CITATION: ABDELRAZIK *v.* CANADA (MINISTER OF FOREIGN AFFAIRS), 2009 FC 580, [2010] 1 F.C.R. 267 T-727-08

Abousfian Abdelrazik (*Applicant*)

v.

The Minister of Foreign Affairs and **the Attorney General of Canada** (*Respondents*)

INDEXED AS: ABDELRAZIK v. CANADA (MINISTER OF FOREIGN AFFAIRS) (F.C.)

Federal Court, Zinn J.—Ottawa, May 7, 8 and June 4, 2009.

Constitutional Law — Charter of Rights — Mobility Rights — Judicial review of Government of Canada's conduct allegedly thwarting applicant's return to Canada from Sudan, breaching right as Canadian citizen to enter Canada pursuant to Canadian Charter of Rights and Freedoms (Charter), s. 6 — Applicant, Sudanese-Canadian, living at Canadian Embassy in Sudan fearing detention, torture by Sudanese authorities — Applicant's Canadian passport expiring while in Sudan, not renewed — Also while in Sudan, applicant listed as associate of Al-Qaida by United Nations 1267 Committee — Such listing subjecting applicant to asset freeze, travel ban — These facts preventing applicant's return to Canada — Canadian government's refusal to issue applicant emergency passport pursuant to Canadian Passport Order, s. 10.1 prima facie breach of Charter, s. 6 right to enter Canada — Respondents ordered to provide applicant with emergency passport permitting him to travel to, enter Canada — Application allowed.

Constitutional Law — Charter of Rights — Limitation Clause — Canadian government refusing to issue applicant emergency passport pursuant to Canadian Passport Order, s. 10.1, thus breaching latter's right to enter Canada under Charter, s. 6 — No evidence Minister of Foreign Affair's determination applicant posing danger to national security, security of other country constituting s. 1 defence — Also no indication mechanism in place to provide procedural fairness, natural justice followed herein — Government's refusal to issue emergency passport not justified under Charter, s. 1.

Constitutional Law — Charter of Rights — Enforcement — Applicant Sudanese-Canadian trapped in Sudan — Canadian government's refusal to issue applicant emergency passport breaching Charter s. 6 — Applicant entitled to be put back to place would have been but for breach — At minimum, respondents ordered to provide applicant with emergency passport permitting him to travel to, enter Canada.

International Law — United Nations 1267 Committee listing applicant as associate of Al-Qaida — Persons listed by 1267 Committee subject to global asset freeze, global travel ban, arms embargo — Travel ban not preventing applicant from being repatriated to Canada since permission of foreign government not required to transit through its airspace — Interpretation consistent with Committee's concern to limit listed individuals from traveling from country to country — Travel ban not restricting mobility within country.

This was an application for judicial review of the Government of Canada's conduct allegedly thwarting the applicant's return to Canada from Sudan and consequently breaching his right as a Canadian citizen to enter Canada pursuant to section 6 of the *Canadian Charter of Rights and Freedoms* (Charter). The applicant, a Sudanese-Canadian, was living at the Canadian Embassy in Khartoum, Sudan fearing possible detention and torture by the Sudanese authorities if he were to leave this sanctuary. He sought an order directing Canada repatriate him "by any safe means at its disposal".

The applicant came to Canada in 1990 and was accepted as a Convention refugee in 1993. He subsequently obtained his Canadian citizenship in 1995. In Canada, he associated with two individuals involved in terrorism. However, there was no evidence in the record on which one could reasonably conclude that the applicant had any connection to terrorism or terrorists, other than his association with these two individuals.

The applicant travelled to Sudan in 2003 with a valid Canadian passport but his passport expired during his time there and was not renewed. This fact and other circumstances prevented his return home to Canada. In Sudan, he was arrested, detained and allegedly tortured by the Sudanese authorities. He was also interrogated by Canadian Security Intelligence Service (CSIS) agents during his detention. After being released, the United Nations 1267 Committee, which implements UN Security Council Resolutions aimed at controlling international terrorism, listed the applicant as an associate of Al-Qaida. Persons listed by the 1267 Committee are subject to a global asset freeze, a global travel ban and an arms embargo. A petition was filed to have the applicant de-listed by the 1267 Committee but it was denied. As well, the applicant made several requests to Passport Canada for a new passport but these were also denied. Although the issue of an emergency passport or travel document to the applicant was promised on several occasions by the Minister of Foreign Affairs, once the applicant would be in a position to return to Canada, this promise was never fulfilled. In the end, all of the applicant's attempts to return home failed.

The issues were whether the applicant's constitutional right to enter Canada as guaranteed by subsection 6(1) of the Charter was violated by the respondents and, if so, whether the breach was saved by section 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. If there was a breach and it was not saved, the appropriate and just remedy under subsection 24(1) of the Charter had to be determinated.

Held, the application should be allowed.

Subsection 6(1) of the Charter guarantees the right to enter Canada and applies only to Canadian citizens. That right is not to be lightly interfered with. The refusal to let a Canadian citizen enter Canada must be justified as being required to meet a reasonable state purpose. The burden of proof to establish a breach thereof rests with the applicant.

While it is not a requirement to finding a breach of a Charter right that the breach has been done in bad faith or with any ulterior motive, evidence of bad faith or an improper motive may be relevant when considering the appropriate remedy for a breach of a Charter right. The applicant's arguments characterizing the respondents as acting in bad faith were thus taken into account herein. For the reasons that follow, Canada was found to have engaged in a course of conduct and specific acts that constitute a breach of the applicant's right to enter Canada.

The evidence before the Court established, on a balance of probabilities, that the recommendation for the detention of the applicant by Sudan came either directly or indirectly from CSIS. Therefore, CSIS was found to be complicit in the initial detention of the applicant by the Sudanese.

It was reasonable to conclude that Canadian authorities did not want the applicant to return to Canada and that they were prepared to examine avenues that would prevent his return, such as the denial of an emergency passport. In fact, by mid-2004, Canadian authorities had determined that they would not take any active steps to assist the applicant to return to Canada.

There was no impediment from the UN 1267 travel ban to the applicant being repatriated to Canada since no permission of a foreign government is required to transit through its airspace. This interpretation was consistent with the objective of the travel ban as stated by the 1267 Committee in its document "Travel Ban: Explanation of Terms" which is to "limit the mobility of listed individuals." The Committee's concern is to limit listed individuals from traveling from country to country. The travel ban does not restrict mobility within a country. Furthermore, the word "territory" in UN Resolution 1822 does not include airspace. Therefore, the respondents' assertion to the contrary was part of the conduct engaged in to ensure that the applicant could not return to

Canada.

The Minister of Foreign Affairs' last-minute refusal in April 2009 to issue the applicant an emergency passport pursuant to section 10.1 of the *Canadian Passport Order*, despite having given him assurances to the contrary once all of the pre-conditions had been met (i.e. paid itinerary), was a breach of the applicant's Charter right to enter Canada. Where a citizen is outside Canada, the Government of Canada has a positive obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the Charter is illusory. Where the Government refuses to issue that emergency passport, it is a *prima facie* breach of the citizen's Charter rights unless the Government justifies its refusal pursuant to section 1 thereof. Denying a citizen his right to enter his own country requires, at a minimum, that such increased risk be established to justify a determination made under section 10.1 of the Order. There was no evidence that the Minister's determination that the applicant posed a danger to national security or to the security of another country constituted a section 1 defence under the Charter. There was also no suggestion that the Minister followed the process under Passport Canada's guidelines which provide that whenever a citizen may be denied passport privileges, there is a mechanism in place that provides the citizen with procedural fairness and natural justice. While it is not the function of the judiciary to second guess or to substitute its opinion for that of the Minister, when no basis is provided for the opinion, the Court cannot find that the refusal was required and justified given the significant breach of the Charter that refusing a passport to a Canadian citizen entails.

As to the effective remedy for the Charter breach, the applicant was entitled to be put back to the place he would have been but for the breach. Therefore, at a minimum, the respondents were ordered to provide the applicant with an emergency passport that would permit him to travel to and enter Canada.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6, 7, 24(1).
Canadian Passport Order, SI/81-86, ss. 4(3) (as am. by SI-2004-113, s. 3), 10.1 (as enacted *idem*, s. 5).
Criminal Code, R.S.C., 1985, c. C-46.
Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50, s. 1 (as am. by S.C. 1990, c. 8, s. 21).
Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).
Federal Courts Rules, SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2), 81(2).
Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 77 (as am. by S.C. 2002, c. 8, s. 194).
Privacy Act, R.S.C., 1985, c. P-21.
United Nations Act, R.S.C., 1985, c. U-2, s. 2.
United Nations Al-Qaida and Taliban Regulations, SOR/99-444 (as am. by SOR/2006-164, s. 1).

TREATIES AND OTHER INSTRUMENTS CITED

Charter of the United Nations, June 26, 1945, [1945] Can. T.S. No. 7, Art. 24, 25, 41.
Convention on International Civil Aviation, December 7, 1944, [1944] Can. T.S. No. 36.
Convention Relating to the Regulation of Aerial Navigation, signed at Paris, October 13, 1919.
United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1A(2).
United Nations Security Council Resolution 1267 (1999), adopted by the Security Council at its 4051st meeting, on 15 October 1999.
United Nations Security Council Resolution 1333 (2000), adopted by the Security Council at its 4251st meeting, on 19 December 2000.
United Nations Security Council Resolution 1390 (2002), adopted by the Security Council at its 4452nd

meeting, on 16 January 2002.
United Nations Security Council Resolution 1455 (2003), adopted by the Security Council at its 4686th meeting, on 17 January 2003.
United Nations Security Council Resolution 1526 (2004), adopted by the Security Council at its 4908th meeting, on 30 January 2004.
United Nations Security Council Resolution 1617 (2005), adopted by the Security Council at its 5244th meeting, on 29 July 2005.
United Nations Security Council Resolution 1735 (2006), adopted by the Security Council at its 5609th meeting, on 22 December 2006.
United Nations Security Council Resolution 1822 (2008), adopted by the Security Council at its 5928th meeting, on 30 June 2008.

CASES CITED

APPLIED:

Kamel v. Canada (Attorney General), 2009 FCA 21, [2009] 4 F.C.R. 449; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, (1997), 151 D.L.R. (4th) 577, [1998] 1 W.W.R. 50; *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, (1985), 18 D.L.R. (4th) 481, 12 Admin. L.R. 16; *Veffer v. Canada (Minister of Foreign Affairs)*, 2008 FCA 247, [2008] 1 F.C.R. 61, 283 D.L.R. (4th) 671, 156 C.R.R. (2d) 329; *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C.R. 218, 268 D.L.R. (4th) 303, 54 Admin. L.R. (4th) 188; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, (1987), 78 A.R. 1, 38 D.L.R. (4th) 161; *Mackenzie v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, 223 D.L.R. (4th) 17, 2003 DTC 5185.

DISTINGUISHED:

Canada v. Grenier, 2005 FCA 348, [2006] 2 F.C.R. 287, 262 D.L.R. (4th) 337, 344 N.R. 102.

CONSIDERED:

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, (1998), 161 D.L.R. (4th) 385, 55 C.R.R. (2d) 1; *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, (1989), 23 Q.A.C. 182, 96 N.R. 321; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1; *Chorzow Factory Case (Ger. v. Pol.)* (1928), P.C.I.J., Sr. A, No. 17 (September 13).

REFERRED TO:

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350, 276 D.L.R. (4th) 594, 54 Admin. L.R. (4th) 1; *R. v. Smith*, [1992] 2 S.C.R. 915, (1992), 94 D.L.R. (4th) 590, 75 C.C.C. (3d) 257; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, 294 D.L.R. (4th) 456, 232 C.C.C. (3d) 233; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577, 38 Admin. L.R. (4th) 159; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R (3d) 173; *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, (1993), 105 D.L.R. (4th) 577, 156 N.R. 81; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577, 218 N.S.R. (2d) 311.

AUTHORS CITED

Black's Law Dictionary, 8th ed. St. Paul, Minn.: West Publishing Co., 2004, "process".
Canadian Oxford Dictionary, 2nd ed. Toronto: Oxford University Press, 2004, "process".

Fassbender, Bardo. *Targeted Sanctions and Due Process*. Study commissioned by the United Nations Office of Legal Affairs, Berlin: Humboldt University Berlin, 2006.

Robert & Collins Senior : French-English, English-French Dictionary, 6th ed. Paris: Dictionnaires Le Robert, 2002, "*aboutissement*".

Security Council Report. Update Report No. 4, April 21, 2008. "1267 Committee (Al-Qaida/Taliban Sanctions)", online: <http://www.securitycouncilreport.org>.

United Nations Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities. *Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups undertakings and entities associated with them*, online: <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>.

United Nations Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities. *Guidelines of the Committee for the Conduct of its Work*, adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008.

Woolf, Lord. "Judicial Review—The Tensions Between the Executive and the Judiciary" (1998), 114 *Law Q. Rev.* 579.

APPLICATION for judicial review of the Government of Canada's conduct allegedly thwarting the applicant's return to Canada from Sudan and consequently breaching his right as a Canadian citizen to enter Canada pursuant to section 6 of the *Canadian Charter of Rights and Freedoms*. Application allowed.

APPEARANCES

Yavar Hameed, *Paul Champ*, *Audrey Boucher* and *Khalid M. Elgazzar* for applicant.
Anne M. Turley, *Elizabeth D. Richards* and *Zoe Oxaal* for respondents.

SOLICITORS OF RECORD

Hameed Farrokhzad Elgazzar Brousseau, Ottawa, for applicant.
Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment rendered in English by

[1] ZINN J.: Mr. Abdelrazik lives in the Canadian Embassy in Khartoum, Sudan, his country of citizenship by birth, fearing possible detention and torture should he leave this sanctuary, all the while wanting but being unable to return to Canada, his country of citizenship by choice. He lives by himself with strangers, while his immediate family, his young children, are in Montréal. He is as much a victim of international terrorism as the innocent persons whose lives have been taken by recent barbaric acts of terrorists.

[2] Mr. Abdelrazik says that the Government of Canada has engaged in a course of conduct designed to thwart his return to Canada and in so doing has breached his right as a citizen of Canada pursuant to section 6 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter) to enter or return to Canada. He describes the actions taken by Canada and

its failure to act as "procrastination, evasiveness, obfuscation and general bad faith".

[3] Canada challenges that characterization of its conduct. It says that the impediment to Mr. Abdelrazik's return is not of its making but is that of the United Nations Security Council 1267 Committee [established pursuant to UN Security Council Resolution 1267 (1999)] which has listed Mr. Abdelrazik as an associate of Al-Qaida, thus making him the subject of a global asset freeze, arms embargo and travel ban.

[4] There is a tension between the obligations of Canada as a member of the UN [United Nations Organization] to implement and observe its resolutions, especially those that are designed to ensure security from international terrorism and the requirement that in so doing Canada conform to the rights and freedoms it guarantees to its citizens.

[5] In addition to the tension between Canada's international and national obligations, there is also a tension in this case between the roles of the executive and the judiciary. This is a positive tension; it results from the balancing necessary in a constitutional democracy that follows the rule of law. Lord Woolf[1] described this positive tension in the following manner:

> The tension …is acceptable because it demonstrates that the courts are performing their role of ensuring that the actions of the Government of the day are being taken in accordance with the law. The tension is a necessary consequence of maintaining the balance of power between the legislature, the executive and the judiciary . . . .

[6] The rule of law provides that the Government and all who exercise power as a part of the Government are bound to exercise that power in compliance with existing laws. It is one of the "fundamental and organizing principles of the Constitution": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paragraph 32. When the Government takes actions that are not in accordance with the law, and its actions affect a citizen, then that citizen is entitled to an effective remedy. Mr. Abdelrazik seeks such an effective remedy. He seeks an order of this Court directing Canada to repatriate him to Canada "by any safe means at its disposal". The respondents submit that no such remedy is required as there has been no violation of Mr. Abdelrazik's rights by Canada and they further submit that in requesting such an order the applicant is asking this Court to improperly tread on the rights and powers of the executive.

[7] I find that Mr. Abdelrazik's Charter right to enter Canada has been breached by the respondents. I do not find that Canada has engaged in a course of conduct and inaction that amounts to "procrastination, evasiveness, obfuscation and general bad faith". I do find, however, there has been a course of conduct and individual acts that constitute a breach of Mr. Abdelrazik's rights which the respondents have failed to justify. I find that Mr. Abdelrazik is entitled to an appropriate remedy which, in the unique circumstances of his situation, requires that the Canadian government take immediate action so that Mr. Abdelrazik is returned to Canada. Furthermore, as a consequence of the facts found establishing the breach and the unique circumstances of Mr. Abdelrazik's circumstances, the remedy requires that this Court retain jurisdiction to ensure that Mr. Abdelrazik is returned to Canada.

