Date: 20080207

Docket: T-324-07

Citation: 2008 FC 162

Ottawa, Ontario, February 7, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] Amnesty International Canada and the British Columbia Civil Liberties Association ("the applicants") seek an interlocutory injunction prohibiting General Rick J. Hillier - the Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence and the Attorney General of Canada from transferring detainees captured by the Canadian Forces to Afghan authorities, or to the custody of any other country, pending the final disposition of the applicants' application for judicial review.

[2] The evidence adduced by the applicants clearly establishes the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees transferred by the Canadian Forces to the custody of Afghan authorities are not mistreated.

[3] That said, the Court has been advised that the transfer of detainees by the Canadian Forces have ceased, at least temporarily. At this point, we do not know when, and indeed, if, detainee transfers will ever resume.

[4] Furthermore, in the event that transfers do resume at some point in the future, we do not know what safeguards may have been put into place by that time to protect detainees while they are in the hands of the Afghan authorities.

[5] In order to be entitled to an interlocutory injunction, the applicants have to demonstrate, amongst other things, that irreparable harm will likely result unless the injunction is granted. This must be established on the basis of clear and non-speculative evidence. Given the current uncertainty surrounding the future resumption of transfers, and the lack of clarity with respect to the conditions under which those transfers may take place, the applicants have not satisfied this aspect of the injunctive test.

[6] As a consequence, the applicants' motion for an interlocutory injunction will be dismissed, without prejudice to the right of the applicants to renew their request, should detainee transfers resume in the future.

The Underlying Application for Judicial Review

[7] The applicants have brought an application for judicial review with respect to "the transfers or potential transfers, of individuals detained by the Canadian Forces deployed in the Islamic Republic of Afghanistan".

[8] The application seeks to review the conduct of the Canadian Forces with respect to detainees held by the Canadian Forces in Afghanistan, and the transfer of some of these individuals to Afghan authorities.

[9] In particular, the applicants allege that the formal arrangements which have been entered into by Canada and Afghanistan do not provide adequate substantive or procedural safeguards so as to ensure that individuals transferred into the custody of the Afghan authorities are not exposed to a substantial risk of torture.

[10] It is in this context that the applicants now seek an interlocutory injunction prohibiting the transfer of detainees captured by the Canadian Forces to Afghan authorities, or to the custody of any other country, pending the determination of their application for judicial review.

Background

[11] Canadian Forces personnel are currently deployed in Afghanistan, both as part of the NATO-led multi-national International Security and Assistance Force ("ISAF"), and as part of the

American-led “Operation Enduring Freedom” (“OEF”). The majority of Canadian personnel are deployed in Kandahar province as part of ISAF.

[12] In the performance of Canada’s military operations in Afghanistan, the Canadian Forces are required from time to time to capture and detain insurgents, or those assisting the insurgents, who may pose a threat to the safety of Afghan nationals, as well as to members of the Canadian military and allied forces.

[13] In accordance with Task Force Afghanistan’s *Theatre Standing Order* 321A, the decision as to whether individual detainees should be retained in Canadian custody, released, or transferred to the custody of another country, is within the sole discretion of the Commander of Joint Task Force Afghanistan, a position currently occupied by General Laroche.

[14] Before transferring a detainee into Afghan custody, the Commander must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.

[15] It is the position of the respondents that if this standard is not met, transfers will not take place.

[16] On December 19, 2005, the Afghan Minister of Defence and the Chief of the Defence Staff for the Canadian Forces signed an agreement entitled "*Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*" (the "first Arrangement").

[17] The first Arrangement was intended to establish procedures to be followed in the event that a detainee was transferred from the custody of the Canadian Forces to a detention facility operated by Afghan authorities. The Arrangement reflects Canada's commitment to work with the Afghan government to ensure the humane treatment of detainees, while recognizing that Afghanistan has the primary responsibility to maintain and safeguard detainees in their custody.

[18] Amongst other things, the first Arrangement provides that the International Committee of the Red Cross has the right to visit detainees at any time, while the detainees were being held in either Canadian or Afghan custody.

[19] In February of 2007, the Canadian Forces signed an exchange of letters with the Afghan Independent Human Rights Commission, which letters emphasize the role of the AIHRC in monitoring detainees. These letters emphasize the role of the AIHRC in monitoring detainees, and further provide that the AIHRC is to give immediate notice to the Canadian Forces, should it become aware of the mistreatment of a detainee who had been transferred from Canadian custody.

