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Restricted Access to Justice for Canadians Mistreated Abroad: Abdelrazik v. Canada (Re: Interim Costs)

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RESTRICTED ACCESS TO JUSTICE FOR CANADIANS MISTREATED ABROAD: *ABDELRAZIK V CANADA* (RE: INTERIM COSTS)

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I. INTRODUCTION

A growing list of Canadian citizens have suffered egregious mistreatment abroad as a result of actions taken by Canadian officials in the name of national security.[1] Canadians mistreated abroad are especially vulnerable when it comes to access to justice, understood narrowly in terms of access to courts.[2] Constitutional litigation regarding mistreatment abroad raises some of the most serious human rights violations imaginable, and yet those bringing forward such litigation face enormous challenges. The individuals involved cannot do so in person, because one of the forms of mistreatment they frequently face is being prevented from returning to Canada. As a result, they must generally rely on counsel. However, they may not be able to pay for counsel because they may be detained and destitute, and they may have had their assets frozen on national security grounds. Moreover, where they have been detained abroad for long periods they may not be eligible for legal aid due to provincial residency requirements. It is hard to imagine a more urgent scenario in which interim cost awards could facilitate access to justice.

Yet, in *Abdelrazik v Canada*,[3] the Federal Court denied interim costs to Abousfian Abdelrazik, a Canadian who found himself unable to return home from Sudan largely because government action thwarted his attempts at return. This decision has implications not only for interim cost awards, but also for litigation involving citizens who allege that their rights under section 6 of the *Charter*[4] have been violated. This comment critically analyzes the access to justice implications of the Federal Court decision in *Abdelrazik* in light of both the principle that courts may use costs to promote access to justice, and the unique challenges faced by Canadians mistreated abroad by the Canadian government.

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1 Examples include: Maher Arar, Omar Kadhr, Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin.

2 Of course, access to justice should be understood as more than merely access to courts. Access to justice, understood broadly, raises not only issues of procedural and substantive rights, but also the ability to participate meaningfully in forums where law is made, interpreted and applied. See generally, Roderick A. Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just 287. For an example of a broad approach to access to justice in the context of Canadians mistreated abroad, see Jasminka Kalajdzic, "Access to Justice for the Wrongfully Accused in National Security Investigations" (2008) 27 Windsor YB Access Just 171.

3 *Abdelrazik v Canada (Minister of Foreign Affairs and International Trade)*, 2008 FC 839, 73 Imm LR (3d) 139 [*Abdelrazik (re: Interim Costs)*], affd 2009 FCA 77, 79 Imm LR (3d) 1 [*Abdelrazik (FCA re: Interim Costs)*].

4 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 s 6 [*Charter*].

II. *ABDELRAZIK V CANADA*

A. The Context

Abousfian Abdelrazik came to Canada from Sudan in 1990. In 1992, he was accorded refugee protection and subsequently obtained Canadian citizenship.[5] Although he has never been charged with a criminal offence,[6] he was suspected of associating with individuals allegedly connected with terrorism. The nature of these suspected associations is not entirely clear, though it should be noted that he voluntarily testified against one of these individuals at a trial in the United States.[7] What is clear is that security agencies in Canada and abroad acknowledge that they have no evidence that Abdelrazik poses a security threat.[8] Similarly, no evidence that he poses such a threat has ever been publically presented.[9]

In March 2003, Abdelrazik travelled from Canada to Sudan to visit his ailing mother.[10] During this visit he was detained and allegedly tortured by Sudanese authorities for a period of 11 months.[11] There is some evidence suggesting that his detention came at the request of the Canadian government. Although the government contests this evidence, a Canadian government memo obtained through access to information procedures states: "Sudanese authorities readily admit that they have no charges pending against him but are holding him at our request."[12] Moreover, the Canadian government concedes that during his detention he was interrogated by representatives of the Canadian Security Intelligence Service [CSIS].[13]

Sudanese authorities released Abdelrazik from detention in July 2004. Shortly thereafter he sought to return to Canada. However, commercial airlines refused to provide him with passage on the grounds that his name was included on a "no-fly list".[14] He also sought to return to Canada by alternative means, including on a jet used by Canadian officials visiting Sudan, as well as on a jet offered by the Sudanese government. Both possibilities failed to materialize, which Abdelrazik attributes to the Canadian government's refusal to assist with either plan.[15]

In October 2005, Abdelrazik was summoned to a meeting with Sudanese authorities. On the advice of Canadian consular officials, he attended the meeting. At the meeting he was re-arrested and detained for a further 9 months without charge. He alleges that he was also tortured during this second period of detention. Abdelrazik was once again released in July 2006.[16]

Immediately following his release, Abdelrazik was added to the UN Security Council Resolution 1267 list [Resolution 1267 list], maintained by the UN Al-Qaida and Taliban Sanctions Committee.[17] His listing likely came at the request of the United States, which, days before his listing, accused him of being "a person posing a significant risk of committing acts of

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5 *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267 at paras 9-10 [*Abdelrazik (Main Application)*].
6 *Ibid* at para 11.
7 *Ibid.*
8 *Ibid* at paras 20 & 27-28.
9 *Ibid* at para 11
10 *Ibid* at para 12.
11 *Ibid* at paras 13 & 15-16.
12 *Ibid* at para 67.
13 *Ibid* at para 15.
14 *Ibid* at para 18.
15 *Ibid* at para 19.
16 *Ibid* at paras 20-22.
17 *Ibid* at para 23.

terrorism that threaten the security of U.S. nationals and the national security."[18] By virtue of being placed on the Resolution 1267 list, Abdelrazik's assets were frozen, and anyone who directly or indirectly provided him funds became vulnerable to prosecution under Canadian criminal law.[19] Moreover, under international law, his listing subjected him to a travel ban, which requires States to "[p]revent the entry into or transit through their territories of [listed] individuals."[20]

In October 2007, Abdelrazik petitioned the Canadian government to intervene on his behalf with the UN committee responsible for maintaining the Resolution 1267 list, requesting that he be delisted. While the government transmitted Abdelrazik's request to the committee, that request was denied without reasons being offered.[21]

Notwithstanding Abdelrazik's inclusion on the Resolution 1267 list, he continued to seek to return to Canada. Because his passport expired while he was in detention, he required a new passport or emergency travel documents in order to return to Canada. Canadian officials repeatedly assured him that, in the event he secured passage to Canada, he would be provided the requisite documents.[22] Internal government communications, however, indicate that Canadian authorities intended to oppose his return to the country even if he secured a ticket.[23]

Abdelrazik remained stuck in Sudan. In April 2008, fearing that he would be rearrested because his case had attracted media attention, Abdelrazik sought and was granted temporary refuge in the Canadian embassy in Khartoum. Because he was destitute, the Canadian government provided him with a loan of $100.00 per month to cover his basic necessities while he remained in the embassy.[24]

In May 2008, having secured *pro bono* counsel in Canada, Abdelrazik sought a Federal Court order requiring the government to repatriate him "by any safe means at its disposal."[25] The order was requested on the grounds that it was necessary to remedy a breach of his right "to enter, remain in and leave Canada," as accorded to Canadian citizens by section 6 of the *Charter*. It quickly became apparent that the government intended to litigate the case. Abdelrazik's counsel sought an interim costs award to ensure that the case could be litigated.[26] In July 2008, the Federal Court denied the requested interim costs,[27] a decision subsequently upheld by the Federal Court of Appeal.[28] The Federal Court decision is the subject of this comment.