FACTUAL BACKGROUND

[8] There is little dispute with respect to most of the relevant facts. Further particulars and findings of facts in dispute are discussed as necessary when analysing the positions of the parties. Relevant provisions of the Charter, international instruments, and other relevant documents of a legal nature are reproduced and set out in Annex A to these reasons.

[9] Mr. Abdelrazik was born in the Republic of Sudan and still holds Sudanese citizenship. Omar Hassan Ahmad al-Bashir came to power in Sudan in 1989 when, as a colonel in the Sudanese army, he led a group of officers in a military coup. In 1989, Mr. Abdelrazik was jailed in Sudan as an opponent of the new government of President Omar al-Bashir. He came to Canada in 1990 claiming protection as a Convention refugee. The 1951 *United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] provides that a refugee is a person who [Article 1A(2)], "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Canada has implemented this Convention by way of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[10] In 1992 Canada accepted Mr. Abdelrazik's Convention refugee claim. Many refugees never apply for citizenship; they are content to reside in the country of refuge without taking on the responsibilities and the rights that come with citizenship. Mr. Abdelrazik was not of that thinking. He took the necessary steps and obtained his Canadian citizenship in 1995. He has had two Canadian wives, and is the father of three Canadian-born children. Although he is also a national and citizen of Sudan he says that he considers Canada to be his home.

[11] From 1990 to 2003, Mr. Abdelrazik lived in Montréal. There he was an acquaintance of Ahmed Ressam, who has since been convicted in the United States for plotting to blow up the Los Angeles Airport. Mr. Abdelrazik testified for the prosecution in Mr. Ressam's trial. He notes that he did so voluntarily and that his testimony was not under compulsion. He also knew Adil Charkaoui, a Morocco-born permanent resident of Canada who was arrested in May 2003 by the Canadian government under a security certificate issued pursuant to section 77 [as am. by S.C. 2002, c. 8, s. 194] of the *Immigration and Refugee Protection Act* on the grounds that Mr. Charkaoui is a danger to national security. It is said that one is known by the company one keeps; however, Mr. Abdelrazik has never been charged with any criminal offence, terrorism-related or otherwise, in Canada or elsewhere in the world. There is no evidence in the record before this Court on which one could reasonably conclude that Mr. Abdelrazik has any connection to terrorism or terrorists, other than his association with these two individuals.

[12] In March 2003, Mr. Abdelrazik traveled to Sudan in order to visit his ailing mother and, he says, to escape harassment by the Canadian Security Intelligence Service (CSIS) in the wake of the terrorist attacks against the United States of America on September 11, 2001. The memorandum of argument filed by the respondents implies that Mr. Abdelrazik, having voluntarily returned to his country of birth, despite the fact that President Omar al-Bashir remains in power, may be said to be the author of his own misfortune. There is truth in the suggestion that whatever his motivation for returning to Sudan, it was ill-advised; if there was any doubt, subsequent events have proved it. The wisdom or foolishness of his choosing to return to his country of birth is irrelevant to the application

before this Court. Charter rights are not dependent on the wisdom of the choices Canadians make, nor their moral character or political beliefs. Foolish persons have no lesser rights under the Charter than those who have made wise choices or are considered to be morally and politically upstanding.

[13] On or about September 12, 2003, Mr. Abdelrazik was arrested by the Sudanese authorities. The applicant characterized this detention as an "unlawful arrest and detention" throughout the hearing. That characterization is unquestionably correct from a Canadian law perspective, however, there is no evidence before the Court that the arrest was not in conformity with the law of Sudan. There is some evidence in the record that Sudanese officials recognized that their continued detention of Mr. Abdelrazik, without charge, violated his human rights. It may have been for this reason that they eventually sought to have him leave Sudan. In any event, whether the detention was or was not lawful in Sudan is irrelevant, in my view, to the issues before the Court. The only aspect of his detention that might be relevant is whether, as the applicant alleges, Canadian authorities requested his detention.

[14] Mr. Abdelrazik travelled to Sudan with a valid Canadian passport and could have returned to Canada prior to his detention. His passport expired while he was in detention and has not been renewed. That fact and other circumstances have prevented his return home to Canada.

[15] Mr. Abdelrazik's first period of detention lasted some 11 months. He was initially held in the state security prison in Khartoum, and subsequently detained in Kober prison, and then at the facilities of the Sudanese Office for Crimes Against the Republic. He alleges that his detention and arrest by Sudan was specifically requested by CSIS. The respondents deny this claim. It is not disputed that Mr. Abdelrazik was interrogated by CSIS agents while in detention in Sudan.

[16] During Mr. Abdelrazik's first period of detention, the Canadian Embassy in Khartoum provided consular assistance in the form of multiple consular visits and diplomatic representations requesting the Sudanese to provide him with due process. Mr. Abdelrazik claims that he was tortured during his time in detention. In his affidavit of June 25, 2008, he reports that he was beaten with a rubber hose, made to stand at attention hours at a time, subjected to confinement in a freezing cold cell, and also had his asthma medicine and eye-glasses taken away. At Kober prison, he went on three hunger strikes, and says that he was punished by beatings and solitary confinement. Canada denies any knowledge of Mr. Abdelrazik being tortured at the time he was in detention.

[17] In July of 2004, Mr. Abdelrazik was moved by the Sudanese to what he describes as a "half-way house" in Khartoum, where he enjoyed partial freedom of movement. He was required to report weekly to the Sudanese authorities and it would appear that formally he was still considered to be "in detention". He visited the Canadian Embassy several times, urgently requesting assistance to return home to Canada. He also attempted to meet several prominent Canadian envoys to Sudan.

[18] It seemed as if Mr. Abdelrazik would be able to return to Canada. Foreign Affairs made real efforts in July of 2004 to fly Mr. Abdelrazik home via Frankfurt, with a diplomatic escort, on Lufthansa Airlines. Tickets were purchased by Canada for Mr. Abdelrazik using his then-wife's funds. Days before the scheduled departure, however, Lufthansa informed the respondents it would not board Mr. Abdelrazik because his name was on a "no-fly" list.

[19] A Sudanese-rooted idea that Mr. Abdelrazik be returned to Canada aboard the jet of a visiting Canadian minister was rejected by Canada in August 2004. Another possibility of repatriation emerged when, on October 20, 2004, Mr. Abdelrazik informed the Canadian consul in Khartoum that the Sudanese government might be willing to provide an aircraft to fly him back to Canada. The Canadian Embassy advised the Sudanese in writing that Canada had no objection in principle to Sudan transporting Mr. Abdelrazik back to Canada so long as normal flight plan approval information was supplied, but cautioned that "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". In this application, Mr. Abdelrazik alleges that the refusal to provide an escort was fatal to the offer, on the basis that from Sudan's perspective, provision of an escort was an "unconditional" requirement. The respondents deny that there was any such condition attached to the offer and contend that Sudan simply abandoned the plan.

[20] Mr. Abdelrazik was provided with a written decision from the Sudanese Ministry of Justice dated July 26, 2005, exonerating him of any affiliation with Al-Qaida. Notwithstanding this decision, in October of 2005, the applicant was summoned to a meeting by the Sudanese authorities. Mr. Abdelrazik was afraid that he might again be detained, and consulted with Canadian consular officials as to whether he should respond to the Sudanese summons. He was told that he should, and was assured that Canada would "follow up" if anything should happen.

[21] Mr. Abdelrazik attended as summoned and was indeed detained for some nine months, until July 2006.He was held at Dabak prison, where he says that detainees were "seemingly beaten at random". During this second period of detention, Canadian consular officials sought but were denied access to Mr. Abdelrazik, who alleges that he was once again subjected to torture. Three to five days a month, he says, he was beaten with a rubber hose. On two occasions, he says, he was chained to the frame of a door and beaten.

[22] On July 20, 2006, the day of his release from detention, Mr. Abdelrazik was designated by the United States Treasury Department for his "high level ties to and support for the Al-Qaida network". The next day, he was listed by the United States Department of State as "a person posing a significant risk of committing acts of terrorism that threaten the security of U.S. nationals and the national security". The press release issued in conjunction with Treasury Department listing stated that "[a]ccording to information available to the United States Government, Abd Al-Razziq, has provided administrative and logistical support to Al-Qaida. He has been identified as being close to Abu Zubayada, a former high ranking member of the Al-Qaida network, involved in recruiting and training".[2] The Court is not aware of any public disclosure by the U.S. government as to what information was available to it on which it concluded that Mr. Abdelrazik provided support to Al-Qaida.

[23] On July 31, 2006, Mr. Abdelrazik was listed by the UN 1267 Committee as an associate of Al-Qaida. The role and function of the 1267 Committee is discussed in more detail below. At this point it is sufficient to state that this Committee implements UN Security Council Resolutions aimed at controlling international terrorism that the respondents assert have impacted Mr. Abdelrazik's return to Canada. Listing by the 1267 Committee is based on information received from governments and international or regional organizations. According to the Committee's Guidelines [*Guidelines of the Committee for the Conduct of its Work*, adopted on November 7, 2002, as

amended 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007 and 9 December 2008], a criminal charge or conviction is not a pre-requisite to listing.

[24] It is not known which government asked that Mr. Abdelrazik be listed. There has been speculation that his listing was at the request of the United States of America. That suggestion is reasonable in light of the evidence before this Court. First, there is uncontradicted evidence that Canada did not make the request for listing and did not participate in the listing decision as it was not a member of the UN Security Council. Second, there is the evidence that the Sudanese authorities had previously issued a letter exonerating Mr. Abdelrazik of any association with Al-Qaida. Third, there is the evidence that one week prior to the listing the United States issued statements asserting that Mr. Abdelrazik was associated with Al-Qaida. It is the only country that has done so. Fourth, there is no evidence that the United States has ever resiled from that position.

[25] There is no direct evidence before this Court that Mr. Abdelrazik supports, financially or otherwise, is a member of, or follows the principles of Al-Qaida. There is no evidence before this Court as to the basis on which the United States authorities concluded that Mr. Abdelrazik has provided support to Al-Qaida and poses a threat to the security of the United States of America. There is no evidence before this Court nor, as shall be discussed later, that is currently available to Mr. Abdelrazik as to the basis on which the 1267 Committee listed him as an associate of Al-Qaida. The only direct evidence before this Court is in an affidavit filed by Mr. Abdelrazik in which he swears that he has no connection to Al-Qaida:

> I am not associated with Al-Qaida and have never committed terrorist acts. I also do not support persons who commit acts of terrorism. As a Muslim, terrorism is against my religious beliefs. As a Canadian, terrorism endangers my family in Canada. For these reasons I am not a terrorist.

[26] Listing by the 1267 Committee triggers severe sanctions. It subjects listed persons to a global asset freeze, a global travel ban, and an arms embargo. The listing by the 1267 Committee also triggered the application of domestic legislation, namely the *United Nations Al-Qaida and Taliban Regulations,* SOR/99-444 [as am. by SOR/2006-164, s. 1]. Among other prohibitions, this Regulation prohibits anyone in Canada and any Canadian outside of Canada from providing funds to be used by persons listed by the 1267 Committee as associates of Al-Qaida.

[27] In October 2007, counsel for Mr. Abdelrazik filed a petition requesting that the Minister of Foreign Affairs transmit his de-listing request to the 1267 Committee. In turn, Foreign Affairs made inquiries concerning Mr. Abdelrazik with both CSIS and the RCMP. These agencies responded as follows:

> Mr. Abdelrazik voluntarily departed Canada for Sudan in March 2003. The Service has no current substantial information regarding Mr. Abdelrazik. [CSIS letter dated November 6, 2007.]

> Please be advised that the RCMP 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. [RCMP letter dated November 15, 2007.]

[28] Following these responses from CSIS and the RCMP, the Minister of Foreign Affairs transmitted Mr. Abdelrazik's de-listing request to the 1267 Committee. The briefing note prepared for the Minister in relation to the de-listing request states that "the Consular Branch fully supports

[Mr. Abdelrazik's] eventual return to Canada" and notes under the heading "Background" that "Mr. Abdelrazik retains the right to return to his own country of nationality. International law expressly provides for a right of return, and prevents a state from denying return to own's state of nationality" [*sic*]".

[29] The request to be de-listed was denied by the 1267 Committee on December 21, 2007. No reasons were provided.

[30] On April 29, 2008—just over a year ago—Mr. Abdelrazik, fearing that he might be again detained by the Sudanese authorities, sought and was granted safe haven at the Canadian Embassy in Khartoum. In the preceding months, he had received occasional visits from Sudanese intelligence personnel. He had also been interrogated by American intelligence agents. On September 12, 2007 he was intercepted on the way to a meeting with a photographer from the *Globe & Mail* newspaper and was warned not to speak to journalists. He remains at the Embassy to this day. Canada must share his view that he is at risk of further detention and torture in Sudan, without cause, if he leaves the Embassy, otherwise this extraordinary consular effort would not have been necessary and, based on the respondents' submissions as to the level of consular assistance that Canadian citizens are entitled to receive, would not have been offered. Mr. Abdelrazik's basic necessities are provided at the expense of the Canadian government, which has obtained clearance from the 1267 Committee to provide in-kind assistance up to a value of $400 a month, as well as a monthly loan of $100. He is other-wise destitute.

[31] Counsel for the applicant met with officials from Foreign Affairs on February 27, 2008, to discuss his client's situation. In a letter dated April 18, 2008, the Director of Consular Case Management for Foreign Affairs wrote as follows:

> With respect to Mr. Abdelrazik's passport application, I would like to 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 that commitment. [Emphasis added.]

Passport Canada falls under the jurisdiction of the Minister of Foreign Affairs.

[32] This representation was not new. Canadian officials had repeatedly stated within the foreign service, to the Canadian public and to Mr. Abdelrazik that Canada was committed to providing an emergency passport or travel document when Mr. Abdelrazik was in a position to return to Canada. Many of these representations have been gathered from the record and are set out in Annex B to these reasons.

[33] On March 9, 2008, Mr. Abdelrazik applied for a Canadian passport. He had not received any response to an earlier passport application filed in December 2005. There is some evidence in the record that Passport Canada made a determination as early as August 2005 that Mr. Abdelrazik would not be issued a regular passport. In case note 175 dated August 8, 2005, Ralph Micucci, Passport Canada Security Operations Division, writes: "File reviewed and the only passport services which will be considered in respect of this subject is an Emergency Passport for return to Canada". This appears to have been in response to a message in case note 173, dated August 8, 2005, in which the person covering for Ms. Gaudet-Fee writes:

In anticipation that subject contacts the mission to obtain a passport, we would be grateful for instructions. As you know, subject is on PCL. Please let us know as soon as possible what type of travel document can be issued by KHRTM.

PCL stands for Passport Control List. The "Passport Security—Control Requirements", a document in the record, states:

The name of every person applying for passport facilities (or for financial assistance) should be checked against the Passport Control List (PCL) before any action is taken. The application form should be annotated according to the section reserved for official use. If the applicant's name appears on the list, his/her application should be referred to JWD [Passport office] for decision.

[34] The note from Mr. Micucci prompted a response in case note 176 from the person sitting in for Ms. Odette Gaudet-Fee that "we need a substantive response (the basis of your decision) in order to justify the limitation of issuing only an emergency passport. We need the rationale behind it". This request prompted Passport Canada to move the matter to the A/Manager, Entitlement Review who responded, ignoring the earlier decision reported by Mr. Micucci, by suggesting that no decision had yet been made as no passport application had been received. When the subsequent application was received the record indicates that no official response was provided to the applicant. Perhaps it was thought unnecessary because on October 22, 2005 he had been again detained by Sudanese officials. No official response advising Mr. Abdelrazik that he was not entitled to regular passport services would be provided for another three years. In response to his passport application of March 9, 2008, Passport Canada advised him on April 2, 2008 that it would authorize the issuance of an emergency passport to facilitate his repatriation.

[35] On August 25, 2008, Mr. Abdelrazik succeeded in obtaining a reservation on Etihad Airlines to return to Canada, via Abu Dhabi, subject to payment of the airfare. Despite the representations noted previously, Canada failed to issue a travel document.

[36] By letter dated December 23, 2008, counsel for Mr. Abdelrazik was informed by Passport Canada that its Investigation Section had initiated an investigation of Mr. Abdelrazik's "entitlement to passport services" pursuant to section 10.1 [as enacted by SI/2004-113, s. 5] of the *Canadian Passport Order* [SI/81-86], which provides that "the Minister may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country." Pending the outcome of the investigation, counsel was informed that no regular passport services would be provided to Mr. Abdelrazik. The letter of December 23, 2008 reaffirms, however, that "Passport Canada will issue an emergency passport to Mr. Abdelrazik, upon his submission of a confirmed and paid travel itinerary to the Consular Section of the Canadian Embassy, Khartoum" (emphasis added).

