5-2009

Respondent's Memorandum of Fact and Law

Court File No. T-727-08

FEDERAL COURT

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

and

MINISTER OF FOREIGN AFFAIRS and THE ATTORNEY GENERAL OF CANADA

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

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PART I - FACTS

A. OVERVIEW

1. Section 6 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") does not guarantee a right to travel through other countries to enter Canada. The impediment to the applicant's entry into Canada is not as a result of government action and, therefore, the *Charter* is not engaged. His inability to return to Canada is due to his listing by the United Nations Security Council ("UNSC") 1267 Committee as an associate of Al-Qaida, which makes him the subject of a global asset freeze, arms embargo and travel ban. The travel ban prohibits other states from allowing the applicant to enter into and travel through their territories, which includes land, airspace and territorial waters. The asset freeze prohibits Canada from directly or indirectly funding his travel.

2. In any event, the applicant has failed to support his claim of a *Charter* breach with a proper evidentiary record. The applicant is a Canadian citizen who chose to leave Canada and return to Sudan knowing full well that he could be detained. The applicant levies very serious, inflammatory allegations against the Canadian government which are not supported by the evidence before this Court. His entire case rests on the unsubstantiated allegation that the government requested his detention in September 2003. This is directly contradicted by Canadian government officials. In addition, the applicant's claim that the government acted in bad faith by deliberately frustrating his attempts to return to Canada is equally without substance. The evidence, as a whole, demonstrates that the applicant has been provided with a high level of consular assistance. On the balance of probabilities, this Court cannot find that Canada has breached the applicant's *Charter* rights.

3. Furthermore, section 6 of the *Charter* does not create a positive obligation for Canada to repatriate its citizens. Section 6 rights have to be interpreted in accordance with international law. There is no legal obligation in international law to even provide consular protection. As such, the decision to repatriate a Canadian citizen abroad is a matter of discretion falling within Crown prerogative. Elevating that to a positive obligation under the *Charter* would be inconsistent with Canada's international legal obligations. The requested remedy of repatriation

would interfere in matters of Crown prerogative, foreign affairs and high policy and risks putting Canada in breach of its international obligations.

B. BACKGROUND

1. Return to Sudan

4. The applicant was born in Sudan and has Sudanese citizenship. In 1989, he was jailed in Sudan because of his political views after Al Bashir came into power. He came to Canada in 1990 as a convention refugee claiming that he would be persecuted if he remained in Sudan. [1] The applicant became a landed immigrant in 1992 and was granted Canadian citizenship in 1995.

5. In March 2003, the applicant travelled from Canada back to Sudan. He went there of his own accord knowing full well that the same regime he had fled from was still in power. He conceded in cross-examination that he knew there was a possibility he could be jailed again. The applicant also returned to Sudan knowing that there was an ongoing war in the southern and eastern regions of the country. [2] At the time of the applicant's return to Sudan, the Department of Foreign Affairs and International Trade's ("DFAIT's") travel advisory warned Canadian citizens against travelling to Sudan specifically noting increased tensions in Khartoum, the capital city.[3]

6. The applicant went to the Sudan to visit his ailing mother and, he asserts, to avoid the scrutiny of the Canadian Security Intelligence Service.[4] When the applicant left Canada his wife Ms. St.-Hilaire had recently given birth to their child.[5] Ms. St.-Hilaire and the infant travelled to visit the applicant in Sudan in June 2003.[6] The applicant describes his marriage to Ms. St.-Hilaire as under strain at that time, and in August 2003, she returned with their child to Canada.[7]

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[1] Transcript of cross-examination of Abousfian Abdelrazik, pp. 28-29, **Respondents' Record**, vol. 2, Tab 8, pp.411-412.
[2] Transcript of cross-examination of Abousfian Abdelrazik at pp. 29-30, **Respondents' Record**, vol. 2, Tab 8, pp.412-413.
[3] Affidavit of Sean Robertson, at para. 14, **Respondents' Record**, vol. 1, Tab 1, p.5.
[4] Affidavit of Abousfian Abdelrazik at para. 11, **Applicant's Record**, vol. I, Tab 11, p. 62.
[5] Transcript of cross-examination of Abousfian Abdelrazik at p. 33, **Respondents' Record**, vol. 2, Tab 8, p.416.
[6] Transcript of cross-examination of Abousfian Abdelrazik at p. 49, **Respondents' Record**, vol. 2, Tab 8, p.432.
[7] *Ibid.*

7. Contrary to the applicant's allegations, it is not true that the applicant was unable to return to Canada with his family in August 2003 because "he was arbitrarily detained by Sudanese authorities".[8] In cross-examination, the applicant stated that he remained in Sudan after his family members left in order to look after his ill mother and that his departure was dependant on his mother's health. As such, he did not have a specific planned date of return.[9]

- deal w/ factual error, re: timing of dates

2. First Detention by Sudanese Authorities

8. On or about September 12, 2003, the applicant was arrested and detained by Sudanese authorities until the spring of 2004. [10] Contrary to the applicant's allegations, there is no evidence establishing that Canadian officials requested the applicant's detention. Evidence filed on this application states that "Canadian officials have not requested his detention by Sudanese authorities". [11]

9. During the applicant's detention, Canada provided consular assistance including multiple consular visits, assistance in finding him legal counsel and diplomatic representations asking the Sudanese to provide due process to the applicant by either charging him and putting him through a transparent process or by releasing him.[12] David Hutchings, the Head of Mission at the embassy in Khartoum, visited the applicant numerous times while he was detained. After each of those visits, Mr. Hutchings made notes to record what had occurred. [13] According to Mr. Hutchings, during his visits, he was able to meet with the applicant alone for a period of time. [14] The applicant, however, denies ever meeting with Mr. Hutchings alone while in detention. [15]

10. One of the purposes of consular visits is to assess the health and well-being of a Canadian citizen. During the consular visits between December 2003 and May 2004, the applicant did not

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[8] Applicant's Memorandum of Fact and Law at para. 55, **Applicant's Record**, vol. IV, Tab 28, p. 14-15.
[9] Transcript of cross-examination of Abousfian Abdelrazik at pp. 32 and 49, **Respondents' Record**, vol. 2, Tab 8, pp. 415 and 432.
[10] Transcript of cross-examination of Abousfian Abdelrazik at p. 53, **Respondents' Record**, vol. 2, Tab 8, p.436.
[11] Affidavit of Sean Robertson, Exhibit "N", **Respondents' Record**, vol. 1, Tab 1N, p.228.
[12] Affidavit of Sean Robertson, at para. 2, **Respondents' Record**, vol. 1, Tab 1, p.1; Affidavit of Sean Robertson, at Exhibit "M", **Respondents' Record**, vol. 1, Tab 1M, p.227.
[13] Affidavit of Sean Robertson, Exhibits "J" and "K", **Respondents' Record**, vol. 1, Tab 1J and 1K, pp. 204 – 221.
[14] Affidavit of David Hutchings, at para. 6, **Respondents' Record**, vol. 2, Tab 7, p. 382.
[15] Transcript of cross-examination of Abousfian Abdelrazik at pp. 66, 68, 71, **Respondents' Record**, vol. 2, Tab 8, pp.449, 451 and 453.

report that he was abused by the Sudanese. Mr. Hutchings also testified that during those visits he saw no signs that the applicant had been abused. [16] In addition, the applicant's family members were able to visit him while in detention and consular notes indicate that they reported to embassy staff that the applicant was fine and showed no signs of abuse. [17]

3. Canadian Government Efforts to Facilitate Return to Canada

11. The applicant was released from Sudanese detention in the spring of 2004. Shortly after his release, consular officials undertook extensive efforts to arrange for the applicant's return to Canada. [18] These efforts included arranging for a Canadian official to act as escort on the flight home. [19] A plane ticket was arranged for the applicant to depart Khartoum on July 23, 2004 with Lufthansa to Frankfurt and then on Air Canada to Montreal. [20]

12. On July 22, 2004, the Canadian government was advised that the applicant would be refused boarding by Lufthansa. The basis for the refusal was cited as follows: (i) the applicant was on the U.S. no fly list; (ii) he is involved with Al-Qaida; (iii) they were not satisfied with the escort situation; and (iv) Air Canada has refused to accept him. [21] Embassy staff were advised by a Lufthansa representative that there was nothing that officials could do to change their decision. [22]

13. Following that failed effort, consular officials attempted to make alternate travel plans for the applicant, such as flying on an African airline through Casablanca. [23] No airlines would accept the applicant on the basis that there was a "strong alert regarding him everywhere". [24]

14. Following this attempt, in October 2004, the applicant informed Canadian consular officials that the Government of Sudan might be willing to consider flying him back to Canada.

