C.A. Nº A-123-11

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

(Appellant)

- and -

RAHEEM KHAN

(Respondent)

APPELLANT'S FACTUM

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PART I:
INTRODUCTION

1. This case is about extraterritoriality and the limits of the *Charter*, particularly in regards to the question of whether a person with alleged terrorist affiliation should receive rights under the *Charter* after willingly travelling to a foreign country in which terrorist groups are highly active. The respondent claims that the *Charter* does apply and the conscriptive statements he made should be excluded. However, the *Charter* does not apply and any alleged breaches of *Charter* rights are just and reasonable in the war against terror.

PART II:
SUMMARY OF THE FACTS

2. The Respondent, born and raised in Canada, is a member of a prominent Toronto family. His parents emigrated from Pakistan many years ago and became Canadian citizens. They own and operate a very successful media company based in Toronto. The family is known for its out-spoken views against Canadian involvement in the war in Afghanistan and is involved in charitable work directed at improving the living conditions of the war-affected in Afghanistan. It is alleged by the Crown that members of the family have connections to individuals in Al Qaeda and the Taliban. It is these alleged connections which gave rise to the charges against the Respondent.

3. On February 7, 2008, the Respondent's father and older brother were arrested and charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the Criminal Code. A

year later, the Respondent was charged with this same offence.

4. While the charges against the Respondent's father and brother were recently stayed, the allegations against all three individuals are that they have been raising money in Canada and sending it to Pakistan in order to finance Al Qaeda and Taliban operations in Afghanistan. It is alleged these operations involve attacks on NATO forces in southern Afghanistan, which includes members of the Canadian Armed Forces.

5. In March of 2008, when the Respondent was 17 years old, he spent two weeks visiting extended family in Pakistan while on holiday from school. At that time, the Crown's prosecution was focused on the activities of the Respondent's father and older brother; the Respondent, a minor then, was not charged with any offence nor was he a suspect in the investigation.

6. On March 17, 2008, the Respondent was detained by the Afghan Border Police (ABP) just inside the border of southern Afghanistan. While the Crown asserts he was attempting to cross the border illegally, the trial judge found that there was no evidence that would allow him to make such a finding. The Respondent, whose extended family lives close to the Afghanistan border in Pakistan, took the position that he did not intend to cross into Afghanistan and did so inadvertently.

7. When the Respondent's detention came to the attention of officials at the Canadian embassy in Kabul, the trial judge found that no Canadian consular official intervened on the Respondent's behalf or took any measures to assist him.

8. The trial judge found that Canadian embassy officials in Kabul contacted RCMP members responsible for the Canadian investigation of the Respondent's father and brother and informed them of the Respondent's detention. Subsequently, a decision was made by the RCMP in Canada to have RCMP officers in Afghanistan question the Respondent in respect of the allegations against his father and brother.

9. These particular RCMP officers were present in Afghanistan as part of NATO's international mission and were responsible for training and supporting Afghanistan's various national police forces. The RCMP in Canada, who was responsible for the investigation of the Respondent's father and brother, requested that the RCMP in Afghanistan interview the Respondent in order to see whether his activities had any connection to the financing terrorism charges pending against the Respondent's father and brother.

10. The RCMP sent two members of the ABP to question him. The trial judge found that the Respondent was not given access to any consular officials or legal counsel. The Respondent, a minor at the time, was detained by the ABP in the company of his cousins, who were also minors. At no point were adult family members contacted and informed of the youths' detention.

11. The trial judge also found that the RCMP instructed the ABP not to tell the Respondent that they were questioning him in respect of a criminal prosecution against his father and brother in Canada. They provided the Afghan police with a list of questions to ask the Respondent about his activities in Pakistan and his reasons for crossing the border. The RCMP also provided the ABP with an audio recording device and asked them to record their interview with the Respondent.

12. The ABP would have released the Respondent (returning him to Pakistan) within 24 hours after determining his identity and satisfying themselves that he was not engaged in any illegal activity. However, as a result of the RCMP's decision to interview the Respondent, the ABP had to detain the Respondent for another two days as the RCMP travelled with officers of the ABP to the border post for the interview.