[37] In an appendix to its letter of December 23, 2008, Passport Canada included a copy of its guidelines entitled "Process by the Investigations Section of the Security Bureau Regarding Investigations Pertaining to Section 10.1 of the *Canadian Passport Order*". Its process provides for notification of investigations and disclosure of investigations reports, as well as a right to make representations in response. The departmental "Backgrounder" on refusal or revocation of passports on national security grounds states that the investigative procedure "has been specifically designed to ensure procedural fairness and compliance with the rules of natural justice". It would be reasonable

to conclude that a passport refusal that ignored the process set out in these guidelines would *prima facie* not be in compliance with procedural fairness and the rules of natural justice. The relevance of this becomes evident when considering the decision of the Minister on April 3, 2009 to refuse an emergency passport to Mr. Abdelrazik without observing any of the guidelines established by his own department.

[38] On March 15, 2009, Mr. Abdelrazik provided the Manager of Consular Affairs at the Canadian Embassy in Khartoum with a confirmed and fully paid travel itinerary from Khartoum to Toronto, aboard Etihad Airlines, with a scheduled departure of April 3, 2009.

[39] The following day, counsel for Mr. Abdelrazik wrote to counsel for the respondents to advise of this new development. He asked the respondents to "take all necessary steps to ensure that Mr. Abdelrazik can return to Canada safely on April 3, 2009" (emphasis added). The letter cited the representations of Foreign Affairs that an emergency travel document would be issued upon submission of a paid and confirmed travel itinerary for Mr. Abdelrazik.

[40] On April 3, 2009, Mr. Abdelrazik learned from his counsel that the Minister of Foreign Affairs had denied his request for an emergency passport, by way of letter delivered approximately two hours before his scheduled departure. The single sentence letter signed by counsel to the Department of Justice, DFAIT [Department of Foreign Affairs and International Trade] Legal Services Unit, reads as follows: "Pursuant to Section 10.1 of the *Canadian Passport Order* the Minister of Foreign Affairs has decided to refuse your client's request for an emergency passport".

[41] Mr. Abdelrazik, in his affidavit sworn April 14, 2009, concludes with the following statement:

> Because the Minister did not issue me a travel document, I was unable to board my April 3, 2009 flight and was unable to return to Canada on my own. I remain in the Canadian Embassy in Sudan.

LEGAL BACKGROUND

The *Canadian Charter of Rights and Freedoms*

[42] The only Charter right raised by Mr. Abdelrazik in this application is his right, as a citizen of Canada to enter Canada, as provided for in subsection 6(1) of the Charter. This is a right guaranteed only to citizens of Canada; it does not extend to those who are merely resident in Canada or who have some other connection to Canada. This right is not without one limitation. It is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" as set out in section 1 of the Charter.

[43] The Supreme Court of Canada in *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469 considered subsection 6(1) rights in the context of an extradition of a Canadian citizen to the United States of America to face criminal charges. The Court recognized the significance of the citizen and state relationship and further observed that interference with the right to remain in one's country is not to be lightly interfered with. Justice La Forest, at page 1480 of the judgment, describes it as follows:

In approaching the matter, I begin by observing that a Constitution must be approached from a broad perspective. In particular, this Court has on several occasions underlined that the rights under the *Charter* must be interpreted generously so as to fulfill its purpose of securing for the individual the full benefit of the *Charter*'s protection (see the remarks of Dickson C.J. in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). The intimate relation between a citizen and his country invites this approach in this context. The right to remain in one's country is of such a character that if it is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose.

The same is to be said of the right, as a citizen of Canada, to enter Canada. That right is not to be lightly interfered with; if a citizen is refused the right to enter Canada then that refusal must be justified as being required to meet a reasonable state purpose.

[44] The position of the respondents is that it is not as a consequence of any of Canada's actions that Mr. Abdelrazik has been prevented from entering Canada; rather it is as a consequence of his listing by the 1267 Committee as an associate of Al-Qaida. If true, then there is nothing Canada is required to justify because it is not Canada that is preventing this citizen's entry into Canada.

Canada's International Obligations

[45] Article 24 of the *Charter of the United Nations* [June 26, 1945, [1945] Can. T.S. No. 7] (the UN Charter) confers "primary responsibility for the maintenance of international peace and security" on the Security Council. Pursuant to Article 41 of the UN Charter, the Security Council may decide on measures to be employed to give effect to its decisions and call upon member nations to apply them.

[46] Article 25 of the UN Charter provides that "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Canada is a member of the UN and in furtherance of its obligations has enacted the *United Nations Act*, R.S.C., 1985, c. U-2 which provides [at section 2] that the Governor in Council may make such orders and regulations as are "necessary or expedient" to effect decisions of the UN Security Council.

[47] In 1999, in response to the August 7, 1998 bombing of United States of America embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, by Usama bin Laden and his associates, the UN Security Council passed Resolution 1267. Resolution 1267 was directed at the Taliban who were permitting their territory to be used by bin Laden and his associates. Paragraph 4 of Resolution 1267 set out the measures the Security Council imposed on member nations. These were originally limited to a ban on Taliban aircraft landing or taking off from member states' territory, save for humanitarian purposes or for the performance of religious obligations such as the performance of the Hajj, and to a freeze on funds and financial resources of the Taliban. A Committee of all members of the Security Council (the 1267 Committee) was established to implement Resolution 1267 and report back to the Council.

[48] The sanctions set out in Resolution 1267 have been modified and strengthened by subsequent

resolutions, including Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) so that the sanctions now apply to designated individuals and entities associated with Al-Qaida, Usama bin Laden and the Taliban where-ever located. Specifically, by Resolution 1390 adopted January 16, 2002, these measures were expanded to address the Al-Qaida network and other associated terrorist groups as a response to the attacks on the United States of America on September 11, 2001. Notwithstanding these further Resolutions, the oversight group continues to be known as the 1267 Committee. The most recent Resolution, and that which presently applies to Mr. Abdelrazik as a consequence of being listed, is Resolution 1822, adopted June 30, 2008.

[49] As noted, Mr. Abdelrazik was listed by the 1267 Committee as being associated with Al-Qaida. Paragraph 2 of Resolution 1822 defines "associated with" as including, but not being restricted to the following:

(a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

(b) supplying, selling or transferring arms and related materiel to;

(c) recruiting for; or

(d) otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

[50] A Study commissioned by the United Nations Office of Legal Affairs [Bardo Fassbender, *Targeted Sanctions and Due Process*, Berlin: Humboldt University Berlin, 2006, at pages 4–5] summarizes the lack of legal procedures available to persons listed by the 1267 Committee:[3]

Targeted individuals and entities are not informed prior to their being listed, and accordingly do not have an opportunity to prevent their inclusion in a list by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolution(s). There exist different de-listing procedures under the various sanctions regimes, but in no case are individuals or entities allowed directly to petition the respective Security Council committee for de-listing. Individuals or entities are not granted a hearing by the Council or a committee. The de-listing procedures presently being in force place great emphasis on the States particularly involved ("the original designating government" which proposed the listing, and "the petitioned government" to which a petition for de-listing was submitted by an individual or entity) resolving the matter by negotiation. Whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion; no legal rules exist that would oblige the committee or the Council to grant a request if specific conditions are met.

At the same time, no effective opportunity is provided for a listed individual or entity to challenge a listing before a national court or tribunal, as UN Member States are obliged, in accordance with Article 103 of the UN Charter, to comply with resolutions made by the Security Council under Chapter VII of the UN Charter. If, exceptionally, a domestic legal order allows an individual directly to take legal action against a Security Council resolution, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations (General Assembly Resolution 1/22A of 13 February 1946) and other agreements.

It has been argued by leading scholars of international law that the present situation amounts to a "denial of

legal remedies" for the individuals and entities concerned, and is untenable under principles of international human rights law: "Everyone must be free to show that he or she has been justifiably placed under suspicion and that therefore [for instance] the freezing of his or her assets has no valid foundation." [Footnotes omitted.]

[51] I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness. Unlike the first Canadian security certificate scheme that was rejected by the Supreme Court in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.

[52] The 1267 Committee process has been amended since its inception to include a requirement that a narrative summary of the reasons for listing be included on the Web site of the Consolidated List [*Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them*]. Notwithstanding that Resolution 1822 provides that such information is also to be provided for those, such as Mr. Abdelrazik, who were previously listed, there is not yet any such narrative provided as regards the rationale for the listing of Mr. Abdelrazik.

[53] Originally de-listing requests could only be made by the individual's home State. Again, there has been an amendment to allow a listed individual to make an application personally to the 1267 Committee or to do so through his home State. The *Guidelines of the Committee for the Conduct of its Work* provide that a petitioner seeking de-listing [at paragraph 7(d)] "should provide justification for the de-listing request by describing the basis for this request, including by explaining why he/she no longer meets the criteria described in paragraph 2 of resolution 1617 (2005)" (emphasis added). Those criteria are the four criteria set out above in paragraph 49. For a person such as Mr. Abdelrazik who asserts that he never met the criteria and was wrongly listed in the first instance, it is difficult to see how he can provide the requested justification, particularly when he has no information as to the basis for the initial listing. Subparagraph 7(g)(iii) of the Guidelines further provide that if the request for de-listing is a repeat request and if it does not contain any information additional to that provided in the first request, it is to be returned to the petitioner without consideration. It is difficult to see what information any petitioner could provide to prove a negative, i.e. to prove that he or she is not associated with Al-Qaida. One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate. It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt. In light of these shortcomings, it is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is, as I observed at the hearing, 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.

[54] The UN Security Council itself has recognized the extreme difficulty persons listed have to obtain de-listing. In the Security Council Report *Update Report, No. 4, April 21, 2008.* "1267 Committee (Al-Qaida/Taliban Sanctions)" respecting the 1267 Committee it is stated [at page 3]:

> It is far easier for a nation to place an individual or entity on the list than to take them off. For example, the US last year wanted to remove Abdul Hakim Monib, a former Taliban minister who switched sides and until recently served as the governor of Afghanistan's Uruzgan province, working with US and NATO troops. But Russia blocked it. In other cases, the US has prevented removal of names and entities it has submitted for suspected involvement with Al-Qaida. [Emphasis added.]

I pause to comment that it is frightening to learn that a citizen of this or any other country might find himself on the 1267 Committee list, based only on suspicion.

[55] There are three general consequences set out in paragraph 1 of Resolution 1822 that flow from being listed by the 1267 Committee: an asset freeze, a travel ban and an arms embargo. Only the first two are relevant for our purposes.

[56] The asset freeze set out in paragraph 1(a) requires member nations to freeze the assets of listed persons and requires that member nations ensure that neither the funds of the listed persons "nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit". The respondents submit that this measure prevents Canada, or anyone within Canada, from paying for transportation to Canada or providing such transportation for Mr. Abdelrazik. It was as a consequence of this measure that Canada sought an exemption from this restriction in order to provide Mr. Abdelrazik with the monthly loan it currently provides as well as the facilities it provides him in the Canadian Embassy in Khartoum.

[57] The travel ban set out in paragraph 1(b) requires member states to prevent the entry into or transit through their territories of listed individuals. There are three exceptions to the ban which the applicant submits would permit him to enter Canada. This submission will be considered in the "Analysis" section [of these reasons]. The relevant provision reads as follows:

> 1. . . .
>
> (b) Prevent the entry into or transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case-by-case basis only that entry or transit is justified;

[58] The first two exceptions relating to the entry of a national to his own country and transit necessary for the fulfilment of a judicial process are dealt with below. The respondents submit that neither exception would permit Mr. Abdelrazik to return to Canada.

[59] The third exception which provides that the 1267 Committee, on an *ad hoc* basis, may permit entry or transit where it is "justified" is not relevant to this application, except to note the following. The 1267 Committee Guidelines set out the process for an application for this exemption. The request must be submitted by a State; the individual has no right to submit a request directly to the 1267 Committee. It must be made not less than five working days before the proposed travel. It is

stated [at paragraph 11(c)] that the application "should" include the following information:

11. . . .

i. the permanent reference number, full name, nationality, passport number or travel document number of the listed individual;

ii. the purpose of and justification for the proposed travel, with copies of supporting documents, including specific details of meetings or appointments;

iii. the proposed dates and times of departure and return;

iv. the complete itinerary and timetable, including for all transit stops;

v. details of the mode of transport to be used, including where applicable, record locator, flight numbers and names of vessels;

vi. all proposed uses of funds or other financial assets or economic resources in connection with the travel. Such funds may only be provided in accordance with paragraph 1 of resolution 1452 (2002), as modified by paragraph 15 of resolution 1735 (2006). The procedures for making a request under resolution 1452 (2002) can be found in Section 10 of the guidelines. [Emphasis added.]

[60] If the application for an exemption "should" include this passport information, it is reasonable to conclude that the person doing the travelling must first have a passport that will facilitate his travel. There is no evidence before the Court that the respondents have made any request for permission to exclude Mr. Abdelrazik from the travel ban imposed on him to permit him to return to Canada, or would do so if not ordered by this Court.

ISSUE

[61] The issue in this application is whether Mr. Abdelrazik's constitutional right to enter Canada as guaranteed by subsection 6(1) of the Charter has been violated by the respondents. If his Charter right to enter Canada has been violated, the Court must then consider whether that breach is saved by section 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. If the application is allowed, the Court must fashion an appropriate and just remedy in all of the circumstances, as is required under subsection 24(1) of the Charter.

ANALYSIS

Whether Canada Violated Mr. Abdelrazik's Right to Enter Canada

[62] The applicant submits that his Charter right to enter Canada has been breached by the respondents through a pattern of conduct that begins with his initial detention in Sudan to the present day. He references 11 examples of acts and failures to act by Canada which he submits establish a pattern that constitutes this breach. He submits that if he can establish any one or more of these, then he has established a breach of his subsection 6(1) right to enter Canada. The 11 incidents he relies on are as follows:

1. His initial detention by the Sudanese authorities on September 10, 2003 and his torture by them;

2. The effort to repatriate him to Canada on a Lufthansa flight scheduled for July 23, 2004;

3. The prospect of a private charter flight to Canada raised on July 30, 2004;

4. The Sudanese offer to fly him to Canada on its aircraft on October 20, 2004;

5. The visit to Sudan by the Canadian Minister responsible for the Canadian International Development Agency in August 2004;

6. The visit to Sudan by Prime Minister Martin on November 24, 2004;

7. The possibility of a Canadian Forces bridge flight from Khartoum to Canadian Forces Camp Mirage in the Middle East and then to Canada on a Canadian Forces flight;

8. The possibility of other flights to Canada;

9. The UN 1267 travel ban;

10. The September 15, 2008 flight; and

11. The recent repatriation attempt and the flight scheduled for April 3, 2009.

[63] The respondents submit that the evidence before the Court is not sufficient to establish, on the balance of probabilities, that any of these 11 circumstances violated Mr. Abdelrazik's right to enter Canada. The burden of proof to establish a breach of his subsection 6(1) mobility rights rests with the applicant. If the applicant has established that his mobility rights have been breached, the respondents will then have the burden to prove on the balance of probabilities that their actions are saved under section 1 of the Charter.

[64] The applicant in his amended notice of application and in his memorandum of argument characterizes the respondents as acting in bad faith. The following passage from his memorandum is illustrative of this characterization.

> …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.

[65] It is not a requirement to finding a breach of a Charter right that the breach has been done in bad faith or with any ulterior motive. An action or series of actions or inaction may constitute a breach of a Charter right even when done in good faith and without malice. However, in my view, evidence that a breach occurred as a result of bad faith or an improper motive may be relevant when considering the appropriate remedy for a breach of a Charter right. It may be that where the breach of a citizen's rights has been done in bad faith, the Court may have to take that into account when

fashioning an appropriate remedy that appropriately addresses the breach and the harm to the person whose rights have been breached.

Initial detention and alleged torture

[66] Mr. Abdelrazik was detained by the Sudanese authorities on September 10, 2003. He claims that his detention was "requested" by CSIS. He submits that this is proved from passages in two documents in the record. Each document was provided by Foreign Affairs to the applicant in response to a request under the *Privacy Act*, R.S.C., 1985, c. P-21 and each contains redacted portions.

[67] The first document relied on by the applicant is a draft document entitled "Issue: Consular Case relating to Mr. Abousfian Abdelrazik". It is undated and no author is indicated. The applicant submits that it was written prior to June 23, 2005, which is the date of a memo from Dave Dyet, Director, Case Management, Consular Affairs Bureau, Khartoum which appears to rely on this draft. The draft provides as follows:

> Mr. A travelled to Sudan in March 2003 in order to visit his family. He was travelling on his Canadian passport. In August 2003, he was arrested and detained by Sudanese authorities [redacted] Sudanese authorities readily admit that they have no charges pending against him but are holding him at our request. [Redacted.]

