Abdelrazik Set to Return to Canada, as Government Retreats from Confrontation

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A Canadian citizen who has spent more than a year living in a Canadian embassy, unable to return to Canada amid suspicions of terrorist sympathies, is about to return to Montreal. The Government of Canada has announced that it will comply with – and apparently will not appeal – a Federal Court order to issue him a passport and assist him in returning to Canada.[2]

Government Avoids Collision with Court

The Federal Court's June 4th decision in *Abdelrazik v. Canada*[3]ordered the Government of Canada to make arrangements no later than June 19, 2009 to repatriate Abousfian Abdelrazik. He has been stranded in the Canadian embassy in Sudan, trying to obtain a passport so he can return to Canada. In the week that followed the decision, opposition members demanded to know when, how, and even whether, the government would comply with the court order. The government answered every question with essentially the same taciturn answer, saying only that they were reviewing the court decision and would make their own decision in due course.[4]

The government's reticence invited speculation on its intentions.[5] Would the government appeal? Would it ignore the decision completely and maintain a collision course with the court? What would happen if the government were to be found in contempt of court?

This speculation was rendered moot in Question Period on June 18, when Justice Minister Rob Nicholson responded to the latest demand for answers on Abdelrazik with a succinct answer that seems to have surprised the House.[6] He said, "Mr. Speaker, the government will comply with the court order."[7]. It seems that Canada's "remarkable history of compliance with court decisions" is intact. [8]

***Charter of Rights and Freedoms* to the Rescue: the Significance of the Federal Court Decision**

The June 4 decision shows the Federal Court applying the *Charter* to redress the

government's ill-treatment of a citizen, rather than identifying and repairing flaws in legislation. Much more than a typical constitutional case, *Abdelrazik* raises issues of the separation of powers between the courts and the executive, rather than the separation between the courts and the legislature (or Parliament).

In simple terms, the court's judgment required the government to help Abdelrazik, not because the government was acting outside the laws of Parliament, and not because it was following an unconstitutional law, but because it used its discretionary powers in a way that breached one of Abdelrazik's *Charter* rights.

The *Charter* right the government violated is subsection 6(1): "Every citizen of Canada has the right to enter, remain in and leave Canada." The court interpreted its effect as follows:

> *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 … in subsection 6(1) of the Charter is illusory.[9]*

The decision makes it clear that Abdelrazik was not obligated to exercise his *Charter* rights in a wise or cautious way:

> *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 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.[10]*

In effect, it was no defence for the government to say that Abdelrazik should have been more careful to avoid raising suspicions about himself.

Moreover, the government could not use international anti-terrorism measures as an excuse to deny *Charter* rights. Mr. Abdelrazik's 2003 visit to Sudan was extended when Sudanese authorities detained him on the recommendation of CSIS.[11] It was further complicated in 2006 when he was listed by the United Nations "1267 Committee" as a suspected terrorist associate – apparently at the request of the United States.[12] Justice Zinn of the Federal Court of Canada

criticized the unfairness of the United Nations procedure in a tone of genuine outrage,[13] and concluded:

> *[I]t is disingenuous of the respondents [the Ministers of Justice and Foreign Affairs] 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 … 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.[14]*

Mr. Abdelrazik would have returned to Canada in April if the Minister of Foreign Affairs had not abruptly denied him an emergency passport. The Federal Court found that "the only reason that Mr. Abdelrazik is not in Canada now is because of the actions of the Minister on April 3, 2009."[15]

The Federal Court found a specific *Charter* breach specifically in the failure, under section 6, to issue an emergency passport earlier this year.[16] The judge went on to say:

> *Had it been necessary to determine whether the breach was done in bad faith, I would have had no hesitation in make that finding on the basis of the record before me.[17]*

These remarks were directed on June 4 at the respondents in the case, the ministers of Foreign Affairs and Justice. It is hard not to read them as a rebuke to the current ministers, who were both in the same ministerial positions on April 3. A judgment such as this brings the separation-of-powers issue into sharp focus.

The *Abdelrazik* decision acknowledges "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."[18] The "positive tension" nonetheless puts the government and the court in a relatively unfamiliar and uncomfortable relationship:

> *Although tensions between the Legislature and the Judiciary inevitably arise as the result of courts invalidating legislation, they are minor compared to the tensions that can arise between the Judiciary and the Executive.[19]*

These tensions may be most acute – as in *Abdelrazik* and the key Supreme Court of Canada precedent, *Doucet-Boudreau v. Nova Scotia*[20] – when a court places

itself in the position of ordering specific and ongoing actions by the government, and then retains jurisdiction to supervise the government's compliance with the order.

The Court Order: Did the Court Overstep Its Authority?

Referencing the Supreme Court's decision in *Doucet-Boudreau*, Justice Zinn agreed that the court should go no further than it has to when fashioning a remedy for a *Charter* breach.[21]

The order in the *Abdelrazik* decision required the government to arrange for transportation from Khartoum to Montreal within 15 days, and to ensure that Mr. Abdelrazik arrived in Canada no later than 30 days from the date of judgment. As well, "the Court reserve[d] the right to oversee the implementation of this Judgment and reserve[d] the right to issue further Orders as may be required to safely return Mr. Abdelrazik to Canada."[22]

The court considered the bounds of its authority, saying that "the manner of returning Mr. Abdelrazik, at this time, is best left to the [government] in consultation with [Abdelrazik], subject to the Court's oversight, and subject to it being done promptly."[23]

Calgary lawyer Laura Snowball,[24] who appeared before the Supreme Court in *Doucet-Boudreau*, says that Justice Zinn fashioned "a remedy that takes into account the inherent tension between a just, meaningful and timely remedy for the Canadian citizen whose *Charter* rights have been breached, and the constitutional necessity of leaving the government as much discretion as possible in how (not whether) it fulfills its *Charter* duties."[25]

Ms. Snowball added that Zinn's reasons "show clearly that the court was conscious that *Doucet-Boudreau* is the guiding precedent." The decision shows the court's understanding that "those principles are about the tension between granting meaningful remedies for the citizen and respecting the discretionary authority of the executive in how it meets its *Charter* obligations."[26]

Asked if *Abdelrazik* represents an extraordinary intrusion of courts into public administration, Snowball said she "would be inclined to say that the court's order is about encouraging compliance rather than supervising it. It may turn into supervision if the deadlines are not met and the government fails to provide a legal excuse, or demonstrate impossibility of compliance."[27]

In general, Snowball expects that "courts will be reluctant to tell the executive how to comply with its constitutional obligations in any particular instance; setting calendar deadlines for compliance is much less [assertive] than directing

how to carry out the obligation in question."[28]

The court order that will bring Abdelrazik home to Canada shows how the constitution, including the *Charter*, can be a practical tool of last resort for Canadian citizens. The conclusion of his ordeal, ultimately, illustrates the health and vigour of the Canadian system of government.

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[2] Paul Koring, "*I want to hold my children*" *The Globe and Mail* (19 July 2009).
[3] 2009 FC 580 ("*Abdelrazik*").
[4] House of Commons, *Hansard* (5 June 2009) at 1140, *Hansard* (8 June 2009) at 1445, *Hansard* (9 June 2009) at 1450, *Hansard* (15 June 2009) at 1155.
[5] Canadian Press, "Ottawa must act on Abdelrazik ruling, lawyers say" *Toronto Star* (15 June 2009).
[6] Aaron Wherry, "The Commons: And then, suddenly, an answer" *macleans.ca* (18 June 2009).
[7] House of Commons, *Hansard* (18 June 2009) at 1420.
[8] *Doucet-Boudreau v. Nova Scotia (Minister of Education) 2003 SCC 62 at para.32 ("Doucet-Boudreau").*
[9] *Abdelrazik* at para. 152.
[10] *Ibid* at para. 12.
[11] *Ibid* at para. 91: "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."
[12] *Ibid* at paras. 23-24.
[13] *Ibid* at paras. 51-54. Para. 51: "The accuser is also the judge." Para. 53: "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." Para. 54: "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."
[14] *Ibid* at para. 53.
[15] *Ibid* at para. 148 (emphasis in original).
[16] *Ibid* at para. 153.
[17] *Ibid*
[18] *Ibid* at para. 5.
[19] Hon. Justice McHugh AC, "*Tensions between the Executive and the*

Judiciary," speech at Australian Bar Association Conference (10 July 2002).
[20] *Doucet-Boudreau*.
[21] *Abdelrazik* at para.158.
[22] *Ibid* at para.168.
[23] *Ibid* at para.161.
[24] Laura Snowball is a litigation lawyer with the Calgary firm Davison Worden LLP. Her practice includes Federal Court matters. Ms. Snowball was interviewed by the Centre for Constitutional Studies (CCS) on June 19, 2009.
[25] Snowball interview with CCS (19 June 2009).
[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid*.