13. The interview lasted approximately three hours. There was no evidence of torture or other oppressive circumstances. While the ABP did not explain to the Respondent the purpose of the interview or the reason for his continued detention, the trial judge found that it was clear that the Respondent suspected these reasons; he inquired, half-way through the interview, whether the questioning had anything to do with his family in Canada.

14. One year following his interview in Afghanistan, the Respondent was charged with "providing property or financial services, knowing that, in whole or part, they will be used by or will benefit a terrorist group" contrary to section 83.03 of the *Criminal Code*. At trial, the Crown sought to introduce statements made by the Respondent to the ABP in Afghanistan.

The Respondent opposed the introduction of these statements into evidence. He brought an application before the trial judge, arguing that his *Charter* rights had been violated and the statements had to be excluded. The trial judge granted his application and the statements were excluded.

15. Because of the RCMP's involvement in the questioning of the respondent, the trial judge declared that the *Charter* did apply in the case, under s. 32(1). Garcia J. noted that the respondent's rights to freedom from arbitrary detention (s. 9), to be informed promptly of the reasons for detention and to be informed if they change (s. 10(a)), and to retain and instruct counsel (s. 10(b)) were violated. Following, the trial judge determined that because the respondent's *Charter* rights were breached, the admission of the statements he made would bring the administration of justice into disrepute, under s. 24(2). However, the trial judge also stated that even though the respondent's rights were breached, the evidence obtained from him should not be excluded in a trial because it would not infringe on his right to a fair trial, under ss. 7 and 11(d).

PART III
GROUNDS OF APPEAL

ISSUE ONE: DOES THE CHARTER APPLY?

16. The *Charter* does not apply within the context of this case. As such, the statements made by the respondent to the ABP should be admissible in a court of law. To reference *R. v. Cook*, in their dissent, L'Heureux-Dubé J. and McLachlin J. (as she then was) stated that "A person invoking a *Charter* right must first show that he or she held that right." Holding this in regard, it is sound to say that the trial judge erred in his decision for many reasons.

R. v. Cook, [1998] 2 S.C.R. 597

17. The judge first erred in his decision when he concluded that the *Charter* applied under Section 32 (1) which states that the *Charter* applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament". The trial judge stated that due to the RCMP's involvement within the case, the matters were within the authority of Canada and thus garnered *Charter* scrutiny. However, this is not the case. Within *R. v. Terry*, the judges state that "Foreign police gathering evidence for Canadian police should not, as a matter of policy, be required to conform to the *Charter*. Evidence gathering abroad occurred not because of any attempt to circumvent the *Charter* but because of the accused's decision to go abroad". In the case of the respondent, he would have been interrogated on Canadian soil had he not made the choice to go abroad to Pakistan. Because it was his decision to go abroad, the foreign police acting on behalf of the RCMP are not subject to charter scrutiny.

R. v. Terry, [1996] 2 S.C.R. 207

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Reasons for Judgement

18. The trial judge further erred in his decision to disregard the precedent of *R. v. Hape* due to "unique facts" brought forth within this case. One cannot, however, disregard the striking similarities between this case and *R. v. Hape*, which make it much more relevant than the judge stated. Within *Hape*, the judge found that the actions of the Turks and Caicos police did not fall under the charter, even though they were cooperating with the RCMP. The charge on Hape was that of Money Laundering, which involves the moving and concealing of funds for illegal purposes, which is incredibly relevant to the case at hand due to the fact that this is

essentially what the respondent's brother and father (and later himself) were charged with, except their moving of funds was to benefit a terrorist organization.

Reasons for Judgement

R. v. Hape, [2007] 2 S.C.R. 292, 2007 SCC 26

19. Furthermore, it was found in *Hape* that "the only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights". This means that Canada can only scrutinise Canadian Officers who blatantly abuse human rights. As such, because there is no evidence of torture or a violation of human rights under international law, Canada has no basis to enact the *Charter* in the respondent's case.

