Federal Court of Appeal | Cour d'appel fédérale

Date: 20230531

Docket: A-32-23

Citation: 2023 FCA 120

CORAM: **STRATAS J.A.**
WEBB J.A.
MONAGHAN J.A.

BETWEEN:

HIS MAJESTY THE KING AND THE MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Appellants

and

BOLOH 1(a), BOLOH 2(a) male only, BOLOH 12, and BOLOH 13

Respondents

Heard at Toronto, Ontario, on March 27, 2023.

Judgment delivered at Ottawa, Ontario, on May 31, 2023.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: WEBB J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The Federal Court (*per* Brown J.) required the Government of Canada, specifically the appellants, to take steps to cause the respondents, four Canadian citizens currently detained in northeastern Syria in abysmal, deplorable conditions, to be returned to Canada: 2023 FC 98.

[2] The facts giving rise to this can be briefly stated.

[3] Northeastern Syria is a chaotic war zone: its conditions are ever-changing, dangerous, and violent to all concerned: Reasons of the Federal Court at paras. 10, 152, 160 and 173. It is controlled by the Autonomous Administration of North and East Syria, a non-state entity. It does not consider itself bound by international conventions or treaties concerning human rights, international relations or the safe passage of diplomats.

[4] For a number of years now, the Autonomous Administration of North and East Syria has held the respondents in prisons run by its military wing, the Syrian Democratic Forces. The Autonomous Administration of North and East Syria suspects that the respondents fought for or assisted fighters for Daesh or the Islamic State of Iraq and Syria, otherwise known as ISIS: Reasons of the Federal Court at paras. 2 and 7-9. ISIS is a fundamentalist, extremist and militant group known worldwide for beheadings, atrocities and terrorism.

[5] The Government of Canada is not any way complicit in the respondents' presence in Syria or their detention in prison: Reasons of the Federal Court at para. 176. Quite the opposite. From 2011, the Government of Canada has been warning its citizens not to enter Syria due to a brutal civil war that has caused instability, violence and bloodshed: Reasons of the Federal Court at para. 4. Further, the Government of Canada has warned its citizens that if they get into trouble in Syria, it will not be able to assist: Reasons of the Federal Court at para. 6. Since 2012, Canada's embassy has been closed.

[6] Nevertheless, the respondents entered Syria, made their way to northeastern Syria, did whatever they did there, and eventually were detained in a prison controlled by the Autonomous Administration of North and East Syria: Reasons of the Federal Court, at paras. 4-5.

[7] Recently, the Autonomous Administration of North and East Syria has been encouraging foreign states to repatriate their nationals from its prisons and from certain camps. On its own accord, the Government of Canada has successfully repatriated some of its citizens from camps.

[8] But in every case of potential repatriation, certain challenges must be overcome. For one thing, the criteria and arrangements for the handover of detainees are not known with certainty or particularity: Reasons of the Federal Court at paras. 45-47. The criteria and arrangements must be specifically negotiated with the Autonomous Administration of North and East Syria. The criteria and arrangements it proposes might not be ones that the Government of Canada can practically or legally accept.

[9] At a high level, some of the criteria and arrangements are already known. Officials of the Government of Canada or delegates for whom it is responsible will have to travel through the dangerous territory of northeastern Syria to the place where the respondents are to be handed over: Reasons of the Federal Court at paras. 43-45. There they will receive the respondents, sign whatever documents they must sign, and then travel again through the dangerous territory of northeastern Syria.

[10] In response to this Court's questioning during oral argument of this appeal, one of the counsel for the respondents fairly admitted that the situation in northeastern Syria is "very difficult" and has "been described as a war zone", "the record is replete with all kinds of potential issues and problems and risks that may result [to] a Canadian representative" sent there, and the Autonomous Administration of North and East Syria cannot "guarantee the safety of whoever is in their territory". The evidentiary record supports these statements.

[11] In these circumstances, the respondents say that, as a matter of law and the Charter of Rights and Freedoms, the Government of Canada must take positive steps to cause them to be returned to Canada from this dangerous, unstable war zone. The primary basis for this is subsection 6(1) of the Charter: the right of Canadian citizens "to enter…Canada".