[68] The second document relied on by the applicant is an e-mail dated December 16, 2005 from the Canadian Embassy in Khartoum. It was approved by Mr. Bones, Head of Mission in Khartoum to Foreign Affairs in Ottawa. It provides as follows:

> Abusfian Abdelrazik was arrested September 10, 2003 [redacted] and recommended by CSIS, for suspected involvement with terrorist elements.

[69] In response, the respondents rely on an affidavit from Sean Robertson, Director of Consular Case Management, Foreign Affairs, sworn September 9, 2008, in which he swears that "the respondent did not request that the applicant be detained by Sudanese authorities". As he acknowledged in his cross-examination on this affidavit, there was only one respondent at the time the affidavit was sworn, namely the Minister of Foreign Affairs. He further acknowledged that he does not know if other government departments or agencies had requested Mr. Abdelrazik's arrest or detention.

[70] The respondents also rely on a letter from Jim Judd, Director, CSIS to the Chairman, Security Intelligence Review Committee, dated March 5, 2009. This letter, reproduced from the CSIS Web site, was filed as an exhibit to an affidavit sworn by a legal assistant to counsel for the respondents. The relevant portion of the letter provides as follows:

> As I am certain you are aware, media have been reporting extensively on the efforts of Canadian citizen Abousofian Abdelrazik to return to Canada following his release from detention in Sudan. In fact, recent media reporting has gone so far as to allege that Abousofian Abdelrazik was arrested by Sudanese authorities at the request of CSIS, citing documents obtained under an access to information request.
>
> The Service has stated for the public record that it does not, and has not, arranged for the arrest of Canadian citizens overseas and that, in this matter, CSIS employees have conducted themselves in accordance with the CSIS Act, Canadian law, and policy. In the interest of clarifying this matter for Canadians, I request that the

Security Intelligence Review Committee — at the earliest opportunity — investigate and report on the performance of the Service's duties and functions with respect to the case of Abousofian Abdelrazik.

[71] The applicant asks that the Court draw an adverse inference from the fact that the respondents failed to file an affidavit from Mr. Judd. He relies on subsection 81(2) of the *Federal Courts Rules* [SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)] which provides that "where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts."

[72] The respondents informed the Court that the letter attached to the affidavit of the legal assistant was not being submitted for the truth of its content; rather it was submitted to show that another adjudicative body has been tasked with reviewing the actions of CSIS in this matter and accordingly, they submitted that this Court should be reluctant to make any finding as to the role of CSIS in the detention of Mr. Abdelrazik. I am of the view that the request by CSIS that the Security Intelligence Review Committee examine its role is not an impediment to this Court conducting its own examination and reaching its own conclusions based on the material before the Court. In the circumstances of this case, where that conduct is placed squarely in issue by the applicant, the Court would be abdicating its responsibility if it were to fail to conduct its own examination. It is regrettable that the respondents chose to submit no affidavit from CSIS which would have assisted in ensuring that the Court had a full record. We are left to determine the role of Canadian security officials on the basis of the material that has been filed.

[73] The respondents submitted that there is evidence in the record that contradicts the applicant's evidence. Specifically they rely on passages from five documents in the record.

[74] The first is a letter written by Mr. Dyet Director, Case Management, Consular Affairs Bureau, Foreign Affairs to Sudanese officials dated May 18, 2004, in which he writes that "it is also our understanding that Canadian officials have not requested his detention by Sudanese authorities".

[75] The second is an e-mail from Mr. Hutchings of the Canadian Embassy to Foreign Affairs officials at headquarters on June 1, 2004. He writes:

> Mr. Abdelrazik called this morning to say that the [Sudanese] authorities had now come to him with a new story. They tell him he is detained, and has been detained because the USA asked Canada to ask Sudan to keep him in custody. Or a variant — that Canada prefers to keep him in Sudan rather than to turn him over to the USA. I told him that I had never heard any such story from any source but that I would report it.

[76] The third is an e-mail of the same date from Odette Gaudet-Fee of Foreign Affairs headquarters responding to Mr. Hutchings. She writes:

> What next? Even if the USA has asked Canada to ask Sudan to keep him, if Sudan has no reasons to detain him, why are they taking the responsibilities that should be taken by other countries. Assuming the USA has issues with him, they should let the USA deal with him. [redacted] I feel we should continue to pressure the Sudanese to come up with proof that the USA and/or Canada have requested his detention or they should charge him under the Sudanese laws, or they should let him go.

[77] The fourth is a case note 35 dated June 5, 2004 from Ms. Gaudet-Fee in which she writes:

I would also like that we send another note to the [Sudanese Ministry of Foreign Affairs] asking them to explain what is going on. We have told them before that Canada had not asked the Sudan [*sic*] to detain Mr. Abdelrazik and if they have proof to the contrary, they should give us details and we will assist in finding the reason for the detention.

[78] The fifth is a case note 43 dated June 24, 2004 from Ms. Gaudet-Fee in which she writes:

We asked if [the Chargé at the Sudanese Embassy] knew who had asked for Mr. Abdelrazik's detention. He did not know the specific. [*sic*]

[79] The statements relied on by the respondents to support the submission that Canadian authorities did not request Sudan to detain Mr. Abdelrazik are far from sufficient to make that finding. All they establish is that at the time the documents were written, officials of Foreign Affairs at the Embassy in Khartoum and at headquarters in Ottawa did not know of any request from Canada that he be detained. One may infer from the statement that "if they have proof to the contrary, they should give us details and we will assist in finding the reason for the detention" that Ms. Gaudet-Fee considered it to be at least possible that some Canadian agency or authority may have been behind Mr. Abdelrazik's detention. It certainly shows that she is speaking only from her own knowledge, not with the knowledge of all of the Canadian officials who may have been behind such a request.

[80] That Ms. Gaudet-Fee and others at Foreign Affairs were speaking only for themselves and their department is evident from at least three documents in the record.

[81] There is an e-mail exchange relating to Mr. Abdelrazik's request for an official letter from the Government of Canada certifying that it was not at Canada's behest that his name appears on an airline no-fly list. Mr. Hutchings of the Embassy states that he could provide such a letter and proposes this wording: "You have asked me to indicate what involvement the Govt of C. has had with respect to your name on airline watchlists. I can assure you that the Govt of C. has had no involvement whatsoever in any decision to place your name on such lists." Ms. Gaudet-Fee from headquarters responds in an e-mail dated April 13, 2005: "David, I understand that you want to help him, but you cannot write this letter…it really has to come from other authorities …and it is not for consular to do …besides, we do not know, not really" (emphasis added).

[82] In case note 198 dated December 13, 2005, Ms. Gaudet-Fee writes, with reference to Mr. Abdelrazik's lawyer, that she "made a few assumptions regarding the RCMP, CSIS, etc …so I informed her that we, in consular, have no open conversation with the RCMP or CSIS on this case and that since our mandate was only consular, this is what we did" (emphasis added).

[83] Lastly, there is a passage in the December 16, 2005 e-mail referred to in paragraph 68 [of these reasons] in which the Khartoum Embassy acknowledges being informed by the Sudanese Security and Intelligence Agency that there was a connection between CSIS and the detention of Mr. Abdelrazik of which the Embassy says it is unaware. The passage in question recounts a discussion between Canadian officials at the Khartoum Embassy and Mr. Altayeb, a senior official with the Sudanese National Security and Intelligence Agency (referred to in the e-mail as NSI). Under the heading "Canadian Involvement" the author writes:

NSI/Alatyeb is concerned about the subject's well-being and his situation, noting that it has had a negative impact on his family. He also stated that contact with Canadian officials was regular but inconclusive. That is, NSI maintains that all recent interactions have resulted in repeated statements to them by Canadian security officials in the field reiterating that Mr. Abdelrazik's case "is a consular case" despite the fact that initial recommendations for his detention emerged from CSIS [KHRTM notes that if this is indeed the case, we had not been told of those communications]. He was overwhelmingly forward when expressing his concern and frustration that there seems to be little interest by CSIS and senior GoC authorities to help resolve Mr. Abdelrazik's situation. [Emphasis added.]

[84] Also of note in that e-mail is the following statement under the heading "Options discussed with NSI" which raises a question of the role Canadian and U.S. security may play in resolving Mr. Abdelrazik's situation.

In NSI's view, this issue will only be resolved through a constructive dialogue between Canadian and US security officials regarding the eventual disposition of Mr. Abdelrazik's case: the French are no longer involved, and paramount in Sudanese intelligence's priorities is maintaining good relations with the United States.

[85] The burden of proving that Canada or one of its agencies played a part in Mr. Abdelrazik's detention by Sudan lies with the applicant. The only evidence before the Court that speaks to the role, if any, played in his detention by CSIS is hearsay evidence in documents obtained as a result of a request under the *Privacy Act*, R.S.C., 1985, c. P-21. The respondents have provided evidence from which I find that Canada's officials in Foreign Affairs played no role in his detention; how-ever they have provided no evidence that specifically addresses whether Canada's security officials played a role in the detention. Nonetheless, the burden is on the applicant to prove his allegation, and not on the respondents to disprove it.

[86] The draft document set out in paragraph 67 of these reasons is evidence that unnamed Sudanese authorities say that they are holding Mr. Abdelrazik at "our" request. As this is a draft of a document prepared by a Canadian official the word "our" must be read as a reference to Canada. The second document set out at paragraph 68 has a short redacted portion preceding the relevant phrase—about one-quarter of a line but it does include, with reference to the arrest of Mr. Abdelrazik the words "and recommended by CSIS, for suspected involvement with terrorist elements." In both cases, the respondents submit that the documents are a recounting of information received by the Embassy in Khartoum from Sudanese authorities and is "third hand hearsay which is unsubstantiated for the truth of its contents" and is "inherently unreliable".

[87] It is not evident that the second document refers to information received from Sudanese officials. The relevant passage appears under the heading "Case Overview" and it appears to be a factual recitation of the case from a Canadian perspective. There is nothing in the unredacted portion leading up to the phrase at issue that indicates that it is a recounting of information received from a Sudanese official. It is a recitation of facts, not of information received.

[88] The latter passage from the same e-mail, reproduced at paragraph 83 [of these reasons] is clearly a statement of information received from a senior official of the Sudanese National Security and Intelligence Agency, Mr. Altayeb. The evidence is hearsay evidence. Under the principled approach to the hearsay rule, the evidence is admissible if the twin criteria of reliability and necessity are established on a balance of probabilities: *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298.

[89] The necessity criterion is established because the only way the applicant could get direct evidence before this Court as to how he came to be detained would be through a senior official of CSIS or of NSI. It is not open to the applicant to summons witnesses from either CSIS or NSI to attend and give evidence and the respondents chose not to file an affidavit from CSIS. Accordingly, the only way this evidence was available to the applicant was from documents obtained through a *Privacy Act* request.

[90] The reliability criterion is met because of the way in which this statement came about. It is a statement from a senior security official of Sudan to a senior Canadian Foreign Affairs official relating to the detention by Sudan of a Canadian citizen and a recounting of that conversation by the Canadian officials to his superiors. There is no reason to suspect, and every reason to believe, that the Canadian official would accurately recount the conversation to his superiors. There is also no reason to suspect the truthfulness of the Sudanese security official. The Canadian official describes the conversation as "surprisingly direct". The Sudanese official knew in speaking to a Canadian official that the truth of his statement concerning the involvement of CSIS could be easily checked. This makes it unlikely that he would be untruthful and thus his statement meets the reliability test.

[91] An allegation that Canada was complicit in a foreign nation detaining a Canadian citizen is very serious, particularly when no charges are pending against him and in circumstances where he had previously fled that country as a Convention refugee. However, in my view, the evidence before the Court establishes, on the balance of probabilities, that the recommendation for the detention of Mr. Abdelrazik by Sudan came either directly or indirectly from CSIS. I find, on the balance of probabilities, on the record before the Court, that CSIS was complicit in the initial detention of Mr. Abdelrazik by the Sudanese. This finding is based on the record before the Court on this application. The role of CSIS may subsequently be shown to be otherwise if and when full and compete information is provided by that service as to its role.

[92] There is no reason to challenge the applicant's assertion in his affidavit that he was tortured while in detention. There is no evidence to the contrary. However, the applicant has failed to establish that the Canadian authorities were aware that he had been tortured while in detention. I find that Canada had no knowledge of any torture prior to being informed by counsel for Mr. Abdelrazik at a meeting in Ottawa on February 07, 2008. It was in the following month that Mr. Abdelrazik met with a Member of Parliament and at least one official from Foreign Affairs and showed them the marks on his body that he said were the result of this torture.

[93] There is evidence in the record that conditions in Sudanese prisons are harsh and that Canada knew this. The record shows that during the first period of detention, the only period when Consular officials were permitted to visit him, Mr. Abdelrazik made no mention of being tortured and there was no evidence that from his appearance or demeanour one should reasonably have concluded that he was being tortured. The applicant suggests that there was some positive duty on the Canadian consular visitors to ask him directly whether he was being tortured. I doubt there is any such positive duty at law; however, the fact remains that there is no evidence that the respondents knew until after Mr. Abdelrazik was no longer in detention that he had been tortured.

Lufthansa flight scheduled for July 23, 2004

[94] By e-mail dated July 13, 2004, officials at the Canadian Embassy in Khartoum confirmed with Foreign Affairs in Ottawa that they had made a tentative booking with Lufthansa for a flight for Mr. Abdelrazik on July 23, 2004. The flight was tentative because it had not yet been confirmed that there would be an available seat on the flights; nothing turns on this as it appears that the flight was subsequently confirmed. The booking was made in the name of the Canadian Embassy but there was a requirement that the name of the passenger be provided by July 15, 2004. The flight was from Khartoum to Montréal with a three-to-four hour stop-over in Frankfurt, Germany. The Frankfurt to Montréal portion of the travel was on an Air Canada flight. The ticket had been purchased with funds provided by Mr. Abdelrazik's spouse. Canada had also made arrangements that an official from Foreign Affairs accompany Mr. Abdelrazik on the flight. Case note 91 dated July 20, 2004 states that "the escort is our contribution to ensure that Mr. Abdelrazik does return to Canada". Furthermore, the record indicates that Canada was prepared to have an armed Canadian official also accompany Mr. Abdelrazik should that be necessary in order to ensure the flight could be made. Lastly, Canada had issued Mr. Abdelrazik an emergency Canadian passport valid for the period of travel permitting him to return to Canada.

[95] Early on Canada recognized that there might be an issue with Mr. Abdelrazik as a passenger if he was on a no-fly list. The record contains a memo of July 15, 2004 from the Director, Foreign Intelligence Division, Foreign Affairs in which he writes:

> [Mr. Abdelrazik] is scheduled to return to Canada on July 23 on a Lufthansa flight. This will entail a 3-6 hour layover in Germany. He would return to Montreal the same day.
>
> There is, however, a potential problem relating to the possibility that he is named on one of a number of American 'no-fly' lists [redacted] If this is the case, it would result in Lufthansa refusing to carry him. This potentially could lead the Germans to return him to Sudan (if he is even able to board a plane in Khartoum) where he would likely be detained again. [Emphasis added.]

[96] These fears were realized. On or about July 22, 2004 Canadian authorities were advised that Lufthansa had decided that it would not transport Mr. Abdelrazik. This resulted in discussions between Canadian Foreign Affairs officials and Lufthansa officials—the Canadian officials trying to understand the reasons for the refusal and attempting to convince Lufthansa to change its position. In case note 110 dated July 22, 2004 four reasons were set out for the refusal: "(1) he is on the American no-fly list, (2) his involvement with Al-Qaida, (3) they are not satisfied with the escort situation and (4) Air Canada has also refused to accept him". The note indicates that Lufthansa refused to change its position, even if a police escort were provided and even if Air Canada was convinced to change its position. Accordingly, the real concern of Lufthansa must have been the listing of Mr. Abdelrazik on the no-fly list and his alleged Al-Qaida connections. The Canadian official was told that there was "nothing we can do to change their decision".

[97] The applicant relies on the conduct of the Canadian government in this instance, in part, in contrast to its later actions when an escort and emergency passport were refused. He also relies on documents in the record advising the Canadian Embassy in Khartoum not to make any further or alternative arrangements "until the next steps are worked out" followed by a reference to a meeting at the Privy Council Office as an indication that Mr. Abdelrazik's situation was not an ordinary

consular matter. Lastly, it is suggested that the respondents ought to have done more. It was submitted that Mr. Abdelrazik was a "Canadian in distress" who was uniquely dependant on the Canadian authorities to be repatriated and they exhibited a *laissez faire* attitude towards him.

