

Court File No. T-324-07

FEDERAL COURT

BETWEEN:

**AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Applicants (Responding parties)

and

**CHIEF OF THE DEFENCE STAFF
FOR THE CANADIAN FORCES,
MINISTER OF NATIONAL DEFENCE
and ATTORNEY GENERAL OF CANADA**

Respondents (Moving parties)

**RESPONDENTS' NOTICE OF MOTION TO STRIKE
APPLICATION FOR JUDICIAL REVIEW**

TAKE NOTICE THAT the respondents will make a motion to the Case Management Court, on a special hearing date, to be set by that Court pursuant to Rules 385(1)(b) & (c) of the *Federal Courts Rules*. The respondents request that the motion be heard at the earliest possible date available after September 30, 2007 in Ottawa, Toronto or Montreal.

The estimated time for this motion is one to one and a half days.

THE MOTION IS FOR the following relief:

- (a) An Order striking out the applicants' Notice of Application or portions thereof;
- (b) An Order dismissing the applicants' application for judicial review;

- (c) In the alternative, an Order granting the respondents an extension of 30 days from the final disposition of the issues raised in the within motion in which to serve and file their affidavit materials;
- (d) Costs of this motion; and
- (e) Such further and other relief as the Court deems just.

THE GROUNDS FOR THE MOTION ARE:

General

1. The applicants, Amnesty International Canada (Amnesty) and British Columbia Civil Liberties Association (BCCLA) filed a Notice of Application on February 21, 2007 for judicial review of the "actions or potential actions of Canadian Forces" (CF) deployed in Afghanistan in relation to the *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan* signed by the Chief of Defence Staff of the CF and the Minister of Defence for Afghanistan in December 2005 ("2005 Arrangement").
2. The applicants allege that the Arrangement does not provide adequate safeguards to ensure that detainees will not be tortured by Afghanistan or a third country to which Afghanistan may subsequently transfer them. The applicants allege that there are substantial grounds to believe that Afghan Forces are torturing detainees.
3. After the Notice of Application was initiated, the Government of Canada entered into a supplemental arrangement with the Government of Afghanistan on May 3, 2007 (the "Supplemental Arrangement") wherein Canada secured substantial and further safeguards relating to detainees transferred by Canadian Forces to Afghan authorities. The applicants do not impugn the Supplemental Arrangement.

4. The provisions of the Supplemental Arrangement provide safeguards over and above the standards legally required for the transfer of detainees in these circumstances.
5. This application for judicial review is so clearly improper as to be bereft of any possibility of success.
6. A determination at this stage that this application for judicial review should be dismissed would result in a substantial saving of the Court's and the parties' time and effort. Granting the present motion would secure "the just, most expeditious and least expensive" determination of the proceeding.
7. The respondents are improperly named. The only proper respondent is the Attorney General of Canada.

Non-Justiciability

8. Even though it is framed as an application for Judicial Review alleging violations of the *Charter*, this application is fundamentally a challenge to the foreign policy decisions of Her Majesty the Queen in Right of Canada in the exercise of her absolute Prerogative in relation to International Affairs and National Defence. Canadian Forces operations in Afghanistan take place under the authority of the United Nations Security Council ("UNSC") or in concert with Afghan authorities. Consequently, the application raises matters of a political and foreign policy oriented nature which are not and should not be justiciable.

No Clear Decision Challenged Within Required Time

9. The application is too vague for judicial determination. The applicants do not identify with sufficient clarity a decision, order, act or proceeding that may properly be the subject of an application for judicial review.

10. Insofar as the application may be said to concern a decision to enter into the *Arrangement*, the application is out of time. The *Arrangement* was made in December 2005 and the time period for seeking judicial review has long expired.
11. Insofar as the application may be said to concern a decision by one or more of the Respondents to establish a general policy or practice by the Canadian Forces respecting the transfer of detainees, the application is again out of time.
12. The Notice of Application does not identify any act or proceedings that may properly be the subject of judicial review.

No Charter Application in the Circumstances

13. The *Canadian Charter of Rights and Freedoms* does not apply to the circumstances of this case in light of the tests for *Charter* applicability recently established by the Supreme Court of Canada in *R. v. Hape*, [2007] S.C.J. No. 26.
14. The applicants do not adduce any evidence to demonstrate that an individual detainee holds the *Charter* rights asserted.
15. The Canadian Forces together with forces of Canada's NATO allies are engaged in military operations in Afghanistan under the authority of United Nations Security Council Resolutions. The Canadian Forces are also in Afghanistan with the consent of the lawful government of Afghanistan and in order to further the self-defence of Canada against terrorist organizations. Canada is not an occupying power and does not exercise military or civilian control of any part of the territory of Afghanistan. The *Charter* has no application in these circumstances.