[12] The Federal Court agreed with the respondents. It took the right of Canadian citizens "to enter…Canada" and transformed it into a right of Canadian citizens, wherever they might be, regardless of their conduct abroad, to return to Canada or to have their government take steps to rescue them and return them to Canada: see Reasons of the Federal Court at paras. 105-112, 115, 117, 119, 121-122, 125, 128, 132, 136, 145, 149-150, 155-156, 158, 160-162, 173, and 176. The Federal Court required the Government of Canada to take steps to cause the return of the respondents—who acted against government warnings in circumstances where government did nothing to cause their plight—in the face of challenging issues of planning, logistics, diplomacy, international relations, national security and personal safety.

[13] The subsection 6(1) Charter right is not that broad. This Court must intervene. For the following reasons, I would allow the appeal and set aside the judgment of the Federal Court and, giving the judgment the Federal Court should have given, I would dismiss the respondents' application for judicial review.

B. Analysis

(1) The proper interpretation of subsection 6(1) of the Charter

[14] To interpret subsection 6(1) of the Charter properly, we must first examine a wider, more general question: what is the proper approach to interpreting the Charter?

[15] Then we must examine the specific jurisprudence that has interpreted subsection 6(1) of the Charter under that approach.

(a) The proper approach to Charter interpretation

[16] Soon after the Charter came into force, the Supreme Court told us how to interpret Charter rights and freedoms.

[17] Early in our analysis, we must examine the text of Charter rights and freedoms—words that can be changed only by following specific provisions of the *Constitution Act, 1982*. But the

words, properly construed, are only one consideration: other considerations come to bear and can shape the interpretation in significant ways.

[18] The Supreme Court's classic statement on this is as follows:

> …[T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

(*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 at 344 S.C.R.)

[19] For the first two decades under the Charter, the Supreme Court consistently followed the *Big M* approach. That made sense. Except in the rarest, most justified circumstances, once the Supreme Court lays down the law, that law must be obeyed by all—even by the Supreme Court itself: *R. v. Salituro*, [1991] 3 S.C.R. 654, 68 C.C.C. (3d) 289; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489. This is especially the case for foundational jurisprudence that has been around for decades, like *Big M*.

[20] But starting around the turn of this century, the Supreme Court began toying with a looser approach, one that has now been discredited and rejected. Under that approach, well-described in the majority reasons of *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, 451 D.L.R. (4th) 367, the text was not so much a constraint or an expression of the meaning of constitutional provisions. Rather, it was a cue, prompt or springboard for the Court to fashion a much broader underlying feel, spirit or vibe to widen the scope of the provisions. As a result, sometimes new unwritten constitutional rights, far removed from the constitutional text, were "discovered": see, *e.g.*, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31 (broad right of access to courts found under the Attorney General's judicial appointment power); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (extremely expansive overbreadth doctrine developed under section 7). Unsurprisingly, under this looser approach, the Supreme Court began to strike down or circumvent some decades-old binding precedents, with doctrinal inconsistency the result. See *e.g.*, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; see also the examples during this time of doctrinal inconsistency listed in *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 at paras. 91-95.

[21] In 2020, the *Big M* approach and the looser approach met for a showdown. The case of *9147-0732 Québec Inc.*, above was the battlefield. The *Big M* approach won.

[22] For good measure, soon afterward, a majority of the Supreme Court doubled down on this, reaffirming the proper role of text in constitutional interpretation: *Toronto (City) v. Ontario*

(Attorney General), 2021 SCC 34, 462 D.L.R. (4th) 1. Now no doubt remains. And given the doctrine of precedent that binds all, including the Supreme Court, no doubt can remain. The matter has been settled once and for all. We must interpret the Charter following the *Big M* approach.

[23] Gone is inspiration from some vague feel, spirit or vibe, things that are in the eye of the beholder. In its place is a rigorous, objective and disciplined judicial task guided by the words of the Constitution itself viewed in light of their historical context, the larger objects of the Constitution, and, where applicable, the meaning and purpose of associated provisions in the Constitution. After all, "if [our] job is to enforce the Constitution, then the Constitution is what [we] should be enforcing, not whatever might happen to strike [us] as a good idea at the time": John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 12.