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[16] Affidavit of David Hutchings, at para. 5, **Respondents' Record**, vol. 2, Tab 7, p. 382.
[17] Affidavit of Sean Robertson, at para. 21, **Respondents' Record**, vol. 1, Tab 1, p.7.
[18] Affidavit of Sean Robertson, at para. 23, **Respondents' Record**, vol. 1, Tab 1, p.7; Affidavit of Sean Robertson, at Exhibit "O", **Respondents' Record**, vol. 1, Tab 1O, p.10, pp. 230-248.
[19] Affidavit of Sean Robertson, Exhibit "O", **Respondents' Record**, vol. 1, Tab 10, pp.239 and 243.
[20] Affidavit of Sean Robertson, Exhibit "O", **Respondents' Record**, vol. 1, Tab 10, p.243.
[21] Affidavit of Sean Robertson, Exhibit "O", **Respondents' Record**, vol. 1, Tab 10, p.246.
[22] *Ibid.*
[23] Affidavit of Sean Robertson, at para. 23, **Respondents' Record**, vol. 1, Tab 1, p.7.
[24] Affidavit of Sean Robertson, Exhibit "P", **Respondents' Record**, vol. 1, Tab 1P, p.249.

Canadian officials met with the Sudanese to discuss the Sudanese suggestion. After this meeting, the Canadian embassy advised the Sudanese in writing that Canada had no objection in principle to Sudan transporting the applicant to Canada as long as normal flight plan approval information was supplied. [25] The Canadian government never received a response from the Sudanese.

15. Contrary to the applicant's allegation, the respondents did not delay or equivocate. It was not a condition of this Sudanese plan as communicated in 2004 that the Canadian government provide an escort for the applicant's return. Canadian officials were expressly told by Sudanese officials that an escort was not necessary from the Government of Sudan's perspective. [26] The reference to a Canadian escort relied upon by the applicant, did not arise until nearly a year later.[27] While Sudan never carried through with its proposal, there is no evidence that this was because of any actions or impediments by Canada. Furthermore, this was a Sudanese proposal, outside of the control of the Government of Canada and was abandoned by the Sudanese.

4. Second Period of Detention by Sudanese

16. In October 2005, the applicant was again detained by the Sudanese. Canada repeatedly sought but was denied consular access during this period of detention.[28] Canadian consular officials also repeatedly requested that the applicant be afforded due process under Sudanese law and that if no charges were to be filed, he should be released from custody. [29]

17. The applicant was released in July 2006. Upon his release, consular officials immediately arranged for a medical examination to ensure the applicant's well-being.[30] No concerns were

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[25] Affidavit of Sean Robertson, Exhibit "Q", **Respondents' Record**, vol. 1, Tab 1Q, p.252.
[26] Affidavit of Sean Robertson, Exhibit "Q", **Respondents' Record**, vol. 1, Tab 1Q, p.263.
[27] Document dated 16 December 2005, Transcript of cross-examination of Sean Robertson, Exhibit 8, **Applicant's Record**, vol. II, Tab 16, pp. 508-9; Transcript of cross-examination of Sean Robertson, Q 391, 395, **Applicant's Record**, vol. II, Tab 16, pp. 383-384.
[28] Affidavit of Sean Robertson, at para. 28 and Exhibit "R", **Respondents' Record**, vol. 1, Tab 1R, pp. 8-9, pp. 275-277.
[29] *Ibid.*
[30] Affidavit of Sean Robertson, at para. 29, **Respondents' Record**, vol. 1, Tab 1, p.9. Affidavit of Michael Pawsey, para. 2, **Respondents' Record**, vol. 2, Tab 6, p. 379.

raised by the applicant that he had been abused in detention and the medical reports noted no major ailments or concerns.[31]

5. Applicant's Listing

18. On July 20, 2006, the U.S. Department of the Treasury designated the applicant for "his high level-ties to and support for the Al-Qaida network". The following day, the U.S. Department of State similarly designated the applicant as "posing a significant risk of committing acts of terrorism that threaten the security of U.S. nationals and the national security."[32]

19. On July 31, 2006, the applicant was listed by the United Nations Security Council ("UNSC") Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities (the "1267 Committee") as an Al-Qaida associate, pursuant to UNSC Resolution 1267 and successor resolutions.[33] The 1267 Committee listing subjects the applicant to a global assets freeze, travel ban, and arms embargo.[34]

20. The travel ban specifies that listed individuals may not enter into the territory of a UN member state or transit through the territory of a UN member state.[35] Canada is a member of the United Nations but is not currently a member of the UN Security Council nor its 1267 Committee and as such does not participate in 1267 Committee decisions or listings.[36]

21. As a result of the applicant being listed by the 1267 Committee, Canadian regulations implementing the UN's asset freeze were triggered. Canada's *United Nations Al-Qaida and*

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[31] *Ibid.* See also: Transcript of cross-examination of Alan Bones, pp. 52-54, **Applicant's Record**, vol. III, Tab 22, pp. 772-774.
[32] Affidavit of Sean Robertson, at para. 31, **Respondents' Record**, vol. 1, Tab 1, p.9; Affidavit of Sean Robertson, Exhibit "U", **Respondents' Record**, vol. 1, Tab 1U, pp.281-283.
[33] Consolidated List, entry QI.A.220.06, Affidavit of Jo Wood, sworn July 16, 2008, Exhibit "B", **Applicant's Record**, vol. I, Tab 12B, p. 79; UNSC Resolutions 1267 & 1390, **Applicant's Record**, vol. V, Tabs C & D; UNSC Resolutions 1452, 1526, 1735 & 1822, **Respondents' Authorities**, vol. 1, Tabs 5, 6, 7 and 8.
[34] Affidavit of Sean Robertson, at para. 32 **Respondents' Record**, vol. 1, Tab 1, pp.9-10; These restrictions are imposed pursuant to UNSC Resolution 1267 and successor resolutions, which are implemented in Canadian law though the *United Nations Al Qaida and Taliban Regulations* SOR\99-444, **Applicant's Record**, vol. V, Tab A and the *Immigration and Refugee Protection Act,* S.C. 2001, c.27, s. 35, **Respondents' Authorities**, vol. 1, Tab 1.
[35] UNSC Resolution 1735, Measure 1(b), **Respondents' Authorities**, vol. Tab
[36] Affidavit of Sean Robertson, at para. 5, **Respondents' Record**, vol. 1, Tab 1, pp.2-3.

Taliban Regulations ("the *Regulations*") require an exemption from the UN-imposed asset freeze before any financial assistance – direct or indirect – can be provided to the applicant.[37] In May 2007, DFAIT obtained an exemption from the 1267 Committee to permit a monthly stipend of US$100 to be paid from the Distressed Canadian Fund to the applicant to cover his basic necessities.[38] According to the World Bank, the Sudanese average annual income in 2007 was approximately US$800.[39]

22. In October 2007, the applicant asked the Minister of Foreign Affairs to consider his request to be removed from the 1267 Committee listing. The Minister agreed to transmit the delisting request to the 1267 Committee.[40] This request was denied by the 1267 Committee on December 21, 2007. The Committee's decisions are made by consensus pursuant to its guidelines and the deliberations are confidential.[41] The 1267 Committee did not offer, nor is it required to provide, reasons for its decision. The Government of Canada has no control over the 1267 Committee's delisting processes.

