“Kafkaesque” Adelrazik Saga Raises Mobility Rights Question

Does the Government of Canada have a constitutional obligation to make good faith efforts to repatriate citizens stranded abroad? Section 6(1) of the *Charter of Rights and Freedoms* reads, “Every citizen of Canada has the right to enter, remain in and leave Canada.”[1] However, it is unclear what positive efforts, if any, the government must make to facilitate the exercise of a citizen’s mobility rights. This is the crux of the controversy over Abousfian Abdelrazik.

Mr. Abdelrazik, a Canadian citizen since 1995, traveled to his ancestral homeland of Sudan in 2003. During the Bush administration in the United States, the CIA alleged that Abdelrazik attended an al-Qaeda training camp, despite his claims that he was visiting his mother. In any case, he has never been formally charged with terrorism nor has he been given the opportunity to defend himself in court. While detained by Sudanese authorities, Abdelrazik claims he was “abused and tortured,” contrary to statements from Canada’s head of mission that there were no signs or complaints of abuse during his incarceration. Since his release in 2004, he has been entangled in a bureaucratic dispute with Foreign Affairs and International Trade Canada in an attempt to acquire a passport for his return to Canada.[2]

The Canadian government maintains that it is living up to its international obligations by not facilitating the travel of Mr. Abdelrazik as he is on a United Nations (UN) list of suspected terrorists affiliated with Osama bin Laden and al-Qaeda. In the House of Commons last week, opposition members emphasized that the United Nations has not discouraged Canada, or any other nation, from issuing travel documents to its nationals.[3]Opposition members went on to charge that the excuse of the United Nations list is merely the latest in a series of obfuscations the government has used to evade its responsibility to aid a citizen wishing to return to Canada.[4]

On May 8, 2009, lawyers for Abdelrazik asked a Federal Court judge for an order demanding the government make efforts to repatriate him.[5] Lawyers for the government argued that there is no positive obligation to facilitate a citizen in exercising the section 6 *Charter* right to mobility. They claimed it was up to Abdelrazik to clear his name from the UN list. Justice Russell Zinn seemed sceptical, calling the situation “Kafkaesque.” A ruling from the Federal Court is expected within weeks.[6]

Mr. Abdelrazik’s situation has parallels with that of Omar Khadr. Khadr has been held without benefit of the writ of *habeas corpus* at the U.S. detention facility in Guantanamo Bay for several years. Like Abdelrazik, Khadr has alleged that the Canadian government abandoned its constitutional obligation to aid in the repatriation of its citizen. In *Khadr v Canada (Prime Minister)*,[7] the Federal Court of Canada ordered the government to take positive steps to seek the repatriation of Khadr. The government recently indicated that it

will appeal that decision.[8]

Abdelrazik differs from *Khadr* in that there is apparently nothing other than the lack of a passport to prevent Abdelrazik from boarding a plane for Canada. Rather than the Prime Minister and cabinet, it is Passport Canada that is allegedly denying Abdelrazik his constitutional right to enter Canada.

Passport Canada is a quasi-independent entity, a Special Operating Agency, that receives no funding from government tax dollars. Instead, it generates its own funding from the fees its charges for services.[9] Its authority to issue passports comes from the royal prerogative rather than legislation. The Canadian Passport Order, in part, reads:

10.1 ...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.[10]

In *Canada v Kamel*, [11] the Federal Court of Appeal found that section 10.1 of the *Passport Order* infringed section 6(1) of the *Charter*. The court then made a detailed examination of whether limitations on section 6(1) could be justified under section 1 of the *Charter* (the "reasonable limits" clause). The court concluded that the mobility right limitations were sufficiently precise to constitute a reasonable limit as demonstrably justified in a free and democratic society. Therefore, Passport Canada was constitutionally justified in using its discretion when deciding whether or not to issue a passport.

Whether the *Kamel* precedent will determine the upcoming decision in *Abdelrazik* remains to be seen. In any case, as in other Canadian cases involving allegations of terrorism, further appeals seem likely.

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[1] *Constitution Act, 1982*, s.6(1).

[2] William Kaplan, "William Kaplan: Bring home Abousfian Abdelrazik" *The National Post* (14 April 2009)
[3] "Canada free to bring Abdelrazik home: UN" *The Globe and Mail* (6 May 2009); Res.1390, UN Security Council (2002) 2(b). With respect to persons on the list, member states are obligated to "[p]revent the entry into or the transit through their territories of these 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 fulfillment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified." [emphasis added]
[4] House of Commons, *Hansard* (7 May 2009) at 1415 (Hon. Bob Rae) and 1425 (Hon. Jack Layton).

[5] Paul Koring, "Order Abdelrazik home, lawyers tell court" *The Globe and Mail* (7 May 2009).
[6] Don Butler, "Canadian stuck in Sudan in Kafkaesque quandary: judge" *Canwest News Service* (8 May 2009).
[7] (2009) FC 405.
[8] Mike De Souza, "Government to appeal Khadr repatriation ruling" The National Post (8 May 2009).
[9] Passport Canada, "Passport Canada".
[10] *Canadian Passport Order*, SI/81-86.
[11] 2009 FCA 21.