[24] The Supreme Court's recent, dual approval of the *Big M* approach has brought us more doctrinal stability under the Charter, at least in the area of civil cases. This is welcome. Stability furthers the separation of powers between the judiciary and other branches of government: it keeps the judiciary in a predictable, appropriate lane. Stability brings us certainty, predictability, and freedom: it gives us consistent jurisprudence about what governments can and cannot do and about what they can be required to do. Stability bolsters the rule of law and increases confidence in the legal system. The people we serve deserve to be governed by lasting legal doctrine carefully shaped and sculpted over the years by many—not by the personal diktat of whoever happens to sit in a particular judicial chair at a particular moment of time.

[25] So faced with a Charter question, how do we proceed? Under the *Big M* approach, early on we must examine the text of the Charter right or freedom: *9147-0732 Québec Inc*. at paras. 8-9, citing *British Columbia (Attorney General) v. Canada (Attorney General),* [1994] 2 S.C.R. 41, 114 D.L.R. (4th) 193 (the *Vancouver Island Railway* case), *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566 at para. 32 and *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511 at paras. 36-37. The rule of law "requires that courts give effect to the Constitution's text": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 67. The text has "primordial significance", supplies the "outer bounds" to any examination of the underlying purpose of the provision, prevents the Court from adopting an interpretation that "overshoots…the actual purpose of the right" and is "a foundation and a touchstone for the exercise of constitutional judicial review": *Big M* at p. 344; *9147-0732 Québec Inc*. at para. 10; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144 at paras. 21 and 126; *Caron* at para. 36; *Vancouver Island Railway* at 88; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236 at paras. 17-18 and 40; *Toronto (City)* at para. 14; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 53.

[26] But we do not stop with the text. That would be pure textualism—the delegation of our judicial task to find the authentic meaning of a constitutional guarantee to a dictionary. Rather, as mentioned above, we must look for "the scope and purpose of the right" or freedom in question by looking to "the [philosophical and] historical context [of the right or freedom], the larger objects of the Charter, and, where applicable, the meaning and purpose of associated Charter rights": *9147-0732 Québec Inc*. at paras. 7 and 13, citing the classic passage from *Big M*, above. In some cases, an important part of the task is to "[interpret] the text in a way that is true to the

theories on which the text is based", and an analysis of the structure of the Constitution can shed light on this: Hon. Malcolm Rowe and Manish Oza, "Structural Analysis and the Canadian Constitution" (2023) 101 Can. Bar Rev. 205 at 222, citing Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67 S.C.L.R. 221 at 236.

[27] In short, although in some cases specific text might take us far, it does not necessarily take us all the way down the road to the final destination. But often it can supply essential guardrails and signposts guiding our way and keeping us on track.

[28] Under the *Big M* approach, where do international and foreign law fit in? They can play a role in Charter interpretation, sometimes significant, by supporting or confirming the result reached by purposive interpretation under the *Big M* approach: *9147-0732 Québec Inc*. at paras. 19-47. As well, some Charter guarantees—and as we shall see, subsection 6(1) of the Charter is one such guarantee—were modelled after provisions in international law instruments. Thus, international jurisprudence under those provisions can often play an important role in the interpretive process.

[29] But international law and foreign law do not displace or supplement the *Big M* approach. They have a defined, limited role, not the sprawling, undisciplined role they had under the looser approach: see *9147-0732 Québec Inc*, and, in particular, the comments in the majority opinion about the dissenting opinion's misuse of international law. When we interpret the Charter, international law and foreign law are not "a series of tasty plates on a buffet table from which we

can take whatever we like and eat whatever we please": *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at para. 26. As well, different sources of international law have different value in the interpretive process: see generally *9147-0732 Québec Inc.* at paras. 29-38.

(b) Applying the proper interpretive approach: subsection 6(1) of the Charter and specific jurisprudence

[30] The interpretation of subsection 6(1) of the Charter offered by the respondents requires the Government of Canada to take positive, even risky action, including action abroad, to facilitate the respondents' right to enter Canada. In the context of this case, this transforms the right "to enter…Canada" into a right to be returned to Canada.

[31] This smacks of the looser approach of interpreting Charter provisions, now discredited and rejected. In this case, the respondents acknowledge the existence of the text of subsection 6(1), but then pluck broad words about its underlying purposes from certain isolated paragraphs in certain Supreme Court cases, ignoring the Supreme Court's more specific observations and conclusions in those cases, and ignoring the specific text of the subsection 6(1) right. In the end, all that is left are the broad words ripped from their context and presented in the abstract. The result? Subsection 6(1) of the Charter is given a meaning that overshoots its proper scope.

