CITATION: United States of America v. Khadr, 2011 ONCA 358

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COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe and Cronk JJ.A.

BETWEEN

The Attorney General of Canada on Behalf of The United States of America

Appellant

and

Abdullah Khadr

Respondent

Richard Kramer and Matthew Sullivan, for the appellant

Dennis Edney and Nathan J. Whitling, for the respondent

Heard: April 8, 2011

On appeal from the stay of extradition proceedings of Justice Christopher M. Speyer of the Superior Court of Justice dated August 4, 2010, with reasons reported at (2010), 258 C.C.C. (3d) 231.

Sharpe J.A.:

[1] This appeal raises fundamental issues concerning the appropriate judicial response to a violation of the human rights of an individual sought for extradition on terrorism charges. The United States of America paid the Pakistani intelligence agency, the Inter-Services Intelligence Directorate (the "ISI"), half a million dollars to abduct Abdullah Khadr in Islamabad, Pakistan in 2004. Khadr, a Canadian citizen, was suspected of supplying weapons to Al Qaeda forces in Pakistan and Afghanistan. Following his abduction, Khadr was secretly held in detention for fourteen months. He was beaten until he cooperated with the ISI, who interrogated him for intelligence purposes. The ISI refused to deal with the Canadian government but did have contact with a

CSIS official. The American authorities discouraged the CSIS official's request that Khadr be granted consular access, and the ISI denied access for three months. The ISI refused to bring Khadr before the Pakistani courts. After the ISI had exhausted Khadr as a source of anti-terrorism intelligence, it was prepared to release him. The Americans insisted that the ISI hold Khadr for a further six months in secret detention, to permit the United States to conduct a criminal investigation and start the process for Khadr's possible rendition to the United States. When Khadr was finally repatriated to Canada, the United States sought to have him extradited on terrorism charges.

[2] The Superior Court judge who conducted the extradition committal hearing concluded, at para. 150, that "the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable". The judge granted a stay of proceedings on the basis that to permit the proceedings to continue in the face of the requesting state's misconduct would constitute an abuse of the judicial process.

[3] On behalf of the United States, the Attorney General of Canada appeals to this court, arguing that the extradition judge had no jurisdiction to grant a stay, and that even if he did, this case did not qualify as "the clearest of cases" warranting a stay.

[4] I would dismiss the appeal. There is no appeal against the extradition judge's finding that the human rights violations were shocking and unjustifiable. Because of the requesting state's misconduct, proceeding with

the extradition committal hearing threatened the court's integrity. Responding to that threat was a judicial matter to be dealt with by the extradition judge, not an executive decision reserved to the Minister. The extradition judge did not err in concluding, at para. 150, that "[i]n civilized democracies, the rule of law must prevail". Moreover, the remedy of a stay of extradition proceedings did not, as the Attorney General submits, allow "an admitted terrorist collaborator to walk free". Khadr is liable to prosecution in Canada for his alleged terrorist crimes. The stay granted by the extradition judge does not impair the Attorney General's ability to exercise his lawful powers to commence a prosecution in Canada.

FACTS

[5] While there is a substantial record in this case, the essential facts as found by the extradition judge are not in dispute and may be stated briefly.

[6] Khadr was born in Canada in 1981. He moved with his family to Pakistan when he was three years old, and then moved back and forth between Canada and Pakistan until 1997 when the family settled in Pakistan. Khadr's father was associated with Osama Bin Laden, and the Khadr family had moved to Afghanistan by the time of the 2001 invasion by coalition forces. Sometime after the invasion, the Khadr family returned to Islamabad, Pakistan.

Khadr's apprehension and detention in Pakistan

[7] The United States alleges that in 2003 and 2004, Khadr procured munitions and explosives to be used by Al Qaeda against the United States and

coalition forces in Afghanistan. The United States paid the ISI $500,000 to capture and detain Khadr for interrogation and, on October 15, 2004, ISI agents apprehended Khadr in Islamabad. The American and Pakistani authorities apprehended and interrogated Khadr solely for intelligence purposes and initially had no intention of laying criminal charges. From the time Khadr was apprehended to his release fourteen months later, the ISI refused to lay criminal charges, or to bring Khadr before or submit his case to the courts of Pakistan. It was only after Khadr's use as an intelligence source was exhausted some six months after he was apprehended that the United States turned to the possibility of criminal prosecution.

[8] The extradition judge did not accept Khadr's evidence that he had been subjected to prolonged torture while in the ISI's custody. However, the extradition judge did find that Khadr was mistreated and physically abused during the first three days of his detention, and that he was thereafter held in a hostile environment. The extradition judge found that the physical abuse and mistreatment Khadr suffered led him to cooperate with his ISI and American interrogators. He also found, at para. 124, that while the American authorities did not have actual knowledge that Khadr would be abused, given the way the ISI operated and Pakistan's reputation for human rights abuses in such circumstances, the United States "ought to have known that there was a credible risk that [Khadr] would be mistreated."