R. v .Hape, [2007] 2 S.C.R. 292, 2007 SCC 26

Reasons for Judgement

20. The judgement was even further flawed because it completely discounts the principle of non-intervention in a foreign country. Under international law, all countries should strictly follow the principle of non-intervention, which includes the exacting of a law extraterritorially. As quoted from the decision in *R. v. Cook*,

> To require that Canadian law enforcement authorities comply with *Charter* standards abroad may not, depending on the circumstances, interfere with the foreign state's sovereign authority and integrity. However, an objectionable extraterritorial effect would result if the *Charter* were applied to foreign officers, even where the foreign officers can be described as the agents of Canadian authorities.

In this case, the application of the *Charter* would be done so to foreign officers, which would undermine the authority of the ABP and go against the principles integral to international law. The involvement of the RCMP is regardless, due to the fact that the ABP conducted the questioning of the respondent. Even if they are proven to have acted as agents of the state, they cannot attract *Charter* scrutiny because they are foreign officials and were acting under foreign law.

R. v. Cook, [1998] 2 S.C.R. 597

Resolutions adopted by the General Assembly at its 34th session, Online: United Nations Webpage <http://www.un.org/Depts/dhl/resguide/r34.htm>

21. Finally, the judge erred by not taking into account the cooperation that had to occur between the ABP and RCMP in order for the investigation to be carried out. In their dissent within *Cook*, L'Heureux-Dubé J. and McLachlin J. (as she then was), found that

> Previous jurisprudence has established two fundamental principles regarding the extraterritorial application of the *Charter*. First, the action alleged to have violated the *Charter* must have been carried out by one of the governmental actors enumerated in s. 32. Second, if there is cooperation between Canadian and foreign officials on foreign soil, that action will not trigger *Charter* application even if the action is attributable to a government listed in s. 32.Whether an investigation is cooperative depends on whether Canadian officials have legal authority in the place where the actions alleged to have infringed the *Charter* took place. Section 32 of the *Charter* mandates that it applies to matters that fall "under the authority" of Parliament or a provincial legislature. An investigation on soil under foreign sovereignty takes place under the authority of the foreign state, so s. 32 is not triggered. The *Charter* does not apply to any investigation where Canadian officials no longer hold the legal attributes of government. This occurs whenever an investigation takes place under foreign sovereignty.

R. v. Cook, [1998] 2 S.C.R. 597

This states that if there is cooperation between Canada and the foreign state, the *Charter* does not apply. This is a key issue here: in order for the ABP to question the respondent, they had to cooperate with the RCMP. This cooperation results in the charter not applying. This dissent is further backed up in decisions within *R. v. Terry* and *R. v. Hape* and is thus both relevant and true

R. v. Hape, [2007] 2 S.C.R. 292, 2007 SCC 26

R. v. Terry, [1996] 2 S.C.R. 207

ISSUE TWO: WERE THE APPLICANT'S CHARTER RIGHTS VIOLATED? (9, 10(A), 10(B))

21. Garcia J. found the detention of the respondent arbitrary because his detention period exceeded the amount of time he would have experienced solely under the immigration violation. However, because of the allegations against the respondent's father and brother, the RCMP found it necessary to have him questioned.

Reasons for Judgement

22. The detention of the respondent was not, as he claimed, in violation of his rights. According to s.83.3(4) of the *Criminal Code of Canada*,

> (4) Notwithstanding subsections (2) and (3), if… (*b*) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity, the peace officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a provincial court judge in accordance with subsection (6).

Criminal Code, R.S.C. 2001, c. 41, s. 83.3(4), online: Department of Justice Canada < http://laws-lois.justice.gc.ca/eng/acts/C-46/page-211.html#h-92>

The RCMP suspected that the respondent's illegal entry into Afghanistan may have been in

relation to an act of terrorism, and in the interest of public safety had him detained. The detention was not arbitrary because of the charges against his father and brother, and the suspicious circumstances in which he was caught. Therefore, the actions of the RCMP were condoned by the *Criminal Code of Canada*.

