3-10-2009

Applicant's Memorandum of Fact and Law 10 March 2009

Court File Number: T-727-08

FEDERAL COURT

B E T W E E N:

ABOUSFIAN ABDELRAZIK

Applicant

-and-

MINISTER OF FOREIGN AFFAIRS
and THE ATTORNEY GENERAL OF CANADA

Respondents

APPLICANT'S MEMORANDUM OF FACT AND LAW

PART I – CONCISE STATEMENT OF FACTS

A) Overview of the Case

1. The Applicant is a naturalized Canadian citizen who lived and raised a family in Montreal. He is neither charged with nor convicted of any criminal offence. Yet following a visit to his mother in Sudan almost six years ago, the Applicant has been unable to return to Canada owing to a series of circumstances initiated by the Respondents. His misadventure started when the Respondents' agents — and specifically the Canadian Security Intelligence Service ("CSIS")— explicitly recommended that Sudan detain him. Sudan did so at Canada's request, and the Applicant thereafter endured approximately two years of Sudanese imprisonment and torture.

2. Since 2006, the Applicant has been out of prison —impecunious and broken, but free to leave Sudan. Only days after his release both the United States and a committee of the United Nations listed him as a person associated with Al-Qaida. The Applicant has never been given reasons for those listings, and strongly

denies being a terrorist.

3. The Respondent Minister of Foreign Affairs ("MFA") has said that *"Mr. Abdelrazik is currently not able to return to Canada on his own"*. Yet rather than help the Applicant do what he cannot do alone, the Respondents have in bad faith schemed to thwart his return to Canada. By inaction and subtle sabotage, the Respondents have caused numerous opportunities at repatriation to fail — such as by refusing to issue a passport; by declining to purchase a ticket on the only airline that accepted his booking; and even by letting lapse an offer that Sudan made of a free aircraft.

4. Political channels have failed the Applicant. Some government officials have branded him an "Islamic extremist", as if that epithet, which has also been used to identify Maher Arar –victim of extraordinary rendition to Syria, discounts the government's obligations to the Applicant as a Canadian citizen.

5. The Applicant now comes to the Court, represented *pro bono* and at counsel's personal expense, seeking an order under sections 6(1) and 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") that he be repatriated by any safe means possible.

B) Applicant's Background in Canada

6. In 1990, the Applicant traveled from Sudan to Canada and was granted status as a Convention Refugee. He became a landed immigrant in 1992 and a Canadian citizen in 1995.

Affidavit of Abousfian Abdelrazik, [Applicant's Record ("AR") Vol.1, Tab 11, paras. 2, 3, p. 62]

7. Upon his arrival in Canada the Applicant settled in Montreal. He is the father of three children in Canada and stepfather to a fourth child. He considers Canada his home.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1 Tab 11, paras. 4-7, p. 63]

8. The Applicant is not associated with any terrorist organization, and has never committed any act of terrorism. He deplores violence and as a Muslim; he believes that terrorism is wrong. As a Canadian, he is concerned terrorism can endanger his family.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, para. 9, p 63]

C) Detention and Torture in Sudan (two episodes: 2003-2004 and 2005-2006)

9. The Applicant travelled to Sudan from Canada in March 2003 to visit his mother. In or about September 2003, Canadian officials requested the Sudanese authorities to detain the Applicant, which led to an episode of imprisonment and torture that lasted unitl July 2004 (approximately 11 months).

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, para. 11, 14, p. 63-64]
Excerpts of transcript of cross-examination of Abousfian Abdelrazik, [AR, Vol. 3, Tab 25, p. 878]

10. CSIS was directly responsible for the Respondent's arrest. Memos written by the Respondents' officials concede that the Applicant *"was arrested on September 10, 2003 [words censored] and recommendation by CSIS"*, and that the Applicant's detention in Sudan was *"at our request"* (i.e. Canada's request).

Excerpts of transcript of cross-examination of Abousfian Abdelrazik, [AR, Vol. 3, Tab 25, page 878]
Additional Exhibit to the Cross Examination of Sean Robertson (documents released under section 38 of the Canada Evidence Act, hereinafter "Section 38 Documents") [AR, Vol. 3, Tab 27, p. 964]

11. While in Sudanese detention, the Applicant was tortured. He was lashed with rubber hoses, exposed to unbearable cold, made to stand at attention for hours, and exposed to a litany of verbal abuse. His torturers told him never to mention his torture to others, and fearing them, for many years he did not.

Affidavit of Abousfian Abdelrazik, [AR, Vol.1, Tab 11, paras. 18-19, 21-23, p. 64-65]

12. While the Applicant was in detention and being deprived of consular assistance, the Respondents sent CSIS agents to Khartoum to interrogate him, with the support of the Respondent MFA.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, paras. 17, 23, p. 64-65]
Section 38 Documents [AR, Vol. 3, Tab 27, p. 933]

13. The Applicant was released from prison by Sudanese authorities in July 2004. He was further given a letter exonerating him of criminality and Al-Qaida links on his release. The letter reads in part:

> "As regards of his being one of Al-Qaida members, this – according to our own investigations – is never possible, as his nature, education and nurturing do no belong to this organization, and his being present here or there and his movement here or there does not bear any great threat to the society nor to the individuals, neither does it bear any threat to any international interests."

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, para. 31, p. 66]
Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol.1, Tab 13, p. 164-165]

14. In October 2005, the Sudanese authorities summoned the Applicant to a meeting. Fearing that he may be arrested again, the Applicant sought advice from the Respondents, who advised him to meet with the Sudanese authorities. The Applicant met with Sudanese authorities and was promptly arrested for a second time.

Transcript of cross-examination of Alan Bones, [AR, Vol. 3, Tab 22, p. 762-763]

15. During his second detention, the Applicant was held by Sudanese authorities for approximately 9 months. The Applicant was again tortured by the above-described methods, as well as being beaten while chained to a door frame. He was then released from detention in July 2006—again without charge.