[9] Khadr was detained in Pakistan for fourteen months in a secret detention centre without any charges being laid and without access to legal counsel, the court or a tribunal. For the first three months of his detention, Khadr was denied access to Canadian consular services.

[10] By the end of October 2004, the United States privately informed CSIS that Khadr was being detained, even though the ISI refused to acknowledge that fact. The ISI refused to deal with Canadian government officials but did have regular contact with "John", the senior CSIS official on the ground in Pakistan during the period of Khadr's detention. In his capacity as an intelligence officer, John interviewed Khadr for intelligence purposes and served as the *de facto* point of contact between the Pakistani authorities and the Canadian government in relation to Khadr's situation.

[11] John's attempts to arrange for consular access were rebuffed by the ISI. The extradition judge found that the American authorities "requested CSIS's forbearance in insisting on prompt consular access", at para. 55. Consular visits were eventually permitted in January, April and September 2005.

[12] By March 2005, the ISI decided that it had exhausted Khadr as an intelligence source and wanted the RCMP to charge him and take him back to Canada. John arranged for the RCMP to visit and interview Khadr in April 2005, but the ISI refused to allow the interview to be videotaped or to allow Khadr access to legal counsel, and it insisted that any interview be conducted in the presence of a Pakistani official. The RCMP officer conducting the

interview decided in these circumstances not to take a statement for law enforcement purposes and, without any evidence to support charges, the RCMP was unwilling to take Khadr into custody.

[13] In June 2005, the ISI informed CSIS that Khadr would not be prosecuted in Pakistan and that, as it was unwilling to detain him any longer, he would be released and returned to Canada. At this point, American intelligence officials pressured the ISI to continue detaining Khadr so that the FBI could interrogate him with a view to criminal prosecution in the United States. That interrogation took place in July 2005. The American authorities then asked the ISI to allow for Khadr's rendition to the United States. The ISI refused to do so without permission from Canada and Canada refused to consent. Finally, on December 2, 2005, Khadr was sent to Canada.

Khadr's arrival and later arrest in Canada

[14] Upon his arrival at Pearson Airport in Toronto, Khadr was greeted by the RCMP officer who had interviewed him in Pakistan. The officer advised Khadr that he was free to leave, and that he was under no obligation to cooperate, but that the RCMP would be interested in speaking with him. Before his abduction in 2004, Khadr had told CSIS that he was willing to talk, and upon his arrival in Toronto, Khadr agreed to be interviewed by the RCMP. He was taken to a small room at the airport, given a full caution and offered access to legal counsel, which he declined. The interview was video recorded and lasted about two and one half hours.

[15] Within a few days of the Pearson statement, the same RCMP officer asked Khadr if he would be willing to speak to the FBI. Khadr agreed, and the same FBI officers who had interrogated him in Pakistan conducted an interview at the Delta Hotel in Toronto. Many of the questions posed during the Delta interview made reference to Khadr's previous statement in Pakistan. Khadr was fully cooperative and forthright in his responses.

[16] Criminal charges were filed against Khadr in Boston. On December 17, 2005, Khadr was arrested on a Provisional Arrest Warrant and detained for extradition to the United States. He was denied bail and held in custody until the extradition judge issued the stay of proceedings on August 4, 2010.

[17] A formal Request for Extradition was made to Canada on February 9, 2006. On March 15, 2006, the Minister of Justice issued an Authority to Proceed ("ATP") pursuant to s. 15 of the *Extradition Act*, S.C. 1999, c. 18 (the "Act"), authorizing the Attorney General to seek an order for Khadr's committal. The Canadian offences identified in the ATP that correspond to the conduct alleged in the Boston charges are:

- Directly or indirectly providing or making property available knowing that, in whole or in part, it will be used by or will benefit a terrorist group contrary to s. 83.03(b) of the *Criminal Code*;

- Knowingly participating in or contributing to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the

terrorist group to facilitate or carry out a terrorist activity contrary to s. 83.18 of the *Criminal Code*;

- Conspiracy to traffic in weapons contrary to ss. 99 and 465(1)(c) of the *Criminal Code*;

- Possession of an explosive substance contrary to s. 82(1) of the *Criminal Code*;

- Commission of an indictable offence for the benefit of, at the direction of, or in association with, a terrorist group contrary to s. 83.2 of the *Criminal Code*.

[18] The Record of the Case recites three statements by Khadr as evidence to support the Request for Extradition:

- The statement taken by the FBI in Pakistan over a three-day period in July 2005;

- The statement taken by the RCMP at Pearson Airport on December 2, 2005; and

- The statement taken by the FBI at the Delta Hotel in Toronto on December 4, 2005.

[19] Khadr sought production of American and Canadian documents. The Attorney General refused to disclose any material from the United States, but

voluntarily disclosed CSIS, Department of Foreign Affairs and International Trade ("DFAIT") and RCMP documents redacted for reasons of national security. Khadr challenged the redactions under s. 38.04(2)(c) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The Federal Court judge generally upheld the claims of privilege but ordered that a summary of some information be provided, including the important fact that the United States had paid the bounty. The extradition judge refused Khadr's request for disclosure of the American documents, initially in July 2007, before the Federal Court proceedings, and again in January 2009, after the summary ordered by the Federal Court judge had been provided.

