

IN THE MATTER OF
INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN
OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD
ABOU-EL MAATI AND MUAYEED NUREDDIN (THE “INQUIRY”)

SUBMISSIONS OF THE APPLICANTS

1. By Notice of Application dated September 26, 2008, Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin (the “Applicants”) seek the following relief:

- i. An order releasing their counsel from the undertaking of confidentiality signed in May 2008 so that they may discuss with the Applicants the draft narrative, final submissions and reply submissions of all participants in this Inquiry.
- ii. Immediate access to the amended draft narrative with leave to file additional comments, if necessary.
- iii. An oral hearing at which to make submissions on the appropriate interpretation of subpara. (a)(ii) of the Terms of Reference, namely, whether the Commissioner is precluded from making findings of deficiency in respect of Canadian officials’ conduct prior to the Applicants’ return to Canada but following their release from detention.

2. The Applicants make the following brief submissions in support of their application.

I. Release From Undertaking of Confidentiality

3. In lieu of public hearings, access to *in camera* interviews, documentary disclosure, and disclosure of transcripts or even of summaries of transcripts, the Commission gave Applicants’ counsel limited access to the draft factual narrative prepared by Commission counsel or members of their team.¹ Access to the draft narrative was conditional upon Applicants’ counsel signing an undertaking of confidentiality which prohibited them from discussing the contents of the draft with their clients or anyone else not privy to the draft. Applicants’ counsel were also prohibited from making copies of the draft.

¹ November 6, 2007 Ruling.

4. The Applicants applied twice to the Commissioner to reconsider his decision to preclude them from reviewing the draft narrative or even discussing it with their lawyers. On both occasions, the Commissioner denied the Applicants' request.²

5. In his November 6, 2007 ruling, the Commissioner did not articulate any reasons for limiting disclosure of the draft narrative to counsel only. Indeed, counsel were not invited to make submissions on this point prior to November 6th, nor were they even aware of the restriction until the spring of 2008.³ In his May 23, 2008 ruling, however, the Commissioner gave two reasons for denying access: first, there was a need to keep the draft narrative confidential and lawyers are "in a position to give professional undertakings [...] that ensure the maintenance of confidentiality"; and second, because the three men might be called as witnesses at a later date, having access to the draft narrative "could affect or be seen to affect their evidence".

6. The restrictions were said to apply equally to all witnesses, including government witnesses.⁴ Counsel for the Attorney General, in response (and opposition) to the Applicants' request for reconsideration, affirmed that he had not shared or discussed the draft narrative with government witnesses.⁵ In this way, the ruling was perceived to be "even-handed".

7. In fact, the ruling has been harmful only to the three Applicants themselves, and in this way is not even-handed. Two government witnesses represented by separate counsel may have had access to the draft narrative because their lawyers were not required by Commission counsel to sign the confidentiality undertaking.⁶ Moreover, the other government witnesses would have been able to discuss the evidence received by the Commission because government lawyers have been privy to witness interviews and other evidence. Finally, earlier drafts of the factual narrative were shared with government counsel for the purpose of vetting it for national security

² May 23, 2008 Ruling; June 12, 2008 Ruling (as communicated in email from John Terry to Jasminka Kalajdzic on same date).

³ Applicants' Request for Reconsideration (May 20, 2008).

⁴ Email from John Terry to Jasminka Kalajdzic dated June 12, 2008.

⁵ Submissions of the Attorney General dated May 22, 2008 at page 2.

⁶ Email from John Terry to Jasminka Kalajdzic dated September 9, 2008.

claims; no confidentiality undertaking would have precluded government counsel from sharing the information contained therein with government witnesses.

8. Applicants' counsel made clear that the inability to share the draft narrative with their own clients prejudiced their ability to properly represent their clients' interests and provide all relevant information to the Commission. In the cover letter attached to counsels' comments on the draft narrative, they stated:

For the reasons explained below, it is important that you and the Commissioner understand that the enclosed charts do not reflect all of the problems, including the gaps and mischaracterizations, contained in the draft narrative. [...] The attached charts simply represent the beginning of a process of critique and evaluation that requires many more weeks of research and assessment.