23. It is firmly believed by counsel for the appellant that the respondent's rights were not violated, because the interrogation was conducted by foreign officials in a foreign country. However, if it is found by the Court that the Charter does apply, it is the duty of counsel to prove that the respondent's rights were still not violated. As it is stated in *R. v. Mann*:

> police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.
>
> *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59

In the case at hand, the respondent's father and brother were charged with financing terrorism overseas. The respondent was found illegally crossing the border into Afghanistan, out of which Al-Qaeda and the Taliban operate. Perhaps this was a coincidence, but in light of the charges against the respondent's father and brother, the RCMP had reasonable grounds to suspect the respondent was continuing their work, and that such detention was necessary.

24. At present, the issue of public safety is brought to the attention of the Court. The idea of justice is to balance the needs of the individual with the needs of society. The issue has been brought up multiple times, one such example being *R. v. Ladouceur*, in which it was decided that

> In my view the random stop is rationally connected and carefully designed to achieve safety on the highways. The stops impair as little as possible the rights of the driver. In addition, the stops do not so severely trench on individual rights that the legislative objective is outweighed by the abridgement of the individual's rights.
>
> *R. v. Ladouceur*, [1990] 1 S.C.R. 1257

Of course, drinking and driving and financing terrorism are very different, but the legal foundation remains the same; the rights of an individual may be infringed to keep society safe. The infringement of rights is intended to be as minimal as possible while still resulting in the best possible effect. Garcia J. wrote in paragraph 16 of his decision that there was no evidence of torture or other oppressive circumstances during the respondent's interrogation.

Reasons for Judgement

25. The respondent was informed of the reasons for his original detention, but claims that when the subject of questioning changed without his being informed, his rights under s. 10(a) of the *Charter* were violated. The trial judge agreed, noting in paragraph 34 of his decision that the police are obliged to notify the detainee of the change in reasoning in an interrogation. This decision was directly contradicted by the Supreme Court in *R. v. Harrer*:

> the fact that no new warning was given when the interrogation moved to the more serious offence under Canadian law was not unfair in the circumstances of this case. The appellant knew and understood that she was in jeopardy in relation to the Canadian offence and there was no other evidence of unfairness.
>
> *R. v. Harrer*, [1995] 3 S.C.R. 562

In paragraph 16 of Garcia J.'s decision, he stated that it was clear the respondent was aware of the reasons for his subsequent detention. Accordingly, he is bound by *Harrer* and his rights were not infringed.

Reasons for Judgement

26. Wherein the respondent may claim that he was still treated unjustly because he was not formally told by the ABP that the reasons for his detention had changed, it was decided in *R. v. Evans* that

> very shortly after the point where the appellant became the prime suspect in the killings, the police indicated that they were investigating the appellant for that purpose, and the appellant in turn seemed to recognize that the nature of the questioning had altered...When considering whether there has been a breach of s. 10(*a*) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern
>
> *R. v. Evans*, [1991] 1 S.C.R. 869

While the appellant may not have been told in exact terms that he was no longer being interrogated about his alleged illegal border crossing, but rather about his father and brother and the charges against them, it is clear that he reasonably understood the change, and therefore his right was not violated.

27. The above arguments are once again exemplified in *R. v. Latimer*; where it was ruled that

> The failure to inform the accused that he had been "arrested" and that he could be charged with murder does not violate s. 10(*a*) of the *Charter*…On the facts of this case, the trial judge was right in finding that the accused understood the basis for his apprehension by the police and hence the extent of his jeopardy. He knew that his daughter had died, and that he was being detained for investigation into that death.
>
> *R. v. Latimer*, [1997] 1 S.C.R. 217

The respondent knew that his family was under investigation, and that his father and brother had already been charged with terrorist activity. The respondent clearly would have understood that he was being detained in that respect, considering the country he was in and the country he was allegedly attempting to enter illegally.

28. The respondent claims he was deprived of his s. 10(b) right to retain and instruct counsel. However, the *Charter* does have limits. In accordance with *Re Regina and Speid*, "The right of an accused to retain counsel of his choice has been inferentially entrenched in the Charter. Although it is a fundamental right which must be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations." A person's *Charter* rights are not guaranteed, and certain exemptions need to be made in extenuating circumstances. The *Charter* follows citizens around the country, but they are not immune to the jurisdictions of foreign nations should they choose to leave Canada. As well, under the *Canadian Anti-Terrorism Act*, a person may be detained for up to three days and have their rights suspended as a precautionary measure in preventing terrorist activity

Re Regina and Speid (1983), 8 C.C.C. (3d) 18 (Ont. C.A.).