Proceedings before the Extradition Judge

[20] The extradition judge conducted a blended hearing over several days that embraced all issues: the extradition hearing proper; a voluntariness *voir dire* relating to the Pearson and Delta statements; and Khadr's motion for a *Charter* remedy or stay of proceedings based upon abuse of process.

[21] The extradition judge summarized his key factual findings in relation to the abuse of process motion, at para. 124:

> A summary of my findings is as follows:
>
> > 1. Khadr was captured in Islamabad, Pakistan by the ISI at the behest of the United States, who paid a $500,000 bounty for his arrest.
> >
> > 2. Khadr was initially sought by American officials solely for intelligence purposes and not for criminal prosecution purposes.

> 3. I am satisfied that Khadr's detention by the ISI was both arbitrary and illegal, according to the law of Pakistan.
>
> 4. During his initial three days of detention, Khadr was mistreated and physically abused, but not on the level of severity he alleges in his affidavit. I am satisfied that the United States intelligence agency did not have actual knowledge that Khadr would be abused when it paid the bounty for his arrest. However, I am equally satisfied this agency ought to have known that there was a credible risk he would be mistreated.
>
> 5. Khadr's rights to consular access without delay were denied by Pakistan. The United States and Pakistan collaborated in this delay in order to facilitate the completion of American intelligence interrogations.
>
> 6. I am satisfied for reasons previously stated that the United States intelligence agency pressured the ISI to delay Khadr's repatriation to Canada for a period of six months. The delay was caused by American dissatisfaction with the decision to return Khadr to Canada without charges being laid. This delay was contrary to Canadian officials' expectations and wishes that Khadr be repatriated. It was a source of frustration: Canadian officials had fully expected Khadr to be released and had made preparations for his return to Canada.

[22] The extradition judge found that the Canadian authorities, CSIS, DFAIT and the RCMP, had acted properly and lawfully throughout the process. In Pakistan, CSIS and DFAIT endeavoured to gain consular access for Khadr and to have his case brought before the Pakistani courts. CSIS and DFAIT also refused to agree to Khadr's rendition to the United States. The judge also

found that the RCMP had respected Khadr's legal and *Charter* rights when questioning him both in Pakistan and at Pearson Airport.

[23] The extradition judge reviewed the law relating to abuse of process and, at para. 132, identified two categories of cases: the first category dealing with state misconduct that implicates the fairness of the hearing, and the second "residual" category "unrelated to the fairness of the hearing, but involving state conduct which undermines the integrity of the judicial process". He concluded, at para. 133, that this case fell within the residual category, as

> one of those exceptional cases that involves state misconduct that contravenes fundamental notions of justice, and which undermines the justice system. The extrajudicial misconduct in this case does not, in the narrow procedural sense, compromise the fairness of this extradition hearing. However, that is not to say the conduct of the Requesting State is not linked or connected to this proceeding. I disagree with the submission by counsel for the Attorney General that there is no nexus between the abuse and the fairness of this hearing. On the contrary, in a broader sense, the gross misconduct that occurred in Pakistan very much affects these proceedings in Canada. The basis of this case has its genesis in the serious misconduct by the Requesting State. The Requesting State is seeking a benefit from this court, committal, based on evidence derived from its own misconduct.

[24] The extradition judge recognized, at para. 150, that a stay should only be granted in "the clearest of cases". He also recognized that "the collection of reliable intelligence is of the highest importance in protecting and securing a nation from the dangers of terrorism" and that "there will always be a tension, especially in troubled times, in the balancing of intelligence and security issues

with cherished democratic values, such as the rule of law and protection from human rights violations." He concluded, however, that a stay was warranted in this case:

> In civilized democracies, the rule of law must prevail over intelligence objectives. In this case, the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable. Although Khadr may have possessed information of intelligence value, he is still entitled to the safeguards and benefit of the law, and not to arbitrary and illegal detention in a secret detention centre where he was subjected to physical abuse. The United States was the driving force behind Khadr's fourteen month detention in Pakistan, paying a $500,000 bounty for his apprehension. The United States intelligence agency acted in concert with the ISI to delay consular access by DFAIT to Khadr for three months, contrary to the provisions of the *Vienna Convention*. The United States, contrary to Canada's wishes, pressured the ISI to delay Khadr's repatriation because of its dissatisfaction with Khadr being released without charge, even though there was no admissible evidence upon which to base charges at that time. In my view, given this gross misconduct, there cannot be a clearer case that warrants a stay.

[25] The extradition judge also gave reasons disposing of the other issues. He ruled that in view of Khadr's detention and treatment before and at the time the FBI statement was taken in Pakistan, that statement should be excluded on the ground that it was both "manifestly unreliable" and "gathered in an abusive manner", at para. 163. He further held, at para. 175, that the Delta Hotel statement should also be excluded, as it was derived and "contaminated in an overwhelming fashion by the virtual cross-examination on" the excluded Pakistan statement.

