

**INTERNAL INQUIRY
INTO THE ACTIONS OF CANADIAN OFFICIALS
IN RELATION TO
ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED
NUREDDIN**

**FURTHER SUBMISSIONS OF
AMNESTY INTERNATIONAL**

October 3, 2008

1. This Commission of Inquiry's Terms of Reference, in paragraph a, require the Commissioner to inquire into three aspects of Canadian conduct in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin.
 - i. whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances,
 - ii. whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt, and
 - iii. whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances.
2. These submissions address the question of proper interpretation of sub-paragraph a(ii) and in particular whether the Commissioner should limit his examination of consular services to the period of time during which the three men were actually imprisoned in Syria and/or Egypt and that consideration of issues related to consular services following their release from prison is beyond his mandate. Amnesty International had no previous notice that the Commissioner was considering or had decided to limit the interpretation of sub-paragraph a(ii) in this way.

3. It is Amnesty International's submission that an assessment of the conduct of consular officials and all other Canadian officials, during the time between when these three men were released from prison and their return to Canada can and must come within a reasonable interpretation of the Terms of Reference.
4. In considering the proper interpretation of sub-paragraph a(ii) of the Terms of Reference it is important initially to consider the circumstances the men faced during those time periods.¹
5. Muayyed Nureddin was released from prison in Syria on January 13, 2004. He left Syria the following day. During the interim period, he was awaiting arrangements to be made for his departure to Canada. He was fearful of the possibility of being arrested again. He did not circulate freely during that time. When his name was checked at Damascus airport on January 14, he was identified as a 'wanted' man. He was taken aside while inquiries were made about his case. He was allowed to go after a 40 minute delay. Mr. Nureddin was terrified during this time, even though a Canadian official was accompanying him.
6. Ahmad Abou-Elmaati was released from prison in Egypt on January 14, 2004. He was not allowed to leave Egypt until March 29, 2004. During the interim period of approximately 10 ½ weeks his liberty and freedom of movement were severely restricted. Notably:
 - a) Mr. Elmaati was required to report to the Egyptian State Security Branch in Giza on an ongoing basis, on average once every five days. He estimates that he reported to security officials approximately 12 – 15 times before he left Egypt.
 - b) On the occasions that Mr. Elmaati reported to Egyptian officials he was required to do so at 11p.m. at night and would often line up for hours when he did so. The actual interview lasted approximately 30 minutes. Mr. Elmaati was often not able to leave Giza until 2 or 3 a.m. He generally reported to the same two officials, one of whom he believes was named Noor.
 - c) Mr. Elmaati and his family approached each of these reporting sessions with considerable fear that he would be taken back into custody and would again be subjected to torture. Mr. Elmaati was told by security officials that if he did not report as required he would be arrested and imprisoned again.
 - d) Mr. Elmaati and his mother attempted to leave Egypt on March 7, 2004. At the airport in Cairo Egyptian officials barred him from leaving the country.

¹ Most of this information is drawn directly from the *Chronology of public information relating to the cases of Messrs. Almalki, El Maati and Nureddin*, dated April 11, 2007, which was provided to the Commission by Amnesty International on behalf of intervening organizations when this inquiry began. It is complemented by information from the book, *Dark Days: The story of four Canadians tortured in the name of fighting terror*, written by Kerry Pither.