6. Applicant Granted Safe Haven in Embassy

23. In April 2008, the applicant received a letter by email from his lawyer dated April 15, 2008, stating that "further to granting an interview with a Canadian journalist" he had been "intercepted and threatened by Sudanese security services" and demanding that the applicant be taken into safe haven at the Canadian embassy in Khartoum.[42] The letter claimed that the applicant was fearful of being detained again by the Sudanese because his planned meeting with a photographer had been intercepted. Rather than seek safe haven immediately, the applicant

= a lot going on, not crossed my that issue as to where he was, he was in hiding, didn't feel safe

[37] *United Nations Al-Qaida and Taliban Regulations*, *supra*, **Applicant's Record**, vol. V, Tab A, *United Nations Act*, R.S.C. 1985, c.U.2, **Respondents' Authorities** vol. 1, Tab 2. UNSC Resolutions 1452 and 1735, **Respondents' Authorities**, vol. , Tabs 5 and 7 ; *Guidelines of the Committee for the Conduct of Its Work*, Affidavit of Sean Robertson, Exhibit "Y", pp. 7-8, **Respondents' Record**, vol. 1, Tab 1Y, pp.303-304.

[38] Affidavit of Sean Robertson, Exhibit "Z", **Respondents' Record**, vol. 1, Tab 1Z, p.309.

[39] Affidavit of Sean Robertson, at para. 33, **Respondents' Record**, vol. 1, Tab 1, p.10.

[40] Affidavit of Sean Robertson, at para. 34, **Respondents' Record**, vol. 1, Tab 1, p.10.

[41] *Guidelines of the Committee for the Conduct of Its Work*, Affidavit of Sean Robertson, Exhibit "Y", p 7, **Respondents' Record**, vol. 1, Tab 1Y, p.303.

[42] Transcript of cross-examination of Abousfian Abdelrazik, pp. 127, 130, **Respondents' Record**, vol. 2, Tab 8, pp.510-513; Affidavit of Eric O'Connor affirmed September 12, 2008, Exhibit "A", **Respondents' Record**, vol. 2, Tab 2, p.332.

waited approximately two weeks and in the meantime spoke to a journalist about the very allegations he claimed would put him at risk.[43]

24. It was not until April 29, 2008, that the applicant presented himself at the Canadian embassy in Khartoum expressing fears that he would be detained again and seeking safe haven.[44] The applicant has been permitted to live on the embassy grounds and had been provided with food and medical assistance at the expense of the Government of Canada since April 29, 2008. The assistance is provided in accordance with security protocols and practice at Canadian missions abroad, and the constraints placed upon Canada pursuant to the applicant's UN 1267 listing.[45] Embassy staff has at all times done its best to ensure the applicant's comfort and well-being at the embassy.[46]

25. Since the applicant entered temporary safe haven, the Canadian government notified the 1267 Committee of its intention to provide in-kind assistance for basic necessities to the applicant to a value of approximately $400 per month.[47] The UN 1267 Committee has granted an exemption for this assistance.

7. Applicant's Allegations of Torture Lack Credibility

26. At a meeting with DFAIT officials in Ottawa in February 2008, the applicant's lawyer alleged that the applicant had been tortured while in Sudanese custody. Despite regular communication with and consular assistance provided to the applicant since 2003, this was the first time that claims of torture had been brought to the Canadian government's attention.[48] In a subsequent meeting with officials in Khartoum the applicant showed marks on his body which he alleged were the result of torture.[49]

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[43] Transcript of cross-examination of Abousfian Abdelrazik, p. 129, **Respondents' Record**, vol. 2, Tab 8, p.512.
[44] Affidavit of Eric O'Connor, Exhibit "A", **Respondents' Record**, vol. 2, Tab 2, p.332.
[45] Affidavit of Eric O'Connor, at para 2. **Respondents' Record**, vol. 2, Tab 2, p.325.
[46] Affidavit of Eric O'Connor, at para 4. **Respondents' Record**, vol. 2, Tab 2, p.326.
[47] Affidavit of Sean Robertson, at para. 38, **Respondents' Record**, vol. 1, Tab 1, p.11.
[48] Affidavit of Sean Robertson, at para. 35, **Respondents' Record**, vol. 1, Tab 1, p.10.
[49] Transcript of Cross-Examination of Sean Robertson, pp. 142-144, **Applicant's Record**, vol. III, Tab 16, pp. 428-430.

27. The applicant swore a detailed affidavit in these proceedings. While he alleged to have been tortured in Sudanese detention, he did not state that he had disclosed the torture to Canadian government officials. During his cross-examination, however, the applicant said he had told certain officials about the alleged abuse as early as 2004. He now claims he told David Hutchings, Allan Bones and Michael Pawsey that he was tortured while in Sudanese custody. [50]

28. These officials, however, all independently and directly contradicted the applicant's recent assertion that he had reported torture. They confirmed under oath that the applicant never told them about torture, and that if he had they would have taken appropriate follow-up measures. Furthermore they testified that they independently looked for signs of torture or mistreatment during their visits and interactions with the applicant and saw no such evidence. [51]

29. In fact, Mr. Hutchings testified that his observation was that the applicant was treated better than other prisoners because of the involvement and oversight of Canadian officials:

> **Mr. Hutchings:** My impression is that, from what I was able to observe, he was being treated better than what I understood most Sudanese detainees to be treated. For example, this idea of being brought to the Foreign Ministry for a meeting which, as I said, is unprecedented, the amount of attention he was given by the high level Sudanese, no doubt obviously because we forced the high level Sudanese to focus on him. I can't imagine that there would have been such attention given to him and that such attention would be given to the requests for treatment that he made had he not been in this situation.[52]

30. As detailed above, during the applicant's first period of detention, consular officials visited him on multiple occasions supplemented by regular telephone communications. One of the purposes of these visits was to assess the well-being of the applicant. Consular officials kept records of all of their interactions with the applicant.[53] Despite this contact, there is no documented evidence that the applicant ever reported to Canadian officials the torture he now

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[50] Transcript of cross-examination of Abousfian Abdelrazik, pp. 114-122, **Respondents' Record**, vol. 2, Tab 8, pp.497-505.

[51] Affidavit of David Hutchings, **Respondents' Record**, vol. 2. Tab 7, pp.381-382; Affidavit of Alan Bones, **Respondents' Record**, vol. 2, Tab 5, pp.377-388; Affidavit of Michael Pawsey, **Respondents' Record**, vol. 2, Tab 6, pp.379-380.

[52] Transcript of cross-examination of David Hutchings, **Applicant's Record**, vol. III, Tab 21, pp. 694-695.

[53] Affidavit of Alan Bones, paras. 5-6, **Respondents' Record**, vol. 2. Tab 5, pp. 337-378; Affidavit of Michael Pawsey, para. 1, **Respondents' Record**, vol. 2. Tab 6, p. 376; Affidavit of David Hutchings, para. 2, **Respondents' Record**, vol. 2. Tab 7, p. 381.

alleges was inflicted by Sudanese officials. Nor did consular officials, who were experienced or trained in looking for mistreatment, see any signs of the torture the applicant now alleges.[54]

31. The applicant's own evidence contradicts the recent allegations of torture. In his affidavit, the applicant swore that he was "told not to disclose the conditions I experienced".[55] He does not allege that he told Canadian officials - the inference being that he remained silent out of fear. By contrast, during cross-examination, the applicant alleged that he had, in fact, told various named Canadian officials on multiple occasions that he had been tortured.[56]

32. In his memorandum of fact and law, the applicant claims that "his torturers told him never to mention his torture to others, and fearing them, for *many* years he did not". [57] This, as detailed above, is contradicted by the applicant when he testified that he told consular officials about the torture as early as 2004.

33. The applicant's shifting and inconsistent allegations thus cast doubt on the veracity of the torture claim itself, and undermine his allegation that the respondents have acted in bad faith. Furthermore, while the applicant claims to have been tortured, he voluntarily retracted under oath on cross-examination his previously sworn evidence that Canadian officials interrogated him "in the context" of abuse.[58]

34. In sum, given their lack of coherence and credibility, the applicant's torture allegations and recent assertions that he reported such treatment to Canadian officials, should be rejected by this Court and should not colour the Court's decision on this application.