[26] However, the extradition judge ruled that the statement taken by the RCMP at Pearson Airport should not be excluded. Unlike the Delta Hotel statement, the Pearson statement was not contaminated by what had occurred in Pakistan. The extradition judge found, at para. 165, that the RCMP officer's conduct was "exemplary", that Khadr was fully aware that he was not under arrest and free to leave at any time, and that the statement had not been induced by threats or promises. Khadr was told to disregard any statements he had made in Pakistan and was fully advised of his right to counsel and right to silence.

[27] The extradition judge concluded that, had he not stayed the proceeding for abuse of process, the evidence contained in the Pearson statement was sufficient to commit Khadr on all the offences identified in the ATP, except for possession of an explosive substance contrary to s. 82(1) of the *Criminal Code*.

ISSUES

[28] The Attorney General does not appeal any of the extradition judge's findings of fact or his ruling excluding the Pakistan and Delta Hotel statements. The grounds of appeal are as follows:

1. Did the extradition judge have jurisdiction to stay extradition proceedings on the ground of abuse of process?

2. Did the extradition judge err in determining that the "clearest of cases" standard for a stay of proceedings had been met by:

(a) failing to consider whether any abuse would be perpetuated;

(b) exceeding his jurisdiction by considering foreign law;

(c) failing to order a less draconian yet effective remedy; or

(d) failing to conduct a meaningful balancing?

ANALYSIS

1. Did the extradition judge have jurisdiction to stay extradition proceedings on the ground of abuse of process?

The residual power to grant a stay for an abuse of process

[29] In *R. v.* ***Jewitt***, [1985] 2 S.C.R. 128, the Supreme Court of Canada affirmed the common law power of a superior court judge to enter a stay of proceedings to remedy an abuse of process. At p. 135, Dickson C.J., writing for the court, adopted the proposition stated by Dubin J.A. of this court in *R. v. Young* (1984), 46 O.R. (2d) 520, at p. 551:

> [T]here is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

[30] Dickson C.J. also adopted the qualification added in *Young* that "this is a power which can be exercised only in the clearest of cases".

[31] While this discretion is ordinarily exercised to ensure procedural fairness, the residual category extends to cases where the misconduct does not

produce procedural unfairness. The residual power to grant a stay of proceedings for abuse of process where the individual's right to a fair trial is not implicated was described by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73, as addressing "the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."

[32] The residual power to stay proceedings that do not produce procedural unfairness is not focused on protecting the rights of the individual litigant. Rather, it is aimed at vindicating the court's integrity and the public's confidence in the legal process in the face of improper state conduct. "The prosecution is set aside, not on the merits…, but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. As Lamer J. stated in *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 942:

> The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one.

[33] The Attorney General's core submission on this appeal is that the conduct of the requesting state was entirely unrelated to the committal hearing and did not implicate the fairness of the hearing. By granting a stay on the residual ground that the requesting state's conduct undermined the integrity of the judicial process, the extradition judge exceeded his jurisdiction and usurped the Minister of Justice's allegedly exclusive jurisdiction under the *Extradition Act*, s. 44(1)(a), to refuse surrender if it would be "unjust or oppressive having regard to all the relevant circumstances".

Does the Minister of Justice's jurisdiction under the* Extradition Act *limit the court's residual power to grant a stay?

[34] In assessing this submission, I recognize that the extradition process often involves executive discretion on sensitive matters calling for political judgment. The courts must accord appropriate deference to ministerial discretion in those areas. However, the extradition process embraces as one of its central and essential components a significant role for the judiciary and, in this case, we have not yet reached the phase in the process where deference to ministerial discretion may be invoked. This case concerns the scope of the judicial role, and the issue is whether the general language of s. 44(1)(a) of the Act, conferring authority on the Minister to refuse to make a surrender order at the end of the process, deprives a court of its power to protect its own integrity by staying proceedings on the ground of abuse of process. In my view, s. 44(1)(a) does not have that effect. The Attorney General's contention that an

extradition judge has no jurisdiction to stay proceedings for abuse of process under the residual category is wrong in law and should not be accepted.

[35] I begin by considering the purpose and importance of the judicial phase of the process established by the *Extradition Act*: see *Canada (Justice) v. Fischbacher*, [2009] 3 S.C.R. 170; *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 S.C.R. 77.

[36] There are four phases involved in the extradition process. Responsibility for the first phase of the process is assigned to the executive. Section 15 of the Act gives the Minister of Justice authority to issue an ATP authorizing "the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal" into custody of the person sought to await surrender.