Faced with the Federal Court's denial of his motion for interim costs, Abdelrazik's counsel continued to represent him *pro bono* on the main application – and ultimately succeeded on this application.

With regard to this main application, the government had offered highly questionable arguments to justify their refusal to facilitate Abdelrazik's return to Canada. Specifically, the government asserted that the *Charter* right of citizens to enter and remain in Canada does not

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18 *Ibid* at para 22. See also *ibid* at para 24.

19 *Ibid* at paras 26 & 55-56. See also, *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360, ss 3-4 [*Anti-Terrorism Regulations*].

20 United Nations Security Council Resolution 1822, S/RES/1822 (2008) s 1(b). See also, *Abdelrazik (Main Application)*, *supra* note 5 at para 57.

21 *Abdelrazik (Main Application)*, *ibid* at paras 28-29 & 47-60.

22 *Ibid* at Annex B.

23 *Ibid* at paras 32, 102-108,153 & 156.

24 *Ibid* at para 30.

25 *Ibid* at para 6.

26 *Abdelrazik (re: Interim Costs)*, *supra* note 3.

27 *Ibid* at para 3.

28 *Abdelrazik (FCA re: Interim Costs)*, *supra* note 3.

include a right of repatriation, because "the right to enter Canada does not create a right to be returned to Canada".[29] Alternatively, counsel for the government contended that even if there was a right to be repatriated, that right was not engaged in this case[30] because Abdelrazik was prevented from returning to Canada by his inclusion on the Resolution 1267 list and the accompanying travel ban under international law, not by the Canadian government.[31] While government counsel conceded that the travel ban contains an exemption for individuals returning to their country of nationality,[32] they argued that this exception merely "relieves states of the obligation to turn their own nationals away should they present themselves at the border."[33] The exception would not, this reasoning runs, allow Canada to participate in Abdelrazik's transit through other states, including by flying through the airspace of other states.[34] As counsel for the government put it, "[t]he 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 Resolution 1267 list."[35] The government's position was, thus, that to return to Canada, Abdelrazik first had to have his name removed from the Resolution 1267 list.

The government's arguments contradicted prevailing practices in other states, which frequently use the exemption to repatriate listed nationals notwithstanding that they must pass through the airspace of other states.[36] Similarly, a document prepared on behalf of the UN committee responsible for the Resolution 1267 list indicates that it is not even necessary for states to inform the committee when the exemption is exercised to allow individuals to transit through other states in order to return to their country of nationality.[37] Along similar lines, according to Richard Barrett, a UN administrator who oversaw the Resolution 1267 list, "[t]he overflight states don't come into it and they haven't ever come into it."[38] Although the Canadian government's central argument was, therefore, not especially compelling, government counsel nonetheless chose to continue litigating the main application.

Other developments in that litigation are particularly noteworthy because they suggest the extent to which Abdelrazik's return to Canada was frustrated by the Canadian government. In August 2008, Abdelrazik secured a reservation on a commercial airline to return to Canada. However, despite earlier assurances that he would be supplied emergency travel documents if he obtained a flight to Canada, the government declined to provide him with the necessary documents. Several months later, the government indicated that they were prepared to provide him with an emergency passport, but they imposed an additional requirement: not only must he

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29 *Abdelrazik (Main Application), supra* note 5 (Respondent's Memorandum of Fact and Law) at para 56.

30 *Ibid* at para 38.

31 *Ibid* at paras 39-45.

32 *Ibid* at paras 46-54.

33 *Ibid* at para 51.

34 *Ibid* at para 43.

35 *Ibid* at para 41.

36 See e.g. Paul Koring, "Ottawa cites international obligations in denying citizen's return home", *The Globe and Mail* (13 April 2009) A8 (citing the example of a listed Somali national who transited through airspace and airports in the UK and Kenya using UK travel documents and an exemption from the Resolution 1267 travel ban obtained by the UK in order to return to Somalia).

37 Security Council Committee established pursuant to resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, "Travel Ban: Explanation of terms" online: United Nations <http://www.un.org/sc/committees/1267/pdf/EOT_Travel_Ban_9_12_2008_ENGLISH.pdf>.

38 Paul Koring, "Ottawa's case for barring return of Canadian citizen doesn't wash, UN says", *The Globe & Mail* (7 May 2009) A1.

obtain a ticket, but the ticket also had to be fully paid.[39] This additional requirement was followed by warnings that criminal charges under Canada's anti-terrorist regulations could be laid against anyone who provided Abdelrazik funds to purchase such a ticket.[40] Despite the threat of criminal prosecution, in March 2009 over 100 individuals publically contributed small donations towards the purchase of a plane ticket for Abdelrazik to return to Canada.[41] As a result, he obtained a paid ticket to travel from Sudan to Canada. However, mere hours before his scheduled flight, the Canadian government denied him emergency travel documents on national security grounds.[42]

Following a Federal Court hearing in May 2009, Justice Zinn ordered the government to repatriate Abdelrazik.[43] Among the Court's more important findings were: (1) CSIS was complicit in Abdelrazik's detention in Sudan;[44] (2) he was tortured in detention;[45] (3) individuals included on the Resolution 1267 list are entitled to transit through other states' territories in order to return to their country of nationality;[46] (4) the only reason Abdelrazik was unable to return to Canada was because of the actions of the Canadian government;[47] (5) these actions breached Abdelrazik's constitutional right to enter and remain in Canada;[48] (6) the breach could not be justified in a free and democratic society;[49] and (7) the government acted in bad faith in breaching Abdelrazik's constitutional rights by repeatedly assuring him that they would facilitate his return to Canada despite having no intention of doing so.[50] Shortly after issuing the decision on the main application, Justice Zinn ordered the government to pay costs on the main application to Abdelrazik's *pro bono* counsel.[51]

The government complied with the court order and Abdelrazik was repatriated on 27 June 2009.[52] He has since commenced civil proceedings seeking compensation from the Canadian government for the breach of his rights.[53]

B. *Abdelrazik v Canada* (Re: Interim Costs)

When Abdelrazik's *pro bono* counsel brought the Federal Court application in May 2008 seeking an order that the Canadian government repatriate him, [54] his assets were frozen, he was unable to leave the Canadian embassy for fear of being detained and tortured, he was subsisting

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39 *Abdelrazik (Main Application), supra* note 5 at paras 115-120.

40 Paul Koring, "Ottawa imposes another hurdle for Abdelrazik", *The Globe & Mail* (23 February 2009) A1.

41 Les Perreaux & Bill Curry, "Canadians defy law in bid to bring home one of their own", *The Globe & Mail* (13 March 2009) A1. The full list of donors is online: Peoples Commission Network <http://www.peoplescommission.org/en/abdelrazik/supporters.php>. Disclosure: the author is among the donors.