[32] We must reject that approach. Instead, we must apply the *Big M* approach. Under the *Big M* approach, we keep front of mind the words of the Charter guarantee—the essential guardrails and signposts guiding our way and keeping us on track—while we examine, among other things, the purposes of the Charter and the purposes of the subsection 6(1) guarantee itself.

[33] The text of subsection 6(1) of the Charter is as follows: "[e]very citizen of Canada has the right to enter, remain in and leave Canada". In this case, the key words are "right to enter…Canada". The words appear to be carefully chosen, specific and clear: self-evidently, a right to enter Canada is not a right to be returned to Canada.

[34] Following the *Big M* approach, we must look at the historical context, the larger objects of the Charter, the meaning and purpose of any associated Charter rights, and the purpose of the particular guarantee.

[35] In the case of subsection 6(1) of the Charter, the Supreme Court has done this work for us: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157. The Supreme Court's words in these cases bind us. To the extent the Supreme Court has not yet spoken on an issue, our own jurisprudence binds us as well: *R. v. Sullivan*, 2022 SCC 19, 472 D.L.R. (4th) 521; *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149; Hon. Malcolm Rowe and Leanna Katz, "A Practical Guide to *Stare Decisis*", (2020), Windsor Rev. Legal Soc. Issues 1. Both the Supreme Court and the Federal Courts have developed their jurisprudence under subsection 6(1) following the accepted approach in *Big M*.

[36] In *Cotroni*, the Supreme Court analyzed the text of subsection 6(1) in light of the wider *Big M* considerations set out above. From that analysis, it concluded (at 1482) that the "central thrust" of subsection 6(1) is "against exile and banishment, the purpose of which is the exclusion of membership in the national community". This implies that subsection 6(1) is aimed at state

action that removes people from Canada or prevents their return, or both. The Supreme Court's analysis in *Cotroni* offers no encouragement for the idea that subsection 6(1) includes a right to be returned to Canada.

[37] Indeed, *Cotroni* found (at 1481) that extradition—the sending of a person already present in Canada to a foreign nation to face justice there—was only at the "outer edges of the core values sought to be protected" by subsection 6(1). What about an obligation on the Government of Canada to take positive actions, some of which expose its officials to personal danger, in order to bring back to Canada a person detained in a territory controlled by a non-state entity? Surely that falls outside the "outer edges" of subsection 6(1).

[38] In *Divito*, the Supreme Court further interpreted subsection 6(1) of the Charter and its right to enter Canada. It held that article 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 lay behind section 6 of the Charter and was essential to its interpretation.

[39] The Supreme Court noted that article 12(4) provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In analyzing subsection 6(1), the majority of the Supreme Court found that few if any limitations on the right to enter would be considered reasonable. It found this interpretation bolstered by certain contextual factors. For example, section 6(1) is unqualified. This is unlike subsection 6(2), which is qualified by subsections 6(3) and 6(4). Further, subsection 6(1) is not subject to the override provision in section 33. See

Divito at para. 28, citing *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 at para. 11.

[40] But, importantly for present purposes, the Supreme Court limited subsection 6(1) of the Charter to a right to enter Canada, nothing more. The Supreme Court did not extend subsection 6(1) to include a right of Canadian citizens to have the Government of Canada return them to Canada.

[41] In particular, in *Divito* (at paras. 45 and 48), the Supreme Court held that an inmate in a prison in the United States could not rely on subsection 6(1) of the Charter to force the Government of Canada to take steps to return him to a prison in Canada. The inmate's right to return to Canada was governed only by an international treaty and domestic implementing legislation. The Supreme Court emphasized that the ability of a Canadian citizen to leave a foreign territory is governed by the authority and power of the foreign state or entity with control over that territory: *Divito* at paras. 40 and 48.

[42] In its wording and in the concepts it deployed, the Supreme Court in *Divito* was consistent with *Cotroni*. Indeed, the best reading of *Divito* is that the Supreme Court embraced what it said earlier in *Cotroni*, telling us again what subsection 6(1) of the Charter is about and, importantly for the case at bar, what subsection 6(1) of the Charter is not about.