[37] The second phase – the phase under consideration in this appeal – is judicial. Under s. 29 of the Act, the extradition judge is charged with making a judicial determination as to whether there is sufficient evidence of the alleged conduct "that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the [ATP]". The judicial phase in the extradition process is not subservient to the executive phases that precede and follow. As the Supreme Court of Canada stated in *Ferras*, at para. 23, "the judicial phase must not play a supportive or subservient role to the executive". The judicial phase is an essential component that necessarily retains all its attributes to ensure that the "basic demands of justice" are observed and that

the person sought for extradition is accorded "fair process": *Ferras*, at para. 19. The "separate and independent judicial phase…provides a check against state excess by protecting the integrity of the proceedings and the interests of the 'named person' in relation to the state process": *Ferras*, at para. 23.

[38] The third phase engages ministerial executive discretion. The Minister may, pursuant to s. 40, order that the person sought be surrendered to the extradition partner, or, as already noted, pursuant to s. 44(1)(a), refuse surrender if it would be "unjust or oppressive having regard to all the relevant circumstances".

[39] It is at the final supervisory stage, where the provincial appellate courts have jurisdiction to entertain appeals from the committal order of the extradition judge under s. 49, and applications for judicial review of the Minister's surrender order under s. 57, that curial deference becomes significant. As stated by this court in *Whitely v. United States of America* (1994), 20 O.R. (3d) 794, at p. 805, aff'd [1996] 1 S.C.R. 467:

> [I]f the Minister violates the fugitive's constitutional rights or otherwise errs in law, or if the Minister denies the fugitive procedural fairness, acts arbitrarily, in bad faith or for improper motives, or if the Minister's decision is plainly unreasonable then the reviewing court is entitled to interfere; otherwise the court should defer to the Minister's surrender decision.

[40] The division of responsibility between the Minister and the courts in relation to the application of the *Charter* and the common law jurisdiction to grant a stay of proceedings was dealt with in *United States of America v. Cobb*,

[2001] 1 S.C.R. 587, and *United States of America v. Kwok*, [2001] 1 S.C.R. 532. Those cases hold that *Charter* issues which by their very nature arise only at the surrender stage – the s. 6 *Charter* right to remain in Canada and the s. 12 *Charter* right not to be subjected to cruel and unusual treatment or punishment – fall within the jurisdiction of the Minister, not the extradition judge. *Cobb* also holds that issues which by their very nature pertain to the committal stage – including the court's common law power to stay proceedings on grounds of abuse of process in order to protect the court's integrity – fall within the jurisdiction of the extradition judge, not the Minister.

[41] *Cobb* and its companion case, *United States of America v. Shulman*, [2001] 1 S.C.R. 616, hold that the extradition judge has the discretion to grant a stay on grounds of abuse of process where making a committal order would taint the integrity of the court due to the requesting state's conduct. Of particular importance to this appeal is the statement of Arbour J., writing for the court in *Cobb*, at paras. 44 and 48, rejecting the argument that it was for the Minister alone to deal with complaints regarding the requesting state's conduct at the surrender stage:

> These concerns, and the remedies to which they give rise, properly belong to the judicial phase of the extradition process as they are not dependent on the ultimate outcome of either the committal or the surrender decision. *Nothing the Minister could have done would address the unfairness which would taint a committal order obtained under the present circumstances. The Minister is not the guardian of the integrity of the courts. It is for the courts themselves to guard and preserve their integrity.* This is therefore not

> a case that must await the executive decision. The violations of the appellants' rights occurred at the judicial stage of the process and call for redress at that stage and in that forum.
>
> …
>
> As I indicated before, the existence of potential remedies at the executive stage does not oust the jurisdiction of the courts to control their own process in cases such as here, where *the courts are required to preserve the integrity of their own proceedings*. [Emphasis added.]

[42] In *Cobb*, the United States judge and prosecuting attorney made statements suggesting that if the parties sought for extradition contested the process, they would be given the maximum sentence and subjected to homosexual rape in prison. The Supreme Court of Canada restored a stay of proceedings granted by the extradition judge on the ground that the conduct of the United States judge and prosecuting attorney "shocks the Canadian conscience" and is "simply not acceptable", at paras. 14, 54.

[43] The Attorney General argues that *Cobb* is distinguishable as it dealt with conduct by the requesting state that had a direct bearing on the committal hearing. It is submitted that the offensive statements in *Cobb* were made to intimidate the parties sought from exercising their right to an extradition hearing, while the misconduct of the requesting state in this case did not directly implicate the extradition hearing.

[44] I disagree. First, as the extradition judge pointed out, at para. 133, there was a nexus between the requesting state's misconduct and the committal hearing:

> [T]he gross misconduct that occurred in Pakistan very much affects these proceedings in Canada. The basis of this case has its genesis in the serious misconduct by the Requesting State. The Requesting State is seeking a benefit from this court, committal, based on evidence derived from its own misconduct.

[45] I agree with that analysis. To the extent that there must be a nexus between the conduct alleged to constitute an abuse of process and the committal hearing itself, one was made out on the facts of this case.