42 *Abdelrazik (Main Application)*, supra note 5 at para 130.

43 *Ibid* at para 170.

44 *Ibid* at para 91.

45 *Ibid* at para 92.

46 *Ibid* at para 129.

47 *Ibid* at para 148.

48 *Ibid* at para153.

49 *Ibid* at paras 154-155.

50 *Ibid* at para 153.

51 *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 816 [*Abdelrazik (re: Ex Post Costs)*].

52 Les Perreaux, "Mysterious people tailing Abdelrazik on his first days at home, lawyer says", *The Globe & Mail* (29 July 2009) A1.

53 *Abdelrazik v. Canada*, Ottawa, T-1580-09 (FCTD) (Statement of Claim of Abdelrazik, dated 21 September 2009) at paras 1-2 [*Abdelrazik (re: Compensation)*].

54 *Abdelrazik (re: Interim Costs), supra* note 3.

on a $100.00 per month loan from the Canadian government, and those who might otherwise assist him financially appeared to be prohibited from doing so under Canada's anti-terrorism regulations. To fund the litigation, efforts were made to secure legal aid on Abdelrazik's behalf. However, having been detained in Sudan for several years, he was no longer considered a resident of a Canadian province, and therefore he was not eligible for provincial legal aid funding.[55] Not only was Abdelrazik destitute and ineligible for legal aid, but his *pro bono* counsel was also unable to commit in advance to assisting him for the duration of the litigation. Counsel swore an affidavit contending that he could not maintain the expense of carrying the case *pro bono* without personal hardship, concluding that the litigation would not be able to proceed on a *pro bono* basis.[56]

Justice Mactavish presided over Abdelrazik's motion for interim costs. Applying *British Columbia v Okanagan Indian Band*[57] and *Little Sisters Book & Art Emporium v Canada*,[58] Mactavish J. held that Abdelrazik's circumstances did not meet the conditions of the three-part test for granting interim costs, namely that: (1) the party seeking interim costs cannot afford to finance the litigation and that there is no other way for the litigation to proceed; (2) the claim is *prima facie* well founded; and (3) the claim raises issues of public importance.[59] In particular, Mactavish J held that Ablerazik failed to meet the first part of the test because, while she accepted that Abdelrazik was impecunious,[60] she found that there were two alternative means whereby the litigation could continue.[61]

The first alternative identified was that counsel could continue to provide *pro bono* services.[62] Specifically, Mactavish J. found:

> While Mr. Hameed does assert that the ongoing expense of continuing to represent Mr. Abdelrazik will cause him personal hardship, and that he does not believe that the litigation will be able to proceed on the *pro bono* basis which has brought it to this point, based upon the statements in his affidavit quoted above, it is not at all clear from the record that either Mr. Hameed or his associates will indeed be forced to withdraw from the file if the motion is denied.[63]

In other words, Mactavish J. required something more definitive than the belief expressed by counsel that the file could not continue to proceed on a *pro bono* basis. Absent "clear" evidence to this effect, Mactavish J. found that Abdelrazik should attempt to continue pursuing the main application with *pro bono* representation.

The second alternative identified by Mactavish J. was for Abdelrazik to fund the litigation privately, with the assistance of "family and friends in Canada".[64] She noted that Canada's anti-terrorism regulations impose criminal penalties on those who provide funds to individuals included on the Resolution 1267 list.[65] However, she also noted that according to government

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55 *Ibid* at para 42.
56 *Abdelrazik (re: Interim Costs)*, *ibid*, (Affidavit of Yavar Hameed) at paras 36-39 [emphasis added].
57 *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*].
58 *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 [*Little Sisters No. 2*].
59 *Abdelrazik (re: Interim Costs)*, *supra* note 3.
60 *Ibid* at para 36.
61 *Ibid* at paras 37-50.
62 *Ibid* at paras 37-39.
63 *Ibid* at para 39.
64 *Ibid* at para 43.
65 *Ibid* at paras 44-45. See also *Anti-Terrorism Regulations*, *supra* note 19, ss 3-4.

counsel it was, in principle, possible to apply for an exemption from these criminal penalties where funds are provided to cover the basic expenses of a listed person, which might arguably include legal expenses.[66] In evaluating Abdelrazik's likelihood of successfully obtaining this exemption, Mactavish J. acknowledged that the provisions setting out this exemption are unclear, and that there was no case law offering guidance regarding how to interpret them.[67] She nonetheless found that Abdelrazik should attempt to secure such an exemption prior to seeking interim costs, because there is "at least a chance that [he] may be able to obtain an exemption… so as to allow his supporters to assist him with his legal expenses."[68] Still, given the lack of clarity, Mactavish J. declined "to offer an opinion at this point on the proper interpretation of the Regulations."[69]

Based on her finding that there might be alternative means to fund the litigation Mactavish J. held that Abdelrazik failed to meet the first part of the *Okanagan* test. She therefore refused Abdelrazik's application for interim costs without examining the remaining parts of the test.[70]

She did, however, go on to note that if Abdelrazik's circumstances changed or if a request for an exemption from Canada's anti-terrorist regulations was denied, he would be free to make a new motion for interim costs.[71]

Mactavish J.'s decision was upheld by the Federal Court of Appeal without comment.[72]

1. Interim Costs in Individual Human Rights Litigation

The most straightforward implication of Abelrazik's experience lies in Mactavish J.'s restrictive application of the approach to interim costs. While it is now uncontroversial that costs awards can be used to enhance access to justice,[73] interim costs awards used to this end remain nonetheless highly exceptional, largely because they require a party to fund an opponent's legal expenses while the litigation is still ongoing. In other words, not only must the party fund both sides of the litigation, but they must do so even though the merits of the case have yet to be determined and thus the allegations and arguments that are relied upon to justify the interim costs award have not yet been tested.

The common law test for when interim costs will be awarded reflects their exceptional nature. The Supreme Court held in *Okanagan* that interim costs are only appropriate where a *prima facie* meritorious claim which raises novel issues of public importance would otherwise be unable to proceed because of financial barriers.[74] *Little Sisters No. 2* raised the threshold for awarding interim costs even further.[75] According to the majority, interim costs may be awarded only where the court would otherwise be participating in an injustice against the individual litigant and the public more generally.[76] In the majority's view, this restriction – which effectively places a

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66 *Abdelrazik (Re: Interim Costs), ibid* at para 46. See also *Anti-Terrorism Regulations*, *ibid* s 5.7.

67 *Abdelrazik (Re: Interim Costs), ibid* at para 48.

68 *Ibid* at para 49.

69 *Ibid* at para 48.

70 *Ibid* at paras 51-52.

71 *Ibid* at para 52.

72 *Abdelrazik (FCA re: Interim Costs), supra* note 3 at para 1.