[98] I am unable to accept the applicant's submissions with respect to this failed flight. It is evident from the record that Canadian Foreign Affairs officials had done everything to arrange the flight. They had gone the extra mile in providing an escort. The record shows that they suspected that Mr. Abdelrazik might be on a no-fly list but there is no evidence that they knew it to be a fact until Lufthansa refused to board him. Even then the Canadian officials were prepared to offer an armed escort and use its powers of persuasion with Air Canada, if that would change the position of Lufthansa. They were told that it would not. In those circumstances, it is neither fair nor accurate to say that Canada exhibited a *laissez faire* attitude.

[99] From documents produced in response to the *Privacy Act* request, it appears that consular officials did in fact attempt to find another route for Mr. Abdelrazik that did not involve either Lufthansa or Air Canada. An e-mail dated July 24, 2004 to the Khartoum embassy attaches a confirmed reservation for "Mr. Abdul/Razik" on an Air Emirates flight leaving on July 26, 2004 from Khartoum to Casablanca with a layover in Dubai, and with a connecting flight on Royal Air Maroc on July 27, 2004 from Casablanca to Montréal. It is not clear from the record what became of that flight. There is nothing indicating that those carriers subsequently refused to fly Mr. Abdelrazik. There is an e-mail to the Khartoum Embassy stating that "though these reservations have been made, they cannot be used until we get the approval". Perhaps approval was not forthcoming.

[100] The record fails to establish any conduct or inaction on the part of the respondents with respect to this failed Lufthansa flight that is evidence of a section 6 Charter breach.

Private charter flight raised on July 30, 2004

[101] When it became evident to the applicant and his family that his inclusion on the U.S. no-fly list entailed that it was extremely unlikely that any commercial airline would accept him as a passenger, his then spouse raised with officials at Foreign Affairs the possibility of chartering a private plane to return her husband to Montréal. There is no evidence in the record that Mr. Abdelrazik's spouse got beyond the stage of raising the idea with Foreign Affairs; it is likely that the estimated cost of $70 000 to $80 000 made such a flight impossible. There can be no serious suggestion that at this early point in Mr. Abdelrazik's Sudan sojourn that Canada ought to have picked up the cost of a private chartered flight. Quite simply put, other less costly options were yet to be explored.

[102] The applicant relies on a statement contained in case note 123 dated July 30, 2004, authored by Ms. Gaudet-Lee of Foreign Affairs in Ottawa as evidence of the "attitude" of Foreign Affairs and, he submits, it proves that there was never any real intention to have him returned to Canada. The impugned statement is as follows:

> So, should she get a private plane, there is very little we could do to stop him from entering Canada. He would need an EP [i.e. Emergency Passport] and I guess this could be refused but on what ground.

So, stay tuned.

[103] The applicant asks, "Why would Canadian officials even be contemplating refusing an emergency passport?" A good question. He says that the only answer is that they had no intention of permitting him to return to Canada and if a charter flight had been arranged the only way that he could be kept out of Canada would be to deny him an emergency passport.

[104] The respondents submit that this statement must be read in the context of the events that surround it. The statement was made, they submit, immediately after Canada found out that Mr. Abdelrazik was on a no-fly list recognized by both Lufthansa and Air Canada, as well as on the no-fly list of the United States of America, and that there are allegations that he has links to Al-Qaida.

[105] Although no emergency passport was asked for, as the private flight failed to materialize, I find the comment of the official of Foreign Affairs very troubling. I find the respondents' explanation less than convincing. Admittedly the statement was made shortly after Foreign Affairs found out about the no-fly listing and also learned, for the first time it appears, that Mr. Abdelrazik was alleged to have connections to Al-Qaida. Neither fact explains why a Canadian official of foreign Affairs would be musing about refusing Mr. Abdelrazik an emergency passport.

[106] The only new fact that emerged after the Lufthansa failed flight was that Mr. Abdelrazik was on a number of no-fly lists. Canada had known for some days about the allegation of a connection between Mr. Abdelrazik and Al-Qaida. The July 20, 2004 Press Release from the U.S. Treasury Department concerning him stated that he was a Canadian citizen, and in fact recited his Canadian passport number. Therefore, Canada knew that he was alleged to have links to Al-Qaida even prior to the failed Lufthansa flight and there was no suggestion then that this would impact the emergency passport he had received from Canada. Further, even when advised that he was on the no-fly list, Foreign Affairs officials were prepared to and did attempt to make arrangements in order to have Mr. Abdelrazik on the scheduled flight. Again, the no-fly listing did not have any impact on the emergency passport that Canada had issued. What happened between July 23, 2004 and July 30, 2004 that resulted in Ms. Gaudet-Fee musing as to possible grounds for refusing an emergency passport? There is no answer to that question as the respondents chose not to provide an affidavit from her.

[107] Mr. Abdelrazik submits that this statement proves that Canada intended to refuse him an emergency passport, at least as early as July 30, 2004, but failed to ever advise him that the emergency passport would be refused as they did not believe that he would ever be in a position to actually leave Sudan and fly to Canada. He submits that the fact that Canada refused the emergency passport, after numerous commitments that it would be provided, when he did finally secure a paid flight itinerary for a flight on April 3, 2009 proves that this was the intention of Canada all along.

[108] In my view, it is reasonable to conclude from the July 30, 2004 musings of the Foreign Affairs official that Canadian authorities did not want Mr. Abdelrazik to return to Canada and they were prepared to examine avenues that would prevent his return, such as the denial of an emergency passport. That conclusion is further supported by the extraordinary circumstances in which the

Minister made the decision on April 3, 2009, to refuse the applicant an emergency passport.

Sudanese offer to fly him to Canada on its aircraft

[109] On October 20, 2004, Mr. Abdelrazik advised the Canadian Embassy in Khartoum that the Sudanese government had indicated a willingness to fly him to Canada, at its expense, aboard a private aircraft. Mr. Hutchings, Head of the Canadian Embassy responded on October 31, 2004:

Canada has no objection to this in principle, but requires that normal information needed for flight plan approval be provided, ie flight routing and timing, type and call sign of aircraft, passenger manifest list, etc.

Once this information is provided, authorisation can be sought to provide Mr. Abdelrazik with an Emergency Passport.

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.

[110] The applicant asks the Court to contrast Canada's outright refusal to provide an escort on this proposed flight with its offer only a few months earlier to do so for the Lufthansa flight. It is not clear on the record whether it was Mr. Abdelrazik or the Government of Sudan who requested that an official from Foreign Affairs escort Mr. Abdelrazik. The applicant complains that Canada was putting the burden on Sudan and himself to provide all of the necessary flight information and was taking no active steps to assist in the repatriation effort.

[111] Given that the information required by Canada was the "normal" flight information and was fully and only within the knowledge of the Sudanese authorities, it cannot be said that Canada failed to assist in this respect. Counsel for the applicant candidly acknowledged that it cannot be said that the record shows that the failure to provide an escort was the reason this potential flight alternative failed.

[112] Although this was to be a private charter flight arranged by the Sudanese and although they may have had officials on board escorting Mr. Abdelrazik back to Canada, one must ask why Canada had so quickly reversed its offer made only a few months earlier to provide an escort. No reason has been provided for this reversal.[4] The applicant speculates that the refusal is a further illustration that Canada had determined never to have Mr. Abdelrazik return to Canada and that Canadian officials would not do anything to facilitate his return. If it were established that this flight failed because of the refusal to provide a Canadian escort, the applicant's speculation might have merit. As there is no reason to believe that this is the reason why the flight failed to materialize, I cannot accept the applicant's position.

Canadian Flights from Khartoum

[113] The applicant submits that there were other alternatives to the Sudanese charter flight that were available had the Canadian government taken positive action to repatriate Mr. Abdelrazik. These he characterized as "missed opportunities". The Minister responsible for the Canadian

International Development Agency visited Khartoum aboard a government jet in August 2004 as did Prime Minister Martin on November 24, 2004. The applicant further submits that Canada could remove him from Sudan aboard a Canadian military flight from Khartoum to Camp Mirage in the Middle East and then to Canada aboard a military flight.

[114] In my view, even if these alternatives were a possible avenue to effect Mr. Abdelrazik's repatriation, they need only be considered if Canada had a positive obligation under subsection 6(1) of the Charter to take such extraordinary actions to repatriate him. Canada had no such obligation to take these extraordinary actions, at that time and in the circumstances as they then existed.

The September 15, 2008 flight

[115] In August 2008, Etihad Airlines provided Mr. Abdelrazik with a confirmed flight reservation on a flight from Khartoum to Toronto, via Abu Dhabi, subject to the payment of fare and taxes. He requested that Canada issue him an emergency passport for this trip but none was provided.

[116] At the hearing, the respondents raised an objection to the applicant making any submission on the events relating to this proposed travel other than the fact that an unpaid itinerary had been secured. The basis for this objection was that there had been settlement discussions between the parties relating to this event and because of the order of Prothonotary Tabib of November 27, 2008, wherein she ruled that only the questions put on cross-examination authenticating the itinerary were admissible. I ruled that the evidence that no emergency passport was issued was also admissible as it was referenced in the affidavit of Mr. Abdelrazik and it was without question that he remained in Sudan. I ruled that in keeping with the order of the Prothonotary, nothing further was admissible in evidence.

[117] Accordingly, the Court has no evidence before it as to why the emergency passport was not issued. The flight was not paid for and we have no knowledge whether the applicant was in a position to pay for the reservation should a passport have been issued. There was no evidence that Canada gave consideration to loaning Mr. Abdelrazik funds to pay for this itinerary, even if consent of the 1267 Committee was required.

[118] The applicant submits that he had previously been told by Canadian officials that an emergency passport would issue if he secured an itinerary but that following this potential flight, the respondents changed the goal-posts, requiring him to have a paid itinerary before an emergency passport would issue.

[119] There is support for this submission. The word "paid" is added to the assurances from Canadian officials only after this event. The first such reference is in a letter to applicant's counsel dated December 23, 2008, from the Director General Security Bureau, Passport Canada.

> …in order to facilitate Mr. Abdelrazik's return to Canada, Passport Canada will issue an emergency passport to Mr. Abdelrazik, upon his submission of a confirmed and paid travel itinerary to the Consular Section of the Canadian Embassy, Khartoum. [Emphasis added.]

[120] It was Canada's view that it was illegal under the 1822 Resolution and the laws of Canada to financially assist Mr. Abdelrazik. Canada was also aware that he was impecunious. It is not unreasonable to suggest, as the applicant did, that in adding the condition that the itinerary be a paid one, Canada was ensuring that it would not be called upon to provide the emergency passport. The applicant submits that this added condition is further evidence that Canada never intended to permit him to return to Canada. The weight of the evidence supports that submission.

The UN 1267 travel ban

[121] The UN 1267 travel ban provides that States shall "prevent the entry into or the transit through their territories" of listed individuals, "provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee …determines on a case-by-case basis only that entry or transit is justified."

[122] The respondents submit that this provision applies to transit through a State's airspace in addition to travel on its land and waters. Mr. Abdelrazik must fly through foreign airspace to return home from Sudan. The respondents' position is that any assistance by Canada that would result in such an air flight by him would be in breach of Canada's international obligations. The applicant submits that the respondents' interpretation is incorrect and further submits that Canada's use of this UN Resolution to deny Mr. Abdelrazik the right to return to Canada is a "highly disingenuous and willful example of frustration" of his Charter rights.

[123] The respondents rely on the Paris *Convention Relating to the Regulation of Aerial Navigation* [signed at Paris, October 13, 1919] (Paris Convention) and the Chicago *Convention on International Civil Aviation* [December 7, 1944, [1944] Can. T.S. No. 36] (Chicago Convention) in support of its position that "territory" as used in the UN Resolution includes airspace. In my view, all that these Conventions illustrate is that States have certain rights with respect to travel through the airspace above their territory; however, it does not follow that the word "territory" in Resolution 1822 includes airspace.

[124] Article 1 of the Chicago Convention provides "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory" (emphasis added). Thus, the word "territory" as used in that Convention does not include airspace; airspace is above the territory, not a part of it. If further support was required for that interpretation, it may be found in Article 2 which provides that "[f]or the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of the State." While Article 3 entitles States to prohibit aircraft from flying over its territory, the airspace is not its territory. Articles I, II and III of the Paris Convention are similarly worded. In sum, while these treaties give States sovereignty over the airspace above their territories, this does not entail that the airspace is included within the definition of "territory", as the respondents submit.

[125] I further find that the interpretation being advanced by the respondents is at odds with Canada's submissions to the UN detailing how Canada has implemented the travel ban.

[126] Security Council Resolution 1455 (2003) called on States to report to the 1267 Committee on how they had implemented its measures. By letter dated April 15, 2003, Canada's Ambassador and Permanent Representative wrote to the Security Council requesting that it inform the 1267 Committee that Canada "has implemented all of these measures through, *inter alia*, legislative and regulatory instruments, as described in the attached document" (emphasis added). When one examines the attached document under the heading "IV. Travel ban" one sees reference only to Canada dealing with persons inadmissible to Canada under the provisions of the *Immigration and Refugee Protection Act*. That legislation applies only to persons who "enter" Canada—it has no application to persons who are transiting through the airspace above Canadian territory. One must conclude that in stating that Canada had implemented all of the measures under the UN Resolution, Canada must have been of the view that the Resolution did not require it to prevent listed persons from travelling through Canadian airspace when travelling elsewhere; otherwise Canada would have referenced the measures taken to prevent such listed persons from flying through its airspace. There is no evidence that Canada takes any action to prohibit persons on the 1267 list from transiting through the airspace above Canada.

[127] Further, the respondents' interpretation of the 1267 travel ban leads to a nonsensical result. According to their interpretation, the Resolution permits a citizen to enter Canada if and only if he happens to be standing at the Canadian border crossing, but it prevents that same citizen from reaching that border crossing as he cannot transit over land or through air to reach it. On the respondents' interpretation the exemption that provides that no State is obliged to prevent its citizens from entry becomes meaningless as there is virtually no possibility that a listed person will be located at a border crossing and there is no possibility under current technology that he will be able to simply transport himself to the border crossing without transiting over land or through the air. Quite simply that could not have been the intention of the drafters of the Resolution.

[128] There is also support that the sanction was not intended to apply to transit in air when a person is returning to his country of citizenship in the document entitled "Travel Ban: Explanation of Terms" prepared by the 1267 Committee. After listing the first two exemptions, (i) entry into or departure of its own nationals, and (ii) where entry or transit is necessary for the fulfilment of a judicial process, the Committee writes:

> *Note*: Member States are not required to report to the 1267 Committee the entry into or transit through their territory of a listed individual when exercising their rights under exemptions (i) and (ii) above . . . .

If, as the respondents submit, States other than Canada are required to prevent the transit of Mr. Abdelrazik as a person on the 1267 list through their airspace as he is repatriated to Canada, the 1267 Committee appears to be unaware of this obligation. Not only is such transit permitted, no reporting is required if the person transits over the land of a State on his way to his country of citizenship. Air transit often includes a layover, such as is likely required for Mr. Abdelrazik on a return to Canada; the country of layover does not need to prevent the entry or report the transit to the 1267 Committee. In fact, the 1267 Committee seems to have wisely recognized that if it is to permit a citizen to return home, it cannot require countries to prevent his transit through their territory.

[129] For these reasons, I find that properly interpreted the UN travel ban presents no impediment

to Mr. Abdelrazik returning home to Canada. This interpretation is consistent with the objective of the travel ban as stated by the 1267 Committee in its document "Travel Ban: Explanation of Terms". There they state that the objective of the travel ban is to "limit the mobility of listed individuals." It is to be noted that the travel ban does not restrict mobility within a country. Its concern is to prevent these individuals from traveling from country to country raising funds and arms and spreading terrorism. Mr. Abdelrazik will have no more mobility, in that sense of the word, if he is in Canada than in Sudan.

The flight scheduled for April 3, 2009

[130] In March 2009, Mr. Abdelrazik managed to obtain and pay for a flight from Khartoum to Montréal with a stop over in Abu Dhabi. He had been repeatedly assured for years that an emergency passport would be provided in that eventuality. Notwithstanding the numerous assurances given by Canada over a period of almost five years, and repeated as recently as December 23, 2008, on April 3, 2009 just two hours before the flight was to leave, the Minister of Foreign Affairs refused to issue that emergency passport on the basis that he was of the opinion, pursuant to section 10.1 of the *Canadian Passport Order*, "that such action is necessary for the national security of Canada or another country."

[131] The respondents make a number of submissions urging this Court not to consider or examine this refusal as part of the applicant's Charter challenge. With the greatest of respect for these respondents and their counsel, I find that none of these submissions has merit. In light of the challenge the applicant has made asserting that his Charter rights have been violated, and in light of the evidence reviewed thus far, a failure of this Court to consider this refusal, in these circumstances, would bring the administration of justice into disrepute.