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[54] Affidavit of David Hutchings, para. 5, **Respondents' Record**, vol. 2. Tab 7, pp. 381-382; Transcript of Cross-examination of Alan Bones, pp. 40-41, **Applicant's Record**, vol. III, Tab 22, pp. 760-761.
[55] Affidavit of Abousfian Abdelrazik, at para. 15, **Applicant's Record**, vol. I, Tab 11, p. 64.
[56] Transcript of cross-examination of Abousfian Abdelrazik, pp. 114-122, **Respondents' Record**, vol. 2, Tab 8, pp.497-505.
[57] Applicant's Memorandum of Fact and Law, at para. 11, **Applicant's Record**, vol. IV, p. 3.
[58] Transcript of cross-examination of Abousfian Abdelrazik, p.60, **Respondents' Record**, vol. 2, Tab 8, p.443; Affidavit of Abousfian Abdelrazik, at para. 22, **Applicant's Record**, vol. I, Tab 11, p. 65.

PART II - ISSUES

35. The issues raised by this application are:

(a) whether portions of the affidavits filed in support of this application should be struck;

(b) whether the *Charter* is engaged;

(c) whether the applicant's rights under s.6 of the *Charter* have been breached;

(d) if so, whether the breach is justified as a reasonable limit under s. 1 of the *Charter;* and,

(e) whether the Court can order the requested remedy of repatriation.

PART III - ARGUMENT

A. Portions of Affidavit Evidence Should be Struck

36. Affidavit evidence may be struck by the Court where it is abusive or clearly irrelevant, where there is conjecture, speculation or legal opinion contained therein.[59] The applicant's affidavit contains evidence that is irrelevant to the issues this Court must determine on the application. The affidavit alleges mistreatment during the applicant's present stay within the Canadian embassy.[60] The applicant's allegations are highly inflammatory and are not relevant to the Court's determination as to whether the applicant's s. 6 *Charter* rights have been breached. On that basis, paragraph 58 of the applicant's affidavit should be struck.

37. Portions of the affidavit of Jo Wood sworn July 16, 2008, should also be struck as irrelevant and not within the affiant's knowledge. Paragraphs 7 and 8 purport to provide evidence about the repatriation of other Canadians. Neither of the repatriation efforts referred to in those paragraphs involved circumstances similar to that of the applicant. In addition, the affiant has no personal knowledge of these events and relies on news reports and press releases as the source of her evidence. Paragraph 9 is based on information found on the Canadian Air Force website and the affiant has no personal knowledge of this information.

B. The *Charter* is not Engaged

38. As a preliminary matter, this Court must determine the essence of the applicant's claim and whether it falls within the asserted *Charter* right.[61] Here, section 6 of the *Charter* is not engaged because the applicant has not been denied entry into Canada. Rather, the applicant's challenge concerns his inability to travel through other countries to return to Canada. His inability to

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[59] *Global Enterprises International Inc. v. Aquarius (The)*, 2001 FCT 1311, at para. 6, **Respondents' Authorities,** vol. 1, Tab 13; *GlaxoSmithKline Inc. v. Apotex*, 2003 FC 920 at para. 2, **Respondents' Authorities,** vol. 1, Tab 14.
[60] Affidavit of Abousfian Abdelrazik sworn June 25, 2008 at para. 58, **Applicant's Record,** Volume I, p. 69.
[61] *Baier v. Alberta*, 2007 SCC 31, at para. 77, **Respondents' Authorities**, vol. 1, Tab 15.

return to Canada is not as a result of Canadian government action and therefore pursuant to s. 32 of the *Charter* is not amenable to review.[62]

1. 1267 Listing not a Result of Government Action

39. Prior to July 2006, the circumstances preventing the applicant's return to – as opposed to his entry into – Canada, were his detention by the Government of Sudan and his listing on various "no-fly" lists, including that of commercial airlines and the United States. Since July 2006, the circumstances preventing his return to Canada are also the result of his listing by the 1267 Committee as an associate of Al-Qaida.

40. Canada did not participate in the decision of the 1267 Committee to list the applicant. As such, the listing is not in the control of the Government of Canada. Under article 41 of the *Charter of the United Nations* ("*UN Charter*") the Security Council may decide on measures to give effect to its decisions taken following a determination under Chapter VII of the *UN Charter* that a threat to international peace and security exists. Pursuant to Article 25 of the *UN Charter* the decisions contained in UNSC Resolution 1267 and successor resolutions, are a binding obligation in international law on Canada and all other UN member states.[63]

41. While Canada has an obligation in international law to enforce the effects of the listing, the listing and resulting prohibitions are caused by the actions of an international body. The applicant's return to Canada is impeded because the necessary transit through the territories of other UN members is prohibited by virtue of his listing on the UN 1267 list. Furthermore, the asset freeze imposed by the resolutions, and incorporated in Canadian law, prohibits the provision of funds for the transit.

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[62] *R. v. Hape*, 2007 SCC 26, at para. 32, **Applicant's Record**, vol. V, Tab M., *Schreiber v Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para 15.
[63] *Charter of the United Nations*, Exhibit "A", Affidavit of Sean Robertson, **Respondents' Record**, vol. I, Tab 1A.

2. Prohibition on Travel

42. The applicant's UN 1267 listing as an associate of Al-Qaida imposes an obligation on all UN member states to prevent his entry into or transit through their territories. This travel ban is provided for in UNSC Resolution 1735[64] where the Security Council decided that all states shall:

> (b) Prevent the **entry into or the transit through** their territories of these individuals, provided that nothing in this paragraph shall oblige any State **to deny entry** or require the departure from its territories **of its own nationals** and this paragraph shall not apply where **entry or transit is necessary** for the fulfilment of a judicial process or the Committee established pursuant to resolution 1267 (1999) ("the Committee") determines on a case-by-case basis only that **entry or transit** is justified;

43. A state's territories necessarily include its airspace and territorial waters. This is supported by the 1919 *Paris Convention for the Regulation of Aerial Navigation* and the 1944 *Convention on International Civil Aviation*[65] both of which recognize the full sovereignty of states over the airspace above their land and territorial sea. As the International Court of Justice has noted:

> The principle of respect for territorial sovereignty is also directly infringed by the unauthorized over flight of a State's territory by aircraft belonging to or under the control of the government of another State. [66]

Respect for the sovereignty of other states, as the Supreme Court of Canada has recently held, is a foundational principle of the international legal system.[67]

44. Canada is bound by this international law principle and has demonstrated so by statements of the then Minister of Foreign Affairs in Parliament:

> Canada expects its territory, including its air space, not to be used by foreign governments for activities that are in breach of Canadian or international law.[68]

Canada is bound at international law to treat other states the same way as it expects them to treat it, by respecting international law in the airspace of other states.

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[64] The travel ban was most recently restated in UNSC Resolution 1822.

[65] *Convention on International Civil Aviation* signed at Chicago on 7 December 1944 (Chicago Convention), Articles 1 and 2, **Respondents' Authorities**, vol. 1, Tab 8. *Paris Convention for the Regulation of Aerial Navigation*, **Respondents' Authorities**, vol. 1, Tab 10.

[66] *Nicaragua v. United States of America,* I.C.J. Reports, 1986, pp.14, 128, **Respondents' Authorities**, vol. 1, Tab 17.

[67] *Hape, supra.* at para. 46, **Applicant's Record**, vol. V, Tab M.

[68] *House of Commons Debates*, Vol. 140, no. 158, (25 November 2005), at 10161 (Hon. Pierre Pettigrew), **Respondents' Authorities**, vol. 2, Tab 38.

45. The meaning of the UNSC prohibition on "transit through their territories" when applied to air travel, thus includes commercial or government flight over the land territories and territorial waters of all UN member states. It is geographically impossible for the applicant to travel from Sudan to Canada by air, land or sea, without transiting through the sovereign territories (land, airspace or territorial waters) of numerous UN member states,[69] which are bound at international law to prevent such transit. In addition, to fly the applicant from Sudan to Canada in a government aircraft, the respondents would need to obtain diplomatic clearance from at least one UN member state for the flight.[70] While passenger lists might not be required, to obtain such clearance without reference to the nature of the mission would create unacceptable risks, both to the applicant and to the Crown's conduct of foreign affairs.