73 See generally Mark Orkin, *The Law of Costs, 2nd ed* (Aurora: Canada Law Books, 2008) at §219.5.2; Chris Tollefson, Darlene Gilliland & Jerry De Marco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 Can Bar Rev 473 at 491-493. See also, *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *Okanagan*, *supra* note 57 at para 26.

74 *Okanagan*, *supra* note 57 at para 40.

75 *Little Sisters No 2*, *supra* note 58 at para 5.

76 *Ibid* at para 40.

heavy burden on the applicant to show that an interim costs award is the only way litigation of exceptional public importance can proceed[77] – was necessary in order to prevent interim costs from becoming a form of judicially imposed legal aid. [78] The restricted approach in *Little Sisters No. 2* has drawn criticism from some commentators who saw potential in *Okanagan* for courts to respond to intractable problems of access to justice through interim costs awards. For example, Faisal Bhabha argues that, "[i]n light of *Little Sisters No. 2*, we can expect to see an even greater reluctance on the part of litigants and courts to rely on advance costs."[79]

Mactavish J.'s decision to deny Abdelrazik interim costs offers a further example of judicial reluctance in this area. Abdelrazik was legally unable to work or receive funds. Canadian government action contributed to his risk of torture abroad and his attempts to return to Canada were repeatedly thwarted by the Canadian government using questionable methods and arguments. If someone in Abdelrazik's extreme circumstances is ineligible for interim costs, given the significance of his case for individual rights and the public more generally, then it is difficult to imagine how litigants asserting government violations of their individual human rights could ever qualify.

It should be acknowledged that Mactavish J.'s decision to deny interim costs in this case rested upon her factual finding that Abdelrazik had not fully explored all possible avenues for pursuing the litigation. Moreover, she explicitly invited Abdelrazik to bring a new motion for interim costs in the event that these avenues were fully exhausted. And indeed, he was never in a position to do so because his *pro bono* counsel persisted in representing him despite their earlier indication that this may not be possible.

Because he was not, in the end, prevented from fully pursuing his litigation, it would seem at first glance that Mactavish J. was correct in her view that declining to award interim costs would not lead the court to participate in an injustice – which, as we have seen, is the threshold established in *Little Sisters No. 2* for when interim costs are appropriate. However, in assessing Mactavish J.'s decision it is essential to keep in mind the unusual circumstances Abdelrazik faced. Unlike most litigants, he was physically unable to access the courts without legal representation because he was (unconstitutionally) confined in the Canadian embassy in Khartoum. At the same time, also because of his confinement, communication with the outside world was difficult. In this context, expecting Abdelrazik to fully pursue the option of funding the litigation through private charity seems problematic. How was he supposed to seek an exemption from Canada's anti-terrorist regulations, and then, if successful, organize private donations, when all the while he was confined to the embassy in Khartoum? Surely such arrangements would have had to be made by his *pro bono* lawyers on his behalf. In other words, in finding that Abdelrazik must take further steps to fully exhaust the option of financing his litigation through private charity, Mactavish J. seems to have assumed that he would continue to receive *pro bono* representation, even if only to arrange for the exemption and organize the donations.

Mactavish J.'s parallel holding that Abdelrazik failed to fully exhaust the option of litigating the main application by relying on *pro bono* representation was also problematic, even though the litigation did end up proceeding on this basis. There are three main difficulties with this aspect of the decision. First, Mactavish J. failed to discuss what Abdelrazik was supposed to do

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77 *Ibid*.

78 *Ibid* at para 5.

79 Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's LJ 139 at 151.

in the event that *pro bono* counsel withdrew due to financial constraints. Though Mactavish J. left open the possibility that in such circumstances Abdelrazik could bring a new motion for interim costs, she neglected to indicate how he could do so without counsel while he was effectively confined in an embassy abroad. Happily for Abdelrazik, such a new motion was not necessary. Nonetheless, given uncontested evidence that counsel re-evaluated on a monthly basis whether they could continue to provide *pro bono* services, this was a possibility that should have been addressed.

Second, Mactavish J.'s decision places *pro bono* counsel in a difficult position. Recall that Mactavish J. found that Abdelrazik was not entitled to interim costs in part because it was not "clear" that his *pro bono* counsel would be forced to withdraw, despite sworn affidavit evidence indicating that counsel did not believe they could continue providing *pro bono* services due to financial constraints. While Mactavish J. did not specify exactly what would constitute "clear" evidence to this effect, it seems likely that a commitment to withdraw if interim costs are denied would be necessary. As one of Abdelrazik's *pro bono* counsel, Amir Attaran, describes it, this "is essentially to say that counsel has to blackmail the court into awarding advance costs."[80] Moreover, it should be remembered that in order to succeed in this "blackmail", *pro bono* counsel must simultaneously show that the case is of such exceptional public importance that the court would be involved in an injustice if the case were not litigated. In other words, to obtain interim costs, *pro bono* counsel must (1) commit to withdrawing if interim costs are denied, in cases where (2) the failure to litigate the case because legal representation was unavailable would represent an injustice. That is to say, *pro bono* counsel must commit to participate in the very injustice that they are asking the court to prevent, and they may then be rewarded for that commitment by having the court order an opposing party to pay their fees. It should also be noted that, due to the complexity of motions for interim costs, it would be difficult for most individuals challenging alleged human rights abuses abroad – even if they are not confined in an embassy – to bring forward such motions without the assistance of *pro bono* counsel. In practice, then, it seems unlikely that motions for interim costs will typically come before the courts except through the efforts of *pro bono* counsel, who must then adopt this problematic position to succeed on the motion.

Third, the reasoning behind Mactavish J.'s finding that there was insufficient evidence that the litigation could not proceed on a *pro bono* basis may pose significant challenges for many other individual human rights litigants seeking interim costs. It is useful, in this respect, to compare typical individual human rights cases with both aboriginal rights and group rights litigation, areas in which interim costs requests have met with some degree of success.[81]

There are significant differences between individual human rights litigation and aboriginal rights litigation. For example, aboriginal rights litigation generally involves disputes between two or more communities, yet the adjudicative institutions in which the disputes are to be resolved have been designed by and are largely controlled by one of the communities, which raises obvious procedural fairness challenges.[82] Aboriginal rights litigation also frequently engages the

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[80] Amir Attaran, Personal Correspondence (22 June 2009) (on file with author).

[81] See, e.g., *Hagwilget Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574 [*Hagwilget*]; *Keewatin v Ontario (Minister of Natural Resources)* (2006), 32 CPC (6th) 258 (Ont SCJ); *Xeni Gwet'in First Nations v British Columbia*, 2002 BCCA 434.