[132] The respondents firstly submit that because section 10.1 of the *Canadian Passport Order* has been found by the Federal Court of Appeal in *Kamel v. Canada (Attorney General)*, 2009 FCA 21, [2009] 4 F.C.R. 449, not to offend the Charter, it follows that decisions of the Minister made pursuant to the section likewise comply with the Charter. This submission is fundamentally contrary to the decision of the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. At paragraph 20 of that decision, the Court said that the Canadian Charter can apply in two ways to the legislation or to decisions made under the legislation.

> First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

This view has more recently been affirmed by that Court in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

[133] Therefore, although there is no doubt that section 10.1 of the *Canadian Passport Order* has been found to be constitutionally valid by the Federal Court of Appeal in *Kamel*, it does not follow that every refusal of the Minister made pursuant to that section must necessarily also be

constitutionally valid. The issue before the Federal Court of Appeal in *Kamel* was limited to whether section 10.1 violated section 6 of the Charter and, if it did, whether it was justified under section 1. In his judgment, Justice Décary was careful to note [at paragraph 11]: "I will not comment on other aspects of this case, and nothing in my reasons shall be interpreted as having an impact on the decision that the Minister will eventually make after reconsidering Mr. Kamel's passport application." In other words, while the section is valid, the decision made under it may not be.

[134] As is implied in subsection 4(3) [as am. by SI/2004-113, s. 3] of the *Canadian Passport Order*, the issuance or refusal to issue a passport is a matter of royal prerogative. The Supreme Court of Canada in *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441 held that where the Crown prerogative violates an individual's rights provided in the Charter, then the exercise of the prerogative can be reviewed by the Court.

[135] The Federal Court of Appeal in *Veffer v. Canada (Minister of Foreign Affairs)*, 2007 FCA 247, [2008] 1 F.C.R. 641, at paragraph 23 has also specifically confirmed that the exercise of the royal prerogative in the issuance of passports is subject to examination for compliance with the Charter:

> …there is no question that the Passport Canada policy is subject to Charter scrutiny, even though the issuance of passports is a royal prerogative. As stated by Justice Laskin in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.), at paragraph 46:
>
> > By s. 32(1)(*a*), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim.

[136] The respondents submit that the validity of the Minister's decision of April 3, 2009 not to issue an emergency passport is not a matter that this Court may consider in the present application. It is argued that the proper course was for the applicant to file a judicial review application under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)] challenging that decision. It is submitted that unless that course is taken, the Court does not have a proper evidentiary record before it on which to assess the validity of the decision.

[137] A similar submission was made by the Crown and rejected by this Court in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C.R. 218. The Crown asked the Court not to decide the issue of whether the failure to issue a passport to Mr. Khadr was contrary to sections 6 and 7 of the Charter because of the inadequacy of the record. I adopt without reservation the following from paragraphs 57–59 of that decision of Justice Phelan:

> The respondent's concern for the record is two-fold. Firstly, the respondent acknowledges that the applicant was not treated fairly because he did not have a chance to address the new grounds for denial of a passport—national security. This assumes that the Minister had the right to create this new ground outside the bounds of the *Canadian Passport Order*. Secondly, the respondent says that it has not put forward sufficient section 1 Charter evidence to demonstrate that any breach of a Charter right is justified.

The simple response to that is that the respondent cannot deprive the applicant of his rights to a proper determination because of the respondent's failure to put forward proper evidence. The applicant must take the record as it is—not the record it would like. So too, the respondent has to take the record it created—it does not get a second chance to create a further and better record.

With respect to section 1 evidence, the respondent gambled that the Charter arguments would be dismissed without the necessity of a section 1 analysis. Sometimes the gamble does not pay out.

[138] Justice Phelan [at paragraph 61] ultimately determined that he would not decide the case on Charter grounds because, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, "courts should refrain from dealing with *Charter* issues raised in an application for judicial review where it is unnecessary to do so". In this case, the only claim raised by this applicant is his Charter claim; he has not raised the claim that the decision was procedurally unfair and contrary to the rules of natural justice. Accordingly, it is necessary in this case to determine the Charter issue raised with respect to the decision.

[139] The respondents also submit that the manner in which the applicant proposes to proceed is, in effect, a collateral attack on the Minister's decision. This they say relying on the decisions of the Federal Court of Appeal in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287 and the Supreme Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, amounts to a collateral attack on the decision when the proper avenue to challenge it is by way of judicial review. Counsel for the respondents went on to note, parenthetically, that the deadline for filing an application under section 18.1 of the *Federal Courts Act* to judicially review the April 3, 2009 decision has expired.

[140] Mr. Grenier was an inmate in a federal institution. He had been placed in administrative segregation by the head of the institution for his conduct in throwing some forms at a guard, which the guard claimed he perceived to be a threat. Rather than challenging the decision by way of judicial review, Mr. Grenier brought an action in damages three years after the decision, claiming that the decision was unlawful in that it was oppressive and arbitrary. The issue before the Court was whether it was necessary for the inmate to attack the decision by way of judicial review before bringing an action in damages. The Federal Court of Appeal held that a litigant who impugns a federal agency's decision is not at liberty to choose between a judicial review proceeding and an action in damages as section 18 [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act* required proceeding by way of judicial review.

[141] The *Grenier* decision does not assist the respondents. Unlike *Grenier*, where the challenge was commenced by way of action, the matter before this Court is brought by way of notice of application pursuant to sections 18 and 18.1 of the *Federal Courts Act*. There is no indirect challenge; it is a direct challenge to the decisions made by the respondents.

[142] In *Garland*, the Supreme Court of Canada agreed with the motions court Judge that as there had been a previous finding that the respondent's late charges violated the *Criminal Code* [R.S.C., 1985, c. C-46], the respondent had no available defence to the appellant's claim for repayment of the charges collected. The respondent had defended the action on the basis that the charges attacked had been authorized by the Ontario Energy Board's rate orders. The Supreme Court held that the appellant's action did not constitute a collateral attack on the orders of the Ontario Energy Board. In the course of its reasons, the Court discusses the doctrine of collateral attack, as follows [at

paragraph 71]:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. . .. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. [Citations and authorities omitted.]

[143] The applicant submits that his challenge of the Minister's decision is not a collateral attack, as described by the Supreme Court, as he is not attacking the decision indirectly or in the wrong forum. He is challenging the constitutional validity of the Minister's decision under the Charter in the Federal Court—the proper forum for such an attack.

[144] In this instance, I agree with the applicant. The challenge to the Minister's decision cannot be said to have been made in a collateral fashion. The applicant is challenging the decision head on and in the proper forum. While it was open to the applicant to challenge the Minister's decision on the basis that it breached the rules of natural justice and procedural fairness, he chose not to do so. Given that this application was already outstanding and close to a hearing, choosing such a course of action was consistent with the well-established principle that all relevant matters ought to be dealt with as one, not split. He made application to this Court to file additional affidavit evidence as part of the record in this application. That additional evidence includes the Minister's April 3, 2009 decision and its impact of the applicant's repatriation. This motion was allowed, on consent, and by order of this Court on April 17, 2009, cross-examination on the additional evidence was permitted.

[145] It is clear from a reading of the notice of application that the applicant is claiming that his constitutional right to enter Canada has been violated by the respondents on an ongoing basis. The following passages from the amended notice of application reflect this claim.

> The Respondents have frustrated the Applicant's efforts to return to Canada, and in fact have connived to keep the Applicant in *de facto* exile in Sudan through a combination of actions undertaken negligently or in bad faith.
>
> . . .
>
> Through bad faith the Respondents have violated the Applicant's right as a Canadian to enter Canada. This ongoing breach has imperilled the Applicant's life, liberty and security of the person by exiling him in Sudan. These rights are protected by the Canadian Charter of Rights and Freedoms and are the subject of this Application.

He seeks a declaration that the respondents have violated his right to enter Canada under subsection 6(1) of the Charter and pursuant to subsection 24(1) seeks a remedy for that violation.

[146] The decision of the Minister on April 3, 2009 was merely the most recent of the actions and

inactions that are complained of as constituting this ongoing breach and, in my view, is properly subject to the Court's consideration in this application. If the respondents wished to exclude the April 3, 2009 decision from the Court's consideration in this application, they ought to have opposed the applicant's motion to file supplementary evidence that directly brings that decision before the Court in this proceeding. Consideration of the April 3, 2009 decision is necessary in order to determine the real issue in controversy between these parties; not to do so would result in a palpable injustice to the applicant.

[147] Lastly, it is clear that the respondents knew exactly the issue before this Court, namely whether they had violated the applicant's right to enter Canada. In their written memorandum of argument filed April 9, 2009, they write:

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

[148] In my view, the submission that the applicant had not been denied entry into Canada by the Government of Canada was not accurate when made six days after the Minister had denied the applicant an emergency passport. Whether or not the Etihad Airways flight scheduled for April 3, 2009 would breach the travel ban set out in the 1822 Resolution, there is no evidence before the Court that had Mr. Abdelrazik been in possession of an emergency passport issued by Canada that he would not have been on that flight and now in Canada. I find that the only reason that Mr. Abdelrazik is not in Canada now is because of the actions of the Minister on April 3, 2009.

[149] The respondents submit that the right to enter Canada as provided for in subsection 6(1) of the Charter does not entail positive obligations on Canada. Their submission, to paraphrase Justice L'Heureux-Dubé in *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, is that the freedom to enter Canada contained in subsection 6(1) prohibits Canada from refusing a citizen's entry into the country (subject to section 1) but does not compel Canada to take positive steps such as the issuance of a passport or the provision of an airplane to effect travel to Canada.

[150] In *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, a case involving section 7 of the Charter, the Supreme Court acknowledged that one day the Charter may be interpreted to include positive obligations such that the failure to do the positive act will constitute a breach of the Charter. It was there stated [at paragraph 82]:

> The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[151] This Court and the Federal Court of Appeal in *Kamel* in the passage below noted the critical importance of a passport, not just to engage in travel, but for a citizen to enter Canada.[5] The fact that Mr. Abdelrazik had secured and paid for a flight for April 3, 2009 back to Canada but was prevented from flying only because he lacked the emergency passport previously promised by Canada, proves

that importance [*Kamel*, at paragraphs 14–15]:

> The appellant submits that subsection 6(1) of the Charter, which gives every Canadian citizen "the right to enter, remain in and leave Canada", does not impose a duty on the State to facilitate the international travel of Canadian citizens. The appellant also maintains that the respondent has not demonstrated that a passport is required to enter or leave Canada.
>
> At the hearing, we did not consider it useful to hear the respondent on this issue. In fact, we agree substantially with Justice Noël's remarks on this point. To determine that the refusal to issue a passport to a Canadian citizen does not infringe that citizen's right to enter or leave Canada would be to interpret the Charter in an unreal world. It is theoretically possible that a Canadian citizen can enter or leave Canada without a passport. In reality, however, there are very few countries that a Canadian citizen wishing to leave Canada may enter without a passport and very few countries that allow a Canadian citizen to return to Canada without a passport (A.B., Vol. 7, p. 1406, Thomas affidavit). The fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re-enter Canada without a passport are, on their face, restrictions on a Canadian citizen's right to enter or leave Canada, which is, of course, sufficient to engage Charter protection. Subsection 6(1) establishes a concrete right that must be assessed in the light of present-day political reality. What is the meaning of a right that, in practice, cannot be exercised?

[152] I agree with the Court of Appeal. In my view, where a citizen is outside Canada, the Government of Canada has a positive obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the Charter is illusory. Where the Government refuses to issue that emergency passport, it is a *prima facie* breach of the citizen's Charter rights unless the Government justifies its refusal pursuant to section 1 of the Charter. As noted in *Cotroni*, the Supreme Court held that such interference must be justified as being required to meet a reasonable state purpose. In *Kamel* the Federal Court of Appeal held that section 10.1 of the *Canadian Passport Order* was a reasonable state purpose; however, the respondent must still establish that the decisions made under section 10.1 are "justified" on a case-by-case basis.

[153] I find that the applicant's Charter right as a citizen of Canada to enter Canada has been breached by the respondents in failing to issue him an emergency passport. In my view, it is not necessary to decide whether that breach was done in bad faith; a breach, whether made in bad faith or good faith remains a breach and absent justification under section 1 of the Charter, the aggrieved party is entitled to a remedy. Had it been necessary to determine whether the breach was done in bad faith, I would have had no hesitation making that finding on the basis of the record before me. As I have noted throughout, there is evidence that supports the applicant's contention that the Government of Canada made a determination in and around the time of the listing by the 1267 Committee that Mr. Abdelrazik would not be permitted to return to Canada. The only legal way to accomplish that objective was by order made pursuant to section 10.1 of the *Canadian Passport Order*. Rather than instituting that process then, Canada put forward a number of explanations as to why he was not being provided with an emergency passport, only some of which were accurate: he is on a no-fly list and commercial air carriers will not board him; he has secured an itinerary but not paid for the flight; he is listed on the 1267 Committee list and cannot fly in the air space of Member States; and lastly, when he had managed to meet the last condition set by Canada that he have a paid ticket, the refusal is necessary for the national security of Canada or another country. This was an opinion the Minister was to make only after the process prescribed by his own department was

followed, giving Mr. Abdelrazik an opportunity to know of and address concerns. Not only was that not done, the Minister waited until the very last minute before the flight was to depart to deny the emergency passport, and although the basis of the refusal is indicated, he provides no explanation of the basis on which that determination was reached, no explanation as to what had changed while Mr. Abdelrazik resided in the Canadian embassy that warranted this sudden finding, and nothing to indicate whether the decision was based on him being a danger to the national security of Canada or on being a danger to another country. Further, there was no explanation offered as to whether Mr. Abdelrazik posed a security risk if returned to Canada, or a greater security risk, than he did in Sudan. In my view, denying a citizen his right to enter his own country requires, at a minimum, that such increased risk must be established to justify a determination made under section 10.1 of the *Canadian Passport Order*. If he poses no greater risk, what justification can there be for breaching the Charter by refusing him to return home; especially where, as here, the alternative is to effectively exile the citizen to live the remainder of his life in the Canadian embassy abroad. In short, the only basis for the denial of the passport was that the Minister had reached this opinion; there has been nothing offered and no attempt made to justify that opinion.

[154] The respondents have provided no evidence to support a section 1 defence to the *prima facie* breach of the Charter from refusing to issue the emergency passport. They simply submitted to the Court that there had been no breach. Having found a breach, the burden then shifted to the respondents to justify that breach. In the absence of any evidence, it has not been justified. Notwithstanding this, I have considered whether the Minister's determination that Mr. Abdelrazik posed a danger to national security or to the security of another country constitutes a section 1 defence in itself and have concluded that it does not.

[155] As previously noted, the guidelines of Passport Canada provide that whenever a citizen may be denied passport privileges, there is a mechanism in place that provides the citizen with procedural fairness and natural justice. It is fair to assume that the minister put these processes in place in his Department in recognition of a citizen's Charter rights and the special relationship that exists between a citizen and his country. There is no suggestion that the Minister followed this process. In fact, the Minister appears to have made the decision to deny the emergency passport with no input from Passport Canada. He had many years to render such a decision after following the processes set by his own department, if there was any basis to support his opinion. He did not. There is nothing in the report of his decision to indicate that his decision is made based on recent information he has received. There is nothing to indicate the basis on which he reached his decision. Even if a decision such as his can be said to have been a decision prescribed by law as it is based on section 10.1 of the *Canadian Passport Order* the decision itself must also be shown to be justified as being required to meet a reasonable State purpose, as the Supreme Court stated in *Cotroni*. It is simply not sufficient for the Minister to say that he has reached this opinion and "trust me"—he must show more; he must establish that it was "required". While it is not the function of the judiciary to second guess or to substitute its opinion for that of the Minister, when no basis is provided for the opinion, the Court cannot find that the refusal was required and justified given the significant breach of the Charter that refusing a passport to a Canadian citizen entails. In this case, the refusal of the emergency passport effectively leaves Mr. Abdelrazik as a prisoner in a foreign land, consigned to live the remainder of his life in the Canadian embassy or leave and risk detention and torture.

[156] I have found that Canada has engaged in a course of conduct and specific acts that constitute

a breach of Mr. Abdelrazik's right to enter Canada. Specifically, I find:

(i) That CSIS was complicit in the detention of Mr. Abdelrazik by the Sudanese authorities in 2003;

(ii) That by mid-2004 Canadian authorities had determined that they would not take any active steps to assist Mr. Abdelrazik to return to Canada and, in spite of its numerous assurances to the contrary, would consider refusing him an emergency passport if that was required in order to ensure that he could not return to Canada;

(iii) That there is no impediment from the UN Resolution to Mr. Abdelrazik being repatriated to Canada—no permission of a foreign government is required to transit through its airspace—and the respondents' assertion to the contrary is a part of the conduct engaged in to ensure that Mr. Abdelrazik could not return to Canada; and

(iv) That Canada's denial of an emergency passport on April 3, 2009, after all of the pre-conditions for the issuance of an emergency passport previously set by Canada had been met, is a breach of his Charter right to enter Canada, and it has not been shown to be saved under section 1 of the Charter.