[20] On February 1, 2007, the applicants filed their application for judicial review with respect to the "actions or potential actions" of the Canadian Forces in Afghanistan. Amongst other relief requested in their Notice of Application, the applicants sought to prohibit further transfers of detainees until adequate safeguards were put in place. To this end, the applicants also sought an interim injunction restraining the transfer of detainees until the hearing of the application for judicial review.

[21] The applicants' motion for an injunction was originally scheduled to be heard on May 4, 2007.

[22] On May 3, 2007, Canada and Afghanistan concluded a second Arrangement governing the transfer of detainees held by the Canadian Forces (the "second Arrangement"). This second Arrangement supplements the first Arrangement, which continues to remain in effect.

[23] The second Arrangement requires that detainees transferred by the Canadian Forces be held in a limited number of detention facilities, to assist in keeping track of individual detainees. The designated institutions are the National Directorate of Security detention facility in Kandahar, Kandahar central prison (Sarpoza), National Directorate of Security detention facility No. 17 in Kabul, and Pul-e-Charki prison, also in Kabul.

[24] The second Arrangement further provides that members of the Afghan Independent Human Rights Commission, the International Committee of the Red Cross and Canadian Government personnel all have access to persons transferred from Canadian to Afghan custody.

[25] The second Arrangement also requires that approval be given by Canadian officials before any detainee who had previously been transferred from Canadian to Afghan custody is transferred on to the custody of a third country.

[26] Finally, the second Arrangement provides that allegations of abuse and mistreatment of detainees held in Afghan custody are to be investigated by the Government of Afghanistan, and that individuals responsible for mistreating prisoners are to be prosecuted in accordance with Afghan law and internationally applicable legal standards.

[27] As a result of the negotiation of the second Arrangement, the applicants' motion for an interim injunction was adjourned *sine die*.

[28] The applicants subsequently developed concerns with respect to the efficacy and sufficiency of the protections afforded to detainees under the second Arrangement. As a consequence, in November of 2007, the applicants renewed their motion for an interlocutory injunction, and the matter was scheduled to be heard on January 3, 2008. At the request of the respondents, this date was subsequently pushed back to January 24, 2008.

[29] On January 22, 2008, the applicants were advised by the respondents that the Canadian Forces had suspended detainee transfers until such time as transfers could be resumed "in accordance with Canada's international obligations".

[30] The decision to suspend detainee transfers was made on November 6, 2008. The decision was the result of a "credible allegation of mistreatment" having been received the previous day by Canadian personnel monitoring the condition of detainees transferred to Afghan authorities.

[31] As a result of the receipt of this allegation, no detainee transfers have taken place since November 5, 2007.

[32] On January 24, 2008, prior to the commencement of the hearing of the applicants' motion for an interlocutory injunction, Brigadier General Joseph Paul André Deschamps testified with respect to recent developments in this matter.

[33] Brigadier General Deschamps works with the Canadian Expeditionary Forces Command in Ottawa, and is the Chief of Staff responsible for overseeing operations for the Canadian Forces deployed outside of Canada, including those stationed in Afghanistan.

[34] Brigadier General Deschamps testified that the day following the receipt of the November 5 allegation of detainee mistreatment, Colonel Christian Juneau, the Deputy Commander of Task

Force Afghanistan, made the decision to suspend further detainee transfers. This decision was made by Colonel Juneau, in the absence of General Laroche, who was on leave at the time.

[35] According to Brigadier General Deschamps, the suspension of transfers is temporary in nature, and the Canadian Forces remain committed to the ISAF policy of transferring Afghan detainees to the custody of Afghan authorities. He further testified that the resumption of detainee transfers remains a real possibility.

[36] The respondents further advise that detainee transfers will not resume until such time as Canada is satisfied it can do so in accordance with its international legal obligations.

Is the Motion Now Moot?

[37] The first issue to be considered is whether the applicants' motion for an interlocutory injunction is moot, in light of the suspension of detainee transfers.

[38] The respondents submit that the application for judicial review seeks to review the Canadian Forces' practice with respect to the transfer of detainees. Given that there is currently no Canadian Forces practice to transfer detainees, the case is therefore moot, and the Court should refuse to grant an injunction on that basis.

[39] Moreover, the respondents say that transfers will not resume until such time as the Canadian Forces can be satisfied that detainees will not face a substantial risk of torture. As a consequence,

there is currently no possibility that any individual detainee will be transferred to the custody of Afghan authorities if there is a substantial risk that the individuals would be tortured.

