REALITY CHECK: DAY AND HARPER STATEMENTS ON SECURITY CERTIFICATES AND HUNGER STRIKE

6 February 2007

1 Day suggests that security certificate detainees remain in prison of their own volition and are free to leave the country at any time

In a letter (faxed 25 January 2007), Minister Stockwell Day wrote, "Throughout the process, an individual named in a certificate has the option to leave the country." He repeated a similar statement to the press on 2 February 2007.

Reality Check

This is a blatant misrepresentation of the facts. In 2006, the Federal Court explicitly recognized that Jaballah and Mahjoub would be seriously at risk of torture if deported to their countries of birth, while this had been recognized earlier in the case of Almrei.

In a decision rendered October 16, 2006 [2006 FC 1230], Justice MacKay of the Federal Court ruled that, "Mr. Jaballah faces a serious risk of torture or worse if he were removed to Egypt".

On December 14, 2006 [2006 FC 1503], Justice Tremblay-Lamer of the Federal Court found that there was overwhelming evidence that Mahjoub would face a very serious risk of torture if returned to Egypt, notwithstanding Egypt's diplomatic assurances.

As for Hassan Almrei, as Maher Arar wrote, "Given my experience, and what I lived through, and what I heard happening to other people in prison in Syria, I believe Mr. Almrei would face the same ordeal, if not worse. I still cannot believe that human beings treat human beings that way in Syrian prison. There is nothing that justifies sending people to countries where torture is commonplace."

Amnesty International has repeatedly expressed its view that all three of these men, as well as Adil Charkaoui and Mohamed Harkat, who are also subject to security certificates, face a serious risk of torture if deported.

2 Day suggests that the situation is temporary while the cases are in appeal or before the Supreme Court

In a statement quoted by Canadian Press on 2 February 2007, Minister Day said, "Nobody is suggesting that being in detention while you're on appeal is a pleasurable experience." On 5 February, in response to a question by NDP MP Bill Siksay in the House of Commons, he continued in the same vein, "I cannot talk about individuals whose cases are before the Supreme Court …"

Reality Check

There is no appeal in a security certificate process: "The determination of the judge is final and may not be appealed or judicially reviewed" (*Immigration and Refugee Protection Act*, 80(3)). Once the certificate is found "reasonable" by a single Federal Court Judge, the certificate automatically becomes a deportation order which

cannot be appealed: “it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing” (*Immigration and Refugee Protection Act*, 81(b)).

Moreover, it is untrue to say that the cases of Almrei, Jaballah and Mahjoub are before the Supreme Court. In June 2006, the Supreme Court heard three constitutional challenges - launched by Adil Charkaoui, Hassan Almrei and Mohamed Harkat - to different aspects of the security certificate procedure. These are challenges to the legal framework of the security certificate, they are not appeals of the certificates. (Needless to say, the challenges do not include the conditions of detention at the KIHC that led to this hunger strike, which begun in November 2006, almost five months after the Supreme Court hearings.)

In practice, the fact that there is an acknowledged risk of torture on the one hand, and a severely limited legal opportunity to challenge detention, on the other, has meant that Jaballah, Mahjoub and Almrei have been neither released from prison nor deported. Indeed the logic of recent court rulings seems to imply ***perpetual*** (not just indefinite) detention. Perpetual detention is contrary to all legal standards – especially for men held without charges and without a fair and public trial.

Mohammad Mahjoub has been in detention since June 2000. This is more than six and a half years. He has been refused release on bail twice. He is awaiting a third decision.

Mahmoud Jaballah has been in detention since August 2001. This is almost five and a half years. He is awaiting a decision on a request for release on bail.

Hassan Almrei has been in detention since October 2001. This is five years and almost four months. His second request for release on bail was refused in December 2005.

Amnesty International wrote (2 February 2007), “Their detention has truly become tantamount to being indefinite as they have limited choices: either remain detained while continuing to pursue legal challenges to the unjust procedure that governs their cases, or agree to be returned to countries where Amnesty International believes they face a serious risk of torture.”

In *Mahjoub,* 2005 FC 1596, par. 92, Justice Dawson wrote that “detention of uncertain duration is anathema to the principles which govern our judicial system”. These sentiments were echoed by Justice Layden-Stevenson in *Almrei*, 2005 FC 1645, at par. 427. Nevertheless, all three remain in detention.

3 Day and Harper suggest that the courts have upheld the security certificate process and that it is therefore legal and just

Day asserted in his 25 January letter that, “Over the years, there have been constitutional challenges to the security certificate process. Canadian courts, however, have rejected these challenges, finding that the process strikes an appropriate balance between an individual's right to procedural fairness and the interests of the state in national security. Harper echoed this idea in his 2 February comments to the press, “their detention under the security-certificate process is lawful, but all prisoners in the Canadian justice system must be treated humanely.”