3. Exemption for Entry into Country of Citizenship does not Permit Transit Through Other States

46. The applicant fundamentally mischaracterizes the nature and scope of the exemption to the travel ban allowing citizens to enter their own states. The exemption is narrowly defined such that it only provides for the entry into one's state, not the transit through other UN member states. On that basis, the applicant's expansive interpretation is erroneous.

47. The Resolution in issue creates a ban and three exemptions as follows:[71]

i. "provided that nothing in this paragraph shall oblige any State to **deny entry** into or require the departure from its territories of its own nationals";

ii. "and this paragraph shall not apply where **entry or transit** is necessary for the fulfillment of a judicial process";

iii. "or the Committee determines on a case by case basis only that **entry or transit** is justified".

48. The principles of interpretation set out in the *Vienna Convention on the Law of Treaties* provide useful guidance in the interpretation of the UN resolutions.[72] The *Vienna Convention of*

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[69] Affidavit of Geoffrey Everts, at para 2, **Respondents' Record**, vol. 2, Tab 3, p.371.
[70] Affidavit of Michel Latouche, at paras. 3-5, **Respondents' Record**, vol. 2, Tab 4, pp.375-376.
[71] UNSC Resolution 1735, **Respondents' Authorities**, vol. 1, Tab 7.

the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[73]

49. As explained by the Supreme Court, the starting point of the interpretive exercise is "an examination of the purpose and context of the treaty as a whole, as well as the purpose of the individual provision in question". [74] The purpose of the travel ban as stated in UNSC Resolutions 1735 and 1822 is to minimize the mobility of listed individuals as an important measure to combat terrorism. [75]

50. In addition, background documents are important in discerning object and purposes.[76] The objective of the travel ban is set out in the Travel Ban Explanation of Terms as follows:[77]

> Objective of the travel ban
> The Al-Qaida/Taliban travel ban measure is intended to limit the mobility of listed individuals. As with the other two measures referred to in paragraph 1 of resolution 1822 (2008), it is preventive in nature and not reliant upon criminal standards established under international law. Member States are encouraged to add the names of the listed individuals to their visa lookout lists and national watch lists to ensure effective implementation of the travel ban. Member States are also encouraged to take other relevant measures in accordance with their international and national obligations, which may include, but are not limited to, cancelling visas and entry permits or refusing to issue any visa/permit for listed individuals.

51. The three exemptions should be interpreted in accordance with the objective of the resolution which is to immobilize listed persons.[78] The purpose of the first exemption, entry of a national, is to avoid creating conflict with the member states human rights obligations pursuant to which they must allow their nationals to enter their territory. This goal is fully met by the first exemption. There is nothing to suggest that the purpose should be interpreted broadly to

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[72] Wood, Michael C., *The Interpretation of Security Council Resolutions*, in Max Planck Yearbook of United Nations Law, vol. 2, 1998, **Respondents' Authorities**, vol. 2, Tab 39.
[73] *Vienna Convention on the Law of Treaties*, 1969, May 23, 1969, articles 31 or 32, **Respondents' Authorities**, vol. 1, Tab 11.
[74] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 56, **Respondents' Authorities**, vol. 1, Tab 18. See also "Wood", *supra* at p 90
[75] UNSC Resolutions 1735 and 1832, **Respondents' Authorities**, vol. 1, Tabs 7 and 8.
[76] Wood, *supra.* at p.90, **Respondents' Authorities**, vol. 2, Tab 39.
[77] 1267 Committee, *Travel Ban: Explanation of Terms*, December 9, 2008, **Applicant's Record**, vol. V, Tab G.
[78] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 5th ed. (LexisNexis Canada 2008), at pp. 483-485, **Respondents' Authorities**, vol. 2, Tab 40.

facilitate the return of listed individuals. Rather it relieves states of the obligation to turn their own nationals away should they present themselves at the border.

52. This entry-of-national exemption expressly applies only to the member state of nationality, and has no application to other member states which are obligated to refuse transit. By virtue of this exemption, Canada only has the authority to permit the entry of the applicant into its territory. It does not grant Canada any rights or authorities with respect to the applicant's transit through the territories of other countries.

53. Based on the foregoing, the applicant is clearly incorrect when stating that there is "an automatic exemption to travel and to enter to one's country of nationality ". Although the Resolution does not prohibit Canada from allowing the applicant to enter into Canada, it prohibits other states from allowing the applicant to enter into and to transit through their territories en route to Canada without prior approval of the Committee. The Government of Canada is bound not to facilitate international travel contrary to their prohibition.

54. In addition to the travel ban, the UNSC Resolutions also require the freezing of all assets and forbid the provision of assets to listed individuals without 1267 Committee approval. This asset freeze is implemented in Canadian domestic law by the *Regulations* which prohibit making any property, including funds or ticket, available, directly or indirectly, for the benefit of the applicant.[79] To the extent that repatriation of the applicant requires the expenditure of Government of Canada funds or services in kind, it is also prohibited without 1267 Committee approval.

C. No Breach of *Charter* Rights

55. The applicant seeks a declaration that the Canadian government violated his right to enter Canada under s. 6(1) of the *Charter*. Section 6(1) provides as follows:

> 6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

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[79] *United Nations Al-Qaida and Taliban Regulations*, *supra*, **Applicant's Record**, vol. V, Tab A.

56. While s. 6(1) includes a right to enter Canada the government has not violated that right. Contrary to the applicant's allegations, the evidence demonstrates that the government has taken reasonable steps consistent with its international and domestic obligations to assist the applicant in his current situation in Sudan. There is no legal obligation for the respondent to take positive steps, to repatriate a citizen, who voluntarily left Canada. Simply put, the right to enter Canada does not create a right to be returned to Canada and certainly not to be returned in a manner inconsistent with international law.

1. No Factual Foundation

57. The applicant's entire case rests on his allegations that "the Respondents have in bad faith schemed to thwart his return to Canada" [80] and, as such violated his s.6(1) *Charter* rights. The Court should be cautious in accepting unfounded allegations of bad faith in support of a *Charter* breach. The burden of proof is on the applicant to prove the "adjudicative facts" necessary to ground the *Charter* breach alleged. The Supreme Court has held that claimants must be held to a stringent requirement of proof – adjudicative facts are specific and must be established through admissible evidence. [81] The Court must therefore be vigilant and not find a *Charter* breach where there is an insufficient factual foundation to support it.

58. In evaluating the conduct of Crown officials, the Court should be mindful of the legal presumption that officials have acted in good faith in the discharge of their duties and the onus is on the moving party to prove bad faith.[82] This Court must also consider the overall conduct of officials and not, as the applicant advocates, focus on isolated statements made in documents to piece together an erroneous theory of attempts to frustrate the applicant's efforts to return to Canada. Since 2004, the applicant has been provided with a high level of consular service and assistance. Based on the evidence as a whole, measured against the balance of probabilities, the

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[80] Applicant's Memorandum of Fact and Law, at para. 3, **Applicant's Record**, vol. IV, p. 2.
[81] *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at paras. 27-28, **Respondents' Authorities**, vol. 1, Tab 19. See also: *Gosselin v Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 S.C.C. 84, at para. 83, **Respondents' Authorities**, vol. 1, Tab 20. *Smith v. Canada (Attorney General)*, 2009 F.C. 228, at para 53, **Respondents' Authorities**, vol. 1, Tab 21.
[82] Brown, Donald J.M. and John M. Evans, *Judicial Review of Administrative Action in Canada*, (Canvasback Publishing, 2004), at para. 15:3314, **Respondents' Authorities**, vol. 2, Tab 41.

applicant's allegations are not well-founded in evidence and should, therefore, be rejected by this Court.

a. Unfounded Allegation that Canada Requested the Applicant's Detention

59. The applicant alleges for the first time in his Memorandum of Fact and Law that Sudan detained him at Canada's request.[83] This extremely serious allegation was not made in his Notice of Application or any of the affidavits filed in support of his application. This Court has said that, on an application for judicial review, it will only deal with the grounds of review raised in the notice of application or supporting affidavit. [84] The refusal to deal with other issues is based on the prejudice to the respondent because it was not given an opportunity to address the new grounds in its affidavit or consider filing an affidavit to address a new issue.[85]

60. This allegation is the lynchpin of the applicant's case as he argues that "his misadventure started with the Respondents' agents – and specifically the Canadian Security Intelligence Service ("CSIS") – explicitly recommended that Sudan detain him". [86] In support of this new allegation, the applicant relies on a single statement in a document written a full two years after he was first detained. [87] The email reports on a consular officer's meeting in December 2005 with the Sudanese National Security & Intelligence Agency to discuss the Sudanese refusal to grant Canada consular access to the applicant during that period of his detention. A reading of the entire document establishes that the consular officer is simply recounting information received from the Sudanese authorities during the meeting. As such, it is third hand hearsay which is unsubstantiated for the truth of its contents. On that basis, the statement, in and of itself, is inherently unreliable and should not be relied on by the Court.

not a single document statement was said - adverse inference - DFAIT understood it was a possibility

→ not against CSIS; yes it is see Crown Liability + Proceedings Act, can get CForces ~~expert~~ affidavits take an adverse inference.

