10-8-2008

Memorandum of Fact and Law of the Respondent

Court File No. A-370-08

FEDERAL COURT OF APPEAL

BETWEEN:

ABOUSFIAN ABDELRAZIK

Appellant

and

MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW
(for appeal and cross-appeal)

PART I – FACTS

A. Overview

1. The appellant has failed to meet the stringent requirements for the extraordinary remedy of an award of advance costs. The Court's discretion to award advance costs should only be exercised in extraordinary and exceptional circumstances. The motions judge properly declined to exercise her discretion because the appellant failed to demonstrate that the litigation would not proceed without an advance costs award, or that he had exhausted all possible funding avenues before seeking the Court's assistance.

2. The motions judge erred in law and jurisdiction by ordering the respondent to facilitate the exchange of solicitor-client communications between the appellant and his counsel. There was no legal basis for this order. As an order in the nature of mandamus, the motions judge was without jurisdiction to grant it on a

motion. The motions judge erred in concluding that the ability of the Court to control its own process allowed her to make such an order. The Court should not use its jurisdiction over process to make orders affecting the important substantive rule of solicitor-client privilege, especially without considering whether such an order is necessary.

B. Background

3. The appellant, a dual national, is a citizen of both Sudan and Canada. He came to Canada in 1990 as a refugee and became a landed immigrant in 1992. He obtained his Canadian citizenship in 1995.[1]

4. In March 2003, the appellant travelled to the Sudan. In August 2003, he was arrested and detained by Sudanese authorities until the spring of 2004.[2] Shortly thereafter, arrangements were made for the appellant to return to Canada, however, those efforts were not successful because the appellant's name was on a "no fly list"[3] and various airlines, including Lufthansa, refused to board him.[4]

5. Since July 31, 2006, the appellant has been listed by the United Nations Security Council ("UNSC") pursuant to its Resolution 1267 and its successor resolutions (the "UNSC 1267 list") as an "individual associated with Al-Qaida" and is, therefore, subject to a global travel ban, an assets freeze and an

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[1] Reasons for Order of Mactavish, J. dated July 4, 2008 ("Reasons for Order"), at para. 12, **Appeal Book**, Tab 3, p. 10.
Foreign Affairs Canada Memorandum dated June 23, 2005, Exhibit "D" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 63.

[2] Reasons for Order, at para. 13, **Appeal Book**, Tab 3, p. 10.
Foreign Affairs Canada Memorandum dated June 23, 2005, Exhibit "D" to the Affidavit of Yavar Hameed,, **Appeal Book**, Tab 7, p. 63.

[3] Reasons for Order, at para. 16, **Appeal Book**, Tab 3, p. 11.
Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 81.

[4] Memorandum, Exhibit "C" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 60.

arms embargo.[5] The travel ban specifies that, subject to certain exceptions, listed individuals may not enter into the territory of a Member State or transit through the territory of a Member State.[6]

6. Since October 2003, the Government of Canada has provided the appellant with a high level of consular assistance and support. The appellant has been provided with financial assistance to cover his basic needs and to obtain medical assistance. In order to provide a monthly stipend, Canada obtained an exemption from the responsible Committee of the UNSC (the "UNSC 1267 Committee"). The stipend has been paid from the Distressed Canadian Fund.[7]

7. In addition, Canada transmitted a de-listing request from the appellant to the UNSC 1267 Committee.[8] That request was not, however, granted by the Committee. As of today, the appellant remains on the UNSC 1267 list.

8. The appellant has family members in Canada and the Sudan. They have previously provided financial assistance.[9] Yavar Hameed, a lawyer in Ottawa, met with the appellant's former wife, Myriam Ste-Hilaire, and was retained by her to represent the appellant in August 2007.[10] In May 2008, Mr. Hameed held a press conference with members of the appellant's Canadian family,

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[5] Reasons for Order, at para. 19, **Appeal Book**, Tab 3, p. 12.
Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 80-81.

[6] UNSC, 5609th Mtg., UN Doc. S/Res/1735 (2006), Exhibit "E" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, pp. 66-71. Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 152.

[7] Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, pp. 80-82.

[8] Reasons for Order, at para. 20, **Appeal Book**, Tab 3, p. 12.
Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed,, **Appeal Book**, Tab 7, p. 81.
Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 156, lines 16-22.

[9] Foreign Affairs Canada Memorandum dated June 23, 2005, Exhibit "D" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 63.

