

April 27, 2009

The Right Honourable Stephen Harper
Prime Minister of Canada
Langevin Block
Ottawa, Ontario
K1A 0A2

The Honourable Lawrence Cannon
Minister of Foreign Affairs
Foreign Affairs and International Trade Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

Dear Prime Minister and Minister Cannon:

Re: Abousfian Abdelrazik

On behalf of the British Columbia Civil Liberties Association, I write to express our serious concerns about the conduct of the Canadian Security Intelligence Service (“CSIS”) and the Department of Foreign Affairs and International Trade (“DFAIT”) with respect to Abousfian Abdelrazik, a Canadian citizen who has been in *de facto* exile in Sudan since 2003. We call on you to facilitate Mr. Abdelrazik’s immediate return to Canada and to initiate an investigation into Ottawa’s role in his detention in Sudan.

The British Columbia Civil Liberties Association is the oldest and most active civil liberties organization in Canada. We have spent more than 40 years working to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada. We have longstanding and extensive involvement in working to ensure that national security concerns are balanced with respect for the rule of law and the rights of individuals.

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Rights of Canadians Abroad

Before setting out our understanding of the facts and matters pertaining to Mr. Abdelrazik's case, we note the decision of Mr. Justice O'Reilly in the case of *Khadr v Canada (Prime Minister) et al* 2009 FC 405, which was recently handed down. That decision sets out in detail the obligations of the Canadian government to protect Canadian citizens. We mention this not simply because there is, as the learned judge notes, ample judicial recognition of that obligation in the context of judicial review of executive action. We do so because as the executive branch of our government you have, as the courts have noted, the primary duty to exercise the powers entrusted to you in a manner that is consonant with the *Charter of Rights and Freedoms* and with Canada's international obligations.

The Supreme Court of Canada made the point well in *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1:

3 The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

4 On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

The case of Mr. Suresh involved a non-citizen who was being deported as a result of a ministerial certificate that held him to be a person involved in terrorist groups. The court ruled, nonetheless, that he was entitled to the protection of the *Charter of Rights and Freedoms* and that in light of evidence that he would be tortured if he was deported from Canada to his native land, the Minister was obliged to reconsider his decision. The court said with regard to non-citizens:

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78 We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. (A violation of s. 7 will be saved by s. 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”: see *Re B.C. Motor Vehicle Act*, supra, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

The legal standard for deportation is therefore a very high one where there is a serious risk of torture or physical abuse at the hands of foreign authorities.

If that is so for non-citizens being deported from Canada, then no less a standard must apply to Canadians who are abroad and desire to return home. Section 6 of the *Charter of Rights and Freedoms* is clear that citizens have a special right to enter and remain in Canada.

Given that the RCMP and CSIS have cleared Mr. Abdelrazik of involvement in terrorist activities, there is, simply put, no proper basis that has been made public to date for the continued obstruction on the part of Canada of his efforts to return here. If there is a rational basis that meets the high standard that the Supreme Court has ruled must exist, that should be clearly articulated. If there is not, then based upon the *Khadr* decision, it is clear that the Canadian government is obliged to facilitate his return. At present, there does not appear to the public or to us to be any such proper basis for keeping him out of Canada.

We note as well that the involvement of Canadian officials with regard to Mr. Abdelrazik span not just the terms of your government, but also those of the previous two governments. It is appropriate therefore, that the call that we make herein for a fresh look at Mr. Abdelrazik’s case and for a review of how Canadian officials have dealt with it since 2003 be made and that appropriate action be taken by your government to correct matters.

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Further, we note that your government has established a record of assisting Canadians abroad. This has arisen in many different contexts. Some have involved Canadians caught up in foreign countries and criminal proceedings. The case of Brenda Martin, who was found guilty by a Mexican court of money laundering and other crimes and sentenced to 5 years imprisonment is one. Ms. Martin was released to Canada's custody by Mexican authorities and flown home at taxpayer expense. This arose following a special meeting with her at a Mexican prison by then Minister of State for Multiculturalism, Jason Kenney. Another instance is the evacuation of 15,000 Canadians living in Lebanon during the Lebanon War of 2006. The Prime Minister himself directed a detour of his official jet from an official visit to Europe so as to pick up evacuees in Cyprus and return them home to Canada. He commented at the time that doing so was "the right thing to do."

Mr. Abdelrazik's detention in Sudan

As you are aware, Mr. Abdelrazik is a dual Canadian/Sudanese national, who arrived in Canada in 1990 as a political refugee from his native Sudan. He became a Canadian citizen in 1995 and currently has three children living in Canada.

As a person of interest to the Canadian and American governments because of alleged ties to al-Qaeda, after September 11, 2001, Mr. Abdelrazik was reportedly harassed by CSIS while living in Canada.

In March 2003, he went to Khartoum on a Canadian passport to visit his ailing mother and to escape the harassment of CSIS. In August of that year, Mr. Abdelrazik was arrested by the Sudanese authorities.

Between August 2003 and July 2006, Mr. Abdelrazik was intermittently detained by Sudanese authorities, spending a total of almost two years in the Sudanese prison system, where, he alleges, he was subjected to abusive treatment and torture. He was at no time during his detention charged with any crimes in Sudan or Canada.

While in detention, Mr. Abdelrazik was interrogated by Canadian and American intelligence officers without access to legal or consular assistance. According to Mr. Abdelrazik, in December 2003, CSIS agents interrogated him in a Sudanese prison before providing him with access to legal counsel or consular assistance. Likewise, in April 2007, Mr. Abdelrazik was interrogated by the U.S. Federal Bureau of Investigation, and despite his request that an embassy official be present at the interrogation, he faced the FBI alone.

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Government documents obtained by Mr. Abdelrazik's legal counsel strongly suggest that Mr. Abdelrazik was arrested and held by Sudanese authorities at the recommendation and request of the Canadian government. These documents also reflect a growing unease on the part of Sudanese officials to continue holding an individual without charge at the behest of a foreign government.

Mr. Abdelzarik's allegations, if true, show the Canadian government engaging in wrongful conduct. By providing intelligence about Mr. Abdelzarik to the Sudanese government, and then requesting that it indefinitely detain him without charge in one of the most notorious prison systems in the world, Canada has engaged in conduct in violation of its international human rights obligations and the *Charter of Rights and Freedoms*.

The *International Covenant on Civil and Political Rights*, to which Canada is a signatory, protects individuals from arbitrary arrest and detention. Likewise, s. 7 of the *Charter* protects individuals from being deprived of life, liberty or security of the person except in accordance with principles of fundamental justice. To have requested that a foreign government detain a Canadian national for close to two years without charge clearly violates these protections of due process. And indeed, to this day, no charges have ever been brought against Mr. Abdelrazik. By the end of 2007, both CSIS and the RCMP had officially cleared Mr. Abdelrazik of involvement in any terrorist activity, as confirmed in their reports to your offices.

Moreover, to the extent that Mr. Abdelrazik was tortured during his detention in the Khartoum prisons, Canada may also be complicit in his torture, in violation of s. 7 of the *Charter*. The Canadian government appears to have engaged in nothing less than an opportunistic rendition in seeking to circumvent its obligations under international humanitarian law and the *Charter* by outsourcing impermissible conduct to Sudan.

Mr. Abdelrazik's de facto exile

In addition to its complicity in the detention and torture of Mr. Abdelrazik, the Canadian government has obstructed his efforts to return to Canada. Mr. Abdelrazik's mobility rights are guaranteed by s. 6(1) of the *Charter*, which provides that "[e]very citizen of Canada has a right to enter, remain in and leave Canada." Article 12 of the *ICCPR* also provides that no individual should be "arbitrarily deprived" of the right to enter his own country. Despite these obligations, DFAIT has actively obstructed Mr. Abdelrazik's attempts to return home to his family in Canada.

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When Mr. Abdelrazik was finally released from Sudanese custody in 2006, he no longer had a valid passport. He also found himself added to the list of individuals and entities alleged to have ties with al-Qaeda, the Taliban, or Osama bin Laden maintained by the United Nations Security Council Committee established pursuant to resolution 1267 (the "UN 1267 List"). Individuals on the List are subjected to an asset freeze and a travel ban. However, after CSIS and RCMP issued reports clearing Mr. Abdelrazik of involvement in terrorist and criminal activities, DFAIT agreed to transmit Mr. Abdelrazik's request to the United Nations to be delisted from the UN 1267 List in December 2007. Unfortunately, that application was unsuccessful.

Nonetheless, in early 2008, DFAIT informed Mr. Abdelrazik that he was entitled to emergency travel documents for his return to Canada and that they would be issued once Mr. Abdelrazik could confirm an itinerary, though at that time, Mr. Abdelrazik was still subject to the UN 1267 List's travel ban. In June 2008, the Security Council adopted resolution 1822, which provided for certain exemptions to the travel ban. One of these exemptions permitted travel for repatriating a citizen to his or her home country. Thus, in August 2008, Mr. Abdelrazik booked a flight to Canada on Etihad Airways and requested that DFAIT provide him with an emergency travel document. Despite its previous position that an emergency passport would be issued upon presentation of a confirmed itinerary, DFAIT refused his request.

In December 2008, DFAIT informed Mr. Abdelrazik that Passport Canada would only issue an emergency passport if he was able to present a fully-paid-for ticket to Canada, knowing that Mr. Abdelrazik was impecunious and had no ability to purchase a ticket, and that Canadian anti-terrorism laws prohibited the contribution of funds to individuals on the UN 1267 List. Nonetheless, in response to DFAIT's new condition, almost 200 Canadians contributed to the purchase of a ticket from Khartoum to Montreal for Mr. Abdelrazik, scheduled to depart on April 3, 2009. On the morning of April 3, however, DFAIT again reneged on its representations and informed Mr. Abdelrazik's lawyers that no emergency passport would be issued.

Mr. Abdelrazik currently continues to live in the lobby of the Canadian embassy in Khartoum, where he has stayed for the past 11 months after being granted "temporary safe haven" by former Minister of Foreign Affairs Maxime Bernier. He has been stranded in Sudan since 2003.

According to recent media reports, Minister Cannon has now taken the position that Mr. Abdelrazik needs to be removed from the UN 1267 List before he can return to Canada -- a near-impossible hurdle, given the government's previously unsuccessful attempt to remove him from the list in December 2007. Moreover, in recent filings in the Federal

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Court, where Mr. Abdelrazik's pro bono counsel has been attempting to seek an order compelling DFAIT to repatriate Mr. Abdelrazik, the government argues that despite its exemption for repatriation, the UN 1267 List's travel ban prohibits Mr. Abdelrazik's return home because the flight from Khartoum to Montreal would take him over territorial airspace of other countries, or require connections through other countries. Such travel "through" countries other than Canada, according to the government's filing, would violate the travel ban.

With respect, such a line of reasoning is disingenuous and deliberately ignores how the travel ban operates in practice. As *The Globe and Mail* has reported, a Somali citizen who is similarly listed on the UN 1267 List was repatriated from Britain in early April. The British government issued him an emergency travel document and applied for a travel exemption from the UN Security Council 1267 Committee to ensure that his itinerary would not run afoul of the travel ban. The Canadian government has never attempted to apply for a travel-ban exemption for Mr. Abdelrazik. Rather than facilitating Mr. Abdelrazik's return home, the government is instead arguing for an unnecessarily restrictive interpretation of the travel ban's provisions and application.

The government's tactic of requiring Mr. Abdelrazik's passage home be contingent on procuring a fully-paid-for ticket when it knew that his assets were frozen and that any donations made to him may be considered to be in violation of Canada's anti-terrorism laws is also problematic. Those individuals who assisted Mr. Abdelrazik in the purchase of his ticket home should not be prosecuted for this act of civil disobedience.

The BCCLA Calls for Mr. Abdelrazik's Immediate Return to Canada and an Investigation into the Government's Role in his Detention in Sudan

We call on you to facilitate Mr. Abdelrazik's immediate return to Canada and uphold the Canadian government's obligations under international law and the *Charter*. The right to return to the country of one's own citizenship is a fundamental principle in international humanitarian law and is enshrined in the human rights covenants and treaties to which Canada is a party. The *Charter* guarantees Mr. Abdelrazik's right to return home. DFAIT's continued failure to honour its various commitments to issue travel documents to Mr. Abdelrazik is appalling treatment of a Canadian citizen.

We further call on you to initiate an investigation into the role played by DFAIT, CSIS, and any other Canadian government agencies in Mr. Abdelrazik's detention in Sudan. We are deeply troubled by the disturbing parallels between this case and those of Maher

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Arar, Abdullah Almalki, Maouyyed Nureddin and Ahmad El Maati. As in those cases, there are allegations that information provided by Canadian authorities either directly or indirectly resulted in the torture and mistreatment of a Canadian citizen. We are also very concerned about the additional allegation that Sudan arbitrarily detained Mr. Abdelrazik at the direction of the Canadian government.

We also call on an investigation in the government's role in Mr. Abdelrazik's arbitrary and unjustified detention in Sudan. Last summer, Mr. Abdelrazik's lawyers sought review by the Security Intelligence Review Committee of CSIS's role in the matters relating to Mr. Abdelrazik. The BCCLA supports Mr. Abdelrazik's application for SIRC review. To the extent that the SIRC review is limited to reviewing only the actions of CSIS, we call on the government to initiate an investigation capable of conducting a cross-agency review. The allegations of government misconduct across agencies only further illustrates the pressing need for the implementation of the Arar Inquiry's recommendations for the establishment of a comprehensive, cross-agency review mechanism, which the government has still failed to undertake.

Chief among our national values is a respect for the rule of law and a recognition that all of our citizens should be treated fairly and equally. The government's actions in this matter are out of step with these fundamental Canadian values.

We respectfully request that you bring Mr. Abdelrazik home with all expedience and to account for the government's actions in this affair.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Holmes", with a long, sweeping flourish extending to the right.

Robert D. Holmes
President