[40] Finally, the respondents submit that if and when transfers do begin again, such transfers will take place on a new set of facts, necessitating the production of an entirely new evidentiary record.

[41] The applicants argue that they are seeking injunctive relief on a *quia timet* basis – that is, on the basis of apprehended future harm. Such future harm remains a real possibility, the applicants say, in light of the evidence of Brigadier General Deschamps as to the Canadian Forces' ongoing commitment to the ISAF policy of transferring detainees to the custody of Afghan authorities, and the fact that the resumption of detainee transfers remains a real possibility.

[42] Moreover, the applicants submit that the motion for an injunction should be entertained, as it is clear from the record that no amount of post-transfer monitoring will suffice to protect the detainees.

[43] A review of the Notice of Application confirms that the application for judicial review is directed, in part, to the policy or practice of denying detainees access to counsel, and transferring them to the custody of Afghan authorities where they face a substantial risk of torture: see *Amnesty International Canada et al. v. Canada (Canadian Forces)*, [2007] F.C.J. No. 1460, 2007 FC 1147, at ¶68.

[44] The evidence of Brigadier General Deschamps confirms that the policy of the Canadian Forces remains unchanged – that is, to transfer individuals detained by the Canadian Forces to the custody of the Afghan authorities, unless those individuals have already been released by the Canadian Forces.

[45] There is no question that the situation on the ground in Afghanistan with respect to detainee transfers is extremely fluid. This is evidenced by changes that have occurred since the commencement of the application for judicial review.

[46] Amongst other developments, there has been the negotiation of the second Arrangement, the day before the applicants' injunction motion was originally scheduled to be heard. Other changes include the establishment of monitoring arrangements involving representatives of both Canada and the Afghan Independent Human Rights Commission, and the November 6, 2007 suspension of detainee transfers.

[47] I agree that what the respondents describe as a temporary suspension of transfers creates problems for the applicants in seeking an interlocutory injunction restraining future detainee transfers. These difficulties will be addressed further on in this decision.

[48] However, I am not persuaded that the matter is 'temporarily moot', as the respondents contend, as I am satisfied that there remains a live controversy between the applicants and the respondents: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[49] In coming to this conclusion, I have taken into account the fact that:

> 1) The applicants' application for judicial review is directed to the policy of detainee transfers, as well as the practice;
> 2) It remains the policy of the Canadian Forces to transfer detainees into the hands of the Afghan authorities unless the detainees are first released from custody by the Forces;
> 3) It is the avowed intention of the Canadian Forces to resume the practice of transferring detainees as soon as satisfied that it can do so in accordance with its obligations at international law;
> 4) There is thus a very real possibility that detainee transfers will resume at some point in the future;
> 5) The respondents have refused to advise the applicants in the event that the decision is made to resume the transfer of detainees to the custody of the Afghan authorities; and
> 6) The injunction is being sought *quia timet*, to prevent apprehended future harm.

[50] Furthermore, if the Court were to grant an injunction, the Court's order would have the effect of resolving a controversy which affects or may affect the rights of the parties: see *Borowski*, previously cited, at ¶15.

[51] That is, the order would affect the ability of the Canadian Forces to resume detainee transfers. The dispute between the parties in this regard has not disappeared.

[52] As a consequence, I will deal with the applicants' motion.

[53] However, before turning to address the merits of the applicants' motion, I would simply note that as a result of my finding that the applicants have not demonstrated that irreparable harm will result if the injunction is not granted, it has been unnecessary to address the respondents' arguments with respect to the availability of injunctive relief against the Crown, Crown Ministers and servants.

The Test for Injunctive Relief

[54] In determining whether the applicants are entitled to an interlocutory injunction restraining future detainee transfers, the test to be applied by the Court is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[55] That is, the applicants must establish that:

1) There is a serious issue to be tried;
2) They will suffer irreparable harm if the injunction is not granted; and
3) The balance of convenience favours the granting of an injunction.

[56] Given that the test is conjunctive, the applicants have to satisfy all three elements of the test before they will be entitled to relief.

Serious Issue

[57] In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. In this regard, the Supreme Court noted that:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (at pp. 337-338)

[58] The respondents submit that the applicants have not demonstrated the existence of a serious issue in this case, as the *Canadian Charter of Rights and Freedoms* does not apply to the conduct of the Canadian Forces in Afghanistan. The respondents further argue that even if the *Charter* does apply, the specific sections of the *Charter* relied upon by the applicants are not engaged on the facts of this case.