The Limits of the Review Process

First, our ability to comment on the draft narrative is impeded by the fact that we have not heard any testimony nor seen any of the evidence obtained by the Commission. Without any disclosure, we are unable to challenge the summary of the evidence in the draft narrative or evaluate factual assertions made by the witnesses. As a result, we cannot be confident that the factual assertions are accurate or have been thoroughly tested. [...]

Second, we reiterate our deep concern that our clients were not permitted to review the draft narrative before we were called upon to comment on it. ... [The Commissioner's May 23rd ruling] has seriously restricted our ability to meaningfully comment on the draft narrative. ...⁷

9. In the span of approximately four weeks, Applicants' counsel were required to prepare extensive comments on the draft narrative, final submissions and reply submissions – the latter, to government submissions that included factual assertions and legal arguments never before disclosed to the Applicants or their counsel. Requests for additional time to prepare these submissions were denied.⁸ The unworkable deadlines coupled with the unprecedented procedural restrictions which prevented counsel from discussing non-NSC information with their clients, makes it highly likely that relevant information and arguments have not been provided to the Commission.

⁷ Letter from Breese Davies to John Laskin and John Terry dated June 10, 2008.

⁸ Email from John Terry to Jasminka Kalajdzic dated June 12, 2008.

10. The Commissioner cannot be confident that he has all relevant information in light of this process. However, giving the Applicants themselves an opportunity to review the draft narrative and government submissions will at least improve this imperfect process. They are in a unique position to vet the information in light of their experiences both with Canadian government officials and in Syria and Egypt.

11. There is another very important reason to give access to the submissions and factual narrative to the Applicants. Among other things, both the narrative and the submissions contain alleged facts that tend to suggest, or leave the impression, that the Applicants were engaged in illegal activity or connected to terrorism. The limited ability of Applicants' counsel to review the draft narrative and provide comments is no substitute for a meaningful opportunity to respond to such allegations, a right that surely these three men are owed.

12. In early September 2008, Ms. Davies wrote to Commission counsel on behalf of the Applicants seeking to be relieved of the undertaking two weeks before the public report is delivered to the government. In her letter, Ms. Davies outlined two other but important reasons for the request:

- a) To ensure that the Applicants are given an opportunity to read the draft narrative and final submissions before the report is released publicly, so that they have sufficient time to absorb new information before they are called upon to comment publicly on the report; and
- b) To give the Applicants an opportunity, alone or with professional assistance, to process any emotional reaction they might have to the allegations made in the government submissions.

13. Ms. Davies' request on behalf of the counsel group was premised on very simple principles of fairness. The men about whom this Inquiry was called should *at least* know as much about the facts compiled by the Commission as do their lawyers (as little as that might be) well before the release of the report. It is unrealistic to expect them to be able to digest all of the facts as well as the findings in a brief lock-up, just hours before the media is given the report. In addition, it cannot be forgotten that these three men are survivors of torture. The psychological

impact of the report and the government's version of events cannot be underestimated. The secretive process of this Inquiry has been largely dehumanizing for them. They ought to be given the courtesy of meaningful advance notice of the evidence as well as the submissions made by the Attorney General.

14. For these reasons, the Applicants ask that their counsel be released from their undertaking immediately, and that the report not be finalized or submitted until they have had an opportunity to make whatever additional comments or submissions are necessary to ensure the factual narrative is accurate and complete.

II. Disclosure of Amended Draft Narrative

15. The rationale given by the Commission for disclosing the draft narrative to Applicants' counsel was to "provide Participants and Intervenors with another important opportunity for an effective contribution to the Inquiry's process", so that the Commission could "take into account their comments and suggestions".⁹ Despite the disclaimer by Applicants' counsel that the comments on the draft narrative were likely incomplete and possibly inaccurate because of their clients' inability to know the facts, the Commissioner found the submissions to be "of great assistance".¹⁰

16. On September 16, 2008, Ms. Kalajdzic learned from Commission counsel that an amended draft narrative had been prepared which incorporated additional evidence obtained from Canadian officials following the submission of comments on the initial draft narrative by Applicants' counsel. The same rationale expressed by the Commissioner in his November 6, 2007 ruling regarding the importance of getting input from the Applicants dictates that the Applicants and their counsel review the amended draft narrative, to ensure that the Commissioner has accurate and complete information.