- e) An Egyptian national who was employed at the Canadian Embassy made inquiries to find out why Mr. Elmaati had been barred from leaving the country. She told Mr. Elmaati that there was a conflict about his case between the intelligence and state security services and the Egyptian intelligence agency did not want him to be allowed to leave Egypt.
 - f) He was not able to leave Egypt until just over three weeks later, on March 29.
7. Abdullah Almalki was released from prison in Syria on March 10, 2004. He was not able to leave Syria until July 28, 2004. During that period of approximately 20 weeks his liberty and freedom of movement were severely restricted. In particular:
- a) Mr. Almalki was not released unconditionally; he was released on bail which was provided by his father and other relatives. In providing bail his family gave an undertaking guaranteeing that Mr. Almalki would not leave the country.
 - b) Upon his release from Sydnaya prison Mr. Almalki was made to sign a document promising that he would appear for a court hearing on April 25, 2004.
 - c) Canadian officials, including Parliamentary Secretary Dan McTeague and officials at the Canadian Embassy, were aware of the fact that Mr. Almalki was barred from leaving Syria and that he wanted to leave the country.
 - d) Mr. Almalki was summoned for an interview at the Palestine Branch on April 14, 2004. He knew that if he did not appear he would almost certainly be arrested. He attended but was fearful that he would be taken back into custody. All the while he worried about the risk that he would face further torture. When he appeared on April 14 he was told instead to return on April 22. He did so. During the interview he was questioned about a new report that officials had received.
 - e) Mr. Almalki appeared in court on April 25 and was told to reappear on June 6.
 - f) Mr. Almalki appeared in court on June 6 and was told to reappear on July 25.
 - g) Mr. Almalki appeared in court on July 25. He was acquitted. However, the judge stated that he should be handed over to Syrian military police to complete his military service. Another court official ordered the military police to refrain from immediately arresting him. The official gave Mr. Almalki 2 days to resolve the issue of his military service.
 - h) Mr. Almalki's ongoing fear that he was going to be arrested again was heightened because of the issue of his military service. On July 26, Parliamentary Secretary Dan McTeague's office advised Mr. Almalki's family to urge Mr. Almalki to seek refuge at the Canadian Embassy as a means of protection.

- i) On July 27, Embassy officials refused to allow Mr. Almalki to remain at the Embassy. Mr. Almalki told Canadian officials that he feared re-arrest and imprisonment by Syrian officials.
 - j) On July 28 Mr. Almalki obtained an exit stamp in his passport from Syrian immigration officials. He then drove from Syria into Lebanon to board a flight to Europe. His description of his departure from Syria is similar to that of an "escape." He was fearful at every moment that he would be refused permission, turned back or re-arrested.
8. Amnesty International submits that the Commissioner's Terms of Reference should be interpreted to include consideration of consular services following the release from prison of the three men up to and including the time of their ultimate departure from Syria and Egypt. Amnesty International makes this submission on three grounds:
9. First, detention should be understood to include restrictions on freedom and liberty beyond situations of custodial imprisonment. As is clearly described in paragraphs 5 – 7, above, the men did face and were compelled to submit to significant restrictions on their liberty between their release from prison and return to Canada. During this time they held a reasonable belief that they continued to be detained and that they had no choice but to acquiesce to the demands and directions of officials. Consular officials were aware of those restrictions at the time.
- a) Canadian law on the definition of detention is borne out of *Charter* cases dealing with s.9 and s.10 that seek to determine when an individual is deemed to have been detained. Under Canadian common law a broad contextual analysis that accounts for all relevant factors is required to ascertain whether an individual was detained. Courts have set out a number of circumstances to be considered that include, but are not limited to, whether the individual subjectively believed that he was detained, the personal circumstances as they may affect the individual's perceptions of questioning, whether the individual had a choice in conversing with officials, whether officials gave a direction or assumed control over the individual, and whether the individual is free to leave.²
 - b) The Supreme Court of Canada has identified three situations that give rise to a detention: (1) where there is a deprivation of liberty by physical constraint; (2) when the police assume control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel; and (3) in situations where the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist (*i.e.* psychological detention).³

² *R v Pomeroy* 2008 ONCA 521 at 32 and 38, *R. v. Rajaratnam* 2006 ABCA 333 at 14.

³ *R. v. Therens* [1985] 1 S.C.R. 613, *R. v. Thomsen* [1988] 1 S.C.R. 640, affirmed in *R v Pomeroy* 2008 ONCA 521 at 23, *R. v. Rajaratnam* 2006 ABCA 333.