[43] The Supreme Court's holdings in *Divito* and *Controni* bind us. And they make sense. For one thing, the Charter governs matters within the control of governments in Canada: Charter,

section 32. Reading subsection 6(1) of the Charter as including an enforceable constitutional obligation on the Government of Canada to take steps in other countries to rescue and repatriate citizens in trouble, where they alone are responsible for their trouble, greatly overshoots the mark. As the Government of Canada puts it:

> The right to enter set out in s. 6(1) has a clear link to matters under the exclusive jurisdiction of Canada: namely control over who comes into the country by passing through the border. In contrast, the process of returning to Canada from abroad is inherently transnational and multi-jurisdictional. Returning to Canada, especially for citizens detained abroad, is a multi-step process including matters outside of Canada's territory, jurisdiction and control.

(Government of Canada's memorandum of fact and law at para. 31.)

[44] Can the Government of Canada voluntarily try, through diplomacy or other means, to help a citizen in distress abroad? Of course it can. But, as a matter of constitutional law, does it have to? Of course not. Subsection 6(1) of the Charter, the right to enter, remain in and leave Canada, is not a golden ticket for Canadian citizens abroad to force their government to take steps—even risky, dangerous steps—so they can escape the consequences of their actions.

[45] The respondents submit that two authorities in the Federal Courts system support their position: *Kamel v. Canada (Attorney General)*, 2009 FCA 21, [2009] 4 F.C.R. 449; *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267.

[46] *Kamel* and *Abdelrazik* do not help the respondents. They address a failure by the Government of Canada to issue a travel document without reasonable justification—a relatively

easy, administrative step required by law and entirely within the control of Canada, the only step preventing entry into Canada.

[47] These authorities do not stand for the broader proposition that, as this Court put it in *Kamel* in summarizing a party's submission (at para. 17), the Government of Canada must act "to guarantee entry to or exit from another country". Indeed, in *Abdelrazik*, the Federal Court expressly rejected the submission that Canada's failure to take extraordinary measures to repatriate a citizen, such as arranging for a military jet to take the citizen home, infringed the citizen's rights under subsection 6(1) of the Charter.

[48] The respondents also submit that international law supports their position. It does not. As mentioned in paragraphs 38-39 above, subsection 6(1) of the Charter is modelled upon article 12(4) of the *International Covenant on Civil and Political Rights*. Article 12(4) provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country". Textually, this provision does not give people the right to be returned to their country of citizenship. And case law under article 12(4) confirms the interpretation the Supreme Court has adopted in *Cotroni* and *Divito* concerning subsection 6(1) of the Charter: *Case of H.F. and Others v. France*, Application Nos. 24384/19 and 44234/20, Decision of the Grand Chamber of the European Court of Human Rights (14 September 2022), especially at paras. 201, 250-252, 259, 261 and 272-276; see also *C.B. v. Germany* (no. 22012/93, Commission decision of 11 January 1994, unreported). *H.F.* tells us that article 12(4) prohibits state actions that arbitrarily prevent citizens from entering their country of citizenship and does not extend to a right to be returned to their

country of citizenship. The parties have not placed before this Court any international authorities that conflict with *H.F.*, nor has this Court found any.

[49] The Federal Court relied on a letter from the UN Special Rapporteur as support for its imposition of positive obligations upon the Government of Canada under subsection 6(1) of the Charter. The letter does support the Federal Court's view. But, as we have seen, *H.F.*, a decision of the European Court of Human Rights, says the opposite, in highly detailed, persuasive reasoning.

[50] Different international authorities are of different value, and, in particular, international court decisions in adjudicative contexts, such as *H.F.*, deserve far more weight than the non-adjudicative individual opinions of other international actors, such as the letter from the UN Special Rapporteur relied upon by the Federal Court: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 142-144, 147-148. International law is not a box of chocolates from which one can take what one wants, leaving the rest in the box. Instead, international law is a specialized field calling for discipline, intellectual rigour and careful judgment when applying it to domestic issues: *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, 471 D.L.R. (4th) 391 at paras. 43-48, largely affirming *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at paras. 76-92.