[82] For a discussion of some of the challenges produced by the "inter-societal" aspects of aboriginal rights litigation, see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727.

honour of the crown and always raises a long history of colonialism.[83] Given these challenges, Canadian courts characterize aboriginal rights litigation as *sui generis*, and often modify procedural rules in an attempt to accommodate the unique circumstances of such litigation.[84]

On a more day to day level, one further difference is that individual human rights litigation is usually less costly and less drawn out than aboriginal rights litigation. There are of course exceptions, but it is telling that Abdelrazik's main application was fully litigated within a little over a year, whereas the issues at the heart of the litigation that prompted the *Okanagan* decision in 2003 remain largely unresolved at the time of writing. Similarly, counsel for Abdelrazik estimated the value of their *pro bono* services at approximately $130,000,[85] whereas, in *Okanagan*, the aboriginal community estimated the costs of a full trial at around $814,000.[86]

There are also important differences between individual human rights litigation and group rights litigation. Consider for example, the recent decision, *R v Caron*,[87] where the Supreme Court upheld an interim costs award in the context of constitutional minority language rights litigation. In that case, Mr. Caron, a Franco-Albertan, sought to challenge the constitutional validity of English-only traffic ticket proceedings on the basis of a conflict with language rights purportedly accorded through the Royal Proclamation of 1869. Mr. Caron initially funded the litigation through private loans and donations, and through the now-defunct Court Challenges Program. However, as the length of the trial increased and as the voluminous historical evidence submitted by the Crown accumulated, he quickly exhausted his funds and was unable to secure further funding. He therefore applied for – and obtained – an interim costs award.[88]

In upholding the interim costs award, the Supreme Court noted that the litigant's resources were exhausted largely due to the substantial historical record filed by the Crown and the large number of expert witnesses, and that as a result, Mr. Caron could not proceed with the litigation without an interim costs award.[89] Moreover, the Court found that Mr. Caron had demonstrated at least a *prima facie* case.[90] Finally, the Court found that the case was of exceptional public importance because it questioned the validity of all of Alberta's unilingual statutes: "The injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest."[91] As a result, the Supreme Court held that Mr. Caron met the test for interim costs as established by *Okanagan* and *Little Sisters No. 2.* It would seem, then, that part of the reason that interim costs were awarded in this case is that, as with aboriginal rights litigation, minority language rights litigation often involves voluminous historical records and entails disputes between communities that have widespread effects beyond the individual litigants involved.

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83 For a judicial discussion of the history and implications of ways in which the honour of the crown may be engaged in aboriginal rights litigation (and negotiations) see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511. See also *Hagwilget, supra* note 81 at para 24.

84 See e.g., *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *R v Van der Peet*, [1996] 2 SCR 507.

85 *Abdelrazik (re: Ex Post Costs), supra* note 51 at para 4.

86 *Okanagan, supra* note 57 at para 5. See also, *Tsilhqot'in Nation v British Columbia*, 2006 BCCA 2 (interim costs paid in aboriginal rights litigation exceeded $10 million).

87 *R v Caron*, 2011 SCC 5.

88 *Ibid* at paras 10-16.

89 *Ibid* at paras 10-15 & 41.

90 *Ibid* at paras 42-43. Indeed, by the time the appeal on the issue of interim costs came before the Supreme Court, the first instance court made a determination on the merits, and declared the English-only traffic proceedings a nullity. *Ibid* at para 15.

91 *Ibid* at paras 44-45.

Interim costs decisions in aboriginal and group rights litigation are likely often affected by factors such as voluminous records in cross-community disputes, which may partly explain why interim costs awards appear more common in such cases than in individual human rights litigation. Moreover, the fact that individual human rights litigation is often less costly and drawn out than aboriginal and group rights litigation likely means that arguments about the unavailability of *pro bono* representation in individual human rights litigation will be more difficult to substantiate. This seems particularly likely where the individual human rights violation at stake attracts media attention and raises novel legal issues, thereby making *pro bono* representation attractive to counsel. One would expect that these factors will often be present in human rights cases that meet the other conditions for interim costs awards (i.e. prima facie meritorious cases of exceptional public importance). While aboriginal and group rights litigation may also be attractive to *pro bono* counsel for similar reasons, the expense – both in terms of hours and disbursements – associated with litigating such cases make *pro bono* representation in these circumstances more onerous.

It therefore appears likely that Mactavish J's strict application of the first branch of the *Okanagan* test to evaluate the viability of *pro bono* representation as an alternative to interim costs will be applicable to many cases involving human rights litigation, particularly outside the context of aboriginal and group rights. It would seem, then, that for those who hoped that *Okanagan* offered a means of funding *prima facie* meritorious human rights litigation of exceptional public importance brought by impecunious individuals, Abdelrazik's experience indicates that *pro bono* counsel arguing in favour of interim costs for their clients will face an uphill battle – and they may be forced into uncomfortable positions in that battle.

It must be emphasized that Abdelrazik was in an unusual situation. He was reliant on counsel to challenge his unlawful exile and confinement in an embassy abroad (i.e. he could not access the courts in person because of the very actions of the Canadian government that he sought to challenge). He was subject to anti-terrorist regulations that at least arguably prohibited others from paying for counsel, and at any rate he did not have any means to organize private charity except through the services of *pro bono* counsel. Although he obtained *pro bono* counsel, they indicated that they may not be able to complete the litigation due to financial considerations, and if they did withdraw he would have no way to act on his own behalf, even for the limited purposes of seeking a new interim costs award. If Abdelrazik was ineligible for interim costs in these circumstances, then it is hard to imagine what individual human rights litigant would be – especially seeing as how motions for interim costs are unlikely to come before the courts except through the assistance of *pro bono* counsel.

2. Interim Costs in Section 6 Litigation

In addition to exemplifying a restrictive approach to interim costs in individual human rights litigation, and beyond its challenging implications for *pro bono* counsel, Abdelrazik's experience has important repercussions for litigation involving citizens who allege that their rights under section 6 of the *Charter* have been violated. This provision, which essentially prohibits exile, is among the most fundamental rights enjoyed by citizens.[92] Indeed, the drafters of the *Charter* found it prudent to allow the use of the section 33 notwithstanding clause to lawfully abridge most individual rights, including the section 7 right not to be deprived of life, liberty and security

[92] For perhaps the most famous discussion of the right of citizens to remain members of their national communities – i.e. a right not to be exiled – see Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & Co., 1973), see especially at 297.

of the person except in accordance with the principles of fundamental justice. The section 6 right to enter and remain in Canada, in contrast, is among the limited set of rights that are so fundamental that they cannot lawfully be abridged in this manner. Because of the fundamental importance of section 6 rights, credible allegations regarding violations of the right to be free from exile should attract robust procedural protections. In assessing whether Abdelrazik should have been entitled to interim costs, the necessity of robust procedural protections where the right to be free from exile is at stake should have played a central role.

