November 6, 2007

RULING ON APPLICATION MADE BY NOTICE OF APPLICATION

DATED OCTOBER 2, 2007

On October 2, 2007 Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Individuals") and Amnesty International, British Columbia Civil Liberties Association, International Civil Liberties Monitoring Group, Canadian Arab Federation, Canadian Counsel for American Islamic Relations, Canadian Muslim Civil Liberties Association and Human Rights Watch (the "Applicants") made an application to the Inquiry, which they asked be heard orally, for an order seeking:

(1) disclosure of the names of all Canadian officials interviewed by Inquiry Counsel, except those currently employed by CSIS in covert operations;

(2) production of all documents disclosed to Inquiry Counsel by all of the participants in the Inquiry without redaction, except where there are valid national security confidentiality claims requiring redaction;

(3) a Direction that all interviewees with knowledge of the following issues be called as witnesses to give evidence publicly:

(a) embassy and consular conduct;

(b) the Canadian government's practice and policy on torture;

(c) information sharing with foreign regimes; and

(d) requests by Canadian officials to secure information from Messrs. Almalki, Elmaati and Nureddin while they were in detention; and

(4) such other relief as counsel may request.

The application was supported by an affidavit of Hadayt Nazami, one of the counsel representing Mr. Ahmad Abou-Elmaati. Upon reviewing the application and the affidavit in support, I directed that the application be determined on the basis of written submissions, and invited written submissions from the Individuals and the Applicants and others who were granted Participant or Intervenor status in the Inquiry. Submissions were received from the Individuals and the Applicants as well as from the Attorney General of Canada, whose submissions the Ontario Provincial Police adopted.

The submissions from the Individuals and the Applicants set forth lucidly the reasons why they are seeking the relief sought and made supporting arguments on the need for public hearings and for information to be given to the Individuals and the Applicants so that they can in their view have more meaningful participation in the Inquiry. Reference was made to both Canadian law and international human rights law to support their submissions and the relief sought.

On the other hand, the Attorney General of Canada made submissions to the effect that the application should be dismissed because the Individuals and Applicants were misreading the

Inquiry's Terms of Reference and the Ruling made by me on May 31, 2007 regarding the interpretation of the Terms of Reference, and because the application was premature.

Ruling

Having considered the application and supporting material along with the submissions of the Individuals and Applicants and the Attorney General of Canada, I am of the view that it is unnecessary either to grant or to deny the application at this time. I arrive at this conclusion because I have ruled on the Terms of Reference and their interpretation, and the Inquiry is proceeding with a view to fulfilling the mandate given to it along the lines described in the Ruling of May 31, 2007. That Ruling contemplates public hearings and disclosure of information under appropriate circumstances. The application was made, understandably as I will explain further below, without a full appreciation of the steps that the Inquiry will follow and the further opportunities that these steps will give the Individuals and Applicants for meaningful participation. Accordingly, I do not find it necessary at this juncture to rule specifically on the request for information and participation in the manner set forth in the application.

In discussing more fully my reasons for this conclusion, I will provide an update on the work of the Inquiry to date and what lies ahead. The update and future steps are important to the present ruling because they provide context for the ruling as well as providing the Individuals, the Applicants and the Attorney General, and of course, the public, with information as to how the Inquiry intends to proceed.

Reasons

It is important to recall that this Inquiry has its origins in the recommendation of Justice O'Connor in the Arar Commission report that the cases of the Individuals should be reviewed through an independent and credible process that can address the nature of the underlying allegations and inspire public confidence in the results of the investigation. Justice O'Connor went on to say that there are more appropriate ways than a full scale public inquiry to investigate and report on cases where national security confidentiality must play a prominent role.[1] These sentiments are reflected in the recitals to the Terms of Reference of the Inquiry. More specifically, paragraph (d) of the Terms of Reference authorizes the Commissioner to adopt any procedures and methods that he considers expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private. However paragraph (e) goes on to provide that despite paragraph (d), the Commissioner is authorized to conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the Inquiry.