29. The respondent may have possessed the desire to speak with a lawyer, but the trial judge did not write that he had indicated as such, and as proven in *R. v. Black*, "the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused person is not diligent in this regard, then the correlative duties imposed upon the police to refrain from questioning the accused are suspended." The fact that the respondent was not diligent in seeking his rights places him with just as much fault as he claims the ABP has for not notifying him of said rights. It is not being suggested that a person has no rights unless he or she requests them; it is the responsibility of the individual to assert his claim to those rights under a foreign jurisdiction, where the local officials may not have been familiar with them, if he so believed the *Charter* indeed applied.

R. v. Black, [1989] 2 S.C.R. 138

30. It has already been confirmed by the trial judge that the accused was not informed of his right to counsel. In accordance with *Black, supra*, the responsibility is on the accused to assert his right. If the *Charter* did in fact apply in the respondent's situation, then under *R. v. Baig*, "Absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied, or he was denied any opportunity to even ask for it." There is no evidence present in the trial judge's decision relating to the accused ever requesting his rights. The respondent was not under oppressive circumstances during his interrogation, and, as ignorance of the law is not an excuse, would have had plenty of opportunities to request counsel. Because he did not take advantage of these opportunities, he waived his s. 10(b) right, and therefore the right was not violated.

R. v. Baig, [1987] 2 S.C.R. 537

ISSUE THREE: SHOULD THE STATEMENTS BE EXCLUDED FROM EVIDENCE?

31. A reasonable person would conclude that the respondent's statements were obtained fairly, legally, and in the interest of national safety and security. Omitting the respondent's statements would be a great detriment to Canada's legal system, and unjust in terms of precedence.

32. The Grant Test, according to *R. v. Grant* states that

> When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter* infringing state conduct, (2) the impact of the breach on the *Charter* protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353

33. Primarily, if the respondent's *Charter* rights were to have been violated, his right to be free from arbitrary detention would have been disregarded in application of the *Anti-Terrorism Act*, which states that

> (4) Notwithstanding subsections (2) and (3), if… (*b*) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity, the peace officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a provincial court judge in accordance with subsection (6).
>
> *Criminal Code*, R.S.C. 2001, c. 41, s. 83.3(4), online: Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-211.html#h-92>

In accordance with the *Criminal Code, supra*, the respondent's ties with suspected terrorist activity are grounds enough to subsequently detain the respondent following his original detention.

34. Secondly, the impact of the statements being admissible in court as a result of the alleged breach of the *Charter* is minimal for the accused - it is not the statements that incriminate him, it is his actions which have led to the charge. His statements only act as further evidence, and rightfully so.

35. Finally, the interest of society lies in finding the truth, and passing judgement accordingly. Society would agree that it is not a difficult decision to choose between a government that is tough on terrorism yet protects the rights of potential terrorists overseas, and a government that does its best to fairly utilize every resource available to eliminate terrorism.

36. The respondent made the decision to leave Canada, and as he was not in the country at the time his testimony was required, it is of legitimate circumstance that the RCMP worked in collaboration with the ABP to obtain the information needed effectively. In accordance with *R. v. Terry*,

> Foreign police gathering evidence for Canadian police should not, as a matter of policy, be required to conform to the *Charter*. Evidence gathering abroad occurred not because of any attempt to circumvent the *Charter* but because of the accused's decision to go abroad.
>
> *R. v. Terry*, [1996] 2 S.C.R. 207

It was entirely necessary that the RCMP obtain the respondent's information, and the resources they used were reasonable and appropriate.

37. It is clear that Canada cannot begin to extend its *Charter* to foreign countries, seeing as conflicting legislation is inevitable and will prevent Canadian police from fulfilling the requirements of their job. A statement made regarding the case should stand independently under the authority who initially heard it, even supposing a *Charter* right was breached. This is made clear in *Harrer*;

> Evidence cannot be assumed to be unfairly obtained or to be unfairly admitted because it was obtained in a manner that would violate a *Charter* guarantee in this country. Different balances may be struck in various countries between the interests of the state and of the individual, all of which *may be* fair.
>
> *R. v. Harrer*, [1995] 3 S.C.R. 562

As there is no report of threat or torture, it is reasonable to conclude that the statements made by the respondent would be no different if interrogated by the RCMP.