It should be recalled that the government's central argument in Abdelrazik's main application was that Canada could not provide him with the travel documents or otherwise assist in his repatriation so long as his name was included on the Resolution 1267 list. However, the Resolution 1267 list is one of the most flawed procedures established in the name of combating terrorism at the global level. The plethora of procedural defects of the Resolution 1267 list includes: the failure to accord the listed person the right to a hearing;[93] the failure to provide the listed person with the evidence against them;[94] the discretionary nature of listing and de-listing, and an accompanying lack of clear norms for when listing and de-listing are appropriate;[95] members of the committee who may have been responsible for the initial listing request also hold a veto over any subsequent delisting;[96] and the lack of a presumption of innocence.[97] In light of these defects, Justice Zinn, who presided over Abdelrazik's main application, describes the Resolution 1267 list procedure in the following unflattering terms:

> The 1267 Committee regime is… a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning, and for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.[98]

Not only was the particular mechanism the government used to justify refusing to allow Abdelrazik's return to Canada procedurally problematic, but Abdelrazik's case was also part of a troubling global trend whereby states seek to limit procedural protections in national security investigations and enforcement.[99] Canada is a party to this trend. Consider, for instance, that wherever possible the Canadian government prefers to deal with individuals who are suspected of posing national security threats by deploying immigration procedures rather than criminal law procedures.[100] The reason for this preference is that immigration processes involve less robust

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93 See e.g. Andrew Hudson, "Not a Great Asset: The UN Security Council's Counter-terrorism Regime: Violating Human Rights" (2007) 25 Berkley J Int'l L 203 at 213-222.

94 See e.g. *Kadi v Council; Al Barakaat International Foundation v Council*, C-402/05 P, C-415/05 P, [2008] OJ C 285/2, 3 CMLR 41 at paras 346-349.

95 See e.g. Alexandra Dossman, "Designating 'Listed Entities' for the Purposes of Terrorist Financing Offences at Canadian Law" (2004) UT Fac L Rev 1 at 13.

96 See e.g., Clemens Feinäugleat, "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?" (2008) 9 German LJ 1513 at 1532.

97 See e.g. Johannes Reich, "Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)" (2008) 33 Yale J Int'l L 505 at 507.

98 *Abdelrazik (Main Application), supra* note 5 at para 53.

99 For an excellent discussion of this phenomenon, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

100 See generally, Audrey Macklin, "Borderline Security" in Ronald Daniels, Patrick Macklem & Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: U of T Press, 2001) 383.

procedural protections than criminal law procedures.[101] For example, non-citizens can be detained and deported if there are "reasonable grounds to believe" that they have been, are, or may be in the future, members of terrorist organizations.[102] To secure criminal convictions, however, more than mere membership is needed and the standard of proof is much more demanding – not reasonable grounds to believe, but beyond a reasonable doubt.[103]

Departures from standard human rights and due process norms by the Canadian government in dealing with perceived national security threats are, of course, not limited to the context of non-citizens.[104] However, outside the immigration setting, the *Charter* imposes more significant restrictions. One way the Canadian government has tried to circumvent these restrictions is by relocating national security investigation and enforcement abroad in order to take advantage of the historical reluctance of courts to give extra-territorial application to *Charter* norms.[105] This is particularly evident in several recent cases where Canadian officials participated in the detention and interrogation abroad of Canadian citizens suspected of having ties to terrorism. In many such cases, the citizens in question allege that their detention and interrogation abroad involved mistreatment – including torture – that would, if committed in Canada, violate *Charter* norms.[106]

The most familiar example involves Maher Arar, a Canadian citizen who was tortured in Syria after he was subjected to extraordinary rendition while on a stopover at an airport in the United States. A public inquiry into his case determined that one of the reasons for his extraordinary rendition was information provided by Canadian authorities to United States officials indicating, erroneously, that he was associated with terrorists.[107] The same public inquiry, after examining other cases of Canadian citizens detained abroad, concluded that "there appears to have been a pattern of investigative practices whereby Canadian agencies interacted with foreign agencies in respect of Canadians held abroad in connection with suspected terrorist activities."[108]

One of the problematic features of Mactavish J.'s decision on Abdelrazik's application for interim costs is that the decision was inattentive to this context. In fact, Mactavish J. struck evidence of this context from the court record. Specifically, she struck evidence of a larger pattern of human rights violations against Canadian citizens abroad in the name of Canadian

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101 For critiques of the failure to accord procedural protections to those subject to immigration procedures, see Barbara Jackman, "Terrorism and the *Charter*: Immigration and Terrorism" (2007) 23 NJCL 229; Christiane Wilke, "The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation" (2008) 26 Windsor YB Access Just 25; Rayner Thwaites, "Discriminating Against Non-Citizens under the *Charter*: Charkaoui and Section 15" (2009) 34 Queen's LJ 669.

102 *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 33-34.

103 Kent Roach, "Canada's Response to Terrorism" in Victor Ramraj, Michael Hor & Kent Roacheds, *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge Universtity Press, 2005) 511 at 522.

104 For critiques, see e.g. Audrey Macklin, "Exile on Main Street: Popular Discourse and Legal Manoeuvres Around Citizenship", in Law Commission of Canadaed, *Law and Citizenship* (Vancouver: UBC Press, 2006) 22; Ron Daniels, Patrick Macklem & Kent Roach eds, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001).

105 For a discussion of this general reluctance to extend the *Charter* extra-territorially, see Benjamin Berger, "The Reach of Rights in the Security State: Reflections on *Khadr v Canada (Minister of Justice)*" (2008), 56 CR (6th) 268 [Berger].

106 For an extensive review of such allegations, see, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin, *Final Report* (Ottawa: Minister of Public Works, 2008).

107 See generally, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Minister of Public Works, 2006).

108 *Ibid* at 274.

national security on the grounds that it was "irrelevant".[109] It is, however, hard to understand why a pattern whereby Canadian authorities abroad violated other Canadian citizens' rights would not be a relevant consideration in determining whether Abdelrazik's allegations were likely to be *prima facie* meritorious, as well as in determining whether exceptional circumstances existed that would justify an interim costs award.

Had Mactavish J. been more attentive to this context, she may have been less willing to apply a strict test for interim costs.[110] Indeed, had the context played a more prominent role in her reasoning, she may have explicitly considered whether the test for interim costs needed to be modified in light of: (1) the importance of the fundamental right of citizens to be free from exile and the need for robust procedural protections when that right is at risk; (2) the serious procedural defects in the 1267 Resolution list mechanism on which the government relied to justify its refusal to allow Abdelrazik to return home; and, (3) the experience of several other Canadian citizens abroad whose rights were violated by the Canadian government in the name of national security. All these factors made it exceptionally important that Abdelrazik be represented by competent counsel.

One way that Mactavish J. might have considered modifying the test for interim costs in light of these circumstances would have been to draw upon jurisprudence relating to section 7 of the *Charter*, which provides, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[111] In *New Brunswick (Minister of Health and Community Services) v G. (J.)*,[112] the Supreme Court held that courts may order state-funded legal representation to guarantee the fairness of litigation implicating a person's right to life, liberty or security of the person. To put this same point in slightly different terms, courts may order state-funded legal representation where such representation is necessary to ensure that a person's section 7 rights are not breached in a manner that fails to comply with the principles of fundamental justice. Expanding upon when courts should exercise their discretion to order state-funded legal representation in such circumstances, the Court indicated that the relevant factors include: "the seriousness of the interests at stake, the complexity of the proceedings and the capacity of the [litigant]."[113]

Even more significant than the test established by *G. (J.)* – which is less onerous than the test for interim costs articulated in *Okanagan* and *Little Sisters No. 2* – is that the court was attentive to the context surrounding the case. The underlying litigation involved a custody dispute, and the litigant had, in fact, been represented on a *pro bono* basis at the custody hearing by the time the separate issue of state-funded legal representation reached the Supreme Court. Because the individual received *pro bono* representation at the custody hearing – and therefore presumably enjoyed a fair procedure that complied with section 7 of the *Charter* – the matter of state-funded legal representation was technically moot.[114] The Court nonetheless agreed to decide the matter because the case raised the question of whether parents have a constitutional right to state-funded legal representation in custody hearings and this question was "undoubtedly of national

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109 *Abdelrazik (re: Interim Costs)*, *supra* note 3 at para 9.