[10] Exhibits 1 and 2 to the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 165-170.

representatives of Amnesty International Canada, the Muslim Council of Montreal and La Ligue des Droits et Libertés.[11]

9. On February 27, 2008, Mr. Hameed met with officials from the Department of Foreign Affairs and International Trade ("DFAIT"). At that time, he was advised of the mechanism to apply for an exemption from the assets freeze and funding prohibition resulting from the UNSC 1267 listing and the *United Nations Al-Qaida Taliban Regulations (*the "*Regulations*").[12] On March 20, 2008, DFAIT officials provided further information regarding that process, including copies of the relevant Security Council Resolution and the Guidelines of the 1267 Committee.[13]

10. In April 2008, Mr. Hameed requested reimbursement for his legal fees. By letter dated April 18, 2008, a DFAIT official advised Mr. Hameed that there is no federal fund pertaining to legal fees incurred by Canadians abroad. He was informed of the process to apply for an exemption such that third parties could pay the appellant's legal fees pursuant to the *Regulations.*[14]

11. On April 29, 2008, the appellant presented himself at the Canadian embassy in Khartoum to seek safe haven.[15] He remains within the embassy. The conditions placed on his stay within the embassy are consistent with security protocols and practice at Canadian missions abroad, including with respect to

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[11] Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 136, lines 18-25 and p. 137, lines 1-6.

[12] Transcripts of Cross Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 150, lines 10-16.

[13] Letter dated March 20, 2008, Exhibit 10 to the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, pp. 200-201.

[14] Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, pp. 80-82.

[15] Reasons for Order, at para. 21, **Appeal Book**, Tab 3, p. 12.
Letter dated April 15, 2008, Exhibit 3 to the Cross–Examination of Yavar Hameed, **Appeal Book**, Tab 8, pp. 171-173.

the provision of temporary safe haven, and the constraints placed upon Canada pursuant to the appellant's listing under UNSC Resolution 1267.[16]

C. Litigation

12. On May 7, 2008, the appellant filed an application seeking the following relief:[17]

    (i) a mandatory order directing the respondent to repatriate him immediately to Canada; and

    (ii) a declaration that the respondent violated his right to enter Canada under s.6(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

13. In the context of his application, the appellant brought a motion seeking an order for advance costs. In addition, he sought an order requiring the respondent Minister to facilitate solicitor-client communications between himself and his lawyers while he remains in temporary safe haven in the Canadian Embassy in Khartoum.[18]

14. By decision dated July 4, 2008, the motions judge, Justice Mactavish, dismissed the appellant's request for advance costs on the basis that the appellant had not satisfied her that "absent an advance order of costs, there is no other way that this litigation will be able to proceed".[19]

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[16] Terms of Reference for Mr. Abdelrazik's stay within the Embassy grounds, **Appeal Book**, Tab 7, pp. 112-114.

[17] Notice of Application dated May 7, 2008, **Appeal Book**, Tab 6.

[18] Notion of Motion dated June 16, 2008, **Appeal Book**, Tab 5.

[19] Reasons for Order, at para. 36, **Appeal Book**, Tab 3, p. 17.

15. The motions judge allowed the appellant's motion with respect to the facilitation of solicitor-client communications. She relied on the ability of the Court to control its own process in making her order.[20]

[20] Reasons for Order, at para. 61, **Appeal Book**, Tab 3, p. 24.

PART II - ISSUES

16. The issues raised on this appeal and cross-appeal are:

(i) whether the motions judge committed a palpable and overriding error in dismissing the appellant's motion for an order of advance costs; and

(ii) whether the motions judge erred in law and jurisdiction by ordering the respondent to facilitate the exchange of solicitor-client documents between the appellant and his counsel.

PART III - ARGUMENT

A. Request for Advance Costs Properly Dismissed

1. Advance costs are only awarded in rare and exceptional cases

17. Rule 400 of the *Federal Courts Rules* grants the Court the full discretion to award costs. The usual practice is for costs to be awarded to the successful party after judgment has been rendered.[21]

18. The standard characteristics of costs awards have been confirmed by the Supreme Court as follows:[22]

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
> (4) They are not payable for the purpose of assuring participation in the proceedings.

19. These characteristics reflect the traditional purpose of an award of costs, namely to indemnify the successful party for the expenses incurred in defending an unfounded claim or prosecuting a valid legal right.[23] The Supreme Court has

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[21] *Charkaoui (Re)* (2004), 256 F.T.R. 93, 2004 FC 900, [2004] F.C.J. No. 1090, at paras. 15-16.

[22] *British Columbia (Minister of Forests) v. Okanagan Indian Band* ("*Okanagan*"), [2003] 3 S.C.R. 371, 2003 SCC 71, [2003] S.C.J. No. 76, at para. 20.

[23] *Ibid.*, at para. 21.

determined that these ordinary rules of costs should govern unless the circumstances justify a departure.[24] Such a departure must be exercised with caution as highlighted by the following extracts from the Supreme Court:

> The rule in *Okanagan* arose on a very specific and compelling set of facts that created a situation that **should hardly ever reoccur**.[25]
>
> Advanced costs are **not to be used as a smart litigation strategy**; they are a **last resort** before an injustice results for the litigant and the public at large.[26]
>
> Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to **imprudent and inappropriate judicial overreach**.[27]

In sum, as the motions judge cited, an advanced costs award is a "drastic and unusual step".[28]

20. The Court's discretionary power is not intended to cure the various difficulties faced by litigants, such as under-funded legal aid programs:

> *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest.[29]

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[24] *Ibid.*, at para. 22.