Although I do not wish to reiterate all of the points that I made in the Terms of Reference Ruling of May 31, 2007, some points are worth repeating. First, this Inquiry is inquisitorial, investigative and fact-finding in nature and not an adversarial proceeding. I went on to say there is no one charged, no one is on trial and no one has a case to meet.[2] What is at issue is the conduct of Canadian officials regarding three individuals, and I am directed to ensure that the serious concerns raised by the Terms of Reference are dealt with effectively, comprehensively and independently. As Chief Justice McLachlin stated in *Charkaoui v. Canada (Citizenship and Immigration)*, a person conducting an inquisitorial proceeding, as opposed to an adversarial one, is mandated "to take charge of

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1 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) at 277-278

2 *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 36

the gathering of evidence in an independent and impartial way".[3] Consequently, the ordinary features of an adversarial proceeding are not in play.

However, I agree, as I stated in my Ruling on Participation and Funding and repeated in the Ruling on the Terms of Reference, that it is preferable that both adversarial and inquisitorial proceedings be open to the public. That is a general preference that I still hold but it is subject to the Terms of Reference of this Inquiry and its surrounding context, all of which I discussed in the Terms of Reference Ruling. In that respect, I went on to state that apart from the requirements of the Terms of Reference, one must be extremely cautious when examining questions of national security confidentiality. The security of the country depends very much on the agencies whose role it is to protect the Canadian public against threats to national security.[4] Human life is often at risk when individuals serve our country's security and intelligence efforts and any breach of confidentiality could have serious consequences which must be avoided.

As the Individuals and Applicants rightly point out, I did go on to say that the Inquiry will be sensitive to the potential for overbroad assertions of national security confidentiality and not let that become a shield to prevent the Inquiry from doing the necessary work to fulfil its mandate. In this connection, I am also guided by the recent decision of Mr. Justice Noel in *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*,[5] which is instructive on ensuring that claims of national security are given effect only within proper bounds. In concluding that the appropriate process for the Inquiry is one that should not only reflect its inquisitorial nature and the sensitive context in which the required questions must be examined, I also discussed the important but not overriding factors of workability and practicality as the Commission does its work.

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3 [2007] 1 S.C.R. 350 at para. 50

4 *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 45

5 2007 FC 766

As the Individuals and Applicants have pointed out, I also emphasized the importance of being flexible as we proceed in our examination of the facts. I pointed out that as we do our work it may be necessary to modify our approach and that the Inquiry should be prepared to adapt appropriately to the circumstances as they become more fully understood. Furthermore I emphasized that in pursuing the mandate of the Inquiry, Inquiry Counsel and I will be on the lookout to balance the interests in a more transparent way without violating the Terms of Reference or the interests that must be appropriately recognized.

In that respect, I also stated that because of the great importance attached to public hearings, Inquiry Counsel and I will be continually sensitive to having public hearings when they can be held with the proper respect for the Terms of Reference and the underlying national security confidentiality concerns. I expressed the view that the words "essential to the effective conduct of the Inquiry" in paragraph (e) of the Terms of Reference are not totally restrictive as was argued by the Attorney General of Canada, since they reflect an intention that holding some aspects of this Inquiry in public can contribute to its effective conduct. I then went on to say that rulings on holding portions of the Inquiry in public would be made as circumstances warrant and on an individual case by case basis.[6]

As I have mentioned above, the Inquiry's Terms of Reference authorize me "to adopt any procedures and methods that [I consider] expedient for the proper conduct of the Inquiry, while taking all steps necessary to ensure that the Inquiry is conducted in private". When the Inquiry began I determined that it would be undesirable to fix in advance, when we had only a limited sense of the context and the facts that our investigation would disclose, all of the elements of the procedures that the Inquiry would ultimately follow. I wanted to ensure that I retained the flexibility, as a more complete picture emerged, to proceed in the manner that would enable the Inquiry to conduct a thorough and

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[6] *Ruling on Terms of Reference and Procedure* (May 31, 2007) at para. 72

expeditious examination of the relevant facts, so as to be in a position to answer the questions that I am mandated to answer within the framework set by the Terms of Reference and with appropriate participation by Participants and Intervenors. At this stage of the Inquiry it is appropriate both to review what has been accomplished to date and to describe some of the further steps in the process that the Inquiry will be following.

The Inquiry has now reviewed more than 35,000 documents produced by the Government of Canada and interviewed 39 witnesses under oath. These documents comprise both the initial production made in response to a request for production of relevant documents that I directed to the Attorney General of Canada, and additional documents provided in response to further requests arising from our document review and interviews. The Attorney General will be certifying, before the Inquiry is complete, that all relevant documents have been provided to the Inquiry. We have so far secured co-operation from counsel for the Attorney General with respect to all of our requests for information. As contemplated by the Terms of Reference, the documents produced to the Inquiry have been provided in unredacted form. This has helped us to proceed expeditiously without time-consuming review for national security confidentiality. Other Participants and Intervenors have also provided the Inquiry with documents relevant to the issues that the Inquiry is mandated to determine.