[46] Second, I disagree with the Attorney General's narrow reading of *Cobb*. While *Cobb* involved threats or inducements to force the person sought to abandon the right to a hearing, those comments did not implicate the fairness of the committal hearing itself, and the residual category of abuse of process was therefore necessarily engaged. I am not persuaded that there is anything in *Cobb* that limits or curtails the scope of the residual category.

[47] The Attorney General cites no authority adopting this narrow view of *Cobb*. On the other hand, there is authority, in addition to *Cobb*, supporting the proposition that an extradition judge does have jurisdiction to stay proceedings for an abuse of process on residual grounds, unrelated to the fairness of the hearing. In *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), at para. 52, Doherty J.A. stated that an extradition judge has the jurisdiction to grant a stay "if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse of process", but also where "proceeding with committal proceedings would amount to an abuse of process

or a breach of the principles of fundamental justice…no matter how fairly that proceeding might be conducted."

[48] In *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42, the House of Lords dealt with the different issue of a "disguised extradition", where an individual had been subjected to improper treatment in a foreign jurisdiction and brought before an English Court. Nevertheless, *Bennett* supports the need to preserve a broad residual judicial discretion to deal with situations that impugn or threaten the integrity of the judicial process. At p. 62, Lord Griffiths stated that even though the practice did not implicate trial fairness, it would be "unthinkable" for the court to stand idly by rather than end the proceedings as an abuse of process. In addition, Lord Bridge of Harwich stated, at pp. 67-68:

> There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself... To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view… Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted.

[49] See also *United States of America v. Tollman* (2006), 212 C.C.C. (3d) 511 (Ont. S.C.), at para. 18; *United States of America v. Licht* (2002), 168 C.C.C. (3d) 287 (B.C.S.C.), at para. 64: "The conduct of United States agents in this case is so egregious as to constitute an abuse of process to disentitle the requesting state from the assistance of this court."

[50] Recognizing the extradition judge's residual power to stay proceedings for an abuse of process also coincides with the deeply-embedded common law principle that, absent express legislation to the contrary, the courts must not surrender the authority to protect their own integrity to the executive. It has long been recognized that "the jurisdiction of the superior courts is not taken away, except by express words or necessary implication": *Albon v. Pyke* (1842), 4 Man. & G. 421; *Canada (A.G.) v. TeleZone Inc.* (2010), 327 D.L.R. (4th) 527 (S.C.C.), at paras. 42-43. In *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.), a seminal authority on abuse of process, Lord Devlin insisted, at p. 1354, upon the need for the courts themselves to assert and maintain the power to ensure the integrity of the law and the judicial process:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

That statement was adopted by Dickson C.J. in *Jewitt*, at para. 25.

[51] I am unable to read the general permissive language of s. 44(1)(a), conferring ministerial discretion at the surrender stage, as removing the Superior Court's jurisdiction to grant a stay for abuse of process at the committal stage. The jurisdiction to stay proceedings on the grounds of abuse of process lies at the heart of the courts' integrity and the independence of the

judicial process. That core jurisdiction should not be hobbled by the narrow interpretation urged upon us by the Attorney General. To accept that interpretation would not only unduly weaken judicial authority, but would undermine the integrity of the extradition process itself by subverting the courts' capacity to ensure the necessary element of scrutiny by an independent judiciary.

[52] The extradition judge exercised a well-established authority to stay proceedings on grounds of abuse of process in order to protect the integrity of the courts and the judicial process. Accordingly, I would dismiss the Attorney General's first ground of appeal.

2. Did the extradition judge err in determining that the "clearest of cases" standard for a stay of proceedings had been met?

[53] As a stay of proceedings is a discretionary remedy, "an appellate court will be justified in intervening…only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 87; *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 117.

[54] The Attorney General accepts that an appellate court must accord substantial deference to a superior court judge's discretionary decision to grant a stay, but submits that the extradition judge erred in several respects and that such errors justify this court's intervention.

(a) Failing to consider whether any abuse would be perpetuated

[55] The Attorney General submits that the extradition judge erred by failing to consider whether the abuse of process he found would be "perpetuated" if Khadr were committed for extradition and surrendered by the Minister.

[56] That submission is essentially based on the more typical cases falling within the first category of abuse of conduct, where the abuse leads to procedural unfairness: See *O'Connor*, at para. 75; *Regan*, at para. 54. While ordinarily, a stay will only be granted to remedy an abuse that would be perpetuated, there are "exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive": *Tobiass*, at para. 91. As noted by the extradition judge, at paras. 132-33, these cases fall within the residual category of abuse of process.

[57] The extradition judge certainly took into account the "clearest of cases" requirement for a stay and directed his mind to the prospective element of the remedy he granted. Citing *Tobiass*, he stated, at para. 151, that a stay was appropriate, not as a form of punishment for past wrongdoing, "but rather [as] a specific deterrent; that is, a remedy aimed at preventing similar abuse in the future." The remedy was also "aimed at this court dissociating itself with the conduct of the requesting state." Neither the extradition judge's statement, at para. 150, that "the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable", nor his specific findings supporting that statement, at para. 124, are appealed by the Attorney General. In my view, those findings are sufficient to bring this case within the range of exceptional

cases contemplated in *Tobiass* where a judge has the residual discretion to grant a stay on the grounds of "past misconduct…so egregious that the mere fact of going forward in the light of it will be offensive".