[83] Applicant's Memorandum of Fact and Law, at paras. 1, 10, 54-56. **Applicant's Record**, vol. IV, pp. 1, 3, 14-5.
[84] *Métis National Council of Women v. Canada (Attorney General)*, [2005] 4 F.C.R. 272 (T.D.), 2005 FC 230, [2005] F.C.J. No. 328, at para. 45, **Respondents' Authorities**, vol. 1, Tab 22.; *Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 (C.A.), at para. 8, **Respondents' Authorities**, vol. 1, Tab 23.
[85] *Métis National Council, supra*, at para. 45, **Respondents' Authorities**, vol. 1, Tab 22.
[86] Applicant's Memorandum of Fact and Law, at para. 1, **Applicant's Record**, vol. IV, p. 1.
[87] Additional exhibits to Sean Robertson's Cross-Exam., **Applicant's Record**, vol. III, Tab 27, p.964. The statement relied on appears in the first three lines under the heading "case Overview" and was partially expurgated based on section 38 of the *Canada Evidence Act*.

61. In addition, in the very same document, the consular officer notes that if it is indeed the case that the initial recommendations for the applicant's detention emerged from CSIS, "we have not been told of these communications". [88]

62. Furthermore, earlier evidence of Canadian government officials directly contradicts the allegation. In a letter written in May 2004 to the Sudanese embassy in Ottawa wherein the DFAIT requested the applicant's release from detention, a Canadian government official wrote "Canadian officials have not requested his detention by Sudanese authorities". [89] Shortly thereafter, in June 2004, the applicant informed consular officials that the Sudanese authorities told him he "has been detained because the USA asked Canada to ask Sudan to keep him in custody". The applicant was told by the Head of Mission that he had "never heard any such story". [90] Other documents further support the conclusion that the Canadian government was not involved in the applicant's detention. [91]

63. In addition, the only sworn evidence on these matters is that of Sean Robertson, Director of Consular Case Management at the DFAIT. He affirmed that the respondent Minister of Foreign Affairs did not request that the applicant be detained by the Sudanese. [92]

64. Finally, the applicant erroneously states that he was unable to return to Canada in August 2003 with his family because of his detention by the Sudanese. [93] This allegation is directly contradicted by the applicant's own evidence. The applicant testified that his intention was to remain in Sudan until his mother recovered from her illness. [94] He did not consider returning to Canada in August 2003 with his wife and child "because of the circumstances of his mother's illness". [95] Moreover, he was not detained until approximately September 12, 2003.

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[88] *Ibid.*, **Applicant's Record**, vol. III, Tab 27, p.965.
[89] Affidavit of Sean Robertson, Exhibit "N", **Respondents' Record**, vol. 1, Tab 1N, p.228.
[90] Consular Case Note 40 dated June 7, 2004, Exhibit "K" to the Affidavit of Sean Robertson, **Respondent's Record**, vol. 1, Tab 1K, p.220.
[91] Consular Case Note 35 dated June 5, 2004 and Case Note 43 dated June 24, 2004, Exhibit "A" to Affidavit of Jo Wood, **Respondents' Record**, vol. 2, Tab 11, pp.587-597.
[92] Affidavit of Sean Robertson, at para. 22, **Respondents' Record**, vol. 1, Tab 1, p.7.
[93] Applicant's Memorandum of Fact and Law, at para. 55, **Applicant's Record**, vol. IV, pp. 14-5.
[94] Transcript of cross-examination of Abousfian Abdelrazik, p. 31, **Respondents' Record**, vol. 1, Tab 8, p.414.
[95] Transcript of cross-examination of Abousfian Abdelrazik, p. 49, **Respondents' Record**, vol. 1, Tab 8, p.432.

b. No Evidence of Bad Faith Efforts to Thwart the Applicant's Return

65. The applicant further alleges that the Canadian government deliberately and in bad faith frustrated his efforts to return to Canada. Again, in support of this serious allegation he relies on inference and speculation rather than concrete evidence. Contrary to the applicant's allegations, the following evidence demonstrates the government's continued good faith efforts to assist the applicant:

- Requests to the Sudanese authorities that the applicant be given due process under local law or released, and that he receive consular access while in detention;[96]
- Consular visits, supplemented with regular telephone communications, with the applicant while detained in 2003-2004;[97]
- Assistance with the engagement of legal counsel in Sudan;[98]
- Assistance with medical appointments and payment for medical expenses;[99]
- Efforts in making arrangements to repatriate the applicant in 2004;[100]
- Agreement with the Sudanese offer to repatriate the applicant;[101]
- Payment of monthly stipend, or services in kind;[102]
- Transmission of the applicant's request to be delisted from the 1267 list to the 1267 Committee; [103] and,
- Agreement to grant the applicant temporary safe haven in the embassy facilities in Khartoum, including the provision of food, bedding, medical treatment and prescriptions.[104]

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[96] Affidavit of Sean Robertson, at paras. 17, 22, 28, **Respondents' Record**, vol. 1, Tab 1, pp.6,7 and 8-9.
[97] Affidavit of Sean Robertson, at paras. 18-19, 28, **Respondents' Record**, vol. 1, Tab 1, pp.6 and 8-9.
[98] Affidavit of Sean Robertson, at para. 21, **Respondents' Record**, vol. 1, Tab 1, p.7.
[99] Affidavit of Sean Robertson, at para. 29, **Respondents' Record**, vol. 1, Tab 1, p.9.; Affidavit of Eric O'Connor, at paras. 2, 19, **Respondents' Record**, vol. 2, Tab 2, pp.305, 330.
[100] Affidavit of Sean Robertson, at para. 23, **Respondents' Record**, vol. 1, Tab 1, p.7.
[101] Affidavit of Sean Robertson, at paras. 25-26, **Respondents' Record**, vol. 1, Tab 1, p.8.
[102] Affidavit of Sean Robertson, at paras. 33, 38, **Respondents' Record**, vol. 1, Tab 1, pp.10-11.
[103] Affidavit of Sean Robertson, at para. 34, **Respondents' Record**, vol. 1, Tab 1, p.10.
[104] Affidavit of Eric O'Connor, at paras. 2,5,6,11,16,17,18,19, **Respondents' Record**, vol. 2, Tab 2, pp.325,326,328,329,330.

66. In conclusion, the provision of all of the assistance noted above demonstrates, contrary to the applicant's assertion, that he has been provided a high level of consular assistance throughout and that the Canadian government has aided, within its lawful authority, in attempts to repatriate the applicant. The respondents have acted throughout in a good faith exercise of consular discretion.

