[1] Mr. Abdelrazik lives in the Canadian Embassy in Khartoum, Sudan, his country of citizenship by birth, fearing possible detention and torture should he leave this sanctuary, all the while wanting but being unable to return to Canada, his country of citizenship by choice. He lives by himself with strangers while his immediate family, his young children, are in Montreal. He is as much a victim of international terrorism as the innocent persons whose lives have been taken by recent barbaric acts of terrorists.

(...)

[51] I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness. Unlike the first Canadian security certificate scheme that was rejected by the Supreme Court in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9; [2007] 1 S.C.R. 350, the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.

(...)

53 ... It is difficult to see what information any petitioner could provide to prove a negative, i.e. to prove that he or she is not associated with Al-Qaida. One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate. It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt. In light of these shortcomings, it is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is, as I observed at the hearing, a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.

(...)

[54] The UN Security Council itself has recognized the extreme difficulty persons listed have to obtain de-listing. (...)
I pause to comment that it is frightening to learn that a citizen of this or any other country might find himself on the 1267 Committee list, based only on suspicion.

(...)

[91] An allegation that Canada was complicit in a foreign nation detaining a Canadian citizen is very serious, particularly when no charges are pending against him and in circumstances where he had previously fled that country as a Convention refugee. However, in my view, the evidence before the Court establishes, on the balance of probabilities, that the recommendation for the detention of Mr. Abdelrazik by Sudan came either directly or indirectly from CSIS. I find, on the balance of probabilities, on the record before the Court, that CSIS was complicit in the initial detention of Mr. Abdelrazik by the Sudanese. This finding is based on the record before the Court on this application. The role of CSIS may subsequently be shown to be otherwise if and when full and compete information is provided by that service as to its role.

(...)

[153] I find that the applicant's Charter right as a citizen of Canada to enter Canada has been

breached by the respondents in failing to issue him an emergency passport. In my view, it is not necessary to decide whether that breach was done in bad faith; a breach, whether made in bad faith or good faith remains a breach and absent justification under section 1 of the Charter, the aggrieved party is entitled to a remedy. Had it been necessary to determine whether the breach was done in bad faith, I would have had no hesitation making that finding on the basis of the record before me. As I have noted throughout, there is evidence that supports the applicant's contention that the Government of Canada made a determination in and around the time of the listing by the 1267 Committee that Mr. Abdelrazik would not be permitted to return to Canada. The only legal way to accomplish that objective was by order made pursuant to section 10.1 of the *Canadian Passport Order*. Rather than instituting that process then, Canada put forward a number of explanations as to why he was not being provided with an emergency passport, only some of which were accurate: he is on a no-fly list and commercial air carriers will not board him; he has secured an itinerary but not paid for the flight; he is listed on the 1267 Committee list and cannot fly in the air space of Member States; and lastly, when he had managed to meet the last condition set by Canada that he have a paid ticket, the refusal is necessary for the national security of Canada or another country. This was an opinion the Minister was to make only after the process prescribed by his own department was followed, giving Mr. Abdelrazik an opportunity to know of and address concerns. Not only was that not done, the Minister waited until the very last minute before the flight was to depart to deny the emergency passport, and although the basis of the refusal is indicated, he provides no explanation of the basis on which that determination was reached, no explanation as to what had changed while Mr. Abdelrazik resided in the Canadian embassy that warranted this sudden finding, and nothing to indicate whether the decision was based on him being a danger to the national security of Canada or on being a danger to another country. Further, there was no explanation offered as to whether Mr. Abdelrazik posed a security risk if returned to Canada, or a greater security risk, than he did in Sudan. In my view, denying a citizen his right to enter his own country requires, at a minimum, that such increased risk must be established to justify a determination made under section 10.1 of the *Canadian Passport Order*. If he poses no greater risk, what justification can there be for breaching the Charter by refusing him to return home; especially where, as here, the alternative is to effectively exile the citizen to live the remainder of his life in the Canadian Embassy abroad. In short, the only basis for the denial of the passport was that the Minister had reached this opinion; there has been nothing offered and no attempt made to justify that opinion.

[154] The respondents have provided no evidence to support a section 1 defence to the *prima facie* breach of the Charter from refusing to issue the emergency passport. They simply submitted to the Court that there had been no breach. Having found a breach, the burden then shifted to the respondents to justify that breach. In the absence of any evidence, it has not been justified. Notwithstanding this, I have considered whether the Minister's determination that Mr. Abdelrazik posed a danger to national security or to the security of another country constitutes a section 1 defence in itself and have concluded that it does not.

[155] As previously noted, the guidelines of Passport Canada provide that whenever a citizen may be denied passport privileges, there is a mechanism in place that provides the citizen with procedural fairness and natural justice. It is fair to assume that the minister put these processes in place in his Department in recognition of a citizen's Charter rights and the special relationship that exists between a citizen and his country. There is no suggestion that the Minister followed this process. In fact, the Minister appears to have made the decision to deny the emergency passport with no input from Passport Canada. He had many years to render such a decision after following the processes set by his own department, if there was any basis to support his opinion. He did not. There is nothing in the report of his decision to indicate that his decision is made based on recent information he has received. There is nothing to indicate the basis on which he reached his decision. Even if a decision such as his can be said to have been a decision prescribed by law as it is based on section 10.1 of the *Canadian Passport Order* the decision itself must also be shown to be justified as being required to meet a reasonable State purpose, as the Supreme Court stated in *Cotroni*. It is simply not sufficient for the Minister to say that he has reached this opinion and "trust me" – he must show more; he must establish that it was "required". While it is not the function of the judiciary to second guess or to substitute its opinion for that of the Minister, when no basis is

provided for the opinion, the Court cannot find that the refusal was required and justified given the significant breach of the Charter that refusing a passport to a Canadian citizen entails. In this case, the refusal of the emergency passport effectively leaves Mr. Abdelrazik as a prisoner in a foreign land, consigned to live the remainder of his life in the Canadian Embassy or leave and risk detention and torture.

[156] I have found that Canada has engaged in a course of conduct and specific acts that constitute a breach of Mr. Abdelrazik's right to enter Canada. Specifically, I find:
(i) That CSIS was complicit in the detention of Mr. Abdelrazik by the Sudanese authorities in 2003;
(ii) That by mid 2004 Canadian authorities had determined that they would not take any active steps to assist Mr. Abdelrazik to return to Canada and, in spite of its numerous assurances to the contrary, would consider refusing him an emergency passport if that was required in order to ensure that he could not return to Canada;
(iii) That there is no impediment from the UN Resolution to Mr. Abdelrazik being repatriated to Canada – no permission of a foreign government is required to transit through its airspace – and the respondents' assertion to the contrary is a part of the conduct engaged in to ensure that Mr. Abdelrazik could not return to Canada; and
(iv) That Canada's denial of an emergency passport on April 3, 2009, after all of the preconditions for the issuance of an emergency passport previously set by Canada had been met, is a breach of his Charter right to enter Canada, and it has not been shown to be saved under section 1 of the Charter.

[157] Having found that the applicant's right as a citizen of Canada to enter this country has been breached by Canada, he is entitled to an effective remedy.