

Canada's Supreme Court strikes down order to repatriate Guantánamo detainee

Keith Jones
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Canada's Supreme Court has unanimously overturned a Federal Court decision, subsequently upheld by the Federal Court of Appeal, ordering Canada's Conservative government to seek the repatriation of Omar Khadr, a Guantánamo Bay detainee and Canadian citizen.

The ruling effectively condemns Khadr, who was seized by the American military in July 2002 after a firefight in Afghanistan in which his father died and he suffered serious injury, to trial by a US Military Commission—a special military court where traditional standards of evidence do not apply.

Khadr, now aged 23, has been held in the legal black hole that is Guantánamo Bay for seven years, that is, since he was 15 years old. He is the only citizen of a Western country still being held in Guantánamo Bay, after other countries including Australia and Britain have pressed the US to return their citizens.

Canada's rightwing Conservative government lauded the court's decision. "The government," said Justice Minister Rob Nicholson in a statement released shortly after the court's ruling was issued last Friday, "is pleased that the Supreme Court has recognized 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 interests.'"

Prime Minister Stephen Harper and other top Conservative ministers have repeatedly said they have full confidence in US authorities to render "justice" in the Khadr case, although his most basic rights have been systematically trampled on.

Khadr's indefinite detention at Guantánamo Bay without charge was a violation of international law.

He was subject to sleep deprivation—a form of torture—and to other forms of physical and mental abuse.

US authorities attempted to suppress evidence that contradicted their claim that Khadr was the only person who could have thrown the grenade that killed a US Special Forces soldier involved in the 2002 firefight. Indeed, the original military report held another person, who perished in the firefight, responsible.

Even if one were to accept that Khadr was an active participant in the firefight and threw the grenade—something he has strenuously denied—he should, under international law, be deemed a child soldier and therefore not subject to prosecution for any reputed war crimes in which he was involved.

The US authorities' abominable treatment of Khadr is clearly an act of vengeance against his father, who was an associate of al Qaeda leader Osama bin Laden.

Canadian governments, first under the Liberal Prime Ministers Jean Chretien and Paul Martin and now under the Conservative government, have been accomplices in this travesty. Now they are joined by Canada's top court, even though it concedes that the Canadian government has violated Khadr's constitutional rights.

Canada's highest court concurred with the lower courts in finding that the Canadian government violated Canada's Charter of Rights and Freedoms when Canadian Security Intelligence Service (CSIS) and Ministry of Foreign Affairs officials colluded with US officials and interrogated Khadr in 2003 and 2004, while he was under indefinite detention at Guantánamo Bay.

The Canadian officials subsequently turned over transcripts of their interrogations to Khadr's US captors. On the second occasion, they knew Khadr had been subjected to weeks of sleep deprivation—a

gruesome tactic euphemistically known as the “frequent flyer program”—so as to “soften him up” for their questioning.

“Interrogation of a youth,” said the court, “to elicit statements about the most serious criminal charges—while detained in these conditions and without access to counsel and while knowing the fruits of the interrogations would be shared with the US prosecutors—offends the most basic Canadian standards about the treatment of detained youth suspects.”

The Supreme Court further found that the violation of Khadr’s constitutional rights is ongoing, since information derived from his illegal interrogations by Canadian officials may be used by the US military in prosecuting Khadr.

But while admitting that the Canadian government had egregiously violated Khadr’s rights, the highest court struck down the lower courts’ ruling that Ottawa is legally obligated to rectify this situation by seeking his extradition from the US.

Instead it ruled that it is the federal government’s prerogative to decide what remedial action should be taken to make good the violation of Khadr’s rights. The Court justified this with the claim that it did not want to impinge on the executive’s right to formulate foreign policy.

“The appropriate remedy in this case,” ruled Canada’s nine Supreme Court justices, “is to declare that Khadr’s charter rights were violated, leaving it to the government to decide ... in light of current information, its responsibility over foreign affairs and the charter ... the steps necessary to address the breaches of Mr. Khadr’s charter rights.”

The implication is clear—the government can choose “remedies” other than demanding Khadr’s extradition or repatriation.

Although the court did not specify what other remedies might be deemed constitutional, legal experts were quick to suggest that the government could make Washington aware of the Supreme Court ruling and ask that the interrogations of Khadr conducted by Canadian officials not be used as evidence in his prosecution.

In his statement Justice Minister Nicholson declared the ruling a vindication of the government’s position: the Supreme Court has ruled “the government is not required to ask for accused terrorist Omar Khadr’s return to Canada.”

He added that “the government will carefully review the Supreme Court’s decision and determine what further action is required.”

This is certain to be a pro forma statement that leaves Khadr in the hands of the US military and state to be meted out “justice”—in violation of international law and what were hitherto fundamental democratic and juridical principles in both Canada and the US.

Following the issuing of the Supreme Court judgment, Nathan Whitling, one of Khadr’s lawyers, said, “We’re realists. Realistically I don’t think [the decision is] going to have an effect on this government’s behaviour ... I don’t think Prime Minister Stephen Harper is going to change his mind given the degree to which he has dug in on this issue.”

The Globe and Mail, Canada’s so-called newspaper of record, has applauded the Supreme Court’s ruling, claiming that its findings that Khadr’s rights were violated constitutes a “moral victory” for the Guantanamo Bay detainee.

In reality, the court’s ruling represents a further blow to democratic rights. Canada’s highest court has declared that even when the government is complicit in the torture and the illegal detention of a citizen it is not legally compelled to offer any substantive legal remedy. Reputed foreign policy considerations trump the citizen’s basic rights.



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