[157] Having found that the applicant's right as a citizen of Canada to enter this country has been breached by Canada, he is entitled to an effective remedy.

What is the effective remedy?

[158] I agree with the respondents that a Court should not go further than required when fashioning a remedy for a Charter breach: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. In this case, the applicant is entitled to be put back to the place he would have been but for the breach —in Montréal.

[159] In saying this, I am mindful of the international law principle that "reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed," as it was put by the Permanent Court of International Arbitration in the *Chorzow Factory Case (Ger. v. Pol.)* (1928), P.C.I.J., Sr. A, No. 17, at page 47 (September 13). To quote Chief Justice Dickson in the *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at page 348, "[t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions." Similarly, I am of the view that principles of international law are helpful where it is necessary to fashion a just and appropriate Charter remedy, as is the case here.

[160] Accordingly, at a minimum, the respondents are to be ordered to provide Mr. Abdelrazik with an emergency passport that will permit him to travel to and enter Canada. There is any number of ways available to him to return to Canada. He once secured an airline ticket and may be able to do so again. In the Court's view that would cure the breach and be the least intrusive on the role of the executive. If such travel is possible, and if funds or sufficient funds to pay for an air ticket are not

available to the applicant from his April 3, 2009 unused ticket, then the respondents are to provide the airfare or additional airfare required because, but for the breach, he would not have to incur this expense.

[161] The applicant has asked that the respondents return him to Canada "by any safe means at its disposal". In my view, the manner of returning Mr. Abdelrazik, at this time, is best left to the respondents in consultation with the applicant, subject to the Court's oversight, and subject to it being done promptly.

[162] The respondents may submit that they are unable to provide any financial assistance to permit Mr. Abdelrazik to return to Canada as Resolution 1822 prohibits it. As noted, an exception to the travel ban and asset freeze is the fulfilment of a "judicial process".

[163] "Process" is defined in the *Canadian Oxford Dictionary* (2nd ed.) to mean "a course of action or proceeding". *Black's Law Dictionary* (8th ed.) states that "process" means "the proceedings in any action or prosecution". A judicial process means the same as a judicial proceeding. The Supreme Court of Canada in *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, discussed the meaning of the word "proceeding" as found in the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 [s. 1 (as am. by S.C. 1990, c. 8, s. 21)] and found it to have a broad meaning. Its observations are equally applicable here [at paragraph 24]:

> Although the word "proceeding" is often used in the context of an action in court, its definition is more expansive. The Manitoba Court of Appeal stated in *Royce v. MacDonald (Municipality)* (1909), 12 W.L.R. 347, at p. 350, that the "word 'proceeding' has a very wide meaning, and includes steps or measures which are not in any way connected with actions or suits". In *Black's Law Dictionary* (6th ed. 1990), at p. 1204, the definition of "proceeding" includes, *inter alia*, "an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right".

[164] Accordingly, a judicial process, for the purposes of the exemption from the asset freeze and travel ban, encompasses more than the issuance of a summons to appear as a witness before a court as was submitted by the respondents. It includes all steps in the judicial process, including the steps required by order of the Court as a part of the completion of the suit or application. This view is supported by the French language version of Security Council Resolution 1617 which uses the phrase [at paragraph 1(b)] "*le présent paragraphe ne s'applique pas lorsque l'entrée ou le transit est nécessaire à l'aboutissement d'une procédure judiciaire*". On a plain meaning reading "*aboutissement*" means "outcome, result".[6] Thus it would include, in my view, measures required to be taken in execution of the completion of a court order.

[165] In this case, any such assistance provided by Canada is in fulfilment of this judicial process and is not a violation of the UN Resolution.

[166] It is further required, in the Court's opinion that the respondents, at Canada's expense, provide an escort from Foreign Affairs to accompany Mr. Abdelrazik on his flight from Khartoum to Montréal, unless he waives the requirement for an escort. In my view, this is required to ensure that Mr. Abdelrazik is not stopped or delayed in his return to Canada while in transit or when laying-over at a foreign airport. The escort is to use his very best efforts to ensure that Mr. Abdelrazik returns to Canada unimpeded. To use the words of Foreign Affairs earlier—this is their contribution to ensure

that he does return to Canada.

[167] It is further required, in the Court's judgment that the Court satisfy itself that Mr. Abdelrazik has in fact returned to Canada. Accordingly, in fulfilment of this judicial process, the Court requires that Mr. Abdelrazik attend before it at the time and date specified in the judgment.

[168] The Court reserves the right to oversee the implementation of this judgment and reserves the right to issue further orders as may be required to safely return Mr. Abdelrazik to Canada.

[169] As agreed upon by the parties, costs are reserved. The applicant shall provide his submissions on costs to the respondents and file a copy with the Court, not exceeding 15 pages, within 15 days of this judgment. The respondents shall serve and file their reply submissions, not exceeding 15 pages within a further 15 days. The applicant shall have a further 10 days to reply, not exceeding 10 pages.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed;

2. The applicant's right to enter Canada has been breached contrary to subsection 6(1) of the Charter;

3. The respondents are directed to issue the applicant an emergency passport in order that he may return to and enter Canada;

4. The respondents, after consultation with the applicant, are to arrange transportation for the applicant from Khartoum to Montréal, Canada such that he arrives in Canada no later than 30 days from the date hereof;

5. Should such travel arrangements not be in place within 15 days of the date hereof, the parties shall advise the Court and an immediate hearing shall be held at which time the Court reserves the right to issue such further orders as are deemed necessary in order to ensure the transportation to and safe arrival of the applicant in Canada within 30 days of this judgment, or such longer period as this Court then finds to be necessary in the circumstances;

6. In fulfilment of this judicial process, the applicant is ordered to appear before me at 2:00 o'clock in the afternoon on Tuesday, July 7, 2009, at the Federal Court at 30 McGill Street, Montréal, Quebec, Canada or, at the option of the applicant on five days advance notice to the Court and respondents, at 90 Sparks Street Ottawa, Ontario, or at such other location as is subsequently fixed by the Court, subject to an extension of that date on application by either party and upon the Court being satisfied that through no fault of the respondents it is not possible or practicable for the applicant to appear at the date and time set; and

7. Costs are reserved.

ANNEX A

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Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . .

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

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

. . .

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Security Council Resolution 1822 (2008) (adopted by the Security Council at its 5928th meeting, on 30 June 2008)

The Security Council,

Recalling its resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), and 1735 (2006), and the relevant statements of its President,

Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *reiterating* its unequivocal condemnation of Al-Qaida, Usama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them, for ongoing and multiple criminal terrorist acts aimed at causing the death of innocent civilians and other victims, destruction of property and greatly undermining stability,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee, and humanitarian law, threats to international peace and security caused by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort,

Welcoming the adoption by the General Assembly of the United Nations Global Counter-Terrorism Strategy (A/60/288) of 8 September 2006 and the creation of the Counter-Terrorism Implementation Task Force (CTITF) to ensure overall co-ordination and coherence in the counter-terrorism efforts of the United Nations system,

Reiterating its deep concern about the increased violent and terrorist activities in Afghanistan of the Taliban and Al-Qaida and other individuals, groups, undertakings and entities associated with them,

Recalling its resolution 1817 (2008) and *reiterating* its support for the fight against illicit production and trafficking of drugs from and chemical precursors to Afghanistan, in neighbouring countries, countries on trafficking routes, drug destination countries and precursors producing countries,

Expressing its deep concern about criminal misuse of the Internet by Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them, in furtherance of terrorist acts,

Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate, and incapacitate the terrorist threat,

Emphasizing that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and stressing in this regard the need for robust implementation of the measures in paragraph 1 of this resolution as a significant tool in combating terrorist activity,

Urging all Member States, international bodies, and regional organizations to allocate sufficient resources to meet the ongoing and direct threat posed by Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them, including by participating actively in identifying which individuals, groups, undertakings and entities should be subject to the measures referred to in paragraph 1 of this resolution,

Reiterating that dialogue between the Committee established pursuant to resolution 1267 (1999) ("the Committee") and Member States is vital to the full implementation of the measures,

Taking note of challenges to measures implemented by Member States in accordance with the measures referred to in paragraph 1 of this resolution and *recognizing* continuing efforts of Member States and the Committee to ensure that fair and clear procedures exist for placing individuals, groups, undertakings, and entities on the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the "Consolidated List") and for removing them, as well as for granting humanitarian exemptions,

Reiterating that the measures referred to in paragraph 1 of this resolution, are preventative in nature and are not reliant upon criminal standards set out under national law,

Emphasizing the obligation placed upon all Member States to implement, in full, resolution 1373 (2001), including with regard to the Taliban or Al-Qaida, and any individuals, groups, undertakings or entities associated with Al-Qaida, Usama bin Laden or the Taliban, who have participated in financing, planning, facilitating, recruiting for, preparing, perpetrating, or otherwise supporting terrorist activities or acts, as well as to facilitate the implementation of counter-terrorism obligations in accordance with relevant Security Council resolutions,

*Welcomin*g the establishment by the Secretary-General pursuant to resolution 1730 (2006) of the Focal Point within the Secretariat to receive delisting requests, and *taking note* with appreciation of the ongoing cooperation between the Focal Point and the Committee,

Welcoming the continuing cooperation of the Committee and INTERPOL, in particular on the development of Special Notices, which assists Member States in their implementation of the measures, and recognizing the role of the Analytical Support and Sanctions Implementation Monitoring Team ("the Monitoring Team") in this regard,

Welcoming the continuing cooperation of the Committee with the United Nations Office on Drugs and Crime, in particular on technical assistance and capacity-building, to assist Member States in implementing their obligations under this and other relevant resolutions and international instruments,

Noting with concern the continued threat posed to international peace and security by Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings and entities associated with them, and *reaffirming* its resolve to address all aspects of that threat,

Acting under Chapter VII of the Charter of the United Nations,

Measures

1. *Decides* that all States shall take the measures as previously imposed by paragraph 4(b) of resolution 1267 (1999), paragraph 8(c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002), with respect to Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the "Consolidated List"):

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory;

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

(c) Prevent the direct or indirect supply, sale, or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities;

2. *Reaffirms* that acts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Usama bin Laden or the Taliban include:

(a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

(b) supplying, selling or transferring arms and related materiel to;

(c) recruiting for; or

(d) otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

Guidelines of the Committee for the Conduct of its Work
(Adopted on 7 November 2002, as amended on
10 April 2003, 21 December 2005,
29 November 2006, 12 February 2007 and
9 December 2008)

. . .

11. <u>Exemptions from the Travel Ban</u>

In paragraph 2 (b) of resolution 1390 (2002), as reaffirmed by subsequent relevant resolutions, including paragraph 1 (b) of resolution 1822 (2008), the Security Council decided that the travel ban imposed under the Al-Qaida/Taliban sanctions regime shall not apply where the Committee determines, on a case by case basis

only, that entry or transit is justified.

(a) Each request for exemption must be submitted in writing, on behalf of the listed individual, to the Chairman. The States that may submit a request through their Permanent Mission to the United Nations are the State(s) of destination, the State(s) of transit, the State of nationality, and the State of residence. If no effective central government exists in the country in which the listed individual is located, a United Nations office or agency in that country may submit the request for exemption on the listed individual's behalf.

(b) Each request for exemption shall be received by the Chairman as early as possible but not less than five working days before the date of the proposed travel.

(c) Each request for exemption should include the following information:

i. the permanent reference number, full name, nationality, passport number or travel document number of the listed individual;

ii. the purpose of and justification for the proposed travel, with copies of supporting documents, including specific details of meetings or appointments;

iii. the proposed dates and times of departure and return;

iv. the complete itinerary and timetable, including for all transit stops;

v. details of the mode of transport to be used, including where applicable, record locator, flight numbers and names of vessels;

vi. all proposed uses of funds or other financial assets or economic resources in connection with the travel. Such funds may only be provided in accordance with paragraph 1 of resolution 1452 (2002), as modified by paragraph 15 of resolution 1735 (2006). The procedures for making a request under resolution 1452 (2002) can be found in Section 10 of these guidelines.

(d) Once the Committee has approved a request for exemption from the travel ban, the Secretariat shall notify in writing the Permanent Missions to the United Nations of: the State in which the listed individual is resident, the State of nationality, the State(s) to which the listed individual will be traveling, and any transit State, as well as any UN office/agency involved as provided for in paragraph (a) above, to inform them of the approved travel, itinerary and timetable.

(e) Written confirmation of the completion of the travel by the listed individual shall be provided to the Chairman within five working days following the expiry of the exemption by the State (or United Nations office/agency as in paragraph (a) above) in which the listed individual has stated he will be resident after completion of the exempted travel.

(f)Notwithstanding any exemption from the travel ban, listed individuals remain subject to the other measures outlined in paragraph 1 of resolution 1822 (2008).

(g) Any changes to the information provided under paragraph (c) above, including with regard to points of transit, shall require further consideration by the Committee and shall be received by the Chairman no less than three working days prior to the commencement of the travel.

(h) Any request for an extension of the exemption shall be subject to the procedures set out above and shall be received by the Chairman in writing, with a revised itinerary, no less than five working days before the expiry of the approved exemption.

(i) The submitting State (or United Nations office/agency as in paragraph (a) above) shall inform the Chairman immediately and in writing of any change to the departure date for any travel for which the Committee has already issued an exemption. Written notification will be sufficient in cases where the time of departure is advanced or postponed no more than 48 hours and the itinerary remains otherwise unchanged. If travel is to be advanced or postponed by more than 48 hours, or the itinerary is changed, then a new exemption request shall be submitted in conformity with paragraphs (a), (b) and (c) above.

(j) In cases of emergency evacuation to the nearest appropriate State, including for medical or humanitarian needs or through force majeure, the Committee will determine whether the travel is justified within the provisions of paragraph 1 (b) of resolution 1822 (2008), within 24 hours once notified of the name of the listed individual traveler, the reason for travel, the date and time of evacuation, along with transportation details, including transit points and destination. The notifying authority shall also provide, as soon as possible, a doctor's or other relevant national official's note containing as many details as possible of the nature of the emergency and the facility where treatment or other necessary assistance was received by the listed individual without prejudice to respect of medical confidentiality, as well as information regarding the date, time, and mode of travel by which the listed individual returned to his/her country of residence or nationality, and complete details on all expenses in connection with the emergency evacuation.

(k) Unless the Committee otherwise decides, all requests for exemptions and extensions thereto which have been approved by the Committee in accordance with the above procedures, shall be posted in the "Exemptions" section of the Committee's website until expiry of the exemption. [Footnotes omitted.]

Travel Ban: Explanation of Terms

1. Background

On 16 January 2002, by resolution 1390 (2002), the Security Council decided to impose a travel ban on Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals associated with them as designated by the 1267 Committee on its Consolidated List. There is no expiry date for the travel ban sanction measure which has been reiterated in subsequent Security Council resolutions concerning the 1267 regime, most recently in paragraph 1 (b) of resolution 1822 (2008), adopted on 30 June 2008.

The travel ban measure requires all United Nations Member States to:

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

2. Objective of the travel ban

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

3. Member State obligations regarding the travel ban

All Member States of the United Nations are required to implement the Al-Qaida/Taliban travel ban sanction measure against all individuals designated on the Consolidated List by the 1267 Committee, (available at: http://www.un.org/sc/committees/1267/consolist.shtml). The travel ban measure applies to all listed individuals wherever they may be located. The responsibility to implement the travel ban measure lies with the State(s) of entry and/or transit.

The travel ban measure requires States to:

- Prevent the entry into their territories of the listed individuals, and
- Prevent the transit through their territories of the listed individuals unless one of the three exemption provisions apply (explained in paragraph 4 below).

The obligation to prevent the entry of listed individuals into territories applies in all circumstances, regardless of the method of entry, the point of entry or the nature of the travel documents used, if any, and despite any permissions or visas issued by the State in accordance with its national regulations.

The obligation to prevent the transit through a Member State's territory applies to any passage through the territory of a Member State, however brief, even if the listed individual has travel documents, permissions and/or transit visas as required by the State in accordance with its national regulations and is able to demonstrate that he/she will continue his/her journey to another State.

4. Exemptions allowed under the travel ban

There are 3 types of exemption to the travel ban measure and they are described in paragraph 1(b) of resolution 1822 (2008) itself:

(i) Entry into or departure of its own nationals

There is no obligation under the Al-Qaida/Taliban travel ban for a Member State to deny entry into or require the departure from its territories of its own nationals, including those who hold dual nationality.