Affidavit of Abousfian Abdelrazik, [AR, Vol.1, Tab 11, p. 67]

16. During his second detention, Canadian consular officials were denied access to the Applicant for a prolonged period of time. The Canadian head of mission as well as First Consul in Sudan conceded in cross-examination that they were concerned that the Applicant was "at risk" of torture during this time. However, they never asked him if he was in fact tortured.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, para. 41, p. 67]
Transcript of cross-examination of Alan Bones, [AR. Vol. 3, Tab 22, Q35, p. 729]
Transcript of cross-examination of Michael Pawsey, [AR, Vol. 3, Tab 23, Q70, p. 827]

17. The Applicant's body is scarred by torture. The Respondents' leading witness, Sean Robertson, admits that Canadian government officials saw these scars with their own eyes. Further, the Respondents' annual reports on human rights in Sudan for the period states that *"non-conflict torture (e.g. flogging in prisons)"* is practiced.

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q216-217, 539-542, p. 347, 429-430]
Affidavit of Jo Wood, [AR, Vol. 1, Tab, 12, Exh. I, p. 133]

D) United Nations 1267 Committee Listing

18. On July 31, 2006, a committee of the United Nations Security Council established pursuant to Resolution 1267 and concerning Al Qaida and the Taliban and Associated Individuals and Entities (the "1267 Committee") placed one "Abu Sufian Al-Salamabi Muhammed Abd Al-Razziq" (person "QI.A.220.06") on the Consolidated List of individuals associated with Al Qaida. This listing automatically triggers qualified sanctions in Canadian and international law.

Consolidated List [AR, Vol. 2, Tab16, Exh. 11, p. 515, 536]
UN Resolution 1390, section 2, [Book of Authorities ("BOA"), Tab C]
United Nations Al-Qaida and Taliban Regulations, [BOA, Tab A]

19. Persons on the Consolidated List are subject to a qualified travel ban. All U.N. Security Council Resolutions subsequent to 2002 provide an automatic exemption to travel and enter to one's country of nationality, and to travel in fulfillment of a judicial process. These automatic exemptions have been used by listed persons on at least 18 occasions.

U.N. Resolution 1390, section 2 b) [BOA, Tab C]
Consolidated List, [AR, Vol. 2, Tab 16, Exh. 11, p. 515, 530, 532, 534, 539-540, 546, 550, 552-554, 557-558, 560-565, 566-570]
U.N. Report S/2007/677, [BOA, Tab E, paras. 91, 95]

20. Consistent with the automatic exemptions, the Respondent MFA received this advice in January 2008 from his Deputy Minister:

> "By virtue of Canada's *United Nations Al-Qaida and Taliban Regulations* (which implement our international obligations arising as a result of

> UNSCR 1267 and its successor resolutions) Mr. Abdelrazik is subject to an assets freeze, arms embargo and travel ban. Note, however, that as for all Canadian nationals, Mr. Abdelrazik retains the right to return to his own country of nationality. International law expressly provides for a right to return, and prevents states from denying return to own's [sic] state of nationality." (underlining added)

Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. C, p. 848-851]

21. In October 2007, the Applicant's counsel filed a delisting application with the Respondents for them to transmit to the 1267 Committee. The RCMP and CSIS were asked for their opinion on the delisting request. CSIS answered that it *"has no current substantial information regarding Mr. Abdelrazik".* The RCMP answered in November 2007 that it *"conducted a review of its files and was unable to locate any current and substantive information that indicates Mr. Abdelrazik is involved in criminal activity."*

Section 38 Documents, [AR, Vol. 3, Tab 27, p. 920-921]

22. The Respondents' internal correspondence contains a debate whether to champion the delisting request or to express no recommendation when transmitting it to the 1267 Committee. There is no evidence in the record that the Respondents championed the Applicant's delisting request. The Applicant's counsel requested the Respondents to provide a copy of their transmittal letter, but it was never done.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. C, p. 263-264, 282]

23. In December 2007, the 1267 Committee denied the delisting request. No reasons have been provided to the parties.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. C]

E) Repatriation by Commercial Airline: the July 2004 Lufthansa attempt

24. In June and July 2004, the Respondents made efforts to fly the Applicant from Khartoum to Montreal, via Frankfurt. The Canadian embassy in Khartoum purchased two air tickets on Lufthansa for the Applicant (using his then-wife's funds) and for a Canadian diplomat to accompany and escort him (using Canadian government funds). The embassy also issued the Applicant an

emergency passport for the journey, notwithstanding that he was (and is) a person of interest on the Passport Control List. Canadian diplomats in Germany intervened with Lufthansa to facilitate passage. When Lufthansa asked for a police escort, Canada agreed to provide one in addition to the diplomatic escort.

Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol. 1, Tab 13, p. 188-192, 194-195]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. A, p. 527-532, 656, 703-704]
Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q284-323, p. 358-367, 506]

25. However, only days before the planned departure, Lufthansa informed the Respondents it would not transport the Applicant because he was on a "no fly" list. Inquiries were made of other airlines, but as the Respondents' leading witness admits *"no other airlines would agree to accept [the Applicant] as a passenger"*.

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q337-339, 350-351, p. 370, 372-373]

26. After the Lufthansa repatriation attempt failed in summer 2004, the Respondents' leading witness knows of absolutely no further attempt by the Respondents to repatriate the Applicant. In internal memos, the Respondents' officials concede no such attempts would be successful:

> *"Our view is, given the no-fly list restriction and [US Government] labelling of Abdelrazik as a terrorist, that Abdelrazik will not be able to secure any itinerary to leave Sudan and return to Canada."*

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q352-355, p. 373-375]
Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 14]

F) Repatriation by the Sudanese-Offered Aircraft: October 2004

27. On October 20, 2004, the Applicant informed the Canadian consul in Khartoum that the Sudanese government offered an aircraft *at its expense* to repatriate the Applicant to Canada. The Consul called a Sudanese official on that day to verify the offer's authenticity. In an internal memo written by the Consul that day notes that *"the GOS was ready to do this"*, and that the file was moving

"extremely fast." The Consul sought instructions from the Respondents' headquarters.

Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Tab 13, p. 175]

28. On October 31, 2004, the Consul replied in writing to the Sudanese government on its offer, stating: *"The Government of Canada is not prepared to contribute to the cost of the flight and also not prepared to provide an escort for Mr. Abdelrazik on the flight."*

Affidavit of Jo Wood, [AR, Vol. 1, Tab A, p. 523]

29. The Sudanese offer was frustrated by the Respondents' refusal to provide an escort on the flight—a reversal from just three months prior, when the Respondents offered Lufthansa *two* escorts. On or around December 16, 2004, Sudanese security officials met with and cautioned Canadian diplomats that an escort was an "unconditional" requirement. There is nothing in the record to indicate that the Respondents ever renewed the escort offer made to Lufthansa, and accordingly the Sudanese offer of a free aircraft was let lapse.

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q364-368, 371-383, p. 377-381, Exh. 8, p. 507]

30. In the same meeting between the Canadian diplomat and Sudanese security officials, the minutes record that the Sudanese were *"overwhelmingly forward when expressing [the] concern and frustration that there seems to be little interest by CSIS and senior GoC authorities to help resolve Mr. Abdelrazik's situation".*

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q364-368, 371-383, p. 377-381, Exh. 8, p. 507]

G) Other Missed Repatriation Opportunities (2004-2008)

31. In August 2004, plans were underway for the Canadian International Development Agency's Minister to visit Khartoum on a Canadian government Challenger jet. According to the Respondents' internal correspondence, an official at the Sudanese Ministry of Foreign Affairs asked *"if the minister could*

take Mr. A back to Canada with her on the Challenger." The Respondents' *"categorically rejected"* doing so.

Section 38 Documents, [AR, Vol. 3, Tab 27, p. 895-897]

32. In November 2004, the Prime Minister of Canada visited Khartoum on board a Canadian Forces Polaris CC-150 aircraft, which is a large aircraft of up to 194 seats. There is no evidence in the record that the Respondents considered to repatriate the Applicant on the Prime Minister's aircraft, although on other occasions the aircraft has flown with the Prime Minister aboard to repatriate Canadian citizens in distress (as happened during the 2006 Lebanon crisis).

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q561-564, p. 436-437]
Affidavit of Michel Latouche, [AR, Vol. 2, Tab 18, para. 4, p. 416]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. F-G, p. 95-106]

33. The Respondents also routinely dispatch Canadian Forces aircraft on "air bridge" flights between Canada and Camp Mirage in the Middle East. The Respondents' Canadian Forces witness conceded that *"it would be possible for a Canadian Forces flight between Canada and Camp Mirage to deviate to Khartoum"*. Diplomatic clearance would have to be sought of certain countries on the flight route, including Sudan; the witness conceded all these countries have granted the Canadian Forces clearance before. The witness conceded that diplomatic clearances do not depend on the identities of passengers on the manifest. Over 100 such air bridge flights took place in 2008, on aircraft capable of the non-stop flight from Sudan to Canada.

Affidavit of Michel Latouche, [AR, Vol. 2, Tab 18, paras. 2, 4, 6, 8, 11, 12, p. 614]

34. In January 2008, the Respondent Minister was advised by his Deputy Minister that *"it is possible that a plane would need to be chartered for Mr. Abdelrazik's return to Canada"*, although doing so was rejected because the cost *"would be prohibitive"*. Previously, the Respondents' officials estimated a charter would cost $70,000 to $80,000 if a medical repatriation aircraft was used.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. B-C, p. 225-226, 251-254]

35. Although it refuses the Applicant, the Government of Canada has spent larger sums of public money repatriating other Canadian citizens. In 2006, the Respondents spent $94 million repatriating about 14,000 citizens were repatriated from Lebanon to Canada. In 2008, the Respondents reportedly spent approximately $83,000 repatriating Brenda Martin—who unlike the Applicant is a convicted criminal—from Mexico to Canada on a chartered aircraft.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, paras. 7-8, Exh. E-F, p. 88-102]

H) Repatriation by Commerical Airline: the 2008 Etihad Airways attempt

36. On February 27, 2008, the Applicant's counsel met with DFAIT officials in Ottawa to inquire about obtaining a passport for another attempt at booking commercial air travel. On April 18, 2008, the Director of Consular Case Management, Sean Robertson, replied in a letter with this promise: *"With respect to Mr. Abdelrazik's passport application, [we] remind you of our commitment, expressed in our meeting of February 27, to ensure that he has an emergency travel document to facilitate his return to Canada. We stand by the commitment."*

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 14]
Transcript of cross-examination of Sean Robertson, [AR, Vol. 2. Tab 16, Exh. 9. p. 510-513]

37. In August 2008, the Reservations and Ticketing supervisor of Etihad Airlines in Toronto offered the Applicant a confirmed flight reservation on September 15, 2008 from Khartoum to Toronto, via Abu Dhabi, subject only to payment of fare and taxes of $2,906.26.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 14, para. 3]

38. Despite its stated commitment, the Respondents never did issue the Applicant a travel document for the Etihad Airways flight, as they did for the Lufthansa repatriation attempt over four years earlier. The Applicant was unable to travel.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 14, para. 5]

I) Precarious Situation in Sudan

39. For fear of being rearrested and tortured, the Applicant sought refuge in the Canadian embassy in Khartoum on April 29, 2008. He has lived since that date uninterruptedly in the embassy's "temporary safe haven". However, the Respondent has reserved the right to eject the Applicant from the embassy at any time and without notice, putting him in a state of constant distress and uncertainty.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, paras. 55-56, p. 69]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. D, p. 84]

40. The Applicant's health has deteriorated through his ordeal. He suffers from several health conditions: e.g. heart problems, a degenerative eye problem, hypertension, depression, asthma and the effects of malaria. The Respondents' own documents describe him in poor mental health, calling him *"fragile emotionally"*, *"nervous and depressed"*, *"desperate"*–even noting that he *"threatened to commit suicide"*.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, paras. 33, 48, p. 66, 68]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. A, p. 731, 849, 1279]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. C, p. 270-271]

41. The Respondents keep the Applicant on such a tight financial allowance that he cannot receive appropriate treatment. When in June 2007 he arrived at the embassy having only $10 (U.S.) and complaining of chest pains, his request for funds to see a chest specialist was denied. He was told the embassy's financial assistance was only for "basic needs", and that *"the earliest any more money can be provided was July"*.

Afffidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. C, p. 276]

42. The Applicant has been in his involuntary exile for almost six years. He testifies that as this delay persists, his anxiety and insecurity increases, his family in Canada grows more estranged from him and his health steadily deteriorates.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, paras. 6-7, 60, p. 63, 70]

J) Bad Faith and Contempt by the Respondents

43. The Respondents' officials have on numerous occasions exhibited bad faith or contempt in their regard for the Applicant's welfare. These examples are found in the Respondents' internal documents:

44. While the Applicant was imprisoned, he succeeded in retaining a lawyer in Sudan to help him. The Respondents wrote in the case file: *"Unless told otherwise, I would prefer if we (consular) 'pleaded ignorance' with the lawyer."*
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. A, p. 582]

45. After the July 2004 the Lufthansa repatriation attempt failed, the Applicant's then-wife sought the Respondents' advice on chartering a private aircraft. The advice was given to his wife, but this note was also written in the case file: *"should she get a private plane, there is very little we could do to stop him from entering Canada. He would need an EP [emergency passport] and I guess this could be refused but on what ground?"*
Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol. 1, Tab 13, p.160]

46. Despite promising the Applicant that efforts were ongoing to repatriate him, as early as July 2004 the decision was secretly made not to take any action because of security concerns. The Director of consular case management wrote in an internal memo: *"Until we have some answers ourselves to the many questions we have, we will not be taking any action on behalf of Mr. Abdelrazik."*
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. A, p. 1262]

47. In internal memos, the Respondents' officials compare the Applicant's repatriation demands to being stuck *"in a 'catch 22' situation"*. Speaking in Parliament, the Respondent Minister of Foreign Affairs conceded in April 2008 that *"Mr. Abdelrazik is currently not able to return to Canada on his own"*. Yet the Respondents decided more than 5 years ago not to help him. An internal memo written by the Respondents' staff in September 2004 stipulates: *"We will take no extraordinary measures, such as sending in a government airplane or a private charter, to effect his departure from Sudan."*

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 11, para. 60, p. 70]
Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. A, p. 744, 940-941]

PART II – QUESTIONS IN ISSUE

48. The issues in this Application are the following:

ISSUE 1: Have the Respondents violated the Applicant's right to enter Canada under section 6 (1) of the *Charter*?

ISSUE 2: If the violation of the Applicant's *Charter* right is not saved by section 1, what is the appropriate remedy?

PART III – LAW AND ARGUMENTS

ISSUE 1: The Respondents have clearly violated the Applicant's right to enter Canada under section 6 (1) of the *Charter*

49. Section 6(1) of the *Charter* provides, without reservation, for the right of Canadian citizens to leave, enter and remain in Canada. Such right is guaranteed without interference by the Canadian state.

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

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK), 1982, c. 11 (hereinafter "*Charter*") section 6 (1).**

50. Mobility rights are inalienable. Section 6 rights are not subject to the notwithstanding clause. So long as the Applicant is a Canadian citizen, a status which the Respondents concede, the Respondents are constitutionally prohibited from interfering with his right.

***Charter*, section 33**

51. Moreover, the ambit of section 6 must be informed by the political reality in which entry and exit to Canada is controlled. To this end, section 6(1) establishes concrete rights for the citizen and correlative positive obligations on the state to provide the necessary incidents to facilitate entry into Canada. The Federal Court

of Appeal, in this regard has recognized that section 6(1) of the *Charter* is bereft of meaning if it is not engaged where the state impedes the practical possibility of a citizen entering Canada:

> "Le paragraphe 6(1) établit un droit concret qui doit être apprécié en fonction de la réalité politique contemporaine. Que signifie un droit qu'on n'a pas en pratique la possibilité d'exercer?"

Kamel c. Canada (Procureur général), 2009 CAF 21 (QL), [BOA, Tab K, para. 15]

52. The Applicant submits that the Respondents have engaged in a variety of activities since 2003 that, by design or effect, have prevented him from returning to Canada. The Respondents have acted to both explicitly deny viable methods of repatriation for the Applicant as well as to eliminate any practical possibility of him exercising his section 6(1) right. This conduct represents an ongoing Charter breach.

53. The evidence demonstrates that the Respondents have, at every juncture and up to the present day, put up roadblocks and excuses to frustrate the Applicant's efforts to return to Canada. These roadblocks to repatriation, which are set out below, individually and cumulatively represent a violation of the Applicant's section 6(1) right to enter Canada. In these exceptional circumstances, the Applicant submits that the Respondents have a duty under sections 6 and 24 to facilitate his return to Canada.

i) Detention in Sudan

54. The Applicant was detained by Sudanese authorities in September 2003, without charge. Documentation obtained through the *Privacy Act* indicates that the Sudanese authorities were holding the Applicant *"at [Canada's] request."* Other documents also indicate that the Applicant's arrest by Sudanese officials was effected on recommendation of CSIS.

"Section 38 Documents" [AR, Vol. 3, Tab 27, p. 964]

55. The Applicant's wife and son returned to Canada in August 2003. As the Applicant was arbitrarily detained by Sudanese authorities at the request of the

Respondents, he was unable to return to Canada with his family. There is no evidence that the Applicant was on any formal or informal "no fly" lists in 2003.

Affidavit of Abousfian Abdelrazik, [AR, Vol.1, Tab 11, paras. 13, p. 64]

56. It is submitted that the Respondents, therefore, have played a role in illegally detaining and blacklisting the Applicant, thereby making his repatriation highly improbable without Canada's active assistance and facilitation of this process.

ii) Frustration of Lufthansa booking

57. On July 23, 2004, the Applicant was released from an 11 month detention. He immediately took steps to return to Canada and join his wife and children. Soon after a ticket was booked with Lufthansa Airlines, the Applicant was advised by the airline that there was a security problem and was told to contact the Canadian Embassy for assistance.

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q337-339, 350-351, p. 370, 372-373]

58. The Respondents accepted the airlines' refusal without question, despite the fact that the Applicant was determined to be no threat by Sudanese authorities and that the Canadian government had no security concern regarding him. There is no evidence that the Canadian Embassy requested Lufthansa or Air Canada to remove the Applicant from its own internal lists to facilitate his return to Canada. By failing to intercede directly with airlines on the Applicant's behalf, the Respondents caused or contributed to the Applicant's inability to return to Canada at that time.

Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Tab 13, p. 154]

iii) Challenger Flight

59. The Minister for the Canadian International Development Agency (CIDA) was visiting Khartoum, Sudan, in July 2004 on a jet owned by the Respondents. The Respondents considered whether the Applicant should get a *"lift on the Challenger."* Despite the Respondents' knowledge of the Applicant's precarious

situation, the Respondents explicitly recommended that the Minister not agree to provide the Applicant passage aboard the Canadian government challenger jet.
Section 38 Documents, [AR, Vol. 3, Tab 27, p. 895-897]

60. It is submitted that the Respondents willfully obstructed a safe and viable method of repatriation of the Applicant.

iv) Frustration of Repatriation Attempt by Myriam St-Hilaire

61. When it became apparent in the fall of 2004 that the Applicant was unable to secure travel on commercial airlines, the Applicant's ex-wife, Ms. St-Hilaire, began gathering resources to put towards chartering an air flight for the Applicant's return back to Canada.
Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol. 1, Tab 13, p.160]

62. While officials with the Respondent MFA were officially encouraging Ms. St-Hilaire's efforts, privately they were deliberating as to how Ms. St-Hilaire's repatriation effort could be prevented. Ms. St-Hilaire also inquired into the possibility of securing travel for the Applicant by ship. The Respondents failed to assist Ms. St-Hilaire in any way in this effort, and did not indicate that the Applicant would be issued a passport for such travel.
Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol. 1, Tab 13, p.160, 163]

63. It is submitted that the Respondents actively attempted to thwart independent efforts made on the Applicant's behalf for his repatriation.

v) Frustration of Sudanese Offer of Repatriation

64. In October 2004, the Sudanese government offered to repatriate the Applicant on a Sudanese jet at the expense of Sudan provided that the Respondents would provide an accompanying person for the trip.
Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Tab 13, p. 175]

65. As a result of the Respondents' delays and equivocal response, the Sudanese offer to return the Applicant to Canada on a private jet lapsed. The

Respondents have failed to explain why they did not take adequate steps to accept the Sudanese offer, which was a perfectly legal and logistically feasible means of repatriation.

Transcript of cross-examination of Sean Robertson, [AR, Vol. 2, Tab 16, Q364-368, 371-383, p. 377-381, Exh. 8, p. 507]

66. It is submitted that this violation of the Applicant's right to enter Canada was all the more egregious because the Respondents were fully aware of the Applicant's precarious situation.

vi) No assistance following release from detention

67. In 2004 and 2005, the Appellant approached the Canadian embassy numerous times for assistance. According to a memorandum dated June 23, 2005, the Respondents were aware of the Applicant's desperate circumstances, noting that he was out of money, could not work, and was getting *"more and more despondent"*. The same memo states, "As a Canadian citizen he has a right to return to Canada", and acknowledges that, *"[o]ur inability to arrange for his return to Canada could result in a situation in which his health and safety are placed in jeopardy."*

Affidavit of Jo Wood, [AR, Tab 12, Exh. A, p. 758-759]

68. An earlier draft of the same memorandum by consular officials contained a strong recommendation that the Respondents should make arrangements for the Applicant's return to Canada without delay. The draft memo adds, *"By not assisting him, we are in fact condemning him to a life without basic freedoms which all Canadians take for granted."* There is also a suggestion that other government departments or agencies were opposed to providing assistance to the Applicant: *"Under no circumstances should we allow the concerns of other departments and/or agencies to restrain our efforts to provide appropriate consular services in this or any other case."*

Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Tab 13, p. 149-150]

70. The evidence indicates that, from January 2008 to October 20, 2008, Canadian government aircraft have made at least 106 flights between Canada and a Canadian base at an unknown location in the Middle East. Colonel Michel Latouche confirmed that any one of these flights could have been diverted to Khartoum to pick up the Applicant. These flights are ongoing, yet there is no evidence the option has ever been considered by the Respondents.

Written examination of Michel Latouche, [AR, Tab 18, para. 12, p. 614]

71. It is submitted that the Respondents have denied the Applicant access to legally and practically viable air transportation to effect his repatriation. Such repatriation could have been effected and still can be effected as an emergency evacuation, which falls within the purview of the Respondents' consular affairs function and is done routinely for Canadians in distress. The gravity of the Respondents' continued inaction risks further and irreparably aggravating the Applicant's physical and mental well being.

vii) Refusal to evacuate Applicant at request of Sudan

72. In March 2006, while the Applicant was still imprisoned by Sudanese authorities, the Ministry of Foreign Affairs of Sudan specifically informed the Respondents that it would be prepared to immediately release the Applicant from detention provided that Canada would arrange for his repatriation back to Canada on an immediate basis.

Section 38 Documents, [AR, Tab 27, p. 967-68]

73. In response to the Sudanese offer to liberate the Applicant, the Respondents provided vague information that they knew would be unsatisfactory to Sudan and would result in this offer being thwarted. The Respondents did not agree to immediately evacuate the Applicant and as a result he spent another five months in a Sudanese prison where he was subjected to torture.

Section 38 Documents, [AR, Tab 27, p. 967-68]

74. It is submitted that the Respondents' refusal to effect the Applicant's repatriation was maintained even at the expense of lengthening his detention by Sudanese authorities and putting his personal safety in extreme danger.

vi) Frustration of Repatriation via Etihad Airlines Itinerary

75. In April 2008, the Respondents promised to the Applicant that he would be issued an emergency travel document if a specific itinerary were confirmed. In late August 2008, the Applicant obtained a new itinerary for his travel back to Canada on Etihad Airlines on September 15, 2008. The Respondents failed to provide the Applicant with a travel document and failed to take steps to facilitate the Applicant's repatriation via the Etihad Airlines itinerary.