[25] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2, [2007] S.C.J. No. 2, at para. 78.
See also: *Little Sisters*, at para. 36.
Charkaoui, at para. 17.

[26] *Little Sisters*, at para. 71.

[27] *Ibid.*, at para. 44.

[28] Reasons for Order at para. 25, citing *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2008] 3 C.N.L.R. 136, 2008 FC 574, [2008] F.C.J. No. 723, **Appeal Book**, Tab 3, p. 13.

[29] *Little Sisters*, at para. 5.

21. Furthermore, an award for advance costs is not to be used as a proxy for the public inquiry process.[30] Even if it is troubling that an individual may have restricted access to the court, that in and of itself does not to justify such an award.

22. The courts' jurisdiction to award such costs is prospective in nature.[31] The granting of such an award does not, however, provide the litigant with free rein. The Supreme Court suggested that a court should set limits, for instance, on the rates charged and the hours of work, and cap the advance costs award at an appropriate global amount.[32] As the motions judge noted, advance cost applications should include a budget because the court must consider the potential cost of the litigation.[33]

2. The motions judge applied the proper legal test

23. The motions judge applied the advance costs test as set out by the Supreme Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band ("Okanagan")* and confirmed recently in *Little Sisters and Art Emporium v. Canada (Commissioner of Customs and Revenue)*.[34] Under this test, in order for the court to award advance costs, it must be convinced by the litigant that the following three absolute requirements are met:[35]

    (i) The party genuinely cannot afford to pay and no other realistic option exists—in short, the litigation would be unable to proceed if the order were not made;

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[30] *Ibid.*, at paras. 38-39.

[31] *Okanagan*, at para. 41.

[32] *Ibid.*, at para. 41; See also: *Little Sisters*, at paras. 42-43.

[33] Reasons for Order at para. 53, **Appeal Book**, Tab 3, p. 22.

[34] Reasons for Order at para. 26, **Appeal Book**, Tab 3, pp. 13-14.

[35] *Little Sisters*, at para. 37.

(ii) The claim to be adjudicated must be *prima facie* meritorious; and,

(iii) The issues raised must transcend the litigant's individual interests, be of public importance and not have been previously determined.

24. As the motions judge further noted, even if the three requirements of the test are satisfied, advance costs are not necessarily justified.[36] The court, through its discretion, must make the final determination:

> These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively.[37]

25. The Supreme Court has made it clear that few cases will fall within "the narrow class of cases" where the courts should exercise their discretion to award advance costs.[38] The standard is intended to be high.

26. The motions judge applied this test and found that the appellant failed on the first requirement. Having done so, she found it unnecessary to consider the other requirements and declined to make an advance order of costs.[39]

3. The appellant has other realistic options

27. Before a court considers ordering advance costs, an applicant must have explored all other possible funding options. An applicant must demonstrate that

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[36] Reasons for Order at para. 27, **Appeal Book**, Tab 3, p. 14.

[37] *Okanagan*, at para. 41.
See also: *Little Sisters*, at para. 72.

[38] *Okanagan*, at paras. 36 and 41.

[39] Reasons for Order at para. 51, **Appeal Book**, Tab 3, p. 22.

an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising, loans, contingency fee arrangements and other available options.[40] In evaluating this requirement, the Court must ask itself "in every case whether the applicant has made the effort that is required to satisfy a court that all other funding options have been exhausted"[41] as well as whether "the litigation would be unable to proceed if the order were not made."[42]

(a) Litigation could proceed without advance costs

28. The evidence before the motions judge demonstrated that the litigation could proceed without granting the order sought. The appellant is represented by counsel who is currently acting on a *pro bono* basis. The evidence before the motions judge, through the affidavit of counsel, was that counsel "did not believe" the litigation would continue *pro bono*. Given this equivocal statement, it was open to the motions judge to determine that the *pro bono* representation may continue. Absent a palpable and overriding error, the motion judge's factual findings should not be disturbed.[43]

29. The Supreme Court has held that advance costs may only be awarded where "the litigation would be unable to proceed if the order were not made." The appellant did not meet this first requirement of the test and the motions judge correctly declined to order advance costs.

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[40] *Little Sisters*, at para. 14.

[41] *Ibid.*, at para. 68.

[42] *Ibid.*, at para. 37.