[51] The Federal Court did not cite the decision of the European Court of Human Rights in *H.F.*, above. But *H.F.* is relevant. It concerns article 12(4) of the *International Covenant on Civil and Political Rights*, which was very much the inspiration behind subsection 6(1) of the Charter. It rejects the existence of a right to be returned from abroad to one's country of citizenship. It strongly confirms the interpretation of subsection 6(1) of the Charter reached by the Supreme Court in *Cotroni* and *Divito*.

(c) Application of these principles to this case

[52] From the foregoing, it is evident that the Federal Court had no basis under subsection 6(1) of the Charter to make the judgment it did. In such a circumstance, this Court has to intervene, set aside the judgment, and give the judgment the Federal Court should have given.

(2) Additional issues

[53] In their written submissions, the respondents offer a number of brief submissions on sections 7, 9, 12 and 15 of the Charter. They did not expand upon them in oral argument. In substance, these submissions amount to the same thing: an attempt to rewrite the "right to enter…Canada" in subsection 6(1) of the Charter in order to make it broader.

[54] If sections 7, 9, 12 and 15 of the Charter were given the scope the respondents give them here, subsection 6(1) of the Charter would be paved over: it would become completely redundant. Provisions in the Constitution cannot be interpreted and applied to amend, modify or

nullify other provisions in the Constitution: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 24; *Adler v. Ontario*, [1996] 3 S.C.R. 609, (1996), 140 D.L.R. (4th) 385; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238 at para. 14. Subsection 6(1), a specifically worded right meant to govern this sort of circumstance, applies in this case and is not overborne by other, more broadly worded, general rights.

[55] In any event, the Charter and all of the sections the respondents invoke do not apply. Canadian state conduct did not lead to the respondents being in northeastern Syria, did not prevent them from entering Canada, and did not cause or continue their plight. The respondents' own conduct and persons abroad who have control over them alone are responsible. In no way is the Government of Canada infringing the respondents' right to liberty nor on these facts is it violating a principle of fundamental justice (section 7), arbitrarily detaining the respondents (section 9), inflicting cruel and unusual punishment on them (section 12) or discriminating against them (section 15). To the extent these rights are being infringed, entities other than the Government of Canada are responsible.

[56] Further, the application of the Charter in this case would be extraterritorial and invalid. True, sometimes the Charter can apply to circumstances outside of Canada: see *e.g.*, *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. But for that to happen, there must be some action or involvement by the Government of Canada to attract the application of the Charter. In particular, there must be either evidence of "Canadian participation in a process that violates Canada's international law obligations" or "consent by the foreign state to the

application of Canadian law": *R. v. McGregor*, 2023 SCC 4 at para. 18; see also *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 51-52 and 101 and *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 at paras. 18-19. Neither is present here.

[57] As the Federal Court found, there is no evidence of Canadian participation or contribution to the respondents' plight. A foreign state has not consented to the application of Canadian law. Instead, the respondents' plight stems from foreign causes and the actions or omissions of the Autonomous Administration of North and East Syria, the Syrian Democratic Forces, or both. Thus, in this case, the Charter does not apply.

[58] For the benefit of future cases, the remedy granted by the Federal Court deserves comment. Here too, the Federal Court erred in law.

[59] The Federal Court said it was granting declarations. The relevant portions of its judgment are as follows:

> 2. It is hereby declared that the Applicants are entitled as soon as reasonably possible to the Respondents making formal requests to [the Autonomous Administration of North and East Syria] that [the Autonomous Administration of North and East Syria] allow the voluntary repatriation of the Canadian men held in the prisons run by [the Autonomous Administration of North and East Syria's] military wing the [Syrian Democratic Forces].
>
> 3. It is hereby declared that the Applicants are entitled to be provided by the Respondents with passports or emergency travel documents as soon as they are required after [the Autonomous Administration of North and East Syria] agrees to allow the Applicants to be repatriated to Canada.
>
> 4. It is hereby declared that the Applicants are entitled [to] appointment by the Respondents of a representative(s) or delegates(s) to attend within [the Autonomous Administration of North and East Syria] controlled territory or as

> otherwise agreed as soon as possible after [the Autonomous Administration of North and East Syria] agrees to hand over the Applicants for the repatriation to Canada.

[60] Declarations are supposed to be declarations of rights held by those seeking them. But, in reality, what the Federal Court awarded were not declarations. They were disguised mandatory orders or disguised *mandamus* remedies against the Government of Canada.