[59] The question of the applicability of the *Canadian Charter of Rights and Freedoms* to the conduct of the Canadian Forces deployed in Afghanistan is the subject of a separate motion brought under the provisions of Rule 107 of the *Federal Courts Rules*. A decision in relation to that motion is currently under reserve.

[60] However, in addressing the applicants' motion for an interlocutory injunction, I am not required to finally determine the applicability of the *Charter* to the conduct in issue here, and nothing in these reasons should be read to decide that question.

[61] Rather, I am simply called upon to determine whether the applicants have satisfied the burden on them to establish the existence of a serious issue in this regard.

[62] In October of 2007, the Court ruled on the respondents' motion to strike the applicants' Notice of Application. In this regard, the Court found that while the issues raised by the applicants were novel, the applicants had raised one or more serious issues: see *Amnesty International Canada et al*, previously cited. No appeal has been taken by the respondents from that decision.

[63] In particular, this case requires the determination of the extent to which, if at all, a constitutional bill of rights such as the *Canadian Charter of Rights and Freedoms* "follows the flag" when Canadian Forces personnel are deployed outside of Canada.

[64] While the application of the *Charter* to the actions of the Canadian Forces in relation to the Afghan detainees is by no means free from doubt, I am satisfied that the applicants have demonstrated that the issue is neither vexatious nor frivolous, and have thus satisfied the serious issue component of the tripartite injunctive test.

[65] The next question, then, is whether the applicants have demonstrated that irreparable harm will result between now and the time that the application for judicial review is decided, in the event that an interlocutory injunction is not granted.

The Law Regarding Irreparable Harm

[66] Before examining the evidence adduced by the parties in relation to this issue, it is helpful to start by considering what the Courts have said on the question of irreparable harm.

[67] It is well established by the jurisprudence that an interlocutory or interim injunction should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitcodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, at ¶23.

[68] Moreover, the burden is on the party or parties seeking injunctive relief to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), 40 C.P.R. (4th) 210, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326, at &59.

[69] Indeed, as was noted by Justice Rothstein in *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.* (1994), 83 F.T.R. 161, 56 C.P.R. (3d) 289, at ¶117, while a motions judge may draw logical inferences that reasonably flow from the evidence before the Court, at the end of the day, even where *quia timet* injunctive relief is sought, the applicant's evidence of irreparable harm must nevertheless be clear, and non-speculative: see also *Bayer HealthCare AG v. Sandoz Canada Inc.* [2007] F.C.J. No. 585, 2007 FC 352, at ¶34.

[70] Furthermore, in order to be entitled to *quia timet* injunctive relief, the applicants must show a high degree of probability that a breach of the rights in issue will occur imminently, or in the near future: see *Merck & Co. v. Apotex Inc.* (2000), 8 C.P.R. (4th) 248 (F.C.A.).

[71] With this understanding of the jurisprudence, I turn now to consider the evidence relating to the issue of irreparable harm.

The Evidence on the Issue of Irreparable Harm

[72] The applicants have led substantial evidence with respect to the alleged inadequacies in the safeguards that have been put into place to this point to protect detainees transferred to Afghan authorities by the Canadian Forces.

[73] Of particular note are the following matters:

1. ***Deficiencies in Record Keeping***

[74] Both the first and second Arrangements impose an obligation on Afghanistan to maintain accurate written records accounting for all detainees that pass through their custody. This does not appear to be happening.

[75] Indeed, the documentation relating to the period between the negotiation of the second Arrangement on May 3, 2007, and the suspension of transfers on November 6, 2007, is replete with references to the ongoing difficulties facing the Canadian Forces and the Department of Foreign Affairs and International Development ("DFAIT") in tracking down detainees once they leave Canadian custody.

[76] These difficulties seemingly arise from the poor level of record keeping by the Afghan authorities. Amongst other shortcomings, Canadian documents refer to the fact that Afghan records do not note the nationality of the military personnel originally detaining individuals. Also leading to confusion are the multiple ways of transcribing Afghan names into the Latin alphabet, and the unreliability of, or inconsistencies in, the information provided by detainees themselves.

2. *Missing Detainees*

[77] Due in part to the problems of record keeping identified above, Canadian personnel appear to have lost track of a number of individuals who have been handed over to Afghan authorities by the Canadian Forces.

