Federal Court  Cour fédérale

Date: 20090513

Docket: T-536-04

Citation: 2009 FC 497

Toronto, Ontario, May 13, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OMAR AHMED KHADR by his Next Friend
FATMAH EL-SAMHAH

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 for an order granting the plaintiff leave under Rule 75 to file an Amended Amended Statement of Claim. The principal object of the motion is to reintroduce a claim under section 12 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*"). A number of other non-controversial changes are proposed. The defendant consents to all of the proposed amendments except the section 12 claim.

[2] The action was initiated in March 2004 alleging breaches of sections 6, 7, 10(a), 10(b), 10(c), 11 and 12 of the *Charter*. In August 2004, the defendant brought a motion to strike the Statement of Claim arguing, in relation to the section 12 *Charter* claim, that it could not constitute a head of liability against the Crown in right of Canada as the alleged mistreatment or punishment occurred outside of Canada in a territory under the control of the government of the United States of America.

[3] At the hearing of the 2004 motion, counsel for the plaintiff acknowledged that they were not in possession of information to support a claim based on section 12. Accordingly, it was withdrawn and the Statement of Claim was amended: *Khadr v. Canada (Attorney General)*, 2004 FC 1394. At the time of this decision, the plaintiff and his counsel had never met as the plaintiff was being detained under strict conditions at the US military facility at Guantánamo Bay, Cuba, which did not permit confidential solicitor-client communications.

[4] On June 25, 2008, this Court released a decision ordering the disclosure of documents which confirmed that a Canadian official had been advised prior to interviewing the plaintiff in March of 2004 that he had been subjected to a sleep

deprivation regime known as the “frequent flyer program”: *Khadr v. Attorney General*, 2008 FC 807.

[5] At paragraph 88 of my reasons, I found that the regime was a breach of international human rights law respecting the treatment of detainees under the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 and the 1949 Geneva Conventions. I concluded that Canada became implicated in the violation of the plaintiff’s rights under those instruments when the Canadian official was provided with the information about the practice and chose to proceed with the interview.

[6] The plaintiff argues that the circumstances under which he was being held at Guantánamo precluded his counsel from obtaining the information from him to support a section 12 claim at that time. Moreover, while the information was in the possession of the defendant, the claims of privilege asserted by the defendant also prevented the plaintiff from obtaining the information until the June 2008 decision was issued. The plaintiff now wishes to add a claim that by interviewing him with knowledge that he had been subjected to the “frequent flyer program”, the Crown violated section 12 of the *Charter*.

[7] The defendant submits that nothing material has changed since the 2004 motion was dealt with. She contends that the plaintiff’s proposed new paragraph 4(j) merely particularizes the allegations of knowledge on the part of Canadian officials that the

plaintiff was mistreated by officials of the US government and that other proposed changes are merely descriptive. The defendant submits that the proposed amendments should not be allowed because they could not succeed at trial.

[8] The allegations in question would not support a claim under section 12, the defendant submits, as the mistreatment was under the control of US authorities: *R. v. Terry*, [1996] 2 S.C.R. 207. Even if section 12 could be said to have an application to the actions of Canadian officials interviewing the plaintiff following his mistreatment by the US military, those actions could not be said to amount to cruel and unusual treatment as contemplated by section 12: *United States of America v. Burns*, [2001] 1 S.C.R. 283; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. This action presently alleges a breach of section 7 of the *Charter*. The defendant submits that this is the appropriate provision under which to address questions of rights violations by other governments and their officials in which there may be links to Canadian actions: *Burns*, above, at paragraphs 55 and 57.

[9] There is no disagreement between the parties as to the test to determine whether to allow an amendment to the pleadings. The general rule, as set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, is that an amendment should be allowed at any stage of an action for determining the real questions in controversy provided it would not result in injustice to the other party which is not capable of being compensated for by an award of costs and the amendment would serve the interests of justice.

[10] In *Airth v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FC 1334, Mr. Justice Michael Phelan re-iterated this overarching liberal approach and cited paragraph 12 of the *Canderel* decision, which reads, in part:

> Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[11] On a motion for leave to amend, a party need not prove its case. Rather, the court must assume that the facts pleaded are true, and deny an amendment only in a plain and obvious case where the situation is beyond doubt: *Pembina County Water Resource District v. Manitoba*, 2008 FC 1390; *Dené Tha' First Nation v. Canada (Attorney General)*, 2008 FC 679.

[12] I note that my colleague Mr. Justice James O'Reilly recently discussed the participation of Canadian officials in the treatment of the plaintiff at Guantánamo in *Khadr v. Canada (Prime Minister)*, 2009 FC 405 and held the following at paragraph 83 of his reasons:

> The respondents emphasize the fact that the mistreatment of Mr. Khadr was carried out by non-Canadians. Under s. 7, "the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our Government, <u>if there is a sufficient causal connection between our Government's participation and the deprivation ultimately effected</u>" (*Suresh*, above, at para. 54). Here, <u>the necessary degree of participation is found in Canada's interrogation of Mr. Khadr knowing that he had been subjected to treatment that offended international human rights norms</u> to which Canada had specifically committed itself. [Emphasis added]

[13] Justice O'Reilly's comments make reference to the principles enunciated in *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, at paragraph 54. I also find paragraph 55 in *Suresh* instructive:

> We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. <u>There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security</u>. [Emphasis added]

[14] The comments quoted above apply to the question of whether section 7 of the *Charter* is implicated in relation to the actions of foreign governments and, as the defendant submits, a claim under that provision is already part of the action. The issues with respect to the application of section 12 of the *Charter* are different. This is not a case where the plaintiff was directly subjected to cruel and unusual treatment or punishment by Canadian officials. Nonetheless, the plaintiff may also be able to establish a sufficient causal connection between the actions of the Canadian officials and the treatment he experienced at the hands of the American military. The information disclosed last year was to the effect that he was subjected to sleep deprivation in preparation for the visit of the Canadian officials, to soften him up for their interrogation.

[15] While the question is not without doubt, it is not plain and obvious that a claim under section 12 in this matter is futile. Moreover, the defendant has not put forward any

argument that allowing the requested amendments would result in an injustice not capable of being compensated by an award of costs. Accordingly, I am satisfied that the amendments should be allowed.

ORDER

THIS COURT ORDERS that:

1. The plaintiff is granted leave to file an Amended Amended Statement of Claim in the form set out at Tab B to the plaintiff's motion record; and

2. The plaintiff is awarded his costs of this motion payable in any event of the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-536-04
STYLE OF CAUSE:	OMAR AHMED KHADR by his Next Friend FATMAH EL-SAMHAH v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

CONSIDERED AT TORONTO, ONTARIO, MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	May 13, 2009

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