⁹ November 6, 2007 Ruling.

¹⁰ July 22, 2008 Ruling.

17. The Applicants recognize that granting this relief will require a delay in submitting the final report. The current deadline of October 20, 2008 is approximately two weeks away – insufficient time to review the draft and amended draft narrative, and the final submissions, and then provide meaningful feedback and/or corrections to the Commission. The deadline has been extended before, presumably to accommodate government counsel, witnesses, or the Commission’s own schedules and mandate; in light of the importance of providing the Applicants with these limited participation rights, a short extension of time would not be inappropriate.

III. Interpretation of subpara. (a)(ii) of Terms of Reference¹¹

18. Subpara. (a) (ii) of the Terms of Reference provides as follows:

- (a) direct the Commissioner to conduct the Inquiry in order to determine the following:
 - (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...

19. The Commissioner’s Ruling on Terms of Reference and Procedure dated May 31, 2007 does not address the meaning of the subparagraph.

20. For the first time, in an email dated September 23, 2008, Commission counsel informed Mr. Almalki’s counsel that conduct of Canadian officials following the release of the three men from prison would not be the subject of review by the Commissioner. In his email to Ms. Kalajdzic, Mr. Terry explained:

I am writing in response to your letter of September 19, 2008 and the discussions we had last Tuesday. We have discussed these issues with the Commissioner, and he has stated that, consistent with his terms of reference, **he does not intend to make any findings with respect to issues that arose after each of the individuals was released from detention.** As a result, we do not believe that we require further evidence from Mr. Almalki on post-release issues for the purpose of the Commissioner's findings.

¹¹ The Applicants adopt the submissions of Amnesty International with respect to this aspect of the application.

For the sake of providing a coherent summary of each individuals' [sic] circumstances, we intend to keep the discussion of post-release events that is included in the narrative and summary portions of the report, which you have already reviewed and commented upon.¹²

21. It is shocking that a matter of such importance was not discussed with the Applicants during the currency of the Inquiry.

22. A reasonable interpretation of subpara. (a)(ii) requires that the post-release conduct be assessed. The Applicants were not free to leave Syria or Egypt the moment they stepped over the prison door's threshold. Mr. Almalki was on bail and was expected to report for military duty. There was a serious risk he would be put back in prison. Mr. El Maati was re-detained and interviewed after his official release. For all intents and purposes, they remained "detained" and in jeopardy in those two countries. To borrow a phrase, the men found themselves in a prison with three walls.

23. Moreover, during the time period leading up to their actual return to Canada, the Applicants interacted with Canadian officials. They were interviewed by Canadian officials for investigative purposes. They sought consular assistance. Indeed, for Mr. Almalki and Mr. Nureddin, the only contact they had with consular officials was when they were no longer being held by Syrian Military Intelligence. Subpara. (a)(ii) dictates that these interactions, and the conduct of officials as a result of and during these contacts with the three men, be assessed by the Commissioner.

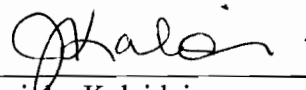
24. It is also unclear why the Commissioner would include in his report a recounting of events leading up the Applicants' return to Canada, but not make determinations about the sufficiency or deficiency of conduct directly related to those events. This does not appear to be the approach taken to other matters determined not to fall within the mandate, such as the issue of media leaks during and after the Applicants' detentions.

¹² Email from John Terry to Jasminka Kalajdzic dated September 23, 2008 (emphasis added).

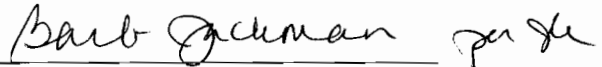
25. In the same way that the Commissioner found it necessary to conduct a public hearing to receive submissions about the interpretation of the Terms of Reference, so, too should a public hearing be held in order to make submissions on this important point. Accordingly, the Applicants seek the opportunity to make oral submissions. In the alternative, the Applicants seek confirmation that the Commissioner will make findings in relation to the conduct of Canadian officials up to the dates that the Applicants returned to Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

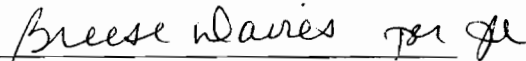
Dated October 3, 2008



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