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Decision to Deport Secret Trial Detainee Mohammad Mahjoub to Egypt Found to be "Flawed, Perverse, Patently Unreasonable"  
Federal Court Judgment concerning Mohammad Zeki Mahjoub

"In another setback for the Canadian government's determined efforts to deport secret trial detainee Mohammad Mahjoub to torture in Egypt, Federal Court judge Danièle Tremblay-Lamer has ruled "patently unreasonable" a decision by a delegate of the Minister of Citizenship and Immigration to return Mr. Mahjoub to Egypt.

"The delegate consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence," writes Tremblay-Lamer in a 53-page decision. "This flawed approach can be considered nothing short of patently unreasonable with regard to the substantial risk of torture issue."

Mr. Mahjoub, an Egyptian refugee and survivor of torture, has been held on a secret trial security certificate since June, 2000, and neither he nor his lawyer have been able to access the secret case being used to hold and, ultimately, deport him. He is currently on day 20 of a hunger strike protesting his conditions of detention at a facility dubbed Guantanamo Bay North on the grounds of Millhaven Penitentiary.

#### 'BALANCING ACT'

Under the secret trial process, the Minister of Citizenship and Immigration appoints a delegate who is tasked with "balancing" the alleged threat posed by an individual with the risk of torture or other ill-treatment that individual faces if deported. Needless to say, such a "balancing act" stands Canada in contravention of international law, specifically the Convention Against Torture, which prohibits under ALL circumstances deportation to torture.

As in the cases of other secret trial detainees, the minister's delegates have unanimously concluded that Mahjoub, along with Mahmoud Jaballah, Hassan Almrei, Mohamed Harkat, and Adil Charkaoui, all subject to the security certificate, must be deported, even if they face torture. Those decisions have been subject to numerous judicial reviews determining the lawfulness of the decisions, and have, with one exception, been found to be patently unreasonable and returned to the immigration minister for a new determination. In the one exception, Federal Court judge Andrew Mackay found "lawfully made" the decision to deport Mr. Jaballah to torture in Egypt, but then ordered, in October 2006, that Jaballah not be deported as "deportation to Egypt or to any country where and so long as there is a substantial risk that he would be tortured or worse would violate his rights as a human being." The Canadian government, continuing to thumb its nose at international laws against torture, is appealing that decision.

In Mahjoub's case, the issue will now be returned to the Minister of Citizenship and Immigration to begin the process all over again, likely to take at least a year. At the end of that time, a new decision is likely to emerge which, even if he is properly found to be at risk of torture, will likely conclude he should be deported anyway (as this has been the consistent refrain of the federal government). At that point, it is possible that a judge, upon judicial review of such a decision, will make a ruling on its constitutionality.

#### MORE ON THE DECISION

Although the Minister of Citizenship and Immigration had determined in July, 2004 that Mahjoub faced human rights abuses if returned to Egypt, a decision rendered January 3, 2006 determined that Mahjoub, a survivor of torture in Egypt, would not be subject to torture or other ill-treatment if returned. A judicial review of that decision was heard in Federal Court over two days in mid-November, and Tremblay-Lamer's decision was issued late yesterday.

The most startling conclusions in the 53-page decision concern the issue of substantial risk of torture. Tremblay-Lamer agrees with Mahjoub that the minister's delegate "relied on information that went against the bulk of the evidence in concluding there was no institutionalized torture in Egypt....this suggests an arbitrary rejection of important, credible evidence on this issue." Tremblay-Lamer notes "the delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as [Amnesty International and Human Rights Watch] is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals." It's a reputation for credibility, she notes, that has been "affirmed by Canadian courts at all levels," including the Supreme Court.

Tremblay-Lamer takes issue with the delegate's finding that even if Mr. Mahjoub were subject to some sort of human rights abuses upon deportation to Egypt that "victims can bring criminal or civil actions for compensation relating to police abuse." In rejecting this statement, Tremblay-Lamer states : "In my view, even if torture victims can increasingly bring about ex post facto claims, it does little to prevent the occurrence of such abuses in the first place."

Although she does not state it, Tremblay-Lamer critiques the delegate for the same habit that is a cornerstone of CSIS allegations in security certificate cases : holding fast to one tiny piece of "evidence" when reality and thousands of other pieces of evidence reject that single piece. Tremblay-Lamer finds "the delegate's selective reliance on one piece of evidence that held that human rights abuses were not a systemic problem in Egypt, against the overwhelming bulk of the evidence which essentially pointed to the contrary, to be patently unreasonable."