[61] The established legal prerequisites for administrative law remedies cannot be avoided simply by applying a different label to the remedy, such as "declaration": *Schmidt* at paras. 21-22; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737. Instead, the court must determine the essential character and real essence of the remedy being sought: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50. Once that is done, the court must first identify the legal prerequisites for it. Only then can it decide whether it is able to grant the remedy and, if so, whether it should.

[62] The essential character and real essence of the remedy the Federal Court awarded was the imposition of mandatory obligations upon the Government of Canada, something akin to *mandamus*. The Federal Court said that the Government of Canada "must make a formal request" for the repatriation of the respondents (at para. 155), must provide appropriate travel documents to the respondents (at para. 145) and "must appoint" a delegate or a Government of Canada official to travel to Syria to deal with the handover of the respondents (at para. 161). These matters had to be done "as soon as reasonably possible" (at para. 160), meaning forthwith.

[63] However, mandatory obligations or *mandamus* cannot be imposed without first determining whether their exacting legal prerequisites are met: for a statement of these prerequisites, see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93 at para. 14, citing, among other authorities, *Apotex v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100, 29 Admin LR (2d) 1, aff'g [1994] 1 F.C. 742, 18 Admin LR (2d) 122 (C.A.) at 767-768 F.C. Here, the prerequisites were not met.

[64] Further, in granting mandatory remedies in this area, courts must proceed with caution. The Government of Canada is entitled to consider possible dangers and other considerations such as foreign relations, international affairs and national security, and their judgments on such matters deserve a wide margin of appreciation and deference: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 56; ***Khadr (2010)*** at para. 37.

[65] In deciding cases, judges are restricted to the evidence supplied by self-interested parties and have a deep knowledge of law but little else at their disposal. In the sort of ever-evolving, sensitive and complex context we have here, are judges well placed to easily substitute their opinion for that of the Government of Canada, given the foreign information and intelligence, knowledge, and experience and expertise in foreign relations and international affairs it has? Of course not.

[66] Courts must appropriately defer to the executive when it acts on matters quintessentially and uniquely within its ken: *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11 at para. 25; *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101 at para. 49;

Re:Sound v. Canadian Association of Broadcasters, 2017 FCA 138, 148 C.P.R. (4th) 91 at para. 49; *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, 422 D.L.R. (4th) 112 at para. 100; *Hupacasath First Nation* at paras. 66-67, citing numerous cases from the Supreme Court. Sensitive issues of foreign relations and international affairs are just such a matter: *Portnov v. Canada (Attorney General)*, 2021 FCA 171, 461 D.L.R. (4th) 130 at para. 44; *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 7 D.L.R. (4th) 95 at 522-523 S.C.R.; *Spencer v. The Queen*, [1985] 2 S.C.R. 278, 21 D.L.R. (4th) 756; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

[67] The Government of Canada correctly submits that the Federal Court accorded insufficient deference in this case:

> The Court directed Canada to undertake what can only be understood as diplomatic negotiations with [the Autonomous Administration of North and East Syria], a foreign non-state actor, and to travel to a foreign territory, without the relevant foreign State's consent as normally required, to effect the repatriation of the detained Respondents as soon as possible after [the Autonomous Administration of North and East Syria] agrees to release them. This decision leaves the Government little flexibility or control over important matters of high policy.

(Government of Canada's memorandum of fact and law at para. 82.) In the words of the Supreme Court in *Khadr (2010)* (at para. 39), the Federal Court gave "too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests".

[68] To the extent that the Court's declaratory remedy was not just a *mandamus* order but was intended to be made under subsection 24(1) of the Charter as an "appropriate and just" remedy, many of the same considerations apply. For example, remedies under subsection 24(1) of the Charter must be granted with due respect for the proper roles of the judiciary and the executive, and the legal and practical limits of the judicial role: *Doucet-Boudreau* at paras 56-57.

[69] Finally, this Court called for supplementary written submissions on the issue whether the Government of Canada might have a positive obligation to take steps to facilitate the respondents' subsection 6(1) rights to enter Canada, following the framework supplied in cases such as *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 and *Toronto (City)*, above. The Court has received the parties' supplementary submissions and has read and considered them.