38. The *Criminal Code* states that

> [if] the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity, the peace officer may arrest the person without warrant and cause the person to be detained in custody
>
> *Criminal Code*, R.S.C. 2001, c. 41, s. 83.3(4), online: Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-211.html#h-92>

Under Canada's *Anti-Terrorism Act*, in the event a Canadian police officer suspected the respondent to have had any link to terrorism, if Canadian law were to apply, the respondent may have been detained without a warrant by the RCMP in Afghanistan regardless of any other charges.

39. A reasonable person would agree that in the interest of truth and in honour of the extensive efforts the government of Canada has gone to in order to eradicate terrorism, calling into question the validity of the respondent's statements for the aforementioned reasons holds no weight. S.24 (2) of the *Charter* outlines the admissibility of evidence and the necessity to exclude it if its admission would bring the justice system into disrepute. It is clarified through *R. v. Cook* that what is called into question is the importance of strictly protecting the rights of Canadians in every conceivable situation, rather than how offensive the error was on the part of the police: "The question in all cases is whether the admission of the evidence could bring the administration of justice into disrepute, in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances." Even in the event the rights of the respondent were breached, a reasonable person would agree the end justified the means.

R. v. Cook, [1998] 2 S.C.R. 597

40. Omitting the respondent's statements in a court of law implies valuable evidence gathered by foreign officers may be deemed invalid simply due to the non-Canadian jurisdiction of the authority collecting it. Crucial information being gathered in future cases of similar circumstances especially related to terrorism cannot run the risk of being disregarded. The preservation of international security and the protection of all Canadians are too important. *R. v. Grant* clarifies that

> Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Section 24(2)'s focus is also societal.
>
> *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353

Even in the event of a *Charter* violation, the evidence remains valid on the grounds that omitting the statements will set a dangerous precedent which will prove harmful in the future, as well as the submission of the evidence will not make the administration of justice any less reputable.

ISSUE FOUR: DOES THE ADMISSION OF THE STATEMENTS VIOLATE THE APPLICANT'S RIGHT TO A FAIR TRIAL?

41. The most important thing to consider when determining whether evidence should be excluded under s. 11(d) is the reliability of the evidence. In *R v. Cook*, the judge states that "Evidence will be excluded when its admission would lead to an unfair trial. However, the fact that the evidence was obtained in a manner that would have violated one of the sections of the *Charter* is not determinative. All relevant circumstances must be taken into account". Thus, not all evidence gathered in a different way than it would have been gathered under

Canadian proceedings is unreliable. There is no way that reliable evidence can render a trial unfair.

R. v. Cook, [1998] 2 S.C.R. 597

42. The evidence gathered by the ABP against the respondent is most definitely reliable. His statements were voluntary because he did not express at any point a desire to remain silent. He was not in an abusive or coercive environment. No threats were made against him or his family. He was not tortured. The conduct of the ABP questioning the respondent could not have elicited any false statement.

43. The content of the statements may be different than if they had been gathered per the Canadian criminal system. Indeed, the trial judge expressed his concern that failure to inform the respondent of the reasons for his questioning could have altered his statements. He stated "while there is no evidence of abuse, threats, inducements or any other oppressive circumstances, the violation of an individual's s. 10 rights may give rise to unreliable statements that may distort the truth-seeking function of the criminal trial process, although in this case I acknowledge that risk is minimal".

Reasons for Judgement

44. With regards to the alleged infringement of s. 9, the trial judge made no assertion in his reasons that infringement of s. 9 could give rise to unreliable statements. This is because the extra days the applicant was detained were nothing more than a minor inconvenience. The extra detention was no sufficiently coercive as to illicit false statements from him, thus the alleged violation of s. 9 is not sufficient basis for an exclusion of evidence under s. 11(d), even if it is proven.