(ii) Where entry or transit is necessary for the fulfillment of a judicial process

There is no obligation to arrest or prosecute listed individuals on the basis of their designation on the Consolidated List by the 1267 Committee. However, if there are reasonable grounds to suspect that a listed individual has committed an offence punishable under national legislation, the competent national authority may take the appropriate measures to allow entry or transit of that listed individual into national territory to ensure his/her presence for the purposes of the fulfillment of a judicial process.

This may include, but would not be limited to: allowing a listed individual to enter the territory of a Member State in relation to judicial proceedings where the listed individual's presence may be necessary for the purposes of identification, testimony or other assistance relevant to the investigation or prosecution of an offence committed by someone other than that listed individual, or in relation to civil proceedings.

Note: Member States are not required to report to the 1267 Committee the entry into or transit through their territory of a listed individual when exercising their rights under exemptions (i) and (ii) above but any information on the entry into or transit through their territory of any listed individual under these exemptions can be of interest to the Committee, and States are invited to inform the Committee accordingly.

(iii) Where the 1267 Committee determines on a case-by-case basis only that entry or transit is justified

In November 2002, the 12567 Committee adopted a mechanism to consider requests for exemptions from the Al-Qaida/Taliban travel ban measure (see Section 4, paragraph (m) of the Committee's Guidelines). On 2 September 2008, the Committee approved specific procedures in this regard (see Section 11 of the Committee's Guidelines). The Committee's Guidelines can be found at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

In summary, under this third exemption provision, it is possible for listed individuals to apply for a travel ban exemption for necessary travel such as for medical treatment or the performance of religious obligations through the State(s) of destination, the State(s) of transit, the State of nationality, or the State of residence. If no effective central government exists in the country in which the listed individual is located, a United Nations office or agency in that country may submit the requested exemption on his/her behalf. Except in cases of emergency, the travel can only take place after formal approval by the 1267 Committee.

In cases of emergency, the Committee will determine whether the travel is justified within the provisions of paragraph 1 (b) of resolution 1822 (2008) within 24 hours once notified of the name of the listed individual traveler and the other details set out in Section 11, paragraph (j) of the Committee's Guidelines.

The Committee's decisions on all requests for exemptions are reached by consensus of its Members on a case-by-case basis, in accordance with its Guidelines.

All proposed uses of funds or other financial assets or economic resources in connection with the travel may only be provided by the Committee in accordance with paragraph 1 of resolution 1452 (2002), as modified by paragraph 15 of resolution 1735 (2006). The procedures for making a request under resolution 1452 (2002) can be found in Section 10 of the Committee's Guidelines, available at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

Canadian Passport Order, SI/81-86

4. (1) Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport.

(2) No passport shall be issued to a person who is not a Canadian citizen under the Act.

(3) Nothing in this Order in any manner limits or affects Her Majesty in right of Canada's royal prerogative over passports.

(4) The royal prerogative over passports can be exercised by the Governor in Council or the Minister on behalf of Her Majesty in right of Canada.

. . .

10.1 Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country.

ANNEX B

Summary of Assurances to Provide an Emergency Passport

His return has been the subject of discussions at the highest levels, including Ministers, and a decision was taken that he was "entitled to a one-time Canadian travel document that would allow him to travel to Canada. [Undated, applicant's record, page 149.]

Consular officials would provide a temporary travel document (and other consular assistance as appropriate) for Mr. Abdelrazik to return to Canada if travel arrangements could be made. …As a Canadian citizen, Mr. Abdelrazik is entitled to a one-time Canadian travel document that would allow him to travel to Canada. Canada is not, however, prepared to make extraordinary arrangements to provide for Mr. Abdelrazik's travel to Canada. [Undated, applicant's record, page 149.]

Q: If Air Canada or any other carrier agrees to fly this person to Canada, would FAC assist him in obtaining the travel documents necessary for his return?

A: Yes, we would, as we would assist any Canadian trying to return to Canada. In this case, Mr. Abdelrazik would be issued a document (Emergency Passport) permitting him a one-way return to Canada. [July 28, 2004, draft 10, press lines *Privacy Act* disclosure, page 1072.]

Q: As a Canadian citizen, isn't Mr. Abdelrazik entitled to return to Canada?

A: Yes, as a Canadian citizen, Mr. Abdelrazik is entitled to a temporary Canadian travel document that would facilitate his travel to Canada. However, as a result of security concerns, airlines have indicated that they are not in a position to provide Mr. Abdelrazik with passenger service from Sudan to Canada. In the absence of a confirmed itinerary, we cannot issue a temporary travel document. [July 30, 2004, no attribution, applicant's record, page 166.]

Generally speaking, we will continue to provide consular assistance – the basic services of visiting him, communicating with his family, ensuring that his rights are protected under international conventions, issuance of a temporary travel document, etc. [August 4, 2004, e-mail from D. Dyet to D. Hutchings, applicant's record, pages 942-943.]

You should inform Mr. A. the next time he calls that the government of Canada is not in a position to arrange for his travel to Canada. Our offer for a EP still stands but we cannot intervene with the airlines to arrange the flights. [August 4, 2004, e-mail from D. Dyet to D. Hutchings, *Privacy Act* disclosure, page 1203.]

I will pass on the message that Canada is not in a position to arrange his travel but that we are willing to give him an EP. [August 4, 2004, e-mail from D. Dyet to S. Ahmed, applicant's record, page 944.]

I passed your message to Mr. A., ie that the GOC was not in a position to arrange his travel but that we are prepared to issue him an EP. [August 4, 2004, e-mail from D. Hutchings to D. Dyet, *Privacy Act* disclosure, page 1202.]

His Canadian passport expired while he was in detention, and both he and the Sudanese authorities are asking us to renew it. The Passport Office has however instructed that he be issued an emergency passport only, once a routing is confirmed. Such a passport would be valid for a one-way trip to Canada only, according to dates and routing specified on the passport. [August 4, 2004, e-mail from D. Hutchings to D. Dyet, applicant's record, page 947.]

The Passport Office has previously authorized the issuance of an EP for Mr. Abdelrazik's return to Canada. Despite the changes to his travel plans, we are still prepared to authorize the issuance of an EP provided all usual requirements are met. [August 4, 2004, case note 126, *Privacy Act* disclosure, page 739.]

Mr. A. phoned and asked if there were any new developments, we told him about the same offer, that we are

willing to issue him an EP once we have a confirmed route and he asked who should provide it we told him it should be him not us, he asked how he can do it when he is a detainee. [August 15, 2004, case note 135, *Privacy Act* disclosure, page 752.]

GOC position is that we are willing to give him an EP for repatriation to Canada, where there are no charges against him, but we are not in a position to overrule the airlines' decision. [August 17, 2004, case note 136, *Privacy Act* disclosure, page 753.]

Mr. Abdelrazik travelled to Sudan on his Canadian passport and says he has not had a Sudanese passport for some time. His Canadian passport expired while he was in detention, and both he and the Sudanese authorities are asking us to renew it. The Passport Office has however instructed that he be issued an emergency passport only, once a routing is confirmed. Such a passport would be valid for a one-way return trip to Canada only, according to dates and routing specified on the passport. [September 9, 2004, no attribution, applicant's record, page 186.]

We have been going around the same course with Mr. A. for some time now. We were prepared to issue him an emergency passport if he could secure air passage out of Sudan. This he could not do. No airline would carry him because of his alleged past associations. This is unlikely to have changed. [September 27, 2004, e-mail from K. Sigurdson to D. Hutchings, applicant's record, page 180.]

Canadian officials have offered Mr. Abdelrazik an Emergency Passport for a one-way return to Canada provided that he is able to make his own travel arrangements. [September 29, 2004, e-mail from D. Dyet to K. Sigurdson, applicant's record, page 177.]

Canadian officials have offered Mr. Abdelrazik an Emergency Passport for a one-way return to Canada provided that he is able to make his own travel arrangements. [September 30, 2004, e-mail from K. Sigurdson to D. Dyet, applicant's record, page 514.]

I said we were prepared to issue an EP once a feasible mode of transport was identified and I would advise Ottawa of this proposal. [October 18, 2004, e-mail from D. Hutchings to K. Sigurdson, applicant's record, page 949.]

The response of the Canadian government is straight forward: consular service, in the form of an Emergency Passport, should be given to the subject only once the Cdn gov't (all interested depts and agencies) has full details of his approved travel plans.

. . .

Only when we have all this information will we be in a position to give the go-ahead for the issuance of an EP. Please note that final authority rests with Ottawa. [October 26, 2004, e-mail from K. Sigurdson to D. Hutchings, applicant's record, page 161.]

I (or Alan Bones) could explain in the course of that mtg that Canada continues to express concern about his case to the GOS and stands ready to provide consular service including an emer ppt if travel becomes possible. [March 21, 2005, e-mail from D. Hutchings to K. Sigurdson, applicant's record, page 715.]

I told him that to my knowledge there was no change in the Cdn position. We were prepared to issue an emergency ppt if transport and an itinerary could be confirmed. I was not aware of any new possibilities in that regard. [April 10, 2005, e-mail from D. Hutchings to O. Gaudet-Fee, *Privacy Act* disclosure, page 103.]

His return has been the subject of discussions at the highest levels, including Ministers, and a decision was taken that he was "entitled to a one-time Canadian travel document that would allow him to travel to Canada. [June 23, 2005 memo from D. Dyet, applicant's record, page 163.]

As a Canadian citizen, Mr. Abdelrazik is entitled to a one-time Canadian travel document that would allow him to travel to Canada. Canada is not, however, prepared to make extraordinary arrangements to provide for Mr. Abdelrazik's travel to Canada.

. . .

In the absence of a confirmed itinerary, the Government of Canada cannot issue a temporary travel document. [Speaking points January 31, 2007, security and emergency preparedness, applicant's record, page 211.]

The position of the Government of Canada to date has been that Mr. Abdelrazik is a Canadian citizen and has the right to return to Canada, provide he can secure his own travel arrangements. The Canadian Embassy in Khartoum is prepared to issue an emergency Canadian passport to Mr. Abdelrazik. This would not be done until travel arrangements have been confirmed. [October 15, 2007, e-mail from IFM to TSI, applicant's record, page 260.]

A request for an exemption to the travel ban was suggested as alternate solution. JLH/Volke explained that as a Canadian, Mr. Abdelrazik had the right to come back to Canada — The question was rather how to do so. CNO confirmed that an emergency passport or travel document could be issued (subject to Passport Canada approval) as had been the case when CNO had initially tried to repatriate Mr. Abdelrazik, but that a travel itinerary would be required in order for such a document to be issued. However, CNO pointed out that since Mr. Abdelrazik remained on the US no fly list, we would need to be creative in determining how to bring him back to Canada as many airlines and countries rely on that list. [February 29, 2008, e-mail from K. Boutin to C. McIntyre, applicant's record, pages 221–222.]

With respect to Mr. Abdelrazik's passport application, I would like to remind you of our commitment, expressed in our meeting of February 27, to ensure that he has an emergency passport document to facilitate his return to Canada. We stand by that commitment. [April 18, 2008, letter from S. Robertson to Y. Hameed, applicant's record, page 512.]

We therefore have to know what our position would be if he is released. I suggest we remain responsive. If Mr. A is able to make an airline booking to Canada, we will issue an emergency passport and provide a transportation loan if he signs an undertaking to repay. [March 17, 2005, e-mail from K. Sigurdson to D. Livermore, applicant's record, page 791.]

Question now, as noted in email, is whether we can continue to refuse to renew his Cnd ppt, which expired during his period of detention. You had said that we should give him only an emergency ppt once he had submitted his itinerary and that itinerary had been approved in Ottawa. As he is on the blacklist, he cannot submit an itinerary so we are effectively denying him a ppt even though he is now unconditionally free in Sudan, there are no charges against him in Sudan or in Canada, and he is no longer…under investigation in Sudan. Would appreciate your thoughts. [August 8, 2005, from Khartoum Embassy, applicant's record, page 899.]

As a Canadian citizen Mr. Abdelrazik has a *prima facie* right to return to Canada and we are prepared to issue travel documents when an itinerary is established. Should the Sudanese Government wish to make air transportation available for the repatriation of Mr. Abdelrazik, we can assure that Canadian authorities will facilitate access to Canadian airspace and granting of landing rights. [December 20, 2005, letter from Canadian Embassy Khartoum, respondent's record, page 276.]

Canadian government efforts to facilitate Abdelrazik's return to Canada will hinge on his having confirmed flight and travel arrangements. The point on which they foundered in June 2004 [redacted] remains on a US no fly list and cannot exclude that he would be refused boarding or detained at a stop-over en route. [May 5, 2006, information memorandum for the Minister of Foreign Affairs, applicant's record, page 905.]

See what his longer term plans are—it will most likely include a return to Canada. Explain the situation and the limitations (in terms of consular issues). From the beginning, he has been informed that should he provide an itinerary, he would be provided with an EP. This has not changed but we do need an itinerary and he will have to pay for his own ticket. Perhaps his family can help. [June 27, 2006, case note from O. Gaudet-Lee, applicant's record, page 864.]

Abdelrazik appears to be in fairly good health but first impressions are that of a broken man. When informed that we could not guarantee his return to Canada and that a travel itinerary would be required before a travel document could be issued Abdelrazik was visibly shocked. [July 20, 2006, from Khartoum Embassy, applicant's record, page 870.]

1. Has the passport in this case not been issued because Mr. Abdelrazik does not present sufficient information to establish his identity of Canadian citizenship, which is ground A (Exhibit 4 s. 5201—Reasons for refusal) (Q:167)

> A passport application is an application for a travel document. Passport Canada has discretion regarding the type of travel document issued, be it a limited validity passport or a regular passport. Both the Department of Foreign Affairs and International Trade and Passport Canada have, to the best of my knowledge, always maintained that Mr. Abdelrazik will be issued an emergency passport for return to Canada as soon as a confirmed travel itinerary can be secured. To the best of my knowledge that is the response to his application. As far as I understand, Mr. Abdelrazik would not be entitled to a limited validity passport if his identity as a Canadian citizen were in issue.

2. Are you aware why Mr. Abdelrazik has not been given a passport? (Q: 170)

> I have some knowledge of the processing of Mr. Abdelrazik's passport application via a computer screen available to me on-line that I reviewed subsequent to the completion of my cross-examination. That computer screen indicates that Mr. Abdelrazik is on the Passport Canada SL and therefore requires authorization from Passport Canada before he can be issued with a travel document. He has been advised that he must present a confirmed travel itinerary for his travel back to Canada before he can be issued with a limited validity passport (aka emergency passport). [December 17, 2008, answers given by S. Robertson to questions put on examination, applicant's record, page 875.]

Note that pending the outcome of our investigation, no regular passport services will be provided to your client. However, notwithstanding any of the foregoing, in order to facilitate Mr. Abdelrazik's return to Canada, Passport Canada will issue an emergency passport to Mr. Abdelrazik, upon his submission of a confirmed and paid itinerary to the Consular Section of the Canadian Embassy, Khartoum. [December 23, 2008, letter from F. Fernandes to Y. Hameed, applicant's record, page 884.]

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[1] Lord Woolf, "Judicial Review—The Tensions Between the Executive and the Judiciary" (1998), 114 *Law Q. Rev.* 579, at p. 580.

[2] There are publicly available reports issued by the United States of America that indicate that Mr. Abu Zubayada was captured in March 2002, that he is currently being held at the U.S. facility at Guantanamo Bay, and that he has been subjected to "enhanced interrogation techniques", including numerous incidents of water-boarding, a practice that many hold to be torture.

[3] The *Security Council Report: Update Report, April 21, 2008, No. 4* ["1267 Committee: Al-Qaida/Taliban Sanctions"] respecting the 1267 Committee reflects these concerns and complaints. Reference is made to a meeting of November 8, 2007 at which "the representative of the Secretariat's focal point reported 'a clear frustration' among petitioners, who want to know the reason they are on the list, which states designated them and how they could appeal, none of which the focal point is allowed to answer."

[4] One might speculate it was because Canada had decided that no extraordinary efforts would be made to repatriate

Mr. Abdelrazik. An e-mail dated August 11, 2004 from Mr. Dyet states "Evidently, this case was discussed by several Ministers responsible for consular affairs as well as for national security and the decision was taken that we were [redacted] to assist Mr. Abdelrazik to return to Canada". One can but speculate as to the words that lie behind those two inches of redacted text.

[5] See also paras. 62–70 in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C.R. 218.

[6] *Robert & Collins Senior: French-English, English-French Dictionary*, 6th ed. Paris: Dictionnaries Le Robert, 2002.