Reality Check

A security certificate is part of the immmigration system, not the criminal justice system. It may be issued against a permanent resident or refugee or non-status person – anyone without full citizenship in Canada - who is *suspected* of being inadmissible on grounds of "national security" (*Immigration and Refugee Protection Act*, 77). The certificate is issued by the Minister of Immigration and the Minister of Public Safety on the recommendation of CSIS and on the basis of evidence supplied by CSIS.

A Federal Court judge reviews the certificate, but does so in a process which severely constrains the judge's discretionary power. The government only has to prove that its case against the person is 'reasonable', which is a far lower standard of evidence than in a normal criminal trial, where the Crown must prove guilt beyond a reasonable doubt. Part or all of the evidence on which the judge bases his decision can be presented by the government in a closed hearing from which the person and his lawyer are excluded. Neither the person detained, nor his lawyer, are allowed access to all of the evidence submitted to the judge. The detainee therefore has very few means of contradicting or questioning this evidence, which includes hearsay and information from foreign intelligence services which may have been obtained under torture. In the Arar case, this type of 'evidence' was found to be worthless; in the case of the 24 'Project Thread' detainees (arrested in Toronto in 2003), it was exposed as the product of racial profiling. Finally, there are no precise charges laid, and key terms such as "terrorism", "national security", and "membership" are not defined in the law.

The detainee thus finds himself in the impossible position of having to prove that it is not *reasonable* to believe that, for example, he "was, is or will be engaged in terrorism [undefined]; and c. posed, poses or will pose a danger to the security of Canada" – all without having access to the case being presented against him, and in a context where being a practising Muslim may be viewed as suspect from the outset.

The constitutionality of security certificates was challenged in the Charkaoui case, mainly on the grounds that these provisions contravene sections 7 (due process rights) and 15 (equality before the law) of the Canadian Charter of Rights. The case was heard by the Supreme Court in June 2006, but no decision has been issued as yet.

Amnesty International, Human Rights Watch, the Canadian Bar Association, legal academics, expert United Nations human rights bodies such as the Human Rights Committee (2 November 2005, CCPR/C/CAN/CO/5), the Committee against Torture (May 2005, CAT/C/CO/34/CAN), and the Working Group on Arbitrary Detention (5 December 2005, E/CN.4/2006/7/Add.2) have all expressed concern that the security certificate process fails to meet international standards governing detention and fair trials. They have repeatedly called on Canada to reform its legislation and policy on security certificates.

4 Day suggests that Red Cross is providing independent monitoring of detention conditions at the Kingston Immigration Holding Centre

On 2 February, Day was quoted by CP as saying, "… the Red Cross has toured the site, as have members of Parliament …" Similarly, in a letter dated 25 January 2007, he wrote, "The Canadian Red Cross monitors all of CBSA's immigration holding centers, and makes recommendations concerning national and international standards governing detention conditions."

Reality Check

There is no independent oversight of KIHC. All other federal inmates have an independent ombudsperson, the federal Correctional Investigator. However, the federal Correctional Investigator does not have jurisdiction over the KIHC, hence the three detainees have no one to call upon to investigate their complaints and prepare an independent set of recommendations to assist in resolving the current emergency situation.

In fact, currently, there is only an internal grievance procedure, in which decisions are made either by the Canada Border Services Agency (CBSA) or Correctional Service of Canada (CSC). This means, in effect, that the detainees are at the mercy of their jailors. In practice, complaints are almost always dismissed by staff at KIHC.

The Correctional Investigator wrote in the Conclusion of his 2005-2006 report:

> A recent decision has been made by the federal government to transfer security certificate detainees held under the Immigration and Refugee Protection Act from Ontario facilities to a federal facility, pending their removal from Canada.
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> In Ontario facilities, the detainees could legally file complaints regarding conditions of confinement with the Office of the Ontario Ombudsman. That Office had the jurisdiction to investigate complaints filed by the detainees pursuant to the Ontario Ombudsman Act.
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> The Immigration Holding Centre has been built in Kingston within the perimeter fence of Millhaven Penitentiary. The Canadian Border Service Agency entered into a service contract with the Correctional Service to provide the Border Service Agency with the physical detention facility and with security staff. The Border Service Agency has a contract in place with the Red Cross to monitor the care and treatment of detainees in immigration holding centres, including the new Kingston holding centre. The Red Cross, a non-government organization, has no enabling legislation to carry out a role as an oversight agency.
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> The transfer of detainees from Ontario facilities to the Kingston holding centre means that the detainees will lose the benefit of a rigorous ombudsman's legislative framework to file complaints about their care and humane treatment while in custody. The Office of the Correctional Investigator is concerned that the detainees will no longer have the benefits and legal protections afforded by ombudsman legislation. Pursuant to the Optional Protocol to the Convention against Torture, a non-profit organization with no legislative framework, such as the Red Cross, is unlikely to meet the protocol's requirement for domestic oversight.