[58] I see no error on the part of the extradition judge under this ground of appeal that would justify this court's intervention.

(b) Considering foreign law

[59] The Attorney General submits that the extradition judge had no jurisdiction to find that Khadr's abduction and detention were illegal under Pakistani law or to criticize the conduct of American and Pakistani officials in Pakistan.

[60] The issue of illegality under Pakistani law was neither difficult nor contested. Khadr introduced a law professor's affidavit to establish that his treatment had been illegal in Pakistan. The Attorney General did not cross-examine that witness or object to the admissibility of the affidavit when it was referred to and relied on at various stages of the process. It surely can come as no surprise that in a country like Pakistan with a constitution guaranteeing fundamental rights and freedoms, it is illegal to accept a bounty or bribe from a foreign government, to abduct a foreign national from the street, to beat that individual until he agrees to cooperate, to deny him consular access, to hold him in a secret detention centre for eight months while his utility as an intelligence source is exhausted, and then to continue to hold him in secret detention for six more months at the request of a foreign power.

[61] This case is readily distinguishable from the cases relied on by the Attorney General, such as *Fischbacher*. Those cases hold that an extradition judge is required by s. 29(1)(a) of the Act to determine whether the evidence justifies committal on the corresponding Canadian offences identified in the ATP and not on the foreign offences upon which the request is based. In those cases, evidence of foreign law is irrelevant and therefore inadmissible. In the admittedly exceptional cases such as this one where foreign law is relevant to the issues raised before the extradition judge, I can see no reason why it should not be admitted and considered.

[62] Finally, the argument that the extradition judge was not entitled to consider the conduct of the Pakistani and American authorities in Pakistan is impossible to reconcile with cases such as *Cobb*; *Shulman*; *United States v. Dynar*, [1997] 2 S.C.R. 462; and *R. v. Harrer*, [1995] 3 S.C.R. 562.

[63] Again, I see no error on the part of the extradition judge under this ground that would justify this court's intervention.

(c) Failing to award a less draconian yet effective remedy

[64] The Attorney General submits that the extradition judge could and should have excluded the Pakistan and Delta Hotel statements as an effective but less draconian remedy and committed Khadr solely on the basis of the Pearson statement.

[65] Excluding the two statements found to have been tainted by the misconduct of the Pakistani and American authorities certainly would have

been “less draconian”. But it was plainly the view of the extradition judge that, given the serious nature of the misconduct, merely excluding those statements would not have been an “effective” remedy. In my view, he committed no error of law in coming to that conclusion.

[66] Excluding the statements but permitting the committal to proceed would not accomplish what the extradition judge determined to be a necessary objective given the gravity of the requesting state’s conduct: namely, for the court to dissociate itself from that very conduct. I need not repeat here the extradition judge’s assessment of the gravity of the human rights abuses perpetuated against Khadr and, as I have already stated, those factual findings are not challenged on appeal. In my view, that conduct brings this case well within the range of the extradition judge’s discretion to qualify it as “gross misconduct” that could not be remedied by anything short of a stay of proceedings.

(d) Failing to conduct a meaningful balancing

[67] The Attorney General submits that the extradition judge erred by failing to conduct a meaningful balancing exercise to weigh the gravity of the requesting state’s conduct against society’s interest in seeing an alleged terrorist committed for extradition.

[68] The starting point for analysis of this argument is the extradition judge’s finding that the gravity of the requesting state’s conduct and the shocking violations of Khadr’s human rights amount in law to the “clearest of cases”

warranting a stay. I agree that there is a compelling societal interest in having an alleged terrorist sought by a requesting state committed for extradition. But did the extradition judge exceed his discretion or err in law by failing to balance the human rights violations and protection of the court's integrity on the one hand, and the societal interest in having Khadr committed for extradition on the other?

[69] To the extent that the Attorney General's submission assumes that a judge is always required to balance the gravity of state misconduct against the benefit of allowing a proceeding to go forward, this submission is wrong and contrary to the law as stated by the Supreme Court. Balancing is the exception, not the rule. In *Tobiass*, at para. 92, and *Regan*, at para. 57, the court states that it is only "where it is unclear whether the abuse is sufficient to warrant a stay, [that] a compelling societal interest in having a full hearing could tip the scales in favour of proceeding." See also *R. v. Tran* (2010), 103 O.R. (3d) 131 (C.A.), at para. 105; Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2010), at para. 9.114: "This balancing should only occur in borderline cases." On the extradition judge's findings, this is a clear case, not a borderline case. It was therefore not a case where he was required to balance the protection and vindication of the court's integrity with the societal interest in responding positively to the extradition request.

[70] This court has recently spoken on the need for a strong legal response to the threat of terrorism in *R. v. Khawaja* (2010), 103 O.R. (3d) 321, at para. 231:

> To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe – values that form the essence of our constitutional democracy.