[70] Given the interpretation of subsection 6(1) of the Charter, set out above, imposing a positive obligation on the Government of Canada would rewrite the text of subsection 6(1) and extend it beyond its proper scope. Subsection 6(1), properly interpreted, gives Canadian citizens a right to enter, remain in and leave Canada, nothing more. Imposing a positive obligation would transform subsection 6(1) from its genuine meaning—just a right to enter Canada—into a sweeping right of Canadian citizens to have the Government of Canada take all necessary steps to return them to Canada. Such a right would have potentially limitless scope. It would cover cases ranging from the repatriation of someone detained abroad for whatever reason, including the alleged violation of foreign law in a foreign land, to the payment of ransom to foreigners

holding a Canadian citizen hostage. A right of that scope could potentially collide with international law understandings of state sovereignty.

[71] For good measure, the reasoning in subsection 6(1) cases such as *Cotroni*, *Divito*, *Kamel* and *Abdelrazik*, above, precludes imposing positive obligations on government to facilitate the right to enter Canada. The only recognized circumstance is the issuance of a passport or travel document in *Kamel* and *Abdelrazik*, the failure of which was taken to be government action preventing the right to enter Canada.

[72] Finally, courts normally impose positive obligations on government to assist in the exercise of a right or freedom where government itself is responsible for the inability to exercise a fundamental freedom: *Dunmore*, above; *Baier*, above at paras. 29-30; *Toronto (City)*, above at para. 23; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at para. 37. In this case, the Government of Canada is not responsible for the respondents' inability to enter Canada: here, the responsibility lies with the Autonomous Administration of North and East Syria, the Syrian Democratic Forces, the respondents themselves who entered Syria against the Government of Canada's advice, or any combination of them.

C. This Court's stay of the Federal Court's judgment and developments since

[73] By Order dated March 14, 2023, this Court stayed the Federal Court's judgment. However, it required that the Government of Canada "continue to take steps in furtherance of paragraph 2 of the Federal Court's [judgment] unless and until the appellants determine that

taking a particular further step would be detrimental, as determined by the appellants acting in good faith, to the respondents".

[74] In previous correspondence, the Government of Canada has advised that it has been taking such steps. However, by letter dated May 12, 2023, the Government of Canada stated that "Canada has determined in good faith that taking further steps at this time to request the voluntary repatriation of the respondents would be detrimental to them".

[75] By letter dated May 16, 2023, the respondents asked the Government of Canada to disclose its information and reasoning supporting that determination.

[76] No motion has been brought. Thus, we need not decide this dispute. In any event, this will soon be moot. The Federal Court's judgment, including the requirements of paragraph 2 of the judgment, will be set aside when this Court issues its judgment allowing the appeal.

[77] The respondents' May 16, 2023 letter also enclosed an affidavit from a former senior official of Amnesty International. In this affidavit, he says that he and a delegation of "parliamentarians, former diplomats, human rights experts and lawyers" will travel to northeastern Syria and will visit the prison in which the respondents are being held. There they will try to secure the release of the respondents. Exactly what is to happen if they succeed is unknown: for one thing, the record suggests that security assessments of the respondents will have to be conducted and, perhaps, measures will have to be put in place before they can transit other countries and enter Canada.

[78] The delegation is free to evaluate the risks and do as it pleases. But this does not change the outcome of this appeal. The Government of Canada is not constitutionally obligated or otherwise obligated at law to repatriate the respondents.

D. Postscript

[79] In a number of other cases, the Government of Canada has surmounted the practical and legal obstacles and has successfully repatriated Canadian citizens from camps in northeastern Syria.

[80] As mentioned, these reasons stand for the proposition that the Government of Canada is not constitutionally obligated or otherwise obligated at law to repatriate the respondents. However, these reasons should not be taken to discourage the Government of Canada from making efforts on its own to bring about that result.

E. Proposed disposition

[81] For the foregoing reasons, I would allow the Government of Canada's appeal, set aside the Federal Court's judgment and, giving the order the Federal Court should have given, dismiss

the respondents' application. Given the circumstances, I would not award costs against the respondents.

"David Stratas"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-32-23

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HENRY S. BROWN DATED JANUARY 20, 2023, NO. T-1483-21

STYLE OF CAUSE:	*HIS MAJESTY THE KING et al. v. BOLOH 1(a) et al.*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 27, 2023
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A. MONAGHAN J.A.
DATED:	MAY 31, 2023

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