The Red Cross has indeed visited the prison but, as the federal Correctional Investigator pointed out in his report (above), it does not have the mandate to offer oversight and redress. As is the case in all their work, Red Cross has entered into agreement with the government to keep their findings confidential. This effectively prevents the Red Cross from providing independent monitoring: they can expose neither abuse nor the failure to rectify it.

Day is also correct in saying that members of Parliament have toured the prison. However it would be incorrect to infer that they approved of what they saw. On the contrary, Bill Siksay, a member of the group which visited the facility, has become particularly outspoken in his critiques of the facility and of the unjust process under which its detainees are held.

On 1 February 2007, Warren Allmand, former Solicitor-General of Canada, joined the call for the immediate appointment of the federal Correctional Investigator as an independent negotiator to help resolve the current crisis.

5 Day and Harper suggest that there is daily medical monitoring during the hungerstrike

According to the Canadian Press (2 February 2007), "Prime Minister Stephen Harper said government officials are keeping a close eye on the detainees' health. 'We are reassuring ourselves on a constant basis that these people are being treated in a humane manner.'"

On the same day, Day was quoted as saying, "There is an on-call, on-standby physician and psychiatrist. And at 10 a.m. every morning a health-care practitioner visits the unit".

Asked pointedly in Parliament on 5 February 2007, "Will the minister ensure daily monitoring takes place at the living unit and then a full examination of these men by an independent medical doctor is urgently arranged?" Day gave the same answer.

Reality Check

There has been no monitoring of hunger strikers' vital signs and electrolyte levels since the beginning of the hunger strike.

This is despite very explicit, repeated demands for daily medical care made by detainees and their lawyers (for example, in a fax from the lawyers to the KIHC manager on 25 January 2007).

Studies recommend daily medical monitoring after a maximum of 10 days of hunger strike. Symptoms such as heart arrhythmia can develop very quickly at any time during a hunger strike, particularly if the hunger striker is not getting precisely the right balance of electrolytes such as sodium and potassium, and can be fatal. This was explicitly pointed out in a letter sent to Minister Day by 67 health professionals on 23 January 2007 (www.homesnotbombs.ca/health.htm).

Amnesty International additionally pointed out, in a letter to Minister Day on 2 February 2007, that, "The World Medical Association, in its 1992 Declaration on Hunger Strikes, highlighted the importance of daily medical visits to ascertain whether or not individuals wish to continue with hunger strikes."

During previous hunger strikes, when the men were detained in the Metro West detention centre in Toronto, nursing staff came to their cells daily to monitor vital signs and electrolyte levels. The KIHC medical staff is failing to do this, on the pretext that the detainees should present themselves at the medical treatment area – a new policy introduced in September 2006. This despite the fact that unaccompanied trips to this area have previously resulted in harassment by guards – one of the sparks of the hungerstrike itself. So while it is true that nursing staff "present" themselves, they refuse to provide any health care. The well-being and even life of the detainees is being held hostage to a perverse and dangerous game.

6 Day suggests that complaints about prison conditions are unjustified

In a statement to Parliament on 5 February 2007, Day stated, "I can tell the public that the facility, as I visited about two weeks ago, is a brand new facility of $3.2 million, six cells in it. The doors open on to a common area where there is a large kitchen where any detainees have their

own washer and drier, microwave, refrigerator stocked with a variety of juices, soups, soy milk, chocolate sauce and honey. Also available to them is a separate unit where they have their own office space. They have a medical room. They have an exercise room with modern universal equipment."

Reality Check

This appalling statement exposes the Minister's failure to grasp the situation confronting him.

First, as Amnesty wrote to the Minister on 5 February 2007, the "Amnesty International recognizes that a hunger strike can be a form of non-violent protest against an abuse of human rights. It comes as no surprise that these individuals, facing great stress and with no other effective options, have resorted to such action. … concerns about lack of a fair process and risk of return to torture lie at the heart of the hunger strikes. … These men have felt compelled to take this desperate step as a result of the government's failure to address these serious human rights shortcomings."

Chocolate sauce is not a substitute for freedom, for a fair trial, for the ability to protect oneself against the threat of torture. It is not a substitute for dignity, respect and justice. People do not resort to starving themselves for trivial reasons.

Second, the detainees have specific demands based on the treatment they are experiencing in the prison. Nothing Day includes in his glowing description addresses those demands, which amount to being treated with some degree of dignity and include: protection from harassment by guards, particularly in order to access medical care; the same degree of access to media they had while in detention in Toronto; and weekend conjugal visits (see their open letter at www.homesnotbombs.ca/openletter.htm).

Third, the men are on a ***hunger strike***, and one which has lasted for more than ***eight weeks***. Rather than recognizing the life and death urgency of the situation and intervening to attempt to find a solution, the Minister prefers to defend the treatment they receive. A fridge full of food does not do much good to people who are on hunger strike. An intervention by a Minister with the power and responsibility to find an emergency solution, on the other hand, would.

Available for Comments to the Press

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