Affidavit of Abousfian Abdelrazik, [AR, Vol. 1, Tab 14, para. 4, p.196]
Transcrips of cross-examination of Sean Robertson, [AR, Vol. 2. Tab 16, Exh. 9. p. 510-513]

76. As a result of the Respondents' failure to abide by their promise to the Applicant, the September 15th booking lapsed and the Applicant's repatriation was again frustrated.

vii) Respondents' selective application of UN 1267 List Violates Applicant's Procedural Rights and Demonstrates Bad Faith

77. The Respondents have relied upon the effect of the Sanctions Committee created by UN Resolution 1267 to suggest that they are legally prevented from repatriating the Applicant. Such assertion is not only patently false, but it also endorses a regime, which has been found to be procedurally flawed and contrary to international human rights principles.

Kadi & Al Barakaat International Foundation v. Council of the European Union et al., (2008), E.C.J. (Grand Chamber), [BOA, Tab P]

78. The Sanctions Committee created pursuant to UN Resolution 1267 does not prohibit the Applicant's repatriation to Canada, which is his country of citizenship. UN Resolution 1390, which calls on UN member states to deny the transit of named persons under the Consolidated List specifically permits repatriation of persons by their country of citizenship. Accordingly, the Respondents' attempt to

use UN Resolution 1267 to deny the Applicant's right of entry into his country of citizenship is a highly disingenuous and willful example of frustration of the Applicant's section 6 *Charter* right.

U.N. Resolution 1267, [BOA, Tab C]
UN Resolution 1390, section 2 (b), [BOA, Tab D]
Guidelines of the Committee for the Conduct of its Work, UNSCOR, [BOA, Tab F]
Travel ban: Explanation of Terms, UNSCOR, [BOA, Tab G]

79. The Respondent's apparently selective application of the 1267 regime is also inconsistent with International Human Rights Law. For example, Article 12:4 of the ICCPR, to which Canada is a signatory, requires that "No one shall be arbitrarily deprived of the right to enter his own country."

International Covenant on Civil and Political Rights, section 12 [BOA, Tab B]

80. There is a presumption that Canadian law should be interpreted in a manner that is consistent with international human rights law, not in a manner that undermines fundamental freedoms and liberties.

R. v. Hape 2007 SCC 26 (QL), [BA, Tab M, paras. 39, 53]

81. Significantly, the legal opinion of the UN itself indicates that under the Sanctions Regime created by the UN 1267 Committee, a listed person should " (...) be offered an opportunity of demonstrating to the Council a change of attitude and conduct." Such a procedural right, which is incontrovertibly recognized by the UN, requires that the individual be provided with the particulars of the case against him and suggests that an impartial body or review mechanism be established to assess his eligibility to be delisted. Despite the foregoing, the 1267 Committee continues to operate with only internal review procedures requiring unanimity and no meaningful disclosure right to the listed person.

Bardo Fassbender,* "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", *[BOA, Tab Q, p. 30]

82. The United Nations' 1267 listing process and sanctions regime has come under successful legal attack in England, which, as a result, judicially invalidated

England's laws in relation to that system. As England's High Court of Justice observed regarding the 1267 system:

> "It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations."

A, K, M, Q & G v HM Treasury, [2008] EWHC 869 (Admin), [BOA, Tab O, para. 18]

83. The Respondents have willfully promoted the most offensive aspects of the 1267 Sanctions by refusing to repatriate the Applicant and by relying only upon the internal and flawed mechanisms of the Sanctions Committee itself to remedy the Applicant's situation. That the Respondents have clearly acknowledged that there is no current and substantial information from Canada justifying the Applicant's continued listing since December 2007 obliged them to have taken available legal measures to repatriate the Applicant independently of the 1267 delisting procedure.

84. The Respondents have, despite their best information which suggests that the Applicant's listing is groundless, failed to take positive and available legal measures to repatriate the Applicant, while they continue to use the 1267 regime as a convenient excuse for their inaction. Such behaviour is a flagrant violation of the Applicant's section 6 *Charter* right.

viii) The Respondents' conduct represents an ongoing breach

85. The Applicant submits that any of the above discrete events would be sufficient to establish a violation of section 6 of the *Charter.* However, it is submitted that these actions should not be considered in isolation. In fact, the Respondents' overall behaviour since 2003 reflects an ongoing pattern by which the Respondents have frustrated and obstructed the Applicant from exercising his right to return to Canada.

86. From 2003 to 2008, Canadian consular officials led the Applicant to believe that they were doing all that they could to secure his safe return to Canada. However, internal government documents released to date under the *Privacy Act* tell a very different story. Most shocking of all is the revelation that Canadian officials recommended that the Applicant be arrested in Sudan, an action which resulted in the arbitrary detention, torture and mistreatment of the Applicant for several years.

87. Other documents indicate that the assistance provided to the Applicant by consular officials – or the lack thereof - was being guided throughout by other government departments or agencies. For example, when Sudan offered to fly the Applicant home, DFAIT officials consulted with intelligence officials on whether this would be a desirable outcome. PCO also made it clear on several occasions that no extraordinary efforts should be made to assist the Applicant's return to Canada, despite the belief by Canadian officials that he was possibly tortured in Sudanese custody. On another occasion, a Canadian consular official frankly expressed the concern that efforts to secure the Applicant's return may be restrained by other government departments or agencies.

Excerpts of Exhibit A of the Affidavit of Jo Wood, [AR, Vol. 1, Tab 13, p. 193]

88. The Applicant's case has been discussed at the highest levels of the Canadian government – the PCO - for more than five years. Unfortunately, the fact that Canadian officials believed that the Applicant was potentially being tortured does not appear to have factored into these discussions. On the contrary, the result of these high level discussions was to dial back attempts by consular officials to assist the Applicant at every juncture. This is particularly disturbing given that the Respondents have chartered flights to repatriate Canadians convicted of crimes on several occasions.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 12, Exh. E-F, p. 89-102]

89. Most tellingly, a Canadian government document from 2008 expresses the concern that American authorities would be opposed to the Applicant's return to

Canada. This is a wholly unlawful basis on which to deny a citizen his constitutional right to enter Canada.

