Federal Court  Cour fédérale

Date: 20230120

Docket No.: T-1483-21

Citation: 2023 FC 98

Ottawa, Ontario, January 20, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

BOLOH 1(A), BOLOH 2(A) adult male only, BOLOH 12, and BOLOH 13

Applicants

and

HIS MAJESTY THE KING AND THE MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for *Charter* relief, mandamus, judicial review, *habeas corpus*, and judicial review that was most recently argued in respect of 6 Canadian women, 13 Canadian children and 4 Canadian men. However, on January 19, 2023 counsel for all the Canadian women and children discontinued proceedings. While counsel for the women and children did

not appraise the Court, it is now public information that Canada has agreed to repatriate these 19 additional Canadians. Unresolved are the claims of the four Canadian male Applicants. The Court encourages and welcomes the resolution effected between the Canadian women and children and the Respondents. In this case the legal principles applicable to the Canadian men are the same as those applicable to the Canadian women and children. These Reasons are a revised version, removing references to the women and children Applicants, of draft Reasons written with respect to the previous Applicants be they women, men or children. These Reasons now address the claims of the men.

[2] At its heart, these Applicants ask the Court to order the Canadian government to take all reasonable steps to repatriate them to Canada from northeastern Syria where they are imprisoned because they are suspected to be Daesh/ISIS terrorist fighters or associates. Daesh/ISIS is a listed terrorist organization under subsection 83.05(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, and has been since 2012.

[3] In broad strokes, the Applicants submit the response of the Government of Canada to their situation fails to comply with the *Canadian Charter of Rights and Freedoms*, Canada's international obligations, and is moreover, is procedurally unfair and unreasonable.

[4] These Applicants went to Syria after the Government of Canada issued a travel advisory to avoid all travel to the region. Indeed, since March 2011, the Canadian government has advised Canadians to avoid non-essential travel to Syria. In April 2011, the Government of Canada

updated its travel advisory for Syria and advised Canadians to avoid all travel to the country. That advice is still in place.

[5] From this, I conclude that risks faced by the Applicants from their decisions to go to this conflict zone, fairly described as a war zone, were taken by them; the evidence is that they travelled to this region against the advice of the Government of Canada and of their own free will.

[6] In terms of the security situation in the region, Canada closed its embassy in Damascus, Syria in 2012 and expelled Syrian diplomats from Canada. Canada transferred responsibility for consular assistance to Canadian citizens in Syria to our Embassy in Beirut, Lebanon. Canada's Syrian travel advisory was updated in 2012 to reflect the closure of our Embassy and to advise Canadians that, due to the lack of a physical presence in country, Canada's ability to provide consular and other support throughout Syria is very limited. I accept and it is not disputed that Canada has no diplomatic presence in northeastern Syria where the Applicants are imprisoned or detained.

[7] The 4 Canadian men are held in what are described as makeshift prisons located in northeastern Syria, including the Hasakah, Derik, and Qamishli prisons. The men are held because they are suspected to have gone to the region to fight for or assist Daesh/ISIS.

(1) Autonomous Administration of North and East Syria (AANES)

[8] These prisons are under the *de facto* control of a self-governing non-state entity established in 2012 by Syrian Kurds, the Autonomous Administration of North and East Syria (AANES). According to the Respondent, the Syrian Democratic Council (SDC) is the political/legislative wing of the AANES, and the Syrian Democratic Forces (SDF) is its military wing.

[9] The prisons holding the Canadian men are located in the Al-Hasakah governorate, in the northeastern corner of Syria, bordering Iraq to the east, Turkey to the north, and the Syrian Raqqa and Deir Ez-Zor governorates to the west and southwest respectively.

[10] AANES is non-state entity. Even the rules of safe passage offered diplomats by most nations to each other under various international conventions, are not available in the territory controlled by AANES. As a non-state entity, the *Vienna Convention on Consular Relations*, which frames international consular relations between states, does not bind the AANES; neither does Canada have any treaty-like agreements with the AANES. Canadian government officials are at risk if they travel to this region.

[11] It is equally important to note the Applicants have no assurance of safe passage out of AANES-controlled territory even if they were be able to leave their prisons. I accept and find that the lives of the Applicants are also at risk outside their places of imprisonment (