2. Section 6 of the *Charter* does not Include a Right of Repatriation

67. Mobility rights contained within section 6 of the *Charter* do not include a positive obligation for Canada to repatriate citizens. A right of entry pursuant to s. 6 of the *Charter* is not a right to be returned to Canada. To date, the Supreme Court has recognized "positive obligations" only in the context of making meaningful the fundamental freedoms in s. 2 of the *Charter* and only in specific, defined circumstances. *Charter* rights are typically conceptualized in terms of negative rights rather than positive entitlements: for example, the freedom of expression "prohibits gags, but does not compel the distribution of megaphones".[105]

68. In fundamental freedoms cases, if it is determined that what the claimant seeks is a positive entitlement to government action (usually a claim to legislate), as opposed to a right to be free from government interference, "positive government action" will only be required where the following conditions are met: a) where the claim is one of under-inclusion grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime; b) where the purpose or effect of the exclusion is to create a substantial interference with a fundamental freedom; and c) where the state is responsible for that substantial interference.[106] Even if it was appropriate to attempt to apply these principles to section 6(1) of the *Charter*, the applicant's claim is not a claim of under-inclusivity and in particular, not a claim to legislate. Furthermore, Canada is not responsible for the applicant's situation.

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[105] *Baier, supra*, at para. 21, **Respondents' Authorities**, vol. 1, Tab 15.
[106] *Ibid,* at paras. 27, 30, **Respondents' Authorities,** vol. 1, Tab 15. See also: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at paras. 31-34, **Respondents' Authorities,** vol. 1, Tab **24**.

69. Even in *Van Vlymen*, the case on which the applicant relies for his novel proposition that the court can order repatriation, the Court recognized that s. 6 rights do not operate without regard to other states' laws. In that case the applicant was an inmate in the U.S. and the Court found that his s. 6 right to enter was

> subject to the practical limitations imposed by the U.S. authorities and the need for their approval before he could return.
>
> . . .
>
> While he remained incarcerated in the U.S. the applicant's section 6 rights remained unenforceable until such time as the U.S. approved his transfer.[107]

Similarly, the applicant's s. 6 rights do not include repatriation in the face of the UN travel ban and assets freeze and does not include the right to transit through other states to enter Canada.

70. The Supreme Court has said that international law is a source that helps define the content of *Charter* rights. LeBel J. for the majority of the Supreme Court held in *Hape*:

> This Court has also looked to international law to assist it in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other. [108]

71. That s. 6 of the *Charter* does not include a right of repatriation is further evidenced by the lack of such a right or a concomitant duty on states to provide it in international law. International human rights law does not suggest that s. 6 includes a right to state-assisted repatriation. Article 12(4) of the *International Covenant on Civil and Political Rights* ("*ICCPR*") provides that no one shall be arbitrarily deprived of the right to enter his own country. However, it has never been interpreted as creating a positive duty to repatriate.

72. Furthermore, states have no legal obligation under international law to provide consular protection, including no duty to repatriate. [109] The *Vienna Convention on Consular Relations* does not oblige states to provide any form of consular protection whatsoever to their citizens. As Jennings and Watts state:

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[107] *Van Vlymen v. Canada (Solicitor General)*, 2004 FC 1054, at paras. 97, 100, **Applicant's Record**, vol. V, Tab N. See also: *Kamel v. Canada (Attorney General)* 2009 CAF 21, at para 17 **Applicant's Record**, vol. V, Tab K.
[108] *Hape, supra*, at paras. 55-6, **Applicant's Record**, vol. V, Tab M.
[109] *Vienna Convention on Consular Relations* 1963, April 29, 1963, article s.36(1)(a), **Respondents' Authorities**, vol. 1, Tab **12.**

> International law imposes no duty upon a state to protect its nationals abroad, and states in practice often decline to exercise their right of protection over their nationals abroad. The matter is in the discretion of every state, and while it has an undoubted right to protect one of its nationals who is wronged abroad in his person or property, no national abroad has by international law a right to demand protection from his home state, although he may have such a right by municipal law. [110] (emphasis added)

73. In the same vein, the UK Court of Appeal held in *Abbasi*:

> it is clear that international law has not yet recognized that a state is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State.[111]

74. Contrary to the applicant's contention, the Canadian government's application of the UN mandated travel ban and asset freeze in this case is neither "selective" nor "disingenuous". [112] As explained in paragraphs 40-54 herein, it is Canada's international legal obligation to implement these measures pursuant to the UN Charter, as long as the applicant remains on the 1267 list. As the applicant himself acknowledges, his listing "automatically triggers qualified sanctions in Canadian and international law."[113] For Canada to attempt to transit the applicant through the sovereign territories of other UN member states in the face of the UN 1267 travel ban and without the consent of those states, would be inconsistent with Canada's international legal obligations and would risk breaching the laws of third states. Section 6 does not require this of the Government of Canada.

D. Justified as a Reasonable Limit

75. In the alternative, should the Court find a breach of section 6, then its infringement is justified under section 1 of the *Charter*.

1. Prescribed by Law

76. The Canadian government actions or inactions are prescribed by law for s. 1 purposes because they are made pursuant to the broad authority contained in s. 10 of the *Department of*

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[110] Jennings, R and Watts, A, *Oppenheim's International Law*, vol. 1, Parts 2 to 4, 9th ed, (London: Longman, 1996), p. 934, para. 410, **Respondents' Authorities**, vol. 2, Tab 42.

[111] *Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, at para 69, **Respondent's Authorities**, vol. 1, Tab 25. See also: *Kaunda and Others v. President of the Republic of South Africa* (CCT 23104) [2004] ZACC 5 (4 August 2004) at paras. 23, 29, 73, **Respondents' Authorities**, vol. 2, Tab 26.

[112] Applicant's Memorandum of Fact and Law, at paras. 78-9, **Applicant's Record**, vol. IV, p. 20.

[113] Applicant's Memorandum of Fact and Law, at para. 18, **Applicant's Record**, vol. IV, p. 5.

Foreign Affairs and International Trade Act (the *"DFAIT Act")*[114] and Crown prerogative over the conduct of consular and foreign affairs. The *DFAIT Act* provides the Minister broad discretion to conduct consular and diplomatic relations. It does not oust Crown prerogative over the conduct of foreign relations or consular affairs. As such any actions of government officials were executive acts pursuant to statutory and common law authority and are thus prescribed by law. [115]

77. Since the applicant's 1267 listing, government officials have exercised the Crown prerogative and broad discretion on consular and foreign affairs in accordance with specific limits prescribed in the various UNSC resolutions. They have also acted pursuant to Canada's domestic statutory implementation of the UN asset freeze, in the *Regulations*. The impediment to Government of Canada assisted repatriation of a listed person is "prescribed by law" given that such repatriation would require covering travel costs, as prohibited by the *Regulations*.

2. **Pressing and Substantial Goal**

78. The pressing and substantial objectives behind the Canadian government's actions or inactions in exercising discretion and/or the Crown prerogative in accordance with the travel ban and the asset freeze are twofold: (i) the suppression of terrorism; and (ii) abiding by Canada's international legal obligations. The Supreme Court of Canada has confirmed that Canada's international obligations should inform the interpretation of pressing and substantial objectives under s. 1 of the *Charter*.[116]

79. The UNSC Resolutions affirm the commitment to combat terrorism:

> terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed; and reiterating its unequivocal condemnation of Al-Qaida, Usama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them, for ongoing and multiple criminal terrorist acts

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[114] *Department of Foreign Affairs and International Trade* Act, R.S.C. 1985, c.E-22.
[115] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at para. 50, **Respondents' Authorities**, vol. 2, Tab 27; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, at paras. 18-23, **Respondents' Authorities**, vol. 2, Tab 28. *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at 1500, **Respondents' Authorities**, vol. 2, Tab 29.
[116] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at para. 23, **Respondents' Authorities**, vol. 2, Tab 30.

> aimed at causing the death of innocent civilians and other victims, destruction of property and greatly undermining stability.[117]

80. The Government of Canada is committed, in accordance with the *UN Charter* and international law, to combating threats to international peace and security caused by terrorist acts of the Taliban and Al-Qaida, as well as other individuals, groups, undertakings, and entities associated with them. The UN plays an important role in leading and coordinating this effort. As the UNSC has affirmed, terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, to impede, impair, isolate, and incapacitate the terrorist threat.

81. Through its successive Resolutions, the UNSC has adopted measures to combat terrorism. Those measures include the creation of a list of individuals decided by the Committee on the basis of information from Member States to be associates of the Taliban or Al-Qaida. The identification of these individuals allows for further measures to ensure that they do not pose a threat by minimizing their mobility, freezing their assets and depriving them of arms.