Affidavit of Jo Wood, [AR, Vol. 1, Tab 15, Exh. A, p. 216]

90. The Respondents' conduct in this matter is analogous to the Solicitor General's actions in *Van Vlymen*. In that case, the Applicant was a Canadian citizen imprisoned in the United States who repeatedly requested the Solicitor General to approve his transfer to a Canadian penitentiary to serve out his sentence. Notwithstanding the American government's agreement to the transfer, the Solicitor General delayed and came up with different excuses on why no decision could be made. The Federal Court observed that the applicant's right to enter Canada had been "stymied" by the Respondent's "procrastination, evasiveness, obfuscation and general bad faith". The Court concluded that the respondent's conduct was "aimed at keeping the applicant out of Canada as long as possible", thereby violating his right under section 6(1) of the *Charter*.

Van Vlymen v. Canada (Solicitor General), 2004 FCC 1054, [BOA, Tab N, paras. 80, 82, 110]

91. Based on all the foregoing, the Applicant submits that the Respondents' failure to repatriate him is not based on a legitimate reason, and is not founded in law. The Respondents have, to the contrary, consistently invented excuses to justify their inaction. These excuses, when viewed in the totality of circumstances of the Applicant's case, are illustrative of a pattern of egregious behaviour and bad faith wherein the Respondents have been complicit and/or acquiescent to the unlawful, arrest, detention, torture and forced exile of a Canadian citizen. These facts amount to deliberate and ongoing interference with the Applicant's right of entry into Canada under section 6(1) of the *Charter*.

92. Once a *prima facie* violation of the Charter has been established, the onus is upon the government to justify such violation "... subject only to such reasonable limits prescribed by laws as can be demonstrably justifiable in a free and democratic society."

***Charter*, section 1.**

***Dagenais v. Canadian Broadcasting Corporation*, [1994] S.C.J. 104, [BOA, Tab H]**

93. The Respondents must establish that the objective invoked is prescribed by the law of Canada. However, there is no Canadian statute, regulation or instrument that requires Canada to deny entry of its own citizen into its territorial borders. The regime created by the UN Sanctions Committee itself expressly permits the Applicant's repatriation by the Respondents.

United Nations Al-Qaida and Taliban Regulations, SOR/99-444, [BOA, Tab A]

94. Within the framework of the 1267 Sanctions Committee, under s. 2(b) of Resolution 1390, there is an automatic exemption for persons on the Consolidated List to enter their state of nationality. As such it is not one of the objectives of the 1267 system that persons should be *de facto* barred from their state of nationality. However, in the instant case, the Respondents seek to rely on the 1267 system as justification for violating the Applicant's right as a Canadian national to enter Canada. Since the Respondents' rights-violative conduct is not in furtherance of the 1267 system's objectives, but actually in direct opposition to the objectives, there is no rational connection under the *Oakes* test and the Respondents' s. 1 argument must fail.

***Dagenais v. Canadian Broadcasting Corporation*, [1994] S.C.J. 104, [BOA, Tab H]**

95. Because there is no limit prescribed by law within the meaning of section 1 of the *Charter*, and, logically, no rational connection can be made between the limit imposed by the Respondents (upon the Applicant) and the objective of the law, the violation of the Applicant's section 6 right cannot be saved by section 1 of the *Charter*.

ISSUE 2: The appropriate remedy is an order for repatriation pursuant to section 24(1) of the Charter

96. Where a violation of a *Charter* right is established that is not saved by section 1, the Applicant may seek an appropriate remedy pursuant to section 24(1) of the *Charter*. Section 24(1) confers upon the Courts discretionary power to provide a

broad-ranging remedy, when judged "appropriate and just in the circumstances", to anyone whose *Charter* rights have been infringed.

Charter, section 24.

97. Upon making the determination of an appropriate and just remedy in particular circumstances, section 24(1) demands that the Court exercise its discretion based on its careful consideration of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles.

Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCJ No. 62 [BOA, Tab I, para. 52]

98. In considering the appropriateness of a remedy pursuant to section 24(1) a competent court must consider whether the relief sought provides a just remedy reflective of the nature of the right that has been violated and recognizes that remedies provided by the Court should be flexible and, may be novel, based on the requirements of a given situation.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [BOA, Tab I, paras. 55-59]

99. In the case at bar, the Applicant requests a declaration that his right to enter Canada under section 6(1) of the *Charter* has been violated, and an order that the Respondents effect the Applicant's immediate repatriation to Canada by any safe means available to the Respondents. The Applicant also asks that the Court remains seized of the matter until he is in fact on Canadian soil.

Order for Immediate Repatriation of the Applicant

100. The Applicant submits that an order for his immediate repatriation is the most appropriate remedy in all of the circumstances and is consistent with the relevant factors identified by the Supreme Court in *Doucet-Boudreau*.

i) An Order for repatriation of the Applicant is a just remedy

101. Section 24(1) remedies must be built on a thorough analysis of the factual context. In *MacKay v. Manitoba*, the Supreme Court indicated that "Charter

decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts [...] is essential to a proper consideration of Charter issues."

MacKay v. Manitoba, [1989] 2 S.C.R. 357 [BOA, Tab L, para. 9]

102. In this application, the evidence establishes that the Applicant has been frustrated in his attempts to return to Canada since 2003 and that on several occasions it was the actions or omissions of the Respondents, which impeded the Applicant's ability to return to Canada.

103. Indeed, the act of repatriation is the most direct and appropriate way of fashioning a remedy seeking the enforceability of the Applicant's section 6 right to enter Canada. Also, as the evidence demonstrates, repatriation could be done fairly easily and is not smothered in procedural delays and difficulties. Given the Respondents' reluctance to the date of this application to accede to the Applicant's request to be repatriated, an order compelling the Respondents to effect the Applicant's repatriation by any safe and immediate means is necessary in the circumstances.

ii) Remedy is within the realm of experience for this court to fashion

104. The relief sought in the instant case does not require this Court to engage in any factual determination or measurement of appropriate enforcement of the manner of repatriation. The order sought by the Applicant allows tremendous latitude for the Respondents to repatriate the Applicant, without delay, by whatever safe means exist at their disposal.