[43] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, [2002] S.C.J. No. 31, at paras. 10-25. *Wakefield Realty Corp. v. Cushman & Wakefield Inc.* (2004), 329 N.R. 39, 2004 FCA 41, [2004] F.C.J. No. 2081, at para. 12.

(b) Appellant failed to exhaust all funding options

30. Furthermore, the evidence before the motions judge demonstrated that the appellant had not fully explored the potential funding alternatives available to him. The motions judge found that there was no evidence to suggest that the appellant's family and friends were not in a financial position to assist him with his legal fees. [44] The appellant does not contest this finding.

31. The appellant has family in both Canada and Sudan who have previously provided financial assistance and his former wife retained Mr. Hameed herself.[45] Furthermore, counsel for the appellant admits that groups including Amnesty International, the Canadian Islamic Congress and the Council on American-Islamic Relations are interested in the appellant's case, and, as the motions judge found, other community members have expressed an interest in supporting the appellant.[46]

32. Despite this interest, counsel for the appellant admits that he has not sought funding from family or others interested in this case.[47] Rather than seek their assistance, he contends that there is an insurmountable obstacle preventing it. He argues that the *United Nations Al-Qaida and Taliban Regulations*[48] ("the

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[44] Reasons for Order at para. 43, **Appeal Book**, Tab 3, p. 19.

[45] Reasons for Order at para. 43, **Appeal Book**, Tab 3, pp. 19-20
Foreign Affairs Canada Memorandum dated June 23, 2005, Exhibit "D" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 63.
Retainer Agreement, Exhibit 2 to the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, pp. 167-170.

[46] Reasons for Order at para. 43, **Appeal Book**, Tab 3, pp. 19-20.
Affidavit of Yavar Hameed, paras. 41 and 43, **Appeal Book**, Tab 7, pp. 51-52.
Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 144, lines 9-17.

[47] Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 156, lines 23-25 and p. 157, line 1.

[48] SOR/99-444.

Regulations") impose an absolute ban on individuals or groups assisting with the appellant's legal fees due to the appellant's UN listing as an associate of Al-Qaida.

33. The appellant is conjuring insurmountable obstacles where they do not exist. Counsel for the appellant has been advised by DFAIT government officials, that the appellant's family or other supporters can apply under the *Regulations* for a Ministerial certificate allowing them to pay his legal fees.[49] DFAIT is the department which administers the *Regulations* on behalf of the responsible Minister. Nevertheless, the appellant denies that this exemption is available and has not asked his family or supporters to apply for it.

34. As a result of this failure to seek an exemption under the *Regulations*, the motions judge found that until such time as the appellant has fully explored the possibility, he "will not have demonstrated that he has exhausted all other possible funding options, as he is required to do before the Court can consider his request for an advance order of costs."[50]

35. The motions judge found that it was unnecessary to determine further how the *Regulations* should be interpreted. [51] She found that the possibility of obtaining an exemption exists, and the appellant must exhaust this possibility. In dismissing the motion she added that it was without prejudice to the appellant's right to return if his request for an exemption was not dealt with in a timely manner.[52]

36. By not pursuing the exemption, the appellant appears determined to construe the *Regulations* against his ability to have his legal fees paid for through private

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[49] Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, p. 82.

[50] Reasons for Order at para. 50, **Appeal Book**, Tab 3, p. 21.

[51] Reasons for Order at para. 48, **Appeal Book**, Tab 3, p. 21.

[52] Reasons for Order at para. 52, **Appeal Book**, Tab 3, p. 22.

funds. Rather than exploring this option, he comes directly to the Court to make an exceptional claim on the public purse. The test as laid out by the Supreme Court and applied by the motions judge requires him to exhaust all options before the Court can consider exercising its discretion to make a rare award of advance costs.

37. The motions judge made no palpable and overriding error in her factual finding that the appellant had failed to exhaust all opportunities for funding. Having so found, she was required to follow the jurisprudence and refuse to award such an extraordinary remedy. On this basis, the appeal should be dismissed.

(c) Exemption exists for payment of legal fees

38. This Court need not determine the correct interpretation of the *Regulations* in order to dispose of this appeal. A realistic possibility of an exemption clearly exists as the officials in charge of administering the *Regulations* have advised the appellant of the mechanism. The appellant has not exhausted his options until he makes good faith efforts to secure funding from family and other supporters and they apply for an exemption.

39. However, should this Court nevertheless decide to determine the interpretation of the *Regulations*, the appellant's interpretation is clearly wrong. The *Regulations* must be read in light of the UN Security Council Resolutions that they are intended to implement, and which expressly provide an exemption mechanism for legal fees.[53]

40. The *Regulations* impose a freeze on the existing assets of a person listed on the UNSC 1267 List as well as a prohibition for any person to make any "property"

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[53] *United Nations Act*, R.S., 1985, c. U-2, s. 2.
National Corn Growers Assn. v. Canada (Import Tribunal) (1990), 74 D.L.R. (4th) 449 (S.C.C.), [1990] S.C.J. No. 110, at 482. See also: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Markham Ont: Butterworths, 2002) Chapter 16, at 430-438.

available for the benefit of a listed person. Accordingly, there is a prohibition on third parties paying for the appellant's legal fees; however, the relevant prohibition is found in s. 4.1(d) of the *Regulations* and not s. 3 as the appellant contends.