45. The evidence should not be excluded on the basis of a s. 10 violation either. A similar would-be charter violation happened in *R. v. Harrer*. Harrer was in the United States, and was questioned about her boyfriend's alleged offence. The interrogation was conducted by American police. The questioning shifted to her involvement in a Canadian crime, but she was not given a second right-to-counsel warning. The Supreme Court found that the breach of the *Charter* did not affect the evidence to the extent that its admission would render the trial unfair.

R. v. Harrer, [1995] 3 S.C.R. 562

46. The ruling in *Harrer* is an acknowledgment that failure to inform an accused person when the focus of their interrogation shifts, coupled with failure to inform them of their right to counsel, does not render evidence given afterwards unfair. The decision was that "The admission of the impugned evidence would not result in an unfair trial. Evidence cannot be assumed to be unfairly obtained or to be unfairly admitted because it was obtained in a manner that would violate a *Charter* guarantee in this country". It is not reasonable to assume that because evidence is foreign and was obtained in a way different from that of Canada, that it is any less valid in any court of law.

R. v. Harrer, [1995] 3 S.C.R. 562

47. This point can be affirmed by another precedent relevant to evidence gathered in the wake of a section 10(b) violation: *R. v. Terry*. Terry was in the United States, was arrested, and was not informed forthwith of the right to counsel. Again, the Supreme Court found that the lack of right to counsel did not destroy the credibility of his statements. There is no way in which the alleged violations against the respondent's s. 10(b) rights were any more severe

than those outlined in *R. v. Terry* and *R. v. Harrer*. Thus, there is no s. 10(b) basis for the exclusion of the appellant's statements under ss. 7 and 11(d).

R. v. Terry, [1996] 2 S.C.R. 207

48. The trial judge combined the effects of a s. 10(a) violation on the reliability of the evidence with the effects of a s. 10(b) violation on the same in his reasons. By doing this, he probably thought that the violations would have had the same effect on the appellant's testimony. The judge's logic was that without the appellant having knowledge of what charges he was being questioned with regards to, he might have said something incriminating that he would not have said otherwise.

Reasons for Judgement.

49. The trial judge found (as did the Supreme Court in *R. v. Harrer* and *R. v. Terry*) that the difference in statement caused by the alleged violation of s. 10 was not sufficient to justify exclusion under s. 11(d). There is no reason that either the absence of counsel or the lack of initial knowledge of what he was being questioned about would have caused the respondent to give false statements. Any good, law-abiding citizen would tell the truth when being questioned by the police of any lawful country, and as it is the duty of the state to assume the respondent is a good, law-abiding citizen, the court must assume that he did the same, even in the absence of counsel and without initially knowing what he was being questioned about.

50. The government of Afghanistan is lawful and just. Although Afghanistan has problems with terrorism, the people in Afghanistan that Canada willingly collaborates with are the

people that work to fight terrorism and uphold the law. Canada's trust in Afghani law is evidenced by the fact that Canada entered into treaty with them in the first place. In *Canada v. Schmidt*, the Supreme Court spoke with regards to gauging Canadian's trust in the fairness of foreign systems. "In determining that issue, the courts must begin with the notion that the executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place, and must have recognized that it too has a duty to ensure that its actions comply with constitutional standards".

Canada v. Schmidt, [1987] 1 S.C.R. 500

In the case of *R v. Khan*, the executive is the Canadian Government and the treaty can be considered to be Canada's friendly relationship with the Government of Afghanistan. By agreeing to enter Afghanistan and help them train their police, and let them interrogate the respondent, Canada showed its trust in the fairness of the administration of justice in Afghanistan.

51. In fact, the "outsourcing" of the interrogation of the respondent to the ABP should not be seen as an attempt to circumvent the Charter. It should be seen as evidence of the RCMP's good faith in the fairness of the administration of justice in Afghanistan. No Canadian is more qualified to judge the fairness of the Afghani system than the RCMP officers who work closely with its proponents on a daily basis.

