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## Afghani's Rights Subject of Charter Appeal

by Jeff Davis

In an effort to ensure Afghans detained by Canadian Forces are not transferred into torture, Amnesty International is appealing a recent decision that ruled the Charter of Rights and Freedoms does not apply in Afghanistan.

On the outcome of this appeal hinges the critical question of whether those in custody of Canadian state authorities in Afghanistan are entitled to the same fundamental rights as Canadian citizens.

If the appeal prevails, the Canadian Forces could be barred from transferring detainees to Afghan authorities.

"The question is this: if a Canadian state agent, like the military, does something, should they be bound by the Canadian Charter of Rights and Freedoms?" said Amir Attaran, a University of Ottawa law professor associated with the case.

This legal saga began in January 2008 when Amnesty International Canada and the British Columbia Civil Liberties Association brought an application for judicial review of the transfers of individuals detained by the Canadian Forces in Afghanistan.

Amnesty says that the arrangements between Canada and Afghanistan do not provide adequate safeguards to ensure that individuals transferred into the custody of the Afghan authorities are not at risk of torture. These transfers should be stopped, they argued, until the risk of torture at the hands of Afghan authorities no longer exists.

Their whole case hinged on Amnesty's belief that sections seven, 10 and 12 of the Charter apply to individuals detained by the Canadian Forces in Afghanistan.

Federal Court Judge Anne Mactavish ruled the charter does not apply in Afghanistan, rejecting the case March 12, 2008.

Paul Champ, Amnesty's attorney, appealed the Mactavish decision at the Federal Court of Appeal Dec. 10, coincidentally Human Rights Day.

He said it will likely be two to four months before a decision is rendered.

While it may seem unusual that Amnesty would assert the Charter has extraterritorial applications, Mr. Champ said there is significant jurisprudence that says most Charter rights apply to non-Canadians.

In the late 1980s, he said, the Supreme Court heard a number of landmark cases that ruled the fundamental rights protected in the Charter apply to everyone, not just Canadian citizens.

While voting and mobility rights apply only to Canadian citizens, the Charter says "everyone" is entitled to fundamental freedoms of association, expression and conscience, as well as legal rights, the right to life, liberty, and security of the person and the right to be free from cruel and unusual punishment.

These rights, Mr. Champ argued, have no territorial bounds, and Canadian state actors are obliged to extend these to anyone under their control.

"All of those types of rights are not limited to citizens, and wherever Canadian state actors operate they are governed by these limits" Mr. Champ said. "These are rights that the Canadian government is required to respect in connection with anyone who comes under control of the Canadian government or is within Canadian government jurisdiction."

Alex Neve, secretary general of Amnesty International Canada, said the case will likely end up before the Supreme Court.

"If the Federal Court [of Appeal] rules against us we will obviously turn to the Supreme Court of Canada," he said. "And if we win the appeal, I'm almost certain the government will want to take it to the Supreme Court as well."

Mr. Neve said if Amnesty wins the appeal, their case aiming to halt detainee transfers will continue.

Earlier on in the Afghan mission, Canada transferred its detainees into the care of American forces, which maintain a large prison at Bagram Air Base.

These transfers to U.S. authorities were halted in the fall of 2005, when the abuse of detainees at American prisons such as Iraq's Abu Ghraib, came to light.

The problematic transfer of detainees to Afghan authorities began after talks about creating a facility for Afghans detained by NATO allies failed to produce results.

These discussions about such a facility, which never materialized, came to light during a cross-examination of Colleen Swords, an assistant deputy minister at DFAIT and Political Director of the department's International Security Branch.

"There has been some discussions about whether one could not create a NATO-wide facility but perhaps a wing of an existing Afghan authority detention facility where detainees transferred from some of the NATO allies might be kept," she said.

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