

Federal Court



Cour fédérale

Date: 20100520

Docket: T-230-10

Citation: 2010 FC 560

Ottawa, Ontario, May 20, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

OMAR AHMED KHADR

Applicant

and

**THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS and
THE MINISTER OF JUSTICE**

Respondents

AND BETWEEN:

Docket: T-231-10

OMAR AHMED KHADR

Applicant

and

**THE PRIME MINISTER OF CANADA and
THE MINISTER OF FOREIGN AFFAIRS**

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicant has filed two applications for judicial review in court files T-230-10 and T-231-10 respectively.

[2] In these proceedings the Applicant seeks a) an order pursuant to sections 6, 7, 12 and 24 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) in the nature of a *certiorari* setting aside decisions of February 3 and 16, 2010 concerning the implementation by the Respondents of the Supreme Court of Canada’s decision in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3; b) an order pursuant to the same provisions of the *Charter* in the nature of a *mandamus* requiring the Respondents to demand the repatriation of the Applicant from the custody of U.S. Forces in Guantanamo Bay, Cuba; c) in the alternative an order directing the Respondents to reconsider their decisions of February 3 and 16, 2010 having first accorded the Applicant with a fair opportunity to be heard; and d) costs and such further or other relief as the Court deems to be just and appropriate.

[3] By decision dated April 9, 2010, Chief Justice Lutfy consolidated both applications and ordered that they be heard together on June 8, 2010 in Edmonton, Alberta. The Chief Justice also set out a calendar for these proceedings, notably requiring that cross-examinations on affidavits be completed by April 30, 2010, that the Applicant’s application record be served and filed by May 11, 2010 and that the Respondents’ application record be served and filed on or before May 31, 2010.

[4] By motion filed on May 10, 2010, the Applicant now seeks to file for the purposes of these applications an additional affidavit from Kobie Flowers sworn on May 3, 2010 and essentially pertaining to the use in an American judicial proceeding held on April 30, 2010 and May 1, 2010 of

video recordings of interviews of the Applicant conducted by Canadian government officials at Guantanamo on February 13, 14, 15, and 16, 2003.

[5] The Respondents object to this on the basis that the affidavit is of marginal or no relevance to the subject matters of the judicial review applications; and that admitting it into the record would delay the proceedings.

[6] I do not find the Respondents' objections compelling and shall consequently grant the Applicant's motion.

[7] Counsel for both parties agree that this motion is governed by the test set out in *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, [2002] F.C.J. No. 1112 (QL), at para. 5:

Applications for judicial review are summary proceedings that should be determined without undue delay. Consequently, the discretion of the Court to permit the filing of additional material should be exercised with great circumspection. Thus, in *Deigan v. Canada (Industry)*, [1999] F.C.J. No. 304 (Proth.), aff'd. [1999] F.C.J. No. 645 (T.D.), Prothonotary Hargrave said (at para. 3):

The new Federal Court Rules allow the filing of a supplementary affidavit and of a supplementary record, however such should only be allowed in limited instances and special circumstances, for to do otherwise would not be in the spirit of judicial review proceedings, which are designed to obtain quick relief through a summary procedure. While the general test for such supplementary material is whether the additional material will serve the interests of justice, will assist the Court and will not seriously prejudice the other side, it is also important that any supplementary affidavit and supplementary record neither deal with material which could have been made

available at an earlier date, nor unduly delay the proceedings.

[8] Much of the information contained in the affidavit of Kobie Flowers could not have been made available to the Applicant at an earlier date. Though the relevance of the information contained in that affidavit will be decided by the judge who shall hear and dispose of the applications for judicial review, this information appears *prima facie* to be relevant to the proceedings. I am also of the view that this information will assist the judge who will hear the applications and that it will serve the interests of justice if it is admitted into these proceedings.

[9] Moreover, I do not accept the argument that admitting this affidavit would seriously prejudice the Respondents. Indeed, the Respondents have been made aware of the contents of this affidavit since May 3, 2010 when a draft affidavit was submitted to their counsel, and their counsel has been provided with a copy of the sworn affidavit since at least May 7, 2010. In addition, in his order setting the timelines in these cases, the Chief Justice gave the Respondents 8 days to proceed to cross examination on the Applicant's affidavits, and I will accordingly give the Respondents a similar delay to proceed to the cross-examination of Kobie Flowers. This will not however affect the other timelines set out in the order from the Chief Justice.

[10] On a final matter, the Applicant submitted a supplementary affidavit with his reply in this motion. Though supplementary affidavits are not normally submitted in reply, I will exceptionally accept this affidavit for the sole purposes of this motion record in light of the fact that it simply

refers to an email exchange which could and should have been part of the Respondents' motion record.

ORDER

THIS COURT ORDERS that:

1. The supplementary affidavit of Candice Cherkowski sworn May 17, 2010 is allowed for filing with the Applicant's reply in this motion;
2. The affidavit of Kobie Flowers sworn May 3, 2010 is allowed for filing with the Applicant's application record and shall be formally served forthwith on the Respondents;
3. Cross-examination on the affidavit of Kobie Flowers shall be completed on or before May 28, 2010, and may be conducted by video-conference if necessary;
4. Costs on this motion shall follow the cause.

"Robert M. Mainville"

Judge