

9-9-2008

Affidavit of Sean Robertson and Exhibit "N" 9 September 2008

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Court file No. T-727-08

FEDERAL COURT

BETWEEN:

Abousfian Abdelrazik

Applicant

and

Minister of Foreign Affairs and International Trade

Respondent

AFFIDAVIT OF SEAN ROBERTSON

I, Sean Robertson, of the City of Ottawa, Province of Ontario AFFIRM THAT:

1. I am Director of Consular Case Management at the Department of Foreign Affairs and International Trade (DFAIT) and have held this position since October 2006. The responsibilities of my position include directing and overseeing the provision of consular assistance to Canadian citizens abroad. I am currently responsible for supervising the applicant's consular assistance file and as a result have reviewed the consular file. As such, I have knowledge of the consular assistance provided to the applicant in Sudan from 2003 to the present.

2. The applicant has received ongoing consular assistance from DFAIT officials since October 2003. This assistance has included conducting prison visits to ensure his well-being, advocating with Sudanese authorities that he be given due process under local law or released, assisting with the engagement of legal counsel in Sudan, attempting to organize his repatriation to Canada in 2004, communicating regularly with his family, and providing financial assistance to cover his basic needs and medical care. In addition, DFAIT has sought and obtained permission from 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) to enable consular officials to provide a monthly stipend for basic humanitarian needs to the applicant. DFAIT also transmitted the applicant's request to the 1267 Committee to be removed from its list of persons associated with the Taliban, Usama bin Laden, and Al-Qaeda.

The respondent Minister of Foreign Affairs and DFAIT

3. The conduct of foreign affairs is the responsibility of the federal government and respondent Minister of Foreign Affairs as outlined in Subsection 10(1) of the *Department of Foreign Affairs and International Trade Act*, R.S. 1985, c. E-22, s. 1; 1995, c. 5, s. 2. Subsection 10(2) of the Act sets out a number of the Minister's obligations including to:

- a. Conduct all diplomatic and consular relations on behalf of Canada;
- b. Conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization;...
- g. Coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions;
- h. Have the management of Canada's diplomatic and consular missions;...

4. The Department of Foreign Affairs and International Trade (DFAIT) assists the Minister in carrying out these obligations. One of the stated strategic policies of DFAIT is to serve Canadians abroad. An important part of this mandate is the provision of consular services.

The United Nations

5. Canada is a member state of the United Nations (UN) and as such has the obligations that membership entails. Canada has not been a member of the Security Council since 1999-2000 and as such was not a member of the 1267 Committee for the

relevant time period. To my knowledge, deliberations of the 1267 Committee are confidential and its decisions are reached by consensus. Attached as Exhibit A is a copy of the UN Charter.

DFAIT conduct of consular affairs

6. DFAIT operates a network of more than 260 missions in over 150 countries, including embassies, High Commissions, and Consulates. Each of these missions provides a variety of consular services to Canadians, and these services are just one component of the activities for which Canadian offices around the world are responsible.

7. Consular assistance is provided to Canadians in accordance with the Manual of Consular Instructions (MCI). Consular services that can be provided include, but are not limited to: 1) arranging for help in cases of medical emergency by providing lists of doctors and hospitals; 2) providing a list of local lawyers; 3) replacing a lost, stolen, damaged, or expired passport; 4) providing an emergency loan, subject to strict rules and only as a last resort; 5) seeking to ensure that Canadians are treated fairly under a foreign country's laws when arrested or detained; and 6) contacting relatives or friends to ask them to send money or airline tickets to Canadians in need. Attached as Exhibit B is Chapter 2 of the MCI.

8. Consular affairs policy does not include a number of services such as: 1) making travel arrangements; 2) helping find accommodation; 3) paying hotel, medical, travel or other expenses; 4) intervening in private legal matters; or 5) accepting mail.