16. In the alternative, even if it may be said that the *Charter* applies to aspect of Canadian Forces conduct in Afghanistan, sections 7, 10(b) and 12 of the *Charter* are not engaged on the facts adduced. Again, the applicants do not identify any individual detainee and do not adduce any evidence to demonstrate that an individual detainee's *'s* Charter rights have been violated. Moreover, the nexus between the transfer of a detainee and possible violation of section 7 of the *Charter* is too remote. Section 10(b) of the *Charter* does not apply to detentions by the Canadian Forces done in the context of military operations in the relevant circumstances. Section 12 of the *Charter* does not apply to allegations of torture by other States.
17. In addition, insofar as the application may be said to concern the constitutionality of the *Arrangement*, the application is without merit and must be dismissed. The *Arrangement* does not call for the transfer of detainees but merely specifies procedures to be followed in the event of a transfer. There is no basis upon which a declaration that the *Arrangement* violates the *Charter* may be made.
18. Insofar as the application may be said to concern a policy or practice of transferring detainees, the application lacks a sufficient evidentiary foundation and is therefore premature and must be dismissed. The applicants do not allege or adduce evidence to prove that any individual person has faced or may face a substantial risk of loss of life, liberty or security. There is no evidence upon which this Court may determine that a particular transfer violates the *Charter* rights of any individual. Accordingly, there is an insufficient factual foundation for determination of the *Charter* violations alleged.
19. Finally, and in any event, the applicants are not entitled to the relief requested under paragraphs (a), (b) and (c) (pages 4-5) of the Notice of Application. Such relief can, in the circumstances, only be obtained under s. 24(1) of the *Charter* by individuals whose rights or freedoms have been infringed or denied and not by

those purporting to have public interest standing. That is, s. 24(1) does provide a remedy in respect of the assertion of third party rights.

No Standing

20. The applicants do not have the requisite standing to advance the *Charter* rights of third party detainees.
21. The applicants are not directly affected by the matters in issue in this application.
22. The applicants do not meet the criteria for public interest standing and there is therefore no basis upon which this Court may exercise its discretion to grant such standing.

Misapplication and misapprehension of International Law

23. The applicants misapply the role that international law plays in the determination of a judicial review application asserting *Charter* rights.
24. In addition, application is grounded upon a fundamental misapprehension of the applicable international law and Canada's obligations thereunder. The proper application of international law, which may be determined by this Honourable Court without any particular proof thereof, discloses that this application is completely bereft of any chance of success.

Mootness

25. The application for judicial review is moot in light of the Supplemental Arrangement, dated May 3, 2007, between Canada and Afghanistan relating to the treatment and monitoring of persons transferred to Afghan authorities by members of the CF,

Extension of Time

26. The respondents should not, on the basis of the faulty factual and legal foundation of the within application, be put to the time and expense of locating witnesses and mustering crucial evidence in response to the application, unless and until a determination is made on whether it should be struck;

Statutory Reliance

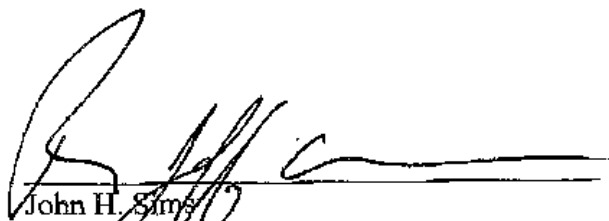
27. The respondents plead and rely upon the following legislation or International Instruments:
- i) Section 18.1 of the *Federal Courts Act* (R.S. 1985, c.F.-7).
 - ii) Rules 3, 8 and 385 of the *Federal Courts Rules* (SOR/98-106).
 - iii) *Canadian Charter of Rights and Freedoms* (Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11).
 - iv) Other international Instruments as necessary.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

1. Originating Notice of Application
2. Affidavit of Scott Proudfoot, sworn May 3, 2007
3. Affidavit of Christopher Greenwood CMG, QC, to be sworn.
4. Such other documents and evidence as counsel may advise and as this Honourable Court deems appropriate having regard to the circumstances.

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OTTAWA, July 26, 2007



John H. Sims
Deputy Attorney General of Canada

Per: **R. Jeff Anderson**

J. Sanderson Graham

Agnieszka Zagorska

Department of Justice

Room 1262/1252, East Tower

234 Wellington Street

Ottawa, ON K1A 0H8

Tel: (613) 957-4851/952-7898

Fax: (613) 954-1920

Solicitors for the Respondents

AND TO: Raven, Cameron, Ballantyne & Yazbeck
Barristers and Solicitors
1600 - 220 Laurier Avenue
Ottawa, ON K1P 5Z9
Tel: (613) 567-2901
Fax: (613) 567-2921

Mr. Paul Champ
Solicitors for the Applicants