[78] While some of these individuals have subsequently been located, according to the testimony of Nicholas Gosselin, the DFAIT Human Rights Officer in Kandahar responsible for detainee monitoring, at this point there are at least four detainees who were taken into Canadian custody after May 3, 2007 and then subsequently transferred to the Afghan authorities, whose current whereabouts are unknown.

[79] As a consequence, it has not been possible to determine whether these individuals have been subject to abuse while in Afghan detention.

[80] In addition, Canadian personnel do not follow up on the condition of detainees after they have been handed over to Afghan authorities, where those individuals have allegedly been subsequently released by the Afghan authorities.

[81] For example, on June 26, 2007, Canadian personnel attended at the National Directorate of Security detention facility in Kandahar City. In preparation for this visit the Canadian Provincial Reconstruction Team prepared a list of 12 individuals who had recently been transferred by the Canadian Forces to the NDS detention facility. On the arrival of the Canadian personnel at the detention facility, they were advised that ten of the individuals had been released the day before.

[82] It appears that Canada has no ability to verify this information, with the result that it has not been possible to ascertain whether these ten individuals had indeed been released, or were still in detention. Moreover, there is no way of knowing whether these individuals had been mistreated while they were in Afghan custody.

[83] The second Arrangement specifically imposes an obligation on Afghanistan to notify the Government of Canada prior to the release of Canadian-transferred detainees from Afghan custody. Based on the events of June 26, 2007, it is clear that this does not always occur.

3. ***Denial of Access to Afghan Detention Facilities***

[84] The documentation produced by the respondents relating to the period after the negotiation of the second Arrangement on May 3, 2007 confirms that on one occasion, Canadian personnel

attempting to visit detainees following their transfer to Afghan custody were denied access to detainees being held at Sarpoza prison, allegedly because of security concerns relating to the large number of visitors in the facility for a family visiting day.

4. ***Complaints of Mistreatment Prior to November 5, 2007***

[85] Eight complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghan detention facilities between May 3, 2007 and November 5, 2007. These complaints included allegations that detainees were kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads.

[86] While it is possible that these complaints were fabricated, it is noteworthy that the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan prisons, as recorded in independent country condition reports, including those emanating from DFAIT.

[87] Moreover, in some cases, prisoners bore physical signs that were consistent with their allegations of abuse. In addition, Canadian personnel conducting site visits personally observed detainees manifesting signs of mental illness, and in at least two cases, reports of the monitoring visits describe detainees as appearing “traumatized”.

5. ***The Need to Rely on Afghan Investigations of Allegations of Mistreatment***

[88] The second Arrangement specifically provides that allegations of mistreatment at the hands of Afghan authorities are to be investigated by the Government of Afghanistan. It further provides that those alleged to be responsible for the abuse of detainees are to be prosecuted in accordance with Afghan law and internationally applicable legal standards.

[89] Canada has no independent capacity to investigate allegations of mistreatment of detainees in Afghan custody, as to do so would encroach on Afghan sovereignty. Moreover, Canada's offers of assistance with respect to the investigation of allegations of detainee mistreatment have thus far been refused by the Afghan authorities.

[90] As a result, Canada is entirely reliant on investigations of detainee abuse carried out by Afghan officials.

[91] The allegations of mistreatment occurring in the period between May 3, 2007 and November 5, 2007 were allegedly investigated, and found to be without merit. Even though Afghan authorities considered the allegations to be unsupported, a number of additional preventative measures were put into place as a result of the allegations, including the implementation of visits to detention facilities by doctors, increased monitoring, and enhanced human rights training for Afghan officials.

[92] It is not clear, however, whether the investigation carried out in relation to these allegations was an independent one. No written report of the investigation has been produced to Canadian

personnel, nor have any details of the investigation been provided thus far. As a consequence, there is no way of knowing whether the investigation was fair, thorough or impartial.

[93] All of these considerations raise concerns as to the reliability of the findings of the investigation that all of the allegations were unfounded.

[94] Furthermore, in many cases, detainees were unwilling to be identified in complaints, for fear of reprisals at the hands of Afghan prison officials. While this is perfectly understandable, it does further constrain the extent to which a meaningful investigation of detainee allegations of mistreatment could be carried out.

6. ***The November 5, 2007 Allegation of Detainee Mistreatment***

[95] On November 5, 2007, Canadian personnel, including Mr. Gosselin, attended at the National Directorate of Security detention facility in Kandahar City on a site visit. In the course of the visit, a detainee stated that he had been interrogated by his captors on more than one occasion - the precise number of interrogations having been redacted from the record on the grounds of national security and diplomatic relations.