105. The Applicant does not wish to dictate to the Respondents the precise means of how repatriation should be effected— currently commercial airline, chartered aircraft and Canadian Forces aircraft are all credible options. The Applicant agrees that the Court would be put in an unrealistic position if it had to choose a specific means of repatriation for the Respondents to follow. The Applicant therefore asks the Court to order repatriation in general and non-

prescriptive terms, and asks the Court to remain seized so that it may monitor and enforce the Respondents' compliance with that order, until such time as the Applicant arrives on Canadian soil and the order is spent.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [BOA, Tab I, para. 72- 88]

106. It is sufficient for the purpose of this Application to make a broad order compelling the Respondents to repatriate the Applicant – which is his legal right and is not derogated by domestic or International Law.

107. The evidence adduced before this Court demonstrates that it is possible to secure a reservation for the Applicant on Etihad Airlines and that there are several options for repatriating the Applicant by way of chartered plane from Khartoum directly to Canada or from Khartoum to Canada's military base in the region known as Camp Mirage.

108. The Applicant does not require that his repatriation be effected in a specific fashion, but that it be done safely and expeditiously. Based on the evidence adduced in the instant application, repatriation of the Applicant is both legal and practicable by several different means.

iii) Remedy requested is consistent with the flexible judicial approach to section 24(1) relief

109. The relief sought by the Applicant is measured and appropriate in all of the circumstances. It is clearly connected to the nature of the right that has been violated and allows the Respondents a large modicum of flexibility in terms of their approach to effecting repatriation.

110. It is true that this Court has not previously ordered the Crown to repatriate a Canadian citizen, however, this Court's order in *Van Vlymen* recognized that in the appropriate circumstance repatriation may be ordered. Hence, the unprecedented nature of this case should not preclude the Applicant from obtaining a just remedy pursuant to section 24(1) of the *Charter*. The remedy may evolve in a way that "may require novel and creative features when

compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand."

Doucet-Boudreau v. Nova Scotia (Minister of Education), [BOA, Tab I, para. 59]

111. Unlike *Van Vlymen*, the Applicant has not yet been repatriated to Canada, and so the question of repatriation is a live issue between the parties. The conduct of the Respondents also is a relevant factor that the Court must consider in assessing whether a repatriation order should issue. As in *Van Vlymen*, there is evidence of a deliberate and sustained pattern of behaviour designed to undermine the Applicant's right of return to Canada, such conduct was deserving of censure of the court and solicitor client costs.

Van Vlymen v. Canada (Solicitor General), 2004 FCC 1054, [BOA, Tab N]

112. In the instant case, the circumstances require some flexibility of judicial disposition to grant what is technically a novel order. But the connection of this order to the nature of the violation and the current circumstances of the Applicant make the requested order, not simply morally just and logistically appropriate, but rather, the order sought is the only meaningful remedy that could be provided by this Court.

Conclusion

113. The Applicant's plight has not begun nor has it ended with the instant application, yet this application represents the first serious legal consideration of his case. It asks the pointed question of how this court will value the Applicant's status as a Canadian citizen. If his status is to mean anything, it must mean that it has corollaries which inform the obligations of the Canadian state. An empty status of citizenship for the last five years has meant a fettered right of mobility for the Applicant, which has ensured his abuse and arbitrary detention and has kept him in danger, insecurity and ill–health. The Applicant's right to return to Canada has never been extinguished – a fact that is well known to all concerned and is supported at law. For reasons known only to the Respondents they continue to wilfully obstruct the Applicant from returning to Canada. But it is the

conduct of the Respondents which is their own undoing, which makes an order for mandatory repatriation the only meaningful and just remedy in this case. The tradition of our law and human rights in Canada demand that Abousfian Abdelrazik be treated as a Canadian citizen and be permitted to return to Canada - to decide otherwise requires a second tier of citizenship, one that is not permitted under our law.

PART IV - ORDER REQUESTED

118. The Applicant requests the following relief:

(a) A mandatory order directing the Respondents to repatriate the Applicant to Canada by any safe means at its disposal;
(b) A declaration that the Respondents violated the Applicant's right to enter Canada pursuant to section 6(1) of the Canadian Charter of Rights and Freedoms;
(c) The Court remain seized of the matter until the Applicant is repatriated to Canada; and
(d) All costs on a substantial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 10th day of March 2009.

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PART V – LIST OF AUTHORITIES

Canadian Legislation

A SOR/99-444	*United Nations Al-Qaida and Taliban Regulations*,

United Nations Treaties, Resolutions, and Documents

B	*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (entered into force 23 March 1976, accession by Canada 19 May 1976).
C	*U.N. Resolution 1267*, SC Res. 1267, U.N. Doc. S/Res/1267, (15 October 1999).
D	*U.N. Resolution 1390*, SC Res. 1390, U.N. Doc. S/Res/ 1390, (28 January 2002).
E	*Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, UNSCOR, 2007, U.N. Doc. S/2007/677.
F	*Guidelines of the Committee for the Conduct of its Work*, UNSCOR, (9 December 2008).
G	*Travel Ban: Explanation of Terms*, UNSCOR, (9 December 2008).

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H	*Dagenais v. Canadian Broadcasting Corporation*, [1994] S.C.J. 104.
I	*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCJ No. 62, [2003] S.C.J. No. 63.
J	*Kamel v. Canada (Solicitor General)*, 2008 FC 338, [2008] F.C.J. No. 423.

K *Kamel c. Canada (Procureur général)*, 2009 CAF 21, [2009] A.C.F. No. 26.

L *MacKay v. Manitoba*, [1989] S.C.J. No. 88.

M *R. v. Hape*, 2007 SCC 26, [2007] S. C. J. No. 26.

N *Van Vlymen v. Canada (Solicitor General)*, 2004 FCC 1054, [2004] F.C.J. No. 1288.

International Jurisprudence

O *A, K, M, Q & G v. H. M. Treasury*, [2008] EWHC 869 (Admin), Case No. PTA 13, 14, 15, 17 & 19/2007.

P *Kadi & Al Barakaat International Foundation v. Council of the European Union et al.*, (2008), E.C.J. (Grand Chamber), C-402/05P & C-415/05P, (3 September 2008).

Doctrine

Q Bardo Fassbender, "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter" (2006), Study commissioned by the United Nations, Office of Legal Affairs, Humboldt-Universitat Zu Berlin (20 March, 2006).