- c) In *R. v. Therens*, Mr. Justice Le Dain established the concept of psychological detention in discussing an individual's compliance with an official's order:

“Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist”⁴

- d) It has since become settled law that the application or threat of application of physical restraint is unnecessary to constitute detention. A detention can be deemed to exist when a suspect is not free to leave, is physically or psychologically detained, and reasonably believes that the choice to do otherwise does not exist. A psychological detention is thus defined as "a reasonable perception of suspension of freedom of choice." The test is whether "the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."⁵
- e) Amnesty International submits that the facts demonstrate that Mr. Elmaati, Mr. Almalki and Mr. Nureddin all continued to be detained in Egypt and Syria, respectively, following their release from prison and at the direction of state officials.
- f) Mr. Elmaati was forced to submit to questioning by state officials on numerous occasions (paras 6(a)-(c) above), he was barred from leaving the country (paras 6(d)-(f) above) and he was threatened with legal consequences including physical restraint through incarceration, and thus the risk of further torture, (para 6(c) above) if he did not acquiesce in the deprivation of his liberty.
- g) Mr. Almalki was also barred from leaving the country (paras 7(a) and (c) above) and compelled to submit to questioning under the threat of physical restraint through imprisonment, again with the risk of further torture, (paras 7(b),(d)-(g)) should he fail to submit to these deprivations of his liberty.
- h) Mr. Nureddin remained in Syria for a very short period of time following his release. Notably, however, he was taken aside and delayed while leaving Syria through the airport because of information emanating from Syrian officials (para 5 above).

⁴ *R. v. Therens* [1985] 1 S.C.R. 613 at 505, affirmed in *R v Grant* (2006) 213 O.A.C. 127 at 8.

⁵ *R. v. Therens* [1985] 1 S.C.R. 613 (S.C.C.) at 53, affirmed in *R. v. Rajaratnam* 2006 ABCA 333 at 12.

- i) As such, upon their release from prison until such time as they were allowed to leave the country, these three men continued to be physically detained in the respective countries by virtue of being barred from leaving and being compelled to submit to various official sessions of interrogation or inquiry. During this time period they were also psychologically detained by virtue of being compelled to involuntarily acquiesce in the deprivation of their liberty under the reasonable belief that the choice to do otherwise did not exist.
10. Second, concerns that the three men would be detained again and further tortured or mistreated continued throughout the period between release and departure, and consular action to protect them from such possibilities during that time is therefore relevant at a minimum under subparagraphs a(i) and a(iii) of the Terms of Reference.
11. In that regard as it is our expectation that the Commission is examining other issues related to the post-imprisonment periods, we have not gone into detail about those here. Clearly it is crucial for the Commission to examine whether different government agencies were working at cross purposes during that time.
12. For instance, while consular officials in Ottawa or abroad may have been attempting to assist these men, other agencies of the Canadian government, such as CSIS, the RCMP or the foreign intelligence division of DFAIT, may have been attempting to prevent or delay their return to Canada or may have been providing further information to Syrian or Egyptian officials that prompted further interrogation. Any such concerns, and their relationship to the provision of consular services, would clearly be relevant under a(i) and (iii) of the Terms of Reference.
13. Third, to curtail the examination of consular services at the moment of release from imprisonment means that some of the most significant issues related to the provision of consular services would not be examined. This would undermine the integrity and completeness of the inquiry. Such a limitation would run counter to the spirit of the Inquiry which is to consider whether Canadian officials contributed to human rights violations experienced by these three men or failed adequately to protect them from experiencing such violations.
14. As such, Amnesty International respectfully submits that sub-paragraph a(ii) of the Terms of Reference must be interpreted to include an examination of the provision of consular services during the period between the release from imprisonment of each of the three men and the time of their departure from Egypt or Syria.