



October 8, 2008

**RULING ON APPLICATION MADE BY NOTICE OF APPLICATION
DATED SEPTEMBER 26, 2008**

On September 26, 2008, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the "Applicants") made an application to the Inquiry for an order:

- (1) releasing their counsel from the undertaking of confidentiality signed in May 2008 so that their counsel may discuss with the Applicants the draft factual narratives, final submissions and reply submissions of all participants in the Inquiry;
- (2) granting the Applicants and their counsel immediate access to the amended draft narratives with leave to file additional comments; and
- (3) providing for an oral hearing to hear submissions on the interpretation of subparagraph (a)(ii) of the Terms of Reference.

Upon reviewing the application, I invited written submissions on the issues raised in the application from the Applicants and others who were granted Participant or Intervenor status in the Inquiry. I also invited counsel to make written submissions respecting the interpretation of subparagraph (a)(ii) of the Terms of Reference, in the event that I decided not to provide for an oral hearing on that issue. Submissions were received from the Applicants, Amnesty International and the Attorney General of Canada. The Applicants also requested that, in view of the impending date for the delivery of my report, I expedite my ruling. In order to meet those timing constraints, I have kept my reasons brief in the rulings set out below.

1. Request for Release from Undertaking of Confidentiality

The Applicants request that I release their counsel from the undertaking of confidentiality signed in May 2008 so that their counsel may discuss with the Applicants the draft narratives, final submissions and reply submissions of all participants in the Inquiry. The Applicants have already requested twice before that I reconsider my decision to limit disclosure of the draft narratives to counsel only. In my ruling dated May 23, 2008, denying the second request for reconsideration, I noted that counsel are in a position to give professional undertakings as lawyers that ensure the maintenance of confidentiality and that having access to the factual narratives could affect or be seen to affect the Applicants' evidence if they were called as witnesses. This time, the Applicants submit that they need to be able to read the draft narratives and submissions so that: (1) they have time to absorb the information before the report is released and they are asked to comment on it; and (2) they have an opportunity, alone or with

professional assistance, to process any emotional reaction they might have to the allegations made in the government submissions.

While I understand the concerns of the Applicants, those concerns must be balanced against the need to protect the confidentiality of my report until its public release, and the possibility that the Applicants might, even at this late stage, be called as witnesses (for example, in the event that my counsel receive a response from Syria to their recent communications with that government indicating that Syria is willing to cooperate with the Inquiry). Considering all of the foregoing, I have asked my counsel to discuss with counsel for the Individuals and for the Attorney General a process to accommodate, to the extent possible, the Applicants' request to review the draft narratives and submissions for the limited purposes described above. The kind of arrangement I have in mind is one that might allow the Applicants to review these materials, with the assistance of their counsel, a day or so in advance of the public release, with appropriate safeguards to protect the confidentiality of these materials.

2. Request for Access to Revised Draft Narratives with Leave to File Additional Comments

The Applicants further request that they and their counsel be permitted to review and file comments on the latest versions of the draft narratives. Counsel for the Applicants have already had an opportunity to review and comment on the draft narratives. All of the comments they provided were carefully considered and revisions were made to the draft narratives as a result. As the Applicants acknowledge, granting their request would require a further extension of the deadline for submitting my report to the government. Given these circumstances, I do not consider it necessary or advisable to delay the submission of my report in order to receive further comments at this time on the draft narratives.

3. Interpretation of Subparagraph (a)(ii) of the Terms of Reference

Subparagraph (a)(ii) of the Terms of Reference requires that I assess whether there were deficiencies in the actions taken by Canadian officials to provide consular services to the Applicants "while they were detained in Syria and Egypt". The Applicants and Amnesty International submit that I should assess the consular services provided by Canadian officials to the Applicants after they were released from prison, because their freedom of movement was still effectively restricted up to the time they left Syria and, in Mr. Elmaati's case, Egypt. The Shorter Oxford English Dictionary (6th ed., 2007) defines "detained" to mean "place or keep in confinement; keep as a prisoner, esp. without charge". In my view, in the context of the Terms of Reference, there is no reason to depart from the ordinary dictionary definition of the word "detained" in interpreting the scope of my mandate. The words "while they were detained in Syria and Egypt" are in my view clear and unambiguous, and preclude me from assessing whether there were deficiencies in the consular services provided to the Applicants after they had been released from prison.