9. More specific information on consular services provided by Canadian missions is available to the general public online and in brochures provided by the Consular Affairs Bureau. Attached as Exhibits C through E are public brochures published by DFAIT

entitled "Bon Voyage, But...", "Dual Citizenship: What Travellers Should Know", and "A Guide for Canadians Imprisoned Abroad".

Consular services for Canadians imprisoned abroad

10. An integral component of consular assistance involves advocating on behalf of imprisoned Canadians to ensure that they receive due process under local law, that they have access to legal counsel, and that their rights under international and local laws are respected. The *Vienna Convention on Consular Relations* (VCCR) is the international agreement governing consular relations. Two of the most important sections of the VCCR are the right of a detained person to be advised of his or her right to have the consular post notified of the detention and to notify the consular post if the person so requests (Article 36(1)(b)) and the right of a consular officer to visit the detained individual (Article 36(1)(c)). Attached as Exhibit F is a copy of the VCCR.

11. Consular access is extremely important in situations of detention. It allows the consular officers to assess the health and well-being of the detained Canadian. It further sends a signal to the detaining state that consular officials will be monitoring the treatment of the detainee in relation to discrimination on the basis of nationality and recognized minimum standards of treatment.

12. An increasingly significant portion of the Canadian citizenry is made up of individuals who have immigrated to Canada in recent years. Many of these individuals may have dual citizenship. The VCCR is silent on the issue of dual nationals. While it is Canada's policy to provide consular assistance to any Canadian in need abroad regardless of any other nationality the person may hold, many states do not recognize a second citizenship. Due to this lack of recognition, a detaining state may not recognize Canada's right to provide consular assistance to a Canadian detained in the state of

“other” nationality. Simply put, many states will treat their nationals as having only one nationality while they are within that state.

Information on safety and security for travelling Canadians

13. DFAIT regularly issues travel reports that provide information on safety and security and other important issues to Canadians abroad. In addition, DFAIT provides a registration service for all Canadians travelling or living abroad. This service allows consular officials to contact and assist registered Canadians in an emergency in a foreign country, such as a natural disaster or civil unrest. Registration is voluntary, and personal information provided is used in accordance with the *Privacy Act*.

14. In March 2003, when the applicant travelled to Sudan, a travel advisory was in effect warning Canadian citizens to avoid all tourist travel to the Sudan, noting specifically that tensions had increased in Khartoum, the capital city. Attached as Exhibit G is a copy of that advisory. This travel advisory advised Canadians to register with the Office of the Canadian Embassy in Khartoum. According to the DFAIT consular records, the applicant did not register his presence in Sudan.

Canadian Embassy in Sudan

15. The Canadian Embassy in Sudan, which is located in Khartoum, is a small embassy with only 13 employees, of which 4 are Canadian-based diplomats. The Embassy is responsible for a wide range of activities including, but not limited to: 1) conducting the business of the Government of Canada with the Government of Sudan; 2) supporting Canada's involvement in peacekeeping operations in Sudan; 3) monitoring and advising the Canadian Government of political, security, and economic developments in Sudan; 4) managing Canadian humanitarian and development assistance activities in Sudan; and 5) providing consular assistance to Canadian citizens in Sudan.

Consular assistance to the applicant during detention

16. In my review of the consular case notes for this file, I noted that the first recorded reference to DFAIT officials seeking to confirm the whereabouts of the applicant in Sudan was dated October 6, 2003. Attached collectively as Exhibit H are relevant internal consular case notes.

17. Upon learning of the applicant's location, consular officials sought to gain access to the applicant. When this access was not immediately granted, consular officials followed up with additional communications. On November 23, 2003, consular officials sent a diplomatic note to the Sudanese Ministry of Foreign Affairs seeking access to the applicant in order to provide consular assistance to him. Attached collectively as Exhibit I are copies of consular case notes regarding the attempts made by officials to secure consular access.

18. On December 13, 2003, David Hutchings, the Embassy Head of Mission, met with the applicant at the Sudanese Ministry of Foreign Affairs. Attached as Exhibit J is the report of that meeting.