52. It is not refuted in this case that the evidence obtained was so in accordance with Afghani law. As the Supreme Court stated in *Harrer*,

> The fact that the evidence was obtained in another country in accordance with the law of that country may be a factor in assessing fairness. Its legality at the place in question will necessarily affect all participants, including the police and the individual accused. More specifically, conformity with the law of a country with a legal system similar to our own has even more weight, for we know that a number of different balances between conflicting principles can be fair.
>
> *R. v. Harrer*, [1995] 3 S.C.R. 562

Because the evidence was obtained in accordance with Afghani law, and counsel for the appellant firmly believes that the trial judge erred in determining that the state of Afghani law is irrelevant, the statements made by the respondent are as valid in a Canadian court as they would be in an Afghani court.

53. It is not proposed that the Afghani legality of the procedures that took place is the be-all-end-all. It is obvious, though, that an argument that evidence gathered under Afghani law is fair holds more merit than an argument that evidence gathered under North Korean law is fair. Fairness in the administration of justice varies from country to country. On this, the Supreme Court provided in *Canada v. Schmidt* that

> The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country. A judicial system is not, for example, fundamentally unjust--indeed it may in its practical workings be as just as ours--because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because it's procedural or evidentiary safeguards have none of the rigours of our system.
>
> *Canada v. Schmidt*, [1987] 1 S.C.R. 500

If the respondent was well within his rights when being interviewed in Afghanistan, then the

fact is that, if he were vacationing in Afghanistan, he would have to obey the laws of that country. When in another country, it is not expected of Canadian citizens to obey Canadian law, so in the same sense, it should not be expected of the foreign government to obey Canadian law.

54. The relevant case law surrounding the application of s. 11(d) to evidence gathered abroad (*R. v. Cook, R. v. Hape, R. v. Harrer, R. v. Terry, Canada v. Schmidt*) all points to one thing; in Canada, the administration of justice is well above what is considered to be the minimum standard for fairness. As long as one is in Canada, one enjoys these wonderful benefits given to suspects, such as ss. 9 and 10. The moment one leaves Canada, one makes oneself subject to the laws and procedures of other countries. Laws and procedures that while different, and indeed in some cases appear to be less fair than Canadian law, are still fair.

55. What happened to the respondent in Afghanistan undoubtedly was less fair to him than what would have happened had he stayed in Canada and been interrogated by the RCMP, but his treatment was still fair. Even more fair was the evidence gathered, as none of the questionable circumstances surrounding its gathering could have elicited false testimony from the appellant.

56. If the evidence gathered abroad was done so in accordance with Afghani law, and the administration of justice in Afghanistan is deemed fair by qualified Canadian executives (including politicians who made the decision to open friendly relations with Afghanistan, and the RCMP who maintain those relations), there is no way that the evidence can be deemed

unfair, and thus, no way it can be excluded under ss. 7 and 11(d) of the *Charter*.

APPLICATION TO THIS CASE

57. The facts of the case make the *Charter* inapplicable. Even if the ABP acted as "agents" of the RCMP, the *Charter* does not apply to their actions. If the *Charter* did apply, the respondent's ss. 9 and 10 rights were not violated. The respondent could easily have been detained under the *Anti-Terrorism Act*, and the questions asked were clear in their connection to the charges against his father and brother. He did not request counsel, or the assistance of consular officials, explaining why he was not granted them. The evidence gathered was reliable, as it was not gathered in sufficiently coercive circumstances to elicit false statements or to shock the conscience. Finally, even if the respondent had rights, and those rights had been violated, the admission of the evidence gathered would not bring the administration of justice into disrepute. Canadians understand that when they leave the country, they subject themselves to the laws of the country they enter. If the respondent's rights were in fact violated, Canadians can accept a minor rights infringement in the incredibly important war against terrorism.

PART IV
ORDER REQUESTED

58. It is respectfully requested that the appeal be granted in order to preserve the safety of Canadians and human beings worldwide.

ALL OF WHICH is respectfully submitted by

Sohail Chatur, Jessica Goddard, Brendan Goodman, Alaric McKenzie-Boone

Of Counsel for the Appellant

DATED AT 1305 CAWTHRA ROAD this 21st Day of **April, 2011**

APPENDIX A

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APPENDIX B

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APPENDIX C

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APPENDIX D

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Reasons for Judgement