110 Paying further attention to context would be consistent with the approach recently taken by the Alberta Court of Appeal in noting that courts should take into consideration power imbalances or imbalances in resources in deciding interim costs motions. *R v Caron*, 2009 ABCA 34 at paras 55-57.

111 *Charter*, *supra* note 4, s 7.

112 *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 [*G. (J)*].

113 *Ibid* at para 75.

114 *Ibid* at para 42.

importance."[115] Moreover, the Court noted that the only way it was likely to ever be in a position to decide this issue of national importance was by considering a moot case, because complex constitutional issues of this kind generally require the assistance of (*pro bono*) counsel in order to even come before the courts.[116]

Significantly, this decision reveals that in cases implicating a person's right to life, liberty and security of the person, courts may be willing to consider the systemic issue of whether state-funded legal representation is constitutionally required for a particular subset of litigants, *even if the individual who requests the state-funded legal representation actually obtained pro bono representation*. Courts will doubtless be cautious in making such findings, because these findings appear to be a form of judicially imposed legal aid. But, in exceptional circumstances, courts may be willing to establish constitutionally mandated state-funded legal representation for particular subsets of litigants who have serious section 7 rights at stake in complex proceedings that they lack the capacity to navigate alone.[117]

In Abdelrazik's case, Mactavish J. explicitly noted that counsel did not present detailed arguments about this line of jurisprudence.[118] This omission arose largely because such jurisprudence is grounded in the language of "fundamental justice" from section 7 of the *Charter*, whereas Abdelrazik's counsel pursued the main litigation on the basis of the violation of Abdelrazik's right to return to Canada as protected by section 6 of the *Charter*. Though Abdelrazik's section 7 rights to life, liberty and security of the person were surely engaged, the legal tests for when a deprivation of life, liberty or security of the person abroad will be attributed to the Canadian government for the purposes of section 7 are complex and constantly evolving.[119] It was a more straightforward matter to show that Abdelrazik's section 6 rights had been breached by the Canadian government, given that the Canadian government's refusal to issue him travel documents prevented him from returning to Canada.[120]

In this context, counsel's strategy of focusing on section 6 in the main application seems to have been prudent, as was ultimately confirmed when Abdelrazik succeeded on this basis in the main application. Moreover, this strategy was also in keeping with the holding in *Little Sisters No. 2*, where the majority held that cases must be framed as narrowly as possible so as to minimize their expense where interim costs are sought.[121] While the jurisprudence on state-funded legal representation in section 7 cases was not, as a result, put to Mactavish J. in detail, it is worth considering whether the reasoning from *G. (J.)* might nonetheless have been applicable to Abdelrazik's circumstances, even though the main litigation involved section 6 rights. For example, counsel for Abdelrazik might have reasonably contended that the violation of Abdelrazik's right to be free from exile, protected by section 6, also implicitly engaged his section 7 rights, including the right to both liberty and security of the person. As a result, while Abdelrazik's main litigation proceeded on the basis of the alleged violation of section 6,

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115 *Ibid* at para 46.

116 *Ibid* at para 47.

117 For a discussion of the applicability of this reasoning to cases outside the child custody setting, see Mary Jane Mossman, "*New Brunswick (Minister of Health and Community Services) v G. (J.)*: Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12 CJWL 490 at 502.

118 *Abdelrazik (re: Interim Costs)*, *supra* note 3 at paras 32-33.

119 Berger, *supra* note 105.

120 See e.g. *Kamel v Canada (Attorney General)*, 2009 FCA 21, 4 FCR 449 at para 15 (holding that the failure to provide a passport clearly infringes a citizen's right to enter of leave Canada as guaranteed by section 6 of the *Charter*).

121 *Little Sisters No. 2*, *supra* note 58 at paras 77.

jurisprudence relating to state-funded legal representation in section 7 cases may still have been applicable. Alternatively, counsel for Abdelrazik could have suggested that the reasoning behind *G. (J.)* should be extended beyond section 7 cases to violations of other fundamental *Charter* rights, including the right to be free from exile.

Regardless of the particular path chosen to justify applying the *G. (J.)* test, if the test had been applied, Abdelrazik may have been eligible for state-funded legal representation. Recall that the test considers: (1) the importance of the interests affected by the litigation; (2) the complexity of the proceedings; and, (3) the capacity of the individual involved. With respect to the first part of the test, it seems evident that the alleged violation of Abdelrazik's fundamental right to be free from exile was serious and engaged important interests. The second part of the test would also have posed no problem, as the litigation involved complex constitutional legal questions, hotly contested factual allegations involving national security agencies, and the disturbing irregularities of the Resolution 1267 list procedures. Finally, with regard to the third part of the test, Abdelrazik's capacity to self-represent was severely compromised by his confinement in an embassy abroad.

Of course, given the oft-repeated concerns about courts refraining from mandating judicially imposed legal aid schemes,[122] it remains possible that courts may impose the additional requirement that the applicant demonstrate that no other alternatives are available, thereby importing the strict test from *Little Sisters No. 2* to this context as well. Nonetheless, one key advantage to working with the *G. (J.)* test, rather than through interim costs jurisprudence, is the way that *G. (J.)* was attentive to systemic factors. What seems troubling about Mactavish J.'s refusal to award Abdelrazik interim costs is not the effect this refusal had on Abdelrazik himself, after all his case was ultimately fully litigated on a *pro bono* basis. Rather, what is troubling is the effect the decision may have on the ability of other Canadian citizens to challenge the violation of their right to be free from exile, especially where national security matters are at play. Had Mactavish J. ordered state-funded legal representation in this case, these other Canadians would have had an easier time securing counsel to challenge alleged human rights violations. Like in *G. (J.)*, this would have put the court in the difficult position of effectively establishing judicially imposed legal aid, albeit in a highly constrained subset of cases. However, in light of the larger context whereby the Canadian government has evidently sought to escape court oversight and constitutional restraints in national security investigation and enforcement activities by relocating those activities abroad, providing those most deeply affected by these activities with the right to state-funded legal representation would seem warranted.

In future litigation involving the section 6 rights of Canadians mistreated abroad, the possibility of securing state-funded legal representation on this basis should be explored further, particularly since Abdelrazik's experience appears to indicate that obtaining state-funded legal representation in these cases through interim costs awards is unlikely.