19. Between January and May 2004, consular officials were granted a further four visits with the applicant. These meetings were supplemented by regular phone communications between consular officials and the applicant. One of the purposes of a consular visit is to assess the health and well-being of a Canadian citizen. Attached collectively as Exhibit K are the official consular reports of those meetings. There are no references that the applicant reported abuse or that consular officials reported signs of abuse.

20. The file also indicates that the applicant's family advised consular officials that members of the family had visited him on several occasions during this period of detention, including prior to the first consular visit in December 2003. Attached as Exhibit L is a report of one such conversation noting that the applicant's then wife,

Myriam St-Hilaire, reported that family members had been able to visit the applicant and that he was fine and showing no signs of abuse.

21. One of the services that consular officials provide is assisting Canadian citizens in finding a lawyer if needed. DFAIT missions maintain lists of local lawyers who have expertise in criminal law and who may have represented Canadians in the past. While consular officials cannot recommend any specific lawyers, they do provide copies of the list to Canadians upon request. According to the file, consular officials provided a copy of the list of lawyers for Sudan to the applicant, following his request for DFAIT's assistance in hiring a lawyer made during the second consular visit on January 12, 2004. Attached collectively as Exhibit M are diplomatic notes regarding the applicant's securing of legal counsel in Sudan.

22. The respondent did not request that the applicant be detained by Sudanese authorities and at no time did the respondent request his continued or further detention. In May 2004, consular officials advised the Sudanese Embassy in Ottawa that Canadian officials had not requested his detention and that the applicant should either be charged and provided with due process or released. Attached as Exhibit N is a case note containing a copy of that letter dated May 18, 2004.

Efforts to arrange for applicant's return to Canada pre UN-listing

23. I am informed by the file that in June 2004 consular officials attempted to make arrangements to repatriate the applicant. After all flight arrangements were confirmed, the airline, Lufthansa, advised consular officials that they would refuse to accept the applicant as a passenger. Consular officials subsequently attempted to make alternate travel plans, such as flying through Casablanca, but these were also unsuccessful. Attached collectively as Exhibit O are consular reports detailing the efforts made by the respondent to secure transportation to Canada for the applicant.

24. Following this attempt to facilitate the applicant's return to Canada, Sudanese authorities released the applicant to an apartment under the control of Sudanese authorities where I understand the applicant was under continued state supervision. Consular officials continued to provide consular assistance to him. Attached collectively as Exhibit P are consular notes recording such assistance.

25. According to the file, in October 2004, the applicant informed consular officials that the Government of Sudan might be willing to consider flying the applicant from Khartoum to Montreal. Consular officials met with Sudanese officials to discuss the Sudanese suggestions. After this meeting, consular officials followed up with Sudanese authorities on the status of the Sudanese plan but received no response. Consular officials received no further communication from the Government of Sudan on this issue. Attached collectively as Exhibit Q are communications sent as a result of pursuing this Sudanese suggestion.

26. I am not aware of the Government of Sudan's reasons for deciding not to pursue their efforts to return the applicant to Canada.

27. In a letter to applicant's counsel Yavar Hameed, dated April 18, 2008, I wrote that no offer was made to departmental officials by Sudanese authorities to provide an aircraft to return the applicant to Canada. From my subsequent review of the file I now realize that I was mistaken in that there were discussions about a Sudanese suggestion to fly the applicant from Khartoum to Montreal.

Consular assistance to applicant 2005-2006

28. In October 2005, consular officials were advised by Sudanese authorities that they had once again detained the applicant. As with his first detention, consular officials 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. Attached

collectively as Exhibit R are copies of diplomatic notes of some of those attempts to gain consular access to the applicant.