[96] At least one of the interrogations had evidently taken place in the room in which the interview was being conducted. The detainee stated that he could not recall the details of that interrogation, as he had allegedly been knocked unconscious early on. He did report, however, that he had been held to the ground and beaten with electrical wires and a rubber hose.

[97] The detainee then pointed to a chair in the interview room, stating that the instruments that had been used to beat him had been concealed under the chair. Canadian personnel then located a large piece of braided electrical wire and a rubber hose under the chair in question.

[98] In the course of the interview, the detainee also revealed a large bruise on his back, which was subsequently described by Canadian personnel as being "possibly … the result of a blow". In cross-examination, Mr. Gosselin conceded that the bruising that he observed was consistent with the beating described by the detainee.

[99] This allegation was reported to Afghan authorities, and is currently under investigation by them. While the investigation is ongoing, an employee at the detention facility has evidently been suspended from his position and placed in detention.

[100] However, once again, the detainee making the allegation of mistreatment refused to allow his name to be disclosed to Afghan prison officials, necessarily limiting the extent to which a meaningful investigation can be carried out.

[101] It was as a consequence of the receipt of this complaint that the decision was made by the Deputy Commander of Task Force Afghanistan to suspend further detainee transfers until such time as the Canadian Forces was satisfied it could do so in accordance with its international legal obligations.

7. *Afghanistan's Human Rights Record*

[102] All of the foregoing concerns must also be considered in the context of Afghanistan's human rights record.

[103] In this regard, entities such as the Department of State of the United States, the Afghan Independent Human Rights Commission, the United Nations High Commissioner for Human Rights and the United Nations Assistance Mission in Afghanistan have all recognized the serious systemic problem of detainee torture and abuse in Afghan prisons.

[104] These problems are noted as being particularly prevalent in Kandahar and Paktia provinces.

[105] Moreover, Canada's own Department of Foreign Affairs and International Trade has recognized the pervasive nature of detainee abuse in Afghan prisons in its annual reviews of the human rights situation in Afghanistan. For example, DFAIT's 2006 report, released in January of 2007, concluded that "Extra-judicial executions, disappearances, torture and detention without trial are all too common".

[106] The Afghan National Directorate of Security is often singled out for particular attention in the country reports, as being responsible for the torture and mistreatment of prisoners. Of particular note is the fact that Louise Arbour, the United Nations High Commissioner for Human Rights, has described torture in NDS custody as being "common".

[107] Many of the detainees turned over to Afghan authorities by the Canadian Forces are in fact handed over to the NDS.

8. *The Expert Evidence With Respect to Post-transfer Monitoring as a Means Of Preventing Torture*

[108] The applicants have also adduced expert evidence with respect to monitoring as a means of preventing torture in the form of an affidavit from Dr. Vincent Iacopino, the Medical Director of Physicians for Human Rights. Dr. Iacopino is also one of the authors of the "Istanbul Protocol", which is a United Nations-sanctioned set of international guidelines for the investigation and documentation of torture.

[109] Dr. Iacopino's evidence raises serious questions as to the usefulness of post-transfer monitoring as a means of preventing torture.

[110] Dr. Iacopino's view that post-transfer monitoring mechanisms are not effective to mitigate the risk of torture is shared by numerous international organizations, including the United Nations Special Rapporteur on Torture and the United Nations High Commissioner for Human Rights.

Have the Applicants Shown that Irreparable Harm will Likely Occur in the Future if the Injunction is not Granted?

[111] The evidence adduced by the applicants is very troubling, and creates real and serious concerns as to the efficacy of the safeguards that have been put in place thus far to protect detainees transferred into the custody of Afghan prison officials by the Canadian Forces.

[112] As a result of these concerns, the Canadian Forces will undoubtedly have to give very careful consideration as to whether it is indeed possible to resume such transfers in the future without exposing detainees to a substantial risk of torture.

[113] Careful consideration will also have to be given as to what, if any, safeguards can be put into place that will be sufficient to ensure that any detainees transferred by Canadian Forces personnel into the hands of Afghan authorities are not thereby exposed to a substantial risk of torture.

[114] That said, it bears repeating that the applicants' application for judicial review is directed to the respondents' policy or practice of denying detainees access to counsel prior to transfer, and transferring them to the custody of Afghan authorities without adequate safeguards in place, with the result that the detainees face a substantial risk of torture.