41. Section 4.1(d) provides as follows:

> No person in Canada and no Canadian outside Canada shall knowingly
> ...
> (d) make any property or any financial or other related service available, directly or indirectly, for the benefit of Usama bin Laden or his associates.

"Property" is defined broadly to include "any funds, financial assets or economic resources". Due to his UNSC 1267 listing, the appellant is considered an associate of Usama bin Laden as defined in the *Regulations*. Thus, paragraph 4.1(d) prohibits third parties from making any funds available for the appellant's legal fees.

42. The *Regulations*, however, provide for an exemption mechanism to the prohibition set out in paragraph 4.1(d). The appellant's family or other interested groups may apply to the Minister for a certificate exempting their funds from the s. 4.1(d) prohibition so that they may be used to pay for his legal fees. Section 5.7 provides:

> (1) A person whose property has been affected by section 4 or 4.1 may apply to the Minister for a certificate to exempt property from the application of either of those sections if the property is necessary for basic or extraordinary expenses.
> (2) The Minister shall issue a certificate if the necessity of that property is established in conformity with Security Council Resolution 1452 (2002) of December 20, 2002,
> (a) in the case of property necessary for basic expenses, within 15 days after receiving the application, if the Committee of the Security Council did not refuse the release of the property.

43. This exemption mechanism reflects UN Security Council Resolution 1452 which exempts "basic expenses" including "reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services" from the UN mandated assets freeze.[54]

44. The same prohibition on providing funds to benefit the appellant, and the same exemption mechanism, also apply to the Government of Canada. This is because s. 2 of the *Regulations* provides that they are binding on the Crown.[55] Should the respondent seek or be ordered to pay the appellant's legal costs, it would be required to seek the ministerial certificate provided for in s. 5.7. Consistent with this, the respondent has in the past applied for exemptions using the exact same mechanism to provide funds for the appellant's basic needs.[56]

45. Sections 4.1(d) and 5.7 of the *Regulations* must also be interpreted in light of their purpose to effectively implement UN Security Council resolutions. Section 4.1 of the *Regulations* implements the asset freeze, including the prohibition on making assets available to listed persons, mandated in various resolutions.[57] In particular, UNSC Resolution 1267 and its successor resolutions direct that, in addition to freezing existing assets, no other funds be made available directly or indirectly to persons on the UNSC 1267 List.

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[54] UNSC, 4678th Mtg., UN Doc. S/Res/1452 (2002), Exhibit 10 to the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 202.

[55] See also: Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough, Ont: Thomson, 2000) at p. 14, 287-290.

[56] Letter dated April 18, 2008, Exhibit "G" to the Affidavit of Yavar Hameed, **Appeal Book**, Tab 7, pp. 80-82.
Transcripts of cross-examination of Yavar Hameed, **Appeal Book**, Tab 8, p. 154.

[57] UNSC, 4051st Mtg., UN Doc. S/Res/1267 (1999), s. 4(b); UNSC, 4251st Mtg., UN Doc. S/Res/1333 (2000), s. 8(c); UNSC, 4385th Mtg., UN Doc. S/Res/1373 (2001), s. 1(c),(d); UNSC, 4452nd Mtg., UN Doc. S/Res/1390 (2002), s. 2(a); UNSC, 4908th Mtg., UN Doc. S/Res/1526 (2004), s. 1(a); UNSC, 5244nd Mtg., UN Doc. S/Res/1617 (2005), s. 1(a); UNSC, 5609th Mtg., UN Doc. S/Res/1735 (2006), s. 1(a); UNSC, 5928th Mtg., UN Doc. S/Res/1822 (2008), s. 1(a).

46. Contrary to the appellant's assertion, s. 3 of the *Regulations* is irrelevant to the present appeal. It implements into Canadian domestic law the prohibition on financing terrorist acts imposed by UNSC Resolution 1373.[58] Section 3 is not intended to prohibit third parties funding the appellant's legal fees as these funds are not provided to be used for terrorist acts.

47. Based on the foregoing, there is indeed a statutory mechanism whereby the appellant's family or other interested parties may obtain an exemption enabling them to pay for the appellant's legal fees. The motions judge was correct in finding that the appellant still had untapped funding options to explore. A full consideration of the *Regulations* leads to the same result that she arrived at summarily.