29. The applicant was released from detention on July 20, 2006. Consular officials immediately arranged for a medical exam. The applicant's doctor recommended the applicant to two further specialists. No major ailments or concerns were reported by any of the doctors. Attached as Exhibit S is a consular case note reporting on the applicant's health condition and medical examination following the second period of detention. This note does not contain any reference to the applicant's advising officials that he had been mistreated.

30. Consular staff also provided the applicant with access to telephones at the Embassy to talk to his family in Canada. Such measures exceed normal consular assistance afforded to Canadian citizens who do not have access to personal funds. Attached as Exhibit T are records of this assistance.

Assistance post-UN listing

31. On July 20, 2006, the US Department of the Treasury designated the applicant for "*his high level-ties to and support for the Al-Qaida network*". The following day, the US Department of State similarly designated the applicant as "*posing a significant risk of committing acts of terrorism that threaten the security of US nationals and the national security.*" Attached collectively as Exhibit U are copies of the U.S. Treasury Department and U.S. State Department press releases announcing these decisions.

32. On July 31, 2006 the applicant was listed by the 1267 Committee as an Al-Qaida associate, pursuant to UN Security Council Resolution 1267. As Canada is not a member of the UN Security Council or the 1267 Committee, the respondent is unaware of the basis for this decision. The 1267 Committee listing subjects the applicant to a global assets freeze, travel ban, and arms embargo. Attached as Exhibit V is a copy of

UN Security Council Resolution 1267, Exhibit W is a copy of the UN Security Council Resolution 1735, Exhibit X is a copy of the UN Security Council Resolution 1452 and Exhibit Y is a copy of the Guidelines of the 1267 Committee.

33. As a result of the applicant being listed by the 1267 Committee, Canada's *United Nations Al-Qaida and Taliban Regulations* require an exemption from the UN imposed asset freeze before providing financial assistance to the applicant. In May 2007, DFAIT obtained this exemption from the 1267 Committee to permit a monthly stipend of US\$100 to be paid to the applicant to cover his basic necessities. According to the World Bank, the Sudanese average annual income in 2007 was approximately US\$800. Attached as Exhibit Z is a copy of the exemption certificate signed by the Minister of Foreign Affairs.

34. In October 2007, the applicant requested that the Minister of Foreign Affairs consider his request to be removed from the 1267 Committee listing. The Minister agreed to transmit the delisting request to the 1267 Committee. The request for delisting was denied by the 1267 Committee on December 21, 2007. The 1267 Committee did not offer, nor is it required to provide, reasons for its decision. The Government of Canada is not a member of the 1267 Committee and has no control over its processes. Attached as Exhibit AA is a copy of a letter to the applicant's lawyer reporting that the respondent had forwarded the delisting request to the 1267 Committee.

35. On February 27, 2008, I along with other DFAIT officials met with Mr. Yavar Hameed, the applicant's lawyer in Ottawa. At this meeting Mr. Hameed alleged that the applicant had been tortured while in Sudanese custody. This was the first time that the applicant's claims of torture were brought to the respondent's attention.

36. In the same meeting, the applicant's lawyer requested that the monthly assistance for basic necessities be increased to \$400. I advised that this would require

the approval of the 1267 Committee and he should provide substantiation for a four-fold increase.

37. In subsequent correspondence dated March 25, 2008, Mr. Hameed increased the request to \$600 per month. Given the requirement of securing approval by the 1267 Committee, I requested that Mr. Hameed provide further information. Attached as Exhibit BB is correspondence on this issue.

38. Since the applicant entered temporary safe haven, the respondent notified the 1267 Committee of its intention to lift the asset freeze so as to be able to provide in-kind assistance to the applicant to a value of approximately \$400 per month. The 1267 Committee did not object to this request.