Similar critiques have been lodged against other minister's delegate decisions, illustrating how such reports are ultimately partisan in nature.

#### "ASSURANCES" AGAINST TORTURE

Tremblay-Lamer also deals with the delegate's reliance on Egyptian "diplomatic assurances" that have been received by Canada. They are designed to satisfy us that Mahjoub will not be ill-treated if deported. Again, Tremblay-Lamer finds the delegate did not take into account Egypt's rotten record with respect to such assurances (which have served as the basis for return of refugees who have subsequently been tortured). "Even more troubling is the reliance of the delegate on the assurance given by the Egyptian government that Mr. Mahjoub would be treated in full conformity with the Human Rights Charter given the uncontradicted evidence before her that there is no such Charter in Egypt."

The delegate again relies on a selective reading of one decision with respect to assurances, leading Tremblay-Lamer to find that the delegate's "favouring of a biased party's submissions over the final conclusions of the CAT [Committee Against Torture] to be perverse."

#### MUCH OF DECISION RELIES ON SECRET "EVIDENCE"

While Tremblay-Lamer finds the delegate's unreasonable approach to the issue of torture enough to force the conclusions of the report to be

set aside, there are nonetheless problematic findings in Tremblay-Lamer's decision, given that she, like the delegate, relies on secret evidence that is not tested by Mr. Mahjoub's counsel.

Throughout her decision, Tremblay-Lamer concurs with conclusions reached by the minister's delegate about some of the far-fetched allegations that have been made against Mahjoub, stating, for example, that "the circumstances of the present matter are particular, given the inherent constraints imposed by classified information which cannot be disclosed....this necessarily restricts the public articulation of the specific evidentiary basis underpinning conclusions, where any of the evidence relied upon is classified." It is frustrating indeed to read, for example, "in relation to the issue of the danger that Mr. Mahjoub poses to the security of Canada, there was much relevant classified information, not contained in the public record." Tremblay-Lamer recognizes how the findings of the minister's delegate "could appear insufficiently corroborated solely through the lens of the public record. However, when considered in concert with the classified evidence, I am satisfied that her conclusions were well-grounded in the evidence before her."

But if the minister's delegate's conclusions around the issue of torture were found to be patently unreasonable and perverse — and only after the judicial review heard from Mahjoub's counsel in open court — how are we to be so reassured with respect to the secret record, where Tremblay-Lamer has not had the benefit of cross-examination by defence counsel? Who is there to seriously question the CSIS allegations (and this at a time when public revelations about the spy agency's inaccuracies, outright falsehoods, and reliance on evidence obtained by torture are increasingly in the headlines)?

Such problems speak to the inherently flawed and unfair nature of the security certificate procedure, which is currently the subject of deliberations by the Supreme Court of Canada. The court heard a wide-ranging challenge to the scheme last June and is expected to come down with a decision sometime in the new year.

#### COMPLICITY WITH TORTURE

Meanwhile, the issue of Canada's complicity with deporting people to torture arose last week in the bail hearing for Mr. Mahjoub as well. On the stand was Louis Dumas, the Director of National Security for the Canadian Border Services Agency (CBSA), who testified that Mr. Mahjoub is essentially removal ready, pending the outcome of the Supreme Court decision.

Dumas was asked by Mahjoub's lawyer, Barb Jackman, whether CBSA — in light of the O'Connor Inquiry into the torture of Maher Arar, the Toope report (which concluded Maher Arar was tortured by Syrian authorities, and which Dumas said he had "heard about through the media", though he has not read it himself) and the revelations of torture of individuals like Ahmed El-Maati (also tortured in Egypt, and still recovering despite five operations in Canada) — would re-examine the "evidence" upon which Mr. Mahjoub is to be deported to torture. Would the agency have reason to check for reliability of the "evidence" and whether it had been obtained by torture?

The answer was as short as it was chilling. "No."

On a related note, the Canadian government, which has had four years to do so, continues to refuse signing the Optional Protocol Against Torture, which came into effect 18 months ago and was adopted by the General Assembly of the United Nations in December 2002. The protocol's objective is to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."

The issue of the ongoing indefinite detention of Mr. Mahjoub, Mr. Jaballah, and Mr. Almrei will be the focus of nationwide demonstrations January 11-15, 2007, with a call for the closure of the Guantanamo Bay North facility and release for those still behind bars, as well as an end to all deportation proceedings where there is a risk of torture. "

[Access the Federal Court judgment](#)



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