4. The appellant's underlying case is not meritorious

48. The motions judge did not consider the application of the remaining elements of the test for granting an order of advance costs. The evidence before the Court demonstrates that the appellant fails to satisfy the remaining requirements as well.

49. To satisfy the second requirement of the test, the appellant must demonstrate that the claim to be adjudicated is *prima facie* meritorious. This part of the test requires something more than mere proof that a case has sufficient merit such that it should not to be dismissed summarily. An applicant must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation.[59]

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[58] UNSC Resolution 1373, s. 1(a) and (b) provide that all States shall "(a) prevent and suppress the financing of terrorist acts" and "(b) criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts".
See also *United Nations Act*, s. 3.

[59] *Little Sisters*, at para. 51.

50. In his notice of application, the appellant seeks the following relief:

    (i) a mandatory order directing the respondent to repatriate him immediately to Canada; and

    (ii) a declaration that the respondent violated his right to enter Canada under s.6(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

51. Mobility rights contained within s. 6 of the *Charter* have never been interpreted to include a positive obligation for a state to act. Although Canadian citizens have a right of entry into Canada, there is no obligation in international law for the Government of Canada to provide consular assistance to its nationals abroad, let alone repatriate them.[60]

52. The appellant has not been denied entry into Canada and, as a Canadian national, would not be denied entry were he able to present himself at a Canadian point of entry. The circumstances presently preventing his return to – as opposed to his entry into – Canada, are the result of the appellant's listing on the UNSC 1267 list. Canada is not a member of the UNSC and has no control over its 1267 list. Consequently, the impediment to the appellant's travel is not as a result of Canadian government action and is not a matter which "falls within the authority of the Parliament of Canada" within the meaning of s. 32(1) of the *Charter*. It is, therefore, not amenable to *Charter* review.

53. In any event, UNSC Resolution 1267 and successor resolutions prevent repatriation without an intervention to the 1267 Committee. Although the travel ban does not oblige any State to deny entry or require the departure from its territories of its own nationals, this exemption does not apply to the prohibition to transit through third countries. Transit and entry are distinct terms in the Resolution, and permission for entry does not include or imply permission for transit. Consequently, the approval of the 1267 Committee would be required

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[60] *Vienna Convention on Consular Relations*, United Nations Treaty Series UNTS 596/261, Canada Treaty Series 1974/25, article s. 36(1)(a).
Jennings, R and Watts, A, *Oppenheim's International Law*, Vol. 1, Parts 2 to 4, 9th ed, (London: Longman, 1996), p. 934, para 410.

in this case as the appellant would need to transit through third countries in order to return to Canada. Exemptions from the assets freeze would also need to be sought from the 1267 Committee to defray costs associated with the travel.

54. Consequently, a declaration that the appellant's right to enter Canada has been violated will not result in the relief sought, namely his repatriation to Canada. On that basis, the appellant's underlying application is not meritorious.

5. Case does not transcend the appellant's private interests

55. The appellant does not meet the third requirement of the advance costs test, as his case relates only to his private interests. In order to meet the public importance requirement, the litigation at issue must relate to the individual and the public at large. However compelling a case may be, if it relates only to an individual's interests the court will deny the award sought. Even if it is of some interest to the public, a costs award will not necessarily follow.[61]

56. The mere fact that an application raises *Charter* issues does not make it of sufficient public interest to warrant an advance costs award. As recognized by the Supreme Court, not all *Charter* litigation is of exceptional public importance.[62]

57. The remedy sought by the appellant, namely his repatriation to Canada, underscores that this case is solely about his personal interest. The appellant has failed to establish that the impact of this case will extend beyond him. The underlying application is restricted to the narrow, fact-specific circumstances of the appellant himself. As such, it does not meet the requirements for public importance that brings it within the category of special cases.

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[61] *Little Sisters*, at para. 39.

[62] *Ibid.*, at para. 64.

58. While the appellant has led evidence of several public interest groups having interest in his case, this does not meet the standard of "public importance" as required. Furthermore, the mere fact that it involves allegations against the Canadian government does not raise it to the level of general pubic importance.[63]

59. The appellant argues that his case is of public importance on the basis of his various allegations about Canadian officials.[64] However, these allegations are not legally relevant to his application, which deals with whether s. 6 of the *Charter* provides the appellant with a positive right to be repatriated. The mere fact of these allegations does not make the case one of public importance.

60. In conclusion, the appellant does not satisfy any of the three requirements laid out by the Supreme Court for an advance costs award and the appeal should be dismissed.

B. Cross-Appeal on Solicitor-Client Communications

1. No jurisdiction to order mandamus

61. Ordering the respondent to facilitate solicitor-client communications is not a matter of "process", it is an order in the nature of mandamus. Mandamus is an extraordinary remedy[65] which can only be obtained on an application for judicial review made under subsection 18.1 of the *Federal Courts Act*.[66] As

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[63] *Ibid.*, at para. 63.