39. With respect to the allegation in paragraph 34 of the applicant's affidavit, Embassy officials have never prevented the applicant from access to visiting Canadians except in accordance with ordinary logistical and security requirements surrounding such visits. For example, the applicant was not permitted to meet with the then Prime Minister Chrétien as a result of such concerns, including the fact that the Prime Minister was only Khartoum for 6 hours and his program was already full. Even though the Prime Minister was unavailable, the respondent arranged for the applicant to meet with Mr. David Malone, the then Assistant Deputy Minister for Global Issues at DFAIT. Both Mr. Malone and the Head of Mission met the applicant to discuss the challenges in repatriating the applicant. Already attached at Exhibit Q is the consular case note 155 containing a report of this meeting.

Comparison to other individuals returned to Canada

40. In his affidavit sworn on June 17, 2008, the applicant made reference to consular assistance provided in the case of Brenda Martin, a Canadian citizen formerly imprisoned in Mexico. These two consular cases are very different. Ms. Martin was


returned to Canada as a result of a prisoner transfer request approved by the Minister of Public Safety, acting under the *International Transfer of Offenders Act*. Ms. Martin was not listed by the 1267 Committee.

41. The applicant also makes reference to the efforts undertaken by the Government of Canada in the summer of 2006 to repatriate thousands of Canadians from Lebanon during hostilities between Israel and Lebanon. To my knowledge, none of the Canadians repatriated from Lebanon were subject to the 1267 Committee listing.

42. At all times consular officials have provided assistance and support to the applicant in accordance with established consular policies for Canadian citizens in distress abroad. While assistance in returning to Canada has been provided to other Canadians abroad in distress, these individuals were not on the 1267 list and subsequently not subject to the resultant asset freeze and travel ban.

43. Based on the foregoing, in all of this assistance and at all times, DFAIT officials have received and treated the applicant with consistent professionalism and respect.

Affirmed before me at)
the City of Ottawa)
in the Province of Ontario on)
September 9, 2008.)
)



Sean Robertson



Commissioner for Taking Affidavits

**Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of
Canada, Department of Justice.
Expires December 3, 2010.**

Department of Foreign Affairs
and International Trade



Ministère des Affaires étrangères
et du Commerce international

Case Note / Note sur le cas

03-KHRTM-1060383 Sudan Abdelrazik 18-May-2004 16:14

Category / Catégorie :	Arrest / Detention	Status / Statut :	Active
Mission / HQ/AC :	CNO	Originator / Auteur :	Gaudet-Fee
Note No. / N° de note :	30	Topic / Sujet :	letter sent to charge d'affaires

in the Sudanese Emb. in Ottawa

Ottawa, Ontario
K1A 0G2

May 18, 2004

Charge d'affaires
Embassy of the Republic of Sudan
354 Stewart Street
Ottawa, ON, K1N 6K8

s.21

This is Exhibit "N" referred
to in the affidavit of
Jean Robertson
Sworn before me this *9th*
day of *September* A.D. *2008*.
Lori Brenning
A Commr. & etc.

re: Mr. Abousfian Abdelrazik

Dear [redacted]

**Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of
Canada, Department of Justice.**

The Consular Affairs Bureau of the Department of Foreign Affairs Canada presents its compliments to the Republic of Sudan and has the honour to refer to the case of Mr. Abousfian Abdelrazik, a Canadian citizen currently detained in a Sudanese prison without charges since August 2003.

The Consular Affairs Bureau appreciates that our Canadian representative in Khartoum has been allowed consular access. However, we regret that Mr. Abdelrazik's lawyer, Mr. Sattie, has been prevented from seeing his client despite assurances that he would be granted access.

It is our understanding that Mr. Abdelrazik entered Sudan with his Canadian passport and that no charges have been laid since his detention last summer. It is also our understanding that Canadian officials have not requested his detention by Sudanese authorities. In light of the information presented, we kindly request your assistance in asking for the release of Mr. Abdelrazik.

The Department of Foreign Affairs Canada avails itself of this opportunity to renew to the Republic of Sudan the assurances of its highest consideration.

Sincerely,

**Dave Dyet
Director, Case Management
Consular Affairs Bureau**

**Info:
Ahmed, Samia/Khartoum; Gaudet-Fee, Odette/JPO**