[115] The Canadian Forces has indicated that it will not resume detainee transfers unless it is satisfied that it can do so in accordance with its international obligations, which would include obligations under the *Convention Against Torture*.

[116] At this point, we have no way of knowing whether detainee transfers will ever be resumed.

[117] In the event that the Canadian Forces does resume transferring detainees into the hands of Afghan prison authorities at some point in the future, we do not know what additional safeguards

may have been put into place by that time, so as to ensure that the detainees are not exposed to a substantial risk of torture.

[118] Indeed, as the applicants conceded in argument, there are scenarios under which detainee transfers could potentially take place in the future, in circumstances that would address the applicants' concerns.

[119] That is, the applicants indicated that their concerns would be adequately addressed if, by way of example, Canada was able to negotiate an arrangement with Afghan authorities whereby a Canadian monitor was stationed in the detention facilities holding Canadian-transferred detainees.

[120] We have no way of knowing whether such an arrangement would be possible, or would be dismissed out of hand as an unacceptable encroachment on Afghan sovereignty. What the above example does serve to illustrate, however, is that whatever concerns may exist as to the adequacy of past efforts to protect detainees, it is by no means clear at this point that future transfers will necessarily take place in circumstances that would expose detainees to a substantial risk of torture.

[121] The applicants submit that notwithstanding the uncertainty surrounding the conditions under which future transfers might take place, an injunction should nonetheless be granted, in light of the respondents' refusal to undertake to notify the applicants in advance, in the event that the decision is made to resume detainee transfers.

[122] While I have some sympathy for the applicants' position, given the degree of public interest in this matter, I am not persuaded that the applicants will not know when transfers are resumed, if that should occur between now and the time that the applicants' application for judicial review is heard.

[123] Moreover, the injunctive test puts the burden on the applicants to adduce clear and non-speculative evidence that irreparable harm will result between now and the time that their application for judicial review is heard, if the injunction is not granted.

[124] Given the uncertainty as to whether transfers will resume during this period, as well as the lack of information with respect to the terms and conditions that may surround future detainee transfers, the applicants have not met this burden.

Notice of the Resumption of Detainee Transfers

[125] In the event that the Court was to refuse the injunction in light of the temporary suspension of detainee transfers, and the uncertainty surrounding future transfers, the applicants ask that the respondents be ordered to provide them with seven days advance notice of the resumption of transfers, in order that a fresh motion for an injunction could then be brought on the basis of an updated record.

[126] While this request has been given careful consideration, there are real concerns about the Court inserting itself in such a fashion into decisions regarding the disclosure of information made

in theatre, by those charged with responsibility for the Canadian Forces. The determination of whether information of this nature should be disclosed could well involve operational or strategic considerations well beyond the knowledge or expertise of the Court.

[127] Moreover, there is a real possibility that any such order may not, in the end, have any practical utility. This is because the respondents have indicated that information as to the resumption of transfers may be "sensitive information or potentially injurious information" relating to national security and international relations, as contemplated by section 38 of the *Canada Evidence Act*.

[128] If the resumption of transfers would not otherwise be disclosed to the public on the basis of the respondents' belief that it is sensitive or potentially injurious information, the respondents cannot not be compelled to disclose that information, without first being afforded the opportunity to have their claim reviewed through the procedures contemplated by section 38 of the *Canada Evidence Act*. This would take some time.

[129] Thus, even if the determination were ultimately made that the information should be disclosed, any such decision would likely not be made until well beyond the seven day notice period requested.

[130] As a consequence, the Court declines to make such an order.

Other Issues Relating to Irreparable Harm

[131] In light of the finding that the applicants have not satisfied the irreparable harm component of the injunctive test, it is unnecessary to address the respondents' argument that even though the applicants have been granted public interest standing to represent the interests of the detainees in this case, they cannot rely on harm to those detainees to support an allegation of irreparable harm, so as to entitle the applicants to injunctive relief.

Balance of Convenience

[132] In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, the Supreme Court stated that this third branch of the injunctive test requires a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits (at p.129, per Beetz J.).

[133] To be entitled to injunctive relief, the applicants have to satisfy all three elements of the *RJR-MacDonald* test. Given that the applicants have not provided clear and non-speculative evidence that irreparable harm will result between now and the time that their application for judicial review is heard if the injunction is not granted, it is not necessary to consider where the balance of convenience lies in this case.

Conclusion

[134] As has been explained above, the evidence adduced by the applicants clearly establishes the existence of real and very serious concerns as to the effectiveness of the steps that have been taken

thus far to ensure that detainees transferred by the Canadian Forces to the custody of Afghan authorities are not mistreated.