3. *Pro Bono*, *Ex Post* Costs & Contingency Fees

Although there may be avenues for securing access to justice for Canadians mistreated abroad by attempting to work with the existing tests for interim costs and both sections 6 and 7 of the *Charter*, considering the reluctance the courts have shown in this area, other options should also be explored. Moreover, given that publically funded legal representation for civil litigation more

[122] See e.g., *Ibid* at para 5; *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873 at paras 13-14.

generally is extremely limited,[123] and in some cases has been entirely eliminated,[124] options other than publically funded legal representation need to be considered. Perhaps the most likely alternative is what ended up being employed by Abdelrazik – *pro bono* representation combined with costs awards at the conclusion of the litigation. Recall that, despite personal hardship, Abdelrazik's counsel continued representing him on a *pro bono* basis. Moreover, Abdelrazik was successful on his main application, in that the Justice Zinn found that his section 6 rights had been breached and issued an order requiring the government to return him to Canada.[125]

Shortly after issuing this decision, Justice Zinn ordered the government to pay $47,500 in costs to Abdelrazik's *pro bono* counsel.[126] This amount represented more than standard party-party costs typically awarded in Federal Court, but less than the $127,600 in solicitor-client costs sought by *pro bono* counsel.[127] In making this costs award, Justice Zinn noted, "Counsel in this instance, taking on Mr. Abdelrazik's case in circumstances where he was unable to do so personally and was impecunious, conducted themselves in the best tradition of the Bar."[128]

Thus, although the court was unwilling to award interim costs in advance of the determination on the merits, the court nonetheless awarded costs to Abdelrazik's *pro bono* counsel when the litigation proved successful. This is in keeping with recent case law establishing that *pro bono* counsel may be entitled to compensation through *ex post* costs awards.[129] To be sure, such costs awards do not usually fully compensate *pro bono* counsel for their time because full solicitor-client costs awards are rare.[130] Moreover, these awards operate in a similar manner as contingency fee arrangements – awards will typically only be available where *pro bono* counsel succeeded on the merits. Nonetheless, such awards may make it easier for some impecunious litigants – including perhaps some Canadian citizens mistreated abroad – to obtain counsel because the possibility of a costs award may mitigate some of the hardship for *pro bono* counsel in terms of lost fees and out of pocket disbursements.

In addition to the possibility of obtaining costs awards at the completion of litigation, contingency fee arrangements may be used to fund litigation in cases where compensation may eventually be sought for the mistreatment Canadian citizens suffer abroad at the hands of Canadian officials. Now that Abdelrazik is back in Canada, he has sued the government for over $24 million and the Minister of Foreign affairs in his personal capacity for $2 million.[131] The *pro bono* counsel who assisted Abdelrazik with his application to return to Canada also represent him in the lawsuit for compensation. Because the requested compensation is substantial, this type of case is amenable to contingency fee arrangements. It is, therefore, possible to imagine in these sorts of cases contingency fee arrangements entered into at the outset, where counsel agrees to represent Canadians mistreated abroad in their constitutional litigation on a *pro bono* basis with the stipulation that they will be entitled to any applicable costs award in that litigation, and that

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123 Civil litigation is seldom funded in most legal aid programs in Canada. See generally, Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Attorney General of Ontario, 2008), see especially at 76.

124 Consider, for example, the Court Challenges Program. Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2009) 25 NJCL 191 at 197.

125 *Abdelrazik (Main Application)*, *supra* note 5 at para 170.

126 *Abdelrazik (re: Ex Post Costs)*, *supra* note 51.

127 *Ibid* at para 4.

128 *Ibid* at para 31.

129 *1465778 Ontario Inc v 1122077 Ontario Ltd* (2006), 82 OR (3d) 757 (Ont CA).

130 *Young v Young*, [1993] 4 SCR 3 at para 251: "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

131 *Abdelrazik (Re: Compensation)*, *supra* note 53. For an early discussion of this lawsuit, see Erika Chamberlain, "Abdelrazik: Tort liability for exercise of prerogative power" (2010) 18:3 Constit Forum 119.

any subsequent suits involving damages will be handled on a contingency fee basis. Such a scenario could provide counsel with a financial incentive (or less of a financial disincentive) to take at least certain types of well-founded cases.

Of course, there are several limitations to funding individual human rights litigation through *pro bono* representation with the possibility of *ex post* costs awards and contingency fees in subsequent litigation regarding compensation.[132] For example, individuals who are unpopular or unsympathetic may find it difficult to secure representation. Similarly, cases that appear likely to be drawn out and expensive may be less likely to attract *pro bono* counsel on these terms. Moreover, cases where compensation for individual human rights violations is unlikely may also prove less attractive to counsel. Still, considering the narrow approach to interim costs adopted by courts as reflected in Abdelrazik's experience, as well as other restrictions on publically funded legal services, lawyers acting in the "best tradition of the bar" by providing *pro bono* services may be the only viable route through which Canadians mistreated abroad in the name of national security can proceed with litigation. Perhaps for some of these *pro bono* counsel, the possibility of being compensated for at least part of their time through *ex post* costs awards, as well as the possibility of contingency fees in subsequent litigation may help to make their provision of *pro bono* services financially viable. In other words, if access to justice for individuals mistreated overseas depends on the ability of litigants to find lawyers willing to bear the financial burden of the litigation, measures such as *ex post* costs and contingency fees may make it easier to obtain access to justice. I hasten to add, however, that this is a highly restrictive approach to providing access to justice for Canadians mistreated abroad, one that is not especially sensitive to the serious nature of the violations at stake or the merits of the underlying claims.

IV. CONCLUSION

Abdelrazik's experience raises challenging questions about access to justice in human rights litigation involving Canadian citizens mistreated abroad. Indeed, his experience shows the importance of competent legal representation when one's government breaches one's fundamental human rights abroad in the name of national security. Abdelrazik remains, at the time of writing, subject to serious national security restrictions and he has not yet received any compensation for the breach of his constitutional rights. Although, through the efforts of his *pro bono* counsel, he ultimately won his *Charter* litigation, resulting in his repatriation, his experience nonetheless holds troubling implications for the availability of interim costs awards in future individual human rights litigation and for *pro bono* counsel applying for such awards. In addition, his experience demonstrates the need for new approaches to requests for state-funded legal representation for Canadian citizens who are denied the right to return to Canada in contexts where national security issues are at play. It also highlights the continued importance of *pro bono* services, as well as the significance of *ex post* costs awards where individual human rights litigants are represented on a *pro bono* basis.

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[132] For discussions of access to justice and contingency fee arrangements, see generally, Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46 OHLJ 131 at 143; Stephen C. Yeazell, "Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law" (2006) 39 Loy LA L Rev 691 at 704-710; Jane Johnson & Geraldine Hammersley, "Access to Justice: No Win, No Fee, What Change of Justice?" (2004) 9 Cov LJ 23; Herbert Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004); Canadian Bar Association, *Opening Doors or Stirring Up Strife: The Implementation of Contingent Fees in Ontario* (Toronto: Canadian Bar Association, 1988).