82. The applicant is on this list, and his place on it was confirmed by the Committee's decision not to de-list him in December 2007. For Canada, implementing the consequences of this listing through its exercise of discretion in the provision of consular assistance and its adherence to the travel ban and asset freeze, furthers the pressing and substantial objective of ensuring that Canada does its part in the international effort to address terrorism. [118] It also serves the pressing and substantial objective that Canada conduct foreign relations in accordance with its international legal obligations.

3. Rational Connection

83. The Canadian government's broad discretion in the conduct of consular affairs, and its exercise of that discretion in accordance with UNSC Resolutions is rationally connected to the objectives of suppressing terrorism and participating in UN efforts to that end.

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[117] UNSC Resolution 1822, **Respondents' Authorities**, vol. 1, Tab 8.
[118] *Charkaoui v. Canada (M.C.I.)*, [2007] 1 S.C.R. 350, at para. 68, **Respondents' Authorities**, vol. 2, Tab 31.

4. Minimal Impairment

84. The applicant's s. 6 *Charter* right is minimally impaired because, to the extent that Canada has impaired it, it has been in the exercise of discretion carried out in good faith and in accordance with international law. The asset freeze is minimally impairing because while funding for his transit through other states is prohibited, possibilities remain for delisting or exemptions. The applicant himself can apply again to be delisted which if successful would lift the prohibition.

85. Furthermore, his rights are minimally impaired because Canada has provided considerable consular assistance to the applicant in attempting to repatriate him before the travel ban, and in providing a stipend and medical assistance and seeking exemptions from the UN as detailed above.

5. Proportionality

86. The applicant's right to re-enter Canada must be balanced against Canada's need to uphold international law and fulfill its obligations to the UN Security Council.[119] Any deleterious effects are proportionate to the benefits which accrue from Canada's compliance with international law and participation in the international effort to combat terrorism.

E. Remedy of Repatriation is Unavailable and Inappropriate

87. The applicant seeks "a mandatory order directing the Respondents to repatriate the Applicant to Canada by any safe means at its disposal". Such an order would be unprecedented and raises serious questions concerning the Court's remedial powers, whether exercised under s. 18(1)(a) of the *Federal Courts Act*[120] or s. 24(1) of the *Charter*. It would intrude on matters of

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[119] *Kadi & Al Barakaat International Foundation v. Council of the European Union et al.*, (2008) ECJ (Grand Chamber), at paras. 363-365, **Applicant's Record**, vol. VI, Tab P.

[120] R.S.C. 1985, c.F-7, as amended, **Respondents' Authorities**, vol. 1, Tab 4.

Crown prerogative, high policy and the conduct of foreign relations, grounds on which courts are reluctant to tread. [121]

88. When considering what is "just and appropriate" for a s. 24 *Charter* remedy, the Court must consider relevant legal principles including Canada's international legal obligations. Furthermore, the Court should heed its mandamus jurisprudence in exercising its remedial discretion under s. 24(1) of the *Charter* given the extraordinary nature of the requested relief. Under that jurisprudence a mandatory order is only available to satisfy a public legal duty. [122] For the reasons set out above, there is no legal duty for the Government to repatriate a citizen.

89. The remedy granted cannot usurp the role of the other branches of government. The remedy must employ means that are legitimate within the framework of our constitutional democracy and must respect the relationships with and separation of functions among the legislature, the executive and the judiciary.[123] The executive has a special responsibility in matters of foreign relations and national security, to which the Court must accord an especially broad margin of discretion.[124] The conduct of foreign and consular affairs is an exercise of Crown prerogative which is a matter for the executive, not the courts.[125]

90. Parliament did not intend for the Federal Court to exercise the Minister's discretion (as opposed to supervising the exercise of that discretion), even where a s. 24(1) remedy is sought.[126] It would be inappropriate for the Court to make an order that would interfere in the executive's broad discretion over the conduct of foreign policy. [127]

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[121] *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, at para 52 (C.A.), **Respondents' Authorities**, vol. 2, Tab 32.
[122] *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), F.C.J. No. 1098, aff'd [1994] 3 S.C.R. 1100, at para. 45, **Respondents' Authorities**, vol. 2, Tab 33.
[123] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 43, 56, **Applicant's Record**, vol. V, Tab H.
[124] *Al Rawi & Others v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA Civ 1279, at paras. 147-8, **Respondents' Authorities**, vol. 2, Tab 34. *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 at p.173, **Respondents' Authorities**, vol. 2, Tab 35. *Kamel v. Canada, supra,* at para 58, **Applicant's Record**, vol. V, Tab K.
[125] *R. v. Latimer*, [2001] 1 S.C.R. 3, at paras. 89-90, **Respondents' Authorities**, vol. 2 Tab 36.
[126] *Cheong Sing Lai v. Canada (M.C.I.)*, 2006 FC 473, at paras. 16-17, **Respondents' Authorities**, vol. 2, Tab 37.
[127] *Abbasi, supra,* at para. 37 **Respondents' Authorities**, vol. 1, Tab 25.

91. In considering the appropriate remedy under s. 24(1) of the *Charter*, the Court must consider that interstate relations are implicated in an order of repatriation. As the Supreme Court observed in *Hape*:

> Where the question of application involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations. [128]

International law establishes the jurisdiction of states over their territory. Comity requires Canada to respect their laws. An order of repatriation would offend both these foundation principles, and the Court ought not order the requested remedy.

92. By ordering Canada to repatriate in the face of the UN asset freeze and travel ban, in the absence of an exemption, the Court would order Canada to violate its international obligations. Given that the *Charter* is to be interpreted consistently with international law whenever possible, an order of repatriation under s. 24(1) would be highly inappropriate.

F. Conclusion

93. The *Charter* is not engaged in this case. The applicant's present inability to return to Canada is a result of his listing on the 1267 list and the resulting prohibition against travel through other countries. The applicant has not been denied entry into Canada by the government contrary to s. 6 of the *Charter*. In any event, the applicant has failed to provide this Court with a sufficient factual and legal foundation to ground his very serious allegations of a violation of his *Charter* rights. Section 6 of the *Charter* does not create a positive obligation for Canada to repatriate its citizens. Such an interpretation would run counter to Canada's international obligations and interfere in matters of Crown prerogative, foreign affairs and high policy.

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[128] *Hape, supra,* at para. 33, **Applicant's Authorities**, vol. V, Tab M.

PART IV - RELIEF SOUGHT

94. The respondents request that the application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, this 9th day of April, 2009.

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PART V - LIST OF AUTHORITIES

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2. *Immigration and Refugee Protection Act*, S.C. 2001, c.27
3. *United Nations Act*, R.S.C. 1985, c. U-2
4. *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c.E-22, s.10
5. *Federal Courts Act*, R.S.C. 1985, c.F-7, as amended, s. 18(1)(a)

Conventions and Resolutions

6. *UNSC* Resolution 1267
7. *UNSC* Resolution 1390
8. *UNSC* Resolution 1452
9. *UNSC* Resolution 1526
10. *UNSC* Resolution 1735
11. *UNSC* Resolution 1822
12. *Convention on International Civil Aviation* signed at Chicago on December 7 1944 (Chicago Convention), articles 1 and 2
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14. *Vienna Convention on the Law of Treaties, 1969*, May 23, 1969, articles 31 and 32
15. *Vienna Convention on Consular Relations, 1963,* April 29, 1963, article s.36(1)(a)

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16. *Global Enterprises International Inc. v. Aquarius (The),* 2001 FCT 1311
17. *GlaxoSmithKline Inc. v. Apotex*, 2003 FC 920
18. *Baier v. Alberta,* 2007 SCC 31
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23. *Danson v. Ontario (Attorney General),* [1990] 2 S.C.R. 1086
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32. *Kaunda and Others v. President of the Republic of South Africa* (CCT 23104) [2004] ZACC 5 (4 August 2004)
33. *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441
34. *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256
35. *United States of America v. Cotroni,* [1989] 1 S.C.R. 1469
36. *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038
37. *Charkaoui v. Canada (M.C.I.),* [2007] 1 S.C.R. 350
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