[135] As a result of the concerns that have arisen with respect to the treatment of detainees, transfers of detainees by the Canadian Forces have ceased, at least temporarily. It is not clear at this point when, and indeed, if, detainee transfers will ever resume.

[136] Furthermore, in the event that transfers do resume at some point in the future, we do not know what additional safeguards may be put into place to protect detainees while they are in the hands of the Afghan authorities.

[137] To be entitled to injunctive relief, the applicants had to demonstrate on the basis of clear and non-speculative evidence that irreparable harm will likely result unless the injunction is granted. Given the current uncertainty surrounding the future resumption of transfers, and the lack of clarity with respect to the conditions under which those transfers may take place, the applicants have not satisfied this aspect of the injunctive test.

[138] For these reasons, the applicants' motion for an interlocutory injunction is dismissed, without prejudice to the right of the applicants to renew their request, on the basis of an updated evidentiary record, should detainee transfers resume in the future.

The Status of the Record

[139] The applicants also seek an order directing that any evidence submitted on this motion be considered as evidence submitted for the purposes of the hearing of the application for judicial review.

[140] The respondents object to such an order, arguing firstly that there are questions as to the admissibility of portions of the evidence adduced by the applicants, given that some of the affidavit material is based upon the information and belief of the deponents, rather than their first-hand knowledge.

[141] In addition, the respondents submit that it cannot be determined at this juncture whether evidence currently before the Court on this motion will be relevant to the facts in existence at the time that the application for judicial review is finally decided.

[142] I agree with the respondents that this is a matter best left to the judge dealing with the application for judicial review on its merits, and decline to make any order in this regard.

Costs

[143] Should their motion be dismissed, either on the basis of mootness, or because of the uncertainty surrounding future detainee transfers, the applicants contend that they should nevertheless be entitled to their costs from November 6, 2007 to January 24, 2008. This is the

period between the date on which the decision to suspend detainee transfers was made, up to, and including, the date of the hearing.

[144] Given that the respondents were in possession of information relevant to these proceedings, and chose not to disclose it in a timely manner, the applicants say that they should be compensated for the enormous amount of work that was done on this file in this period.

[145] The applicants also point to the fact that the respondents filed four affidavits with the Court on December 14, 2007 which, they say, imply that detainee transfers were ongoing. The applicants argue that the *Canada Evidence Act* "ought not to be used as a licence to keep the Court ill-informed of pivotal facts, or as a means to achieve a tactical advantage".

[146] The respondents vigorously oppose this request, stating that they had serious and legitimate national security concerns relating to the disclosure of this information, and should not be penalized for dealing with these concerns in a careful and responsible manner.

[147] While the respondents may well have needed some time to consider the security implications of the disclosure of information with respect to the suspension of detainee transfers, those concerns were surely rendered moot when, on November 14, 2007, General Egon Ramms, the Executive Head of ISAF troops in Afghanistan, gave an interview to Deutsche Welle, Germany's public broadcaster.

[148] In the course of this interview, General Ramms discussed the state of NATO's knowledge of detainee mistreatment at the hands of Afghan authorities. He then stated that "Canadian troops in Kandahar province stopped handing over prisoners until their safety and human rights could be guaranteed".

[149] Given that the information had already been disclosed in the German media, the respondents should have advised the applicants of the Canadian Forces' suspension of detainee transfers by mid-November, 2007.

[150] That said, it appears that the applicants were in fact, or should have been, aware of the suspension of detainee transfers by November 29, 2007 at the very latest. We know this because a report of General Ramms' interview with Deutsche Welle was produced by the applicants as an exhibit to the affidavit of Alex Neve sworn on that date.

[151] In all the circumstances, taking into account the factors set out in Rule 400 of the *Federal Courts Rules*, and in light of the public interest in having this matter litigated, the Court declines to make any order as to costs.

ORDER

THIS COURT ORDERS that:

1. The applicants' motion for an interlocutory injunction is dismissed, without prejudice to the right of the applicants to renew their request, should detainee transfers resume in the future;

2. The question of whether the evidence submitted on this motion should be considered as evidence submitted for the purposes of the hearing of the application for judicial review is left to the applications judge; and

3. Each side shall bear their own costs of the motion.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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REASONS FOR ORDER AND ORDER:	MACTAVISH J.
DATED:	February 7, 2008

APPEARANCES:

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