[71] But *Khawaja* dealt with the imposition of a legal penalty duly enacted by Parliament, for crimes established after trial and conviction. This case poses very different questions: is a judge required to withhold a remedy necessary to protect the integrity of the judicial process, and effectively sanction serious violations of human rights, because of the competing societal interest in bringing alleged terrorists to justice? Is a judge required by law to sacrifice important legal rights and democratic values in the name of ensuring that a proceeding against an alleged terrorist is able to go forward? In my view, the answer to those questions is "no".

[72] Cases involving alleged terrorists or other enemies of the state who oppose and seek to destroy the fundamental values of democracy and the rule of law put our commitment to those very values to the test. No doubt some will say that those who seek to destroy the rule of law should not be allowed its benefits. I do not share that view. I find compelling the extradition judge's statement, at para. 150, that "[i]n civilized democracies, the rule of law must prevail over intelligence objectives."

[73] One of the most famous statements as to the need to maintain respect for the rule of law despite the threat of subversion in time of national peril is Lord

Atkin's speech in *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.). *Liversidge* concerned the judicial review of the ministerial power to intern persons of "hostile origin or association" involved in activities "prejudicial to public safety". At p. 244, in a memorable and often quoted passage, Lord Atkin stated that "amid the clash of arms, the laws are not silent". While the laws may be changed to meet the threat of subversion, "they speak the same language in war as in peace". It is the role of judges to "stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law". Although expressed in dissent, Lord Atkin's speech has since been accepted as a proper statement of the law: See *Khawaja v. Secretary of State for the Home Department*, [1984] A.C. 74 (H.L.).

[74] The same point was made in decisions by the Supreme Court of the United States requiring the state to respect certain basic legal rights of suspected terrorists detained at Guantanamo Bay. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), O'Connor J. held, at p. 509, that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker" and, at p. 536, that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens". In *Boumediene v. Bush*, 553 U.S. 723 (2008), Kennedy J. held, at p. 797, that suspected terrorists could not be denied the constitutionally guaranteed right of *habeas corpus*: "Security subsists, too, in fidelity to freedom's first principles." In a

similar spirit, both the Supreme Court of Canada and the House of Lords have vindicated fundamental legal rights infringed by anti-terrorism legislation: See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; *A. v. Secretary of State for the Home Department*, [2005] 2 A.C. 68, at para. 97, per Lord Hoffman: "The real threat to the life of the nation…comes not from terrorism but from laws such as these."

[75] Another powerful judicial voice defending the rule of law against erosion from threats to national security is that of President Aharon Barak of the Supreme Court of Israel, who stated in *Public Committee Against Torture v. Israel* (1994), HCJ 5100/94, that it is "the destiny of democracy…not [to] see all means as acceptable": at para. 39. Adherence to the rule of law means that a democracy "must sometimes fight with one hand tied behind its back"; but this does not deprive a democracy of "the upper hand" as, at the end of the day, the rule of law and individual liberty "strengthen its spirit and this strength allows it to overcome its difficulties". See also Louise Arbour, "In our name and on our behalf" (2006), 4 Eur. H.R.L. Rev. 371; Owen M. Fiss, "The war against terrorism and the rule of law" (2006), 26 Oxford J. Legal Stud. 235; David Dyzenhaus, "Intimations of legality amid the clash of arms" (2004), 2 Int'l J. Const. L. 244.

[76] These eminent jurists make a fundamental point: the rule of law must prevail even in the face of the dreadful threat of terrorism. We must adhere to our democratic and legal values, even if that adherence serves in the short term

to benefit those who oppose and seek to destroy those values. For if we do not, in the longer term, the enemies of democracy and the rule of law will have succeeded. They will have demonstrated that our faith in our legal order is unable to withstand their threats. In my view, the extradition judge did not err in law or in principle by giving primacy to adherence to the rule of law.

[77] Finally, I think it important to point out that even if balancing is required or warranted, there is a compelling argument that tips the balance in favour of a stay. In my view, the Attorney General's emotive argument that because of what the extradition judge did, an admitted terrorist collaborator is allowed to walk free is unfounded. Although this point was not mentioned by the extradition judge, the stay of the extradition proceedings does not remove the Attorney General's capacity to deal with the allegations of terrorist activity according to law. Khadr is a Canadian citizen and, as conceded by counsel for the Attorney General in oral argument, under the *Criminal Code*, Khadr is liable to be prosecuted in Canada for acts of terrorism committed outside Canada.

[78] Thus, even if I am wrong in concluding that the extradition judge was not required to engage in balancing the stay against the societal interest in allowing the committal to proceed, the fact that Khadr is liable to prosecution in Canada would tip the scales in favour of the stay.

CONCLUSION

[79] For these reasons I would dismiss the appeal.

"Robert J. Sharpe J.A."

"I agree John Laskin J.A."

"I agree E.A. Cronk J.A."

RELEASED: May 6, 2011