The 39 interviews conducted by Inquiry Counsel to date have included individuals associated with the Canadian Security Intelligence Service, the Royal Canadian Mounted Police and the Department of Foreign Affairs and International Trade. Inquiry Counsel have taken into account the suggestions made by the Participants and Intervenors in determining whom to interview. Several further interviews have been scheduled. After reviewing all the transcripts of the interviews, I will shortly be conducting further interviews of some of the witnesses previously interviewed by Inquiry Counsel. In that connection, the Inquiry has retained former Ambassador Paul Heinbecker to provide it with advice

on consular services and intelligence matters as they relate to the activities of DFAIT. These interviews will add further focus and information on the issues bearing on the Inquiry's mandate.

With respect to the very important issue whether the Individuals were subjected to torture, the determination of which I have ruled is part of the Inquiry's mandate, I expect to preside over interviews of the three Individuals as part of the Inquiry's investigation into the Individuals' allegations. To assist with these interviews, and after consultation with Participants and Intervenors, the Inquiry has retained Professor Peter Burns of the University of British Columbia Faculty of Law, a well-known expert in the field who has among other things served as Chairman of the UN Organization Committee Against Torture. Interview procedures are being discussed between counsel for the Individuals and counsel for the Attorney General of Canada. These interviews will be conducted in a way that is sensitive to the interests of the Individuals and, as they have requested, will be conducted in private. It is expected that these interviews will be held in the near future.

The Inquiry's Rules provide that to facilitate the expeditious conduct of the Inquiry, Inquiry Counsel may prepare proposed findings for the Commissioner's consideration based on documents, interviews and the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to the Individuals. Once the interviews have been completed, Inquiry Counsel will be preparing a draft of proposed factual findings, accompanied by a supporting factual narrative, that would be provided to me for my consideration. I have directed Inquiry Counsel to review this draft with counsel for Inquiry Participants and Intervenors on a confidential basis, subject to appropriate measures to protect national security confidentiality, before it is finalized, and to take into account their comments and suggestions, including suggestions for further investigation. This will in my view provide Participants and Intervenors with another important opportunity for an effective

contribution to the Inquiry's process. In addition, they will ultimately have an opportunity to make final submissions on the matters that I must determine.

In the meantime, the Inquiry will be inviting submissions from Participants and Intervenors concerning the standards by which to assess the conduct of Canadian officials during the relevant period, 2001 to 2004, in determining whether that conduct was deficient, as I am mandated to do. The Inquiry is issuing today a notice of hearing requesting submissions on standards relating to, among other things, sharing information with foreign authorities, questioning Canadian citizens detained in foreign states, provision of consular services to Canadian citizens detained in foreign states, and the role of consular and other DFAIT officials in national security and law enforcement matters. A public hearing will be held on these matters in Ottawa on December 19 and 20, 2007.

Apart from the steps to which I have referred, I will be considering what further steps should be followed in completing the Inquiry's mandate, and advising Participants, Intervenors and the public as appropriate.

While the Inquiry has proceeded as expeditiously as possible, and I intend that it will continue to do so, the further work that needs to be done and the necessity for consultations with Participants lead me to the view that the reporting deadline of January 31, 2008 set out in the Terms of Reference is not practical. Accordingly, I will be seeking an extension of the date for submitting my report, including the report suitable for disclosure to the public, to a date that is both realistic and achievable, assuming that the reviews for national security confidentiality that must be conducted proceed in a timely manner.

In conclusion, in light of the status of the Inquiry's work and the further tasks underway and to be carried out, I do not consider it necessary or desirable to make any specific ruling on the

application at this time, either by ordering the relief sought or rejecting it as being inappropriate. A number of the matters raised in the application are contemplated by the May 31, 2007 Ruling and will be under continuous consideration by Inquiry Counsel and me as we go forward. The application was brought at a time when the Individuals and Applicants could not have had a complete understanding of the further steps that the Inquiry would follow and the further opportunities for information and participation that that these procedures will provide. I am satisfied that this disposition of the application is appropriate in the circumstances and will best contribute to the effective and expeditious conduct of the Inquiry, recognizing the interests of all concerned.