[64] Appellant's Memorandum of Fact and Law at paras. 44-47.

[65] *Federal Courts Act*, R.S.C. 1985, c.F-7, as amended, s. 18(1)(a).

[66] *Ibid.*, s.18(3).

such, the motions judge lacked jurisdiction to grant this extraordinary relief on a motion.[67]

62. This was a blanket order granting substantive and final relief. It is relief that will never be ruled on by the Court on the main application and there will be no option for a full hearing on the merits.

63. Furthermore, mandamus is only available to compel the exercise of a public legal duty. There must be a clear legal right to the performance of that duty and no other adequate alternative remedy.[68] The motions judge failed to address whether the respondent is under a legal duty to facilitate the communications ordered.

64. There is no legal duty for the Government of Canada to provide consular assistance in general, let alone to facilitate solicitor-client communications for citizens abroad. While the *Vienna Convention on Consular Relations* allows Canada to provide consular assistance to its citizens under international law, it does not impose any obligation on Canada to provide such assistance.

65. The fact that the appellant is in temporary safe haven in the embassy in Khartoum does not mean that the Canadian government has a legal duty to facilitate communications between himself and his solicitor. As a matter of consular policy, the Crown has been reasonable and accommodating in ensuring that he can communicate with family and his solicitor while living within the

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[67] *Brissett v. Canada (Minister of Citizenship and Immigration)* (2002), 228 F.T.R. 314, 2002 FCT 971, [2002] F.C.J. No. 1310, at paras. 10-13.
Delisle v. Canada (Attorney General) (2004), 258 F.T.R. 268, 2004 FC 788, [2004] F.C.J. No. 966, at para. 13.
Clifton v. Hartley Bay Indian Band (Council) (2005), 144 A.C.W.S. (3d) 391, 2005 FC 1594, [2005] F.C.J. No. 1996, at paras. 3-5.

[68] *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), [1993] F.C.J. No. 1098, aff'd [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113, at para. 45.
Delisle, at para. 12.

embassy.[69] However, the respondent has no legal duty to expand that assistance to include all demands to transmit documents to his solicitor that the appellant may make.

2. **Not part of Court's process**

66. The motions judge erred in law and jurisdiction by finding that an order for the respondent to facilitate the exchange of solicitor-client documents for the appellant was part of the Court's ability to control its own process.

67. A court's jurisdiction to control its own process, by its very definition, extends only to matters of "process". Service or delivery of documents such as pleadings or producible documents in the course of litigation between opposing counsel is a matter of process. But ordering one party to be involved in conveying privileged documents between the adverse party and the adverse party's counsel is a very different matter. The motions judge erred in law by finding that such activity was a matter of "process" and she exceeded the Court's procedural jurisdiction in making such an order.

68. A court may invoke its procedural jurisdiction in order to give effect to its Rules or in accordance with readily accepted common law principles such as mootness or abuse of process.[70] While a variety of orders may ensue, the common factor is that they relate to the conduct of proceedings before the court. This Court has

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[69] Terms of Reference for Mr. Abdelrazik's stay within the Embassy grounds, **Appeal Book**, Tab 7, pp. 112-114.
Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8 at p. 137, lines 15-24, and p. 147-149.

[70] *Sierra Club of Canada v. Canada (Minister of Finance)* (1999), 163 F.T.R. 109, [1999] F.C.J. No. 306, at para. 19.
Blank v. Canada (Minister of Justice), 2007 FCA 101, [2007] F.C.J. No. 338, at para. 13.
Aktiebolaget Hässle v. Apotex Inc. (2008), 375 N.R. 342, 2008 FCA 88, [2008] F.C.J. No. 359, at para. 12.

held that the power of the court to control its own process is relevant only when the party seeks an order to govern the conduct of a proceeding in court.[71]

69. In the circumstances of this case, the court's jurisdiction to control its own process is, therefore, not engaged. If this Court allows procedural jurisdiction to extend beyond the conduct of proceedings into the realm of directing how privileged communications are to be conveyed, it will radically depart from the accepted scope of such jurisdiction. It also risks compromising the sanctity afforded solicitor-client privilege.

70. As the Supreme Court has recently held, solicitor-client privilege is a "rule of substance" and is "fundamental to the proper functioning of our legal system".[72] The Supreme Court has also held that courts must act "swiftly and decisively" to prevent solicitor-client information passing into the adverse party's hands.[73] The motions judge did exactly the opposite. Making the adverse party unnecessarily serve as the conduit for the appellant's privileged communications is inconsistent with the special position of solicitor-client privilege.

71. Finally, the motions judge's order was overly broad. Her order is not limited to communications required in order to proceed with the underlying application. Furthermore, it may be interpreted as continuing to be in effect even when the underlying judicial review proceeding is completed.

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[71] *Apotex Inc. v. Merck Frosst Canada Inc.*, [1997] 2 F.C. 561, [1997] F.C.J. No. 149, at para. 9.

[72] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (2008), 376 N.R. 327, 2008 SCC 44, [2008] S.C.J. No. 45, at paras. 9-10.

[73] *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36, [2006] S.C.J. No. 35, at para. 34.

3. Failed to consider order was unnecessary

72. Should this Court find that there was jurisdiction for the order, the motions judge nevertheless erred in law by granting such an extraordinary remedy without considering the alternatives. The motions judge herself recognized that this was "unquestionably an unusual case". [74]

73. Mandamus may only be ordered when there is no other adequate alternative remedy.[75] Similarly, if the Court's jurisdiction to exercise its discretion over procedural matters is engaged, then it must be exercised on a principled basis in a manner akin to the courts' discretion with respect to advance costs. Before taking the drastic and unusual step of ordering the adverse litigant to be the conveyor of solicitor-client documents, the Court should consider whether all other reasonable options have first been exhausted.

74. The motions judge did not consider whether all other reasonable options were exhausted. Although she noted the respondent's argument that there are other means by which the appellant can transmit solicitor-client documents, she failed to provide any reasons as to why these methods should be rejected in favour of an extraordinary order for facilitation by the respondent.

75. Adequate alternative means of transmitting solicitor-client documents are available to the appellant and his counsel. Counsel for the appellant was able to forward materials and information to the appellant before he entered the embassy.[76] The appellant has family in Sudan who could make arrangements to bring communications to him. Indeed, they regularly visit him at the embassy. He has also retained counsel in Sudan on previous occasions. Additionally,

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[74] Reasons for Order at para. 61, **Appeal Book**, Tab 3, p. 24.

[75] *Apotex Inc. v. Canada (Attorney General)*, at para. 45.

[76] Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8 at p. 137, line 25 and p. 138, lines 1-5.

there are courier services from Canada that could be used to transmit the material to him, subject to the appropriate exemption.

76. These alternatives are preferable to the method of communication ordered by the motions judge because they would avoid the need for the respondent's officials to be exposed to solicitor-client documents. This would preserve the sanctity of privilege in the interests of both parties.

77. The motions judge also failed to consider whether the appellant had pursued these alternatives with due diligence and dispatch. There was no evidence for the motions judge to decide that these alternative means were not available, or that the appellant had encountered any difficulties in using them. If the appellant and his counsel experienced any delay in exchanging documents it was due to their own failure to make arrangements to exchange privileged documents other than through the respondent. [77]

78. There was thus no basis for the motions judge's finding that the communications order was justified "to ensure the timely advancement of the case through the justice system".[78] Timely advancement of the case could be achieved by diligence on the part of appellant's counsel in making arrangements to exchange documents. It did not require ordering the adverse party to facilitate the exchange.

4. <u>Circumstances militate against order</u>

79. Finally, the circumstances of this case exacerbate the error of the motion judge's order. The parties are in an adversarial position. In his application pending before this Court, the appellant is seeking an order against the respondent Minister of Foreign Affairs. Individuals working at the embassy in Khartoum

[77] Transcripts of the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8 at pp. 158-161.

[78] Reasons for Order at para. 61, **Appeal Book**, Tab 3, p. 24.

are officials employed by the Department of Foreign Affairs and International Trade. As such, this situation can be contrasted with one where a Canadian national seeks assistance to receive communications from a family member.

80. This is of particular concern in this case, since the appellant has made allegations against staff members in the embassy.[79] While, the respondent has disputed those allegations,[80] it puts embassy officials in an untenable position should the appellant later assert that his privileged communications have been interfered with. The motions judge's order has placed the respondent in jeopardy of further allegations of wrongdoing from the appellant. It was entirely unnecessary to do so given that alternative methods of communication are available.

C. CONCLUSION

81. The motions judge properly concluded that the appellant had failed to demonstrate that his case is one of those rare and exceptional cases where this Court should exercise its discretion to make an award of advance costs.

82. There was no legal basis for the motions judge to have ordered that the respondent must facilitate solicitor-client communications between the appellant and his counsel.

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[79] Letter dated June 4, 2008, Exhibit 7 to the Cross-Examination of Yavar Hameed, **Appeal Book**, Tab 8 at pp. pp. 187-189.

[80] Letter dated June 6, 2008, Exhibit 8 to the Cross-Examination of Yavar Hameed, **Appeal Book, Tab 8 at pp. 190-193.**

PART IV - RELIEF SOUGHT

83. The respondent requests that the appellant's appeal be dismissed and the respondent's cross-appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, this 8th day of October, 2008.

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PART V – LIST OF AUTHORITIES

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