparable harm must be clear and not speculative; evidence that Canada: "may or is likely" to suffer irreparable harm is not enough; see *WIC Premium Corp v General Instrument Corp*, 2000 ABQB 628 at paras 77-78, 272 AR 20 (citing *Ominayak v Norcen Energy Resources Ltd* (1985) 58 AR 161 at 167 (ABCA) and *Thermo Star Products Ltd v Tomlinson* (1997) 201 AR 191 at 200 (QB)).

[26] I accept that there is a public interest in protecting the integrity of the system of international transfers, and that Khadr was so transferred back into custody in Canada pursuant to its international obligations under the *Treaty* and *ITOA*. For the purpose of this stay application I cannot however rely on the opinion as to irreparable harm offered by Ms. Redpath, who has not been qualified as an expert for the purpose of giving opinion evidence. Nor did she depose that the irreparable harm would arise if the stay is refused, but only that she believed it *might* arise. She did not give clear and non-speculative evidence on this point. (emphasis added)

[27] While I accept that those charged with the enforcement of prisoner transfer agreements honestly have, to this point, interpreted the *Treaty* and the *ITOA* so as to believe that it is not possible for a prisoner transferred to Canada pursuant to their terms to appeal the conviction leading to his or her incarceration in a foreign state, and thus to apply for bail pending that appeal, their beliefs in the face of *Treaty* and legislative silence on the issue do not compel me to conclude that granting bail in these circumstances is not possible, or that irreparable harm will surely flow if it is. It has simply not come up before. Khadr's case is, to say the least, unusual. There is a first time for everything.

[28] I reject the argument that I should presume the type of harm feared by Ms. Redpath will arise. The Crown argued that I should defer to her concerns because she is a representative of the executive, relying on an isolated statement from the Federal Court decision in *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para 46, [2008] 3 FCR 248, to the effect that the courts should defer to the decisions of the executive in matters of international relations. Crown counsel agreed, however, that an Acting Director within the Correctional Service of Canada is not a member of the executive of Canada as that term is used in *Arar*. While she is tasked with administering international prisoner transfers, that does not elevate the opinions contained in her affidavit to the level of an executive decision on a matter of international relations.

[29] The Supreme Court in *RJR-McDonald* stated that in the case of a public authority irreparable harm will nearly always be satisfied upon proof that the authority is charged with the duty of promoting or protecting the public interest in the context of an impugned piece of legislation, regulation or activity undertaken pursuant to that responsibility; see 346. However, the Crown's appeal does not arise in such a context. In matters of such importance as the protection of *Charter* rights, irreparable harm to the Crown is not always to be presumed: see *Morrow v Zhang*, 2008 ABQB 125 at para 32, 424 AR 131.

[30] The Crown alternately argues that it is open to me to infer irreparable harm. The Federal Court in *Bayer HealthCare AG v Sandoz Canada Inc*, 2007 FC 352, 157 ACWS (3d) 169 stated, at paras 34-35, that a judge may infer irreparable harm if that inference can reasonably be drawn from clear and non-speculative evidence which is before it. In the absence of such evidence I should decline to draw that inference: *Canada (Attorney General) v Amnesty International Canada* 2009 FC 426 at paras 27-31. The evidence which is before me is not clear and non-speculative evidence that Canada *will* be harmed in some significant way if the stay is not granted.

[31] However, that evidence is sufficiently clear and non-speculative to convince me that I can infer not that the harm the Crown advances *will* arise but that *there is a risk it will* arise. There is a risk to Canada's international reputation and to its prisoner transfer process arising from its employees, including Ms. Redpath, having made representations to *Treaty* partners from which those partners may conclude that no transferred prisoner would be entitled to apply for bail once in Canada. Upon their subsequently learning that that is not the case, at least in this one instance, there is a risk that those partners may become more hesitant to participate in future prisoner transfers or otherwise harm Canada's diplomatic relationships with other states.

[32] The degree that the integrity of the system of international prisoner transfer is so affected by these risks, however, is to be weighed in the context that both the *Treaty* and *ITOA* are silent about the right, if any, of a transferred offender to apply for judicial interim release pending the hearing of his or her post-transfer appeal. The fact that this is a situation not contemplated by either does not compel the conclusion that the granting of bail for the four month period in question would significantly undermine the relationship between Canada and the United States because the United States believed bail could not be obtained here. I conclude that while I can infer some degree of irreparable harm arising if the stay is not imposed, that inference does not extend to any particular magnitude of risk.

[33] In summary, I conclude that the Crown has established, by inference, that there is a risk that public interest will be harmed to some degree as a result of the release of Khadr on bail pending his appeal to this Court. Irreparable harm relates to the nature of the harm suffered rather than its magnitude. However, that harm will be moderated by the fact that the duration of Khadr's release on bail, if the stay is not granted, will be for a limited time, from now to the hearing of his appeal, likely a matter of a few months.

[34] The third factor which the Crown must establish is that the balance of convenience between the parties favours granting the stay. This part of the test requires a court to determine which of the two parties "will suffer the greater harm from the granting or refusal of an interlocutory injunction": *RJR-MacDonald* at 342.

[35] In addition to the factors raised under the irreparable harm factor, the Crown argues that the public interest will be harmed if Khadr is suddenly released into society without the rehabilitative and reintegration functions achieved through release under a correctional plan, implementing a "cascading" approach. That approach would be especially helpful given his disruptive family history, his years of incarceration in Guantanamo Bay, the circumstances of that incarceration, radical influences in his life, the public attention this case has drawn and the unpredictability of his reaction to life as an adult outside a structured environment.

[36] However, Khadr is not asking to be unconditionally released. On May 5, 2015 Justice Ross imposed extensive conditions on his release, which are subject to the same stay application as her original decision granting bail. Compliance with those conditions will afford Khadr a significant degree of support upon being released. I cannot conclude that the benefits of a "graduated" release via Corrections Canada cannot satisfactorily be replicated in this fashion.

[37] Relevant also is the fact that the United States allowed Khadr to be transferred to serve his sentence in Canada under the terms of an agreement in which they acknowledged that he might eventually receive parole from that sentence and, thus, be released from custody earlier than the final day of that sentence. This *Treaty* partner thus accepted the possibility of early release. The fact that early release was secured in a different legal form as a result of the bail decision will not result in a completely different consequence than that which was anticipated. In fact, his parole application will be heard next month, and could result in his release prior to this Crown appeal being argued even if the bail order is stayed by me.

[38] Balanced against all of this is the degree of harm Khadr will experience if the stay is granted. He has already been incarcerated for over twelve years for a crime committed while he was a young offender. If he had been sentenced as an adult for similar crimes committed while he was a young offender in Canada, the Crown advises me that the maximum duration of the sentence, which he would have served, was ten years' incarceration, four years of which would have been in open custody.

[39] More importantly, if his appeal is successful, and he is denied judicial interim release pending the Crown appeal in Canada, he will have served an additional period of incarceration for crimes of which he will then have been acquitted. The Crown has not challenged the expert opinion which sets his likelihood of success on this appeal as high, others in similar circumstances has successfully appealed.

[40] The Crown has the onus of proof that the balance of convenience favours imposing a stay of the order granting Khadr judicial interim release. I must determine whether it has established to the standard that the public will suffer will greater harm from refusal of the stay than Khadr will suffer from it being granted.

[41] I conclude that the Crown has not adequately established that the balance of convenience favours the public; it has not discharged its onus.

[42] The application is therefore dismissed. Subject to the terms imposed in Justice Ross's bail order, Mr. Khadr you are free to go.

[43] Arrangements have been made through the Edmonton Police Service to release Mr. Khadr at an undisclosed location for his own security. That release is to take place within the next two hours.

[44] Mr. Edney, I invite you to contact the Sheriff's office in this building or the Edmonton Police Service to find details of that location. Mr. Khadr will be taken there now, and I understand that staff from Bowden Institution has brought his personal possessions, so that they will be given to him at the same time as he is released.

Application heard on May 5, 2015

Reasons filed at Edmonton, Alberta
this 7th day of May, 2015

Bielby J.A.

Appearances:

B.F. Hughson / C.G. Regehr
for the Applicants (Appellants)

N.J. Whitling / D. Edney, Q.C.
for the Respondent (Respondent)