Court Orders Canadian Government to Bring Abdelrazik Home

On June 4, 2009, Federal Court Justice Russell Zinn ordered the government to take immediate action to repatriate Abousfian Abdelrazik, a Canadian citizen who has been stranded in Sudan since 2004. Abdelrazik had charged the government with "procrastination, evasiveness, obfuscation and general bad faith" in dealing with his application for an emergency passport.[1] The government maintains that the only thing stopping Abdelrazik from leaving Sudan is that his name is on a United Nations list of al-Qaeda associates.[2] Justice Zinn did not agree entirely with Abdelrazik's assessment, but he did find that there had been "a course of conduct and individual acts that constitute a breach of Mr. Abdelrazik's rights which the [government has] failed to justify."[3]

Justice Zinn made it clear that a Canadian's *Charter* rights are not dependent on moral character or political beliefs. The question of Mr. Abdelrazik's sympathy or support for Al-Qaeda cannot be a factor in determining if his *Charter* rights were violated.[4] Justice Zinn stated that the only relevant issue in this case is whether Abdelrazik's constitutional right to enter and leave Canada (as guaranteed by section 6(1) of the *Charter*) was violated. If there is a breach of that right, the court must 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 (the *Oakes* test).[5]

In his 107-page judgment, Justice Zinn presents a detailed analysis of eleven acts and omissions by the federal government which, according to Abdelrazik, formed a pattern that constitutes a breach of his *Charter*right to enter Canada.[6] Justice Zinn 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."[7] On that date, Abdelrazik was scheduled to fly out of Khartoum. Financially destitute, Abdelrazik had scraped together the money for airfare, based on the promise that Canada would provide him with an emergency passport. The government failed to follow through on the promise, citing the prerogative power to grant or deny passports under section 10.1 of the Passport Order.

The government maintained that it was under no positive obligation to facilitate Abdelrazik's *Charter* right to enter Canada. Justice Zinn did not agree: "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."[8]

Justice Zinn acknowledged that Passport Canada has the prerogative authority to deny the issuance of a passport under section 10.1 of the Passport Order, but "whenever a citizen may be denied passport privileges, there is a mechanism in place that provides the citizen with procedural fairness and natural justice.... There is no suggestion that the Minister followed this process."[9]

The government is obligated to justify a *prima facie* breach of *Charter* rights pursuant to section 1 of the Charter.[10] Rather than justifying the breach, the government denied that there was a breach. In the absence of a government justification, Justice Zinn considered whether the determination that Abdelrazik poses a danger to national security constitutes a justifiable limitation of his section 6(1) mobility right. Zinn concluded that it was not a justifiable limitation. Therefore, the breach could not have been justified, even if the government had so argued.[11]

Because the Canadian government denied Abdelrazik's *Charter* right to enter Canada, he is entitled to a remedy under *Charter* section 24(1). To effect that remedy, the government was ordered to make travel arrangements for Abdelrazik within 15 days of the judgment. Furthermore, Justice Zinn ordered that the government must ensure that Abdelrazik appears before him in an Ottawa courtroom on July 7, 2009 at 2:00 p.m.[12]

The judgment prompted immediate reaction during question period in the House of Commons on June 5, 2009. Four times, Minister of Justice Rob Nicholson was asked about the government's plan to comply with the order. He replied that "because this is a very extensive ruling, we are looking at it very carefully. We are reviewing all aspects of the decision and we will make a decision in due course."[13]

The minister's comments leave the door open to speculation as to whether the government will comply with the court order or appeal the decision, as it did in response to a similar Federal Court ruling in *Khadr v. Canada*[14] just last month.[15]

Further Reading

Jim Young, "'Kafkaesque' Abdelrazik Saga Raises Mobility Rights Question" *Centre for Constitutional Studies* (12 May 2009).

[1] *Abdelrazik v. Canada (Minister of Foreign Affairs and Attorney General)*, 2009 FC 580, at para. 2.
[2] *Ibid*. at para. 3.
[3] *Ibid*. at para. 7.
[4] *Ibid*. at para. 12.
[5] *Ibid*. at para. 61.
[6] *Ibid*. at para. 62.
[7] *Ibid*. at para. 148.
[8] *Ibid*. at para. 152.
[9] *Ibid*. at para. 155.
[10] *Ibid*.
[11] *Ibid*. at para. 154.
[12] *Ibid*. at para. 73.
[13] House of Commons, *Hansard* (5 June 2009) at 1140.
[14] 2009 FC 405.
[15] Joanna Smith and Tonda MacCharles, "Government will Appeal Omar Khadr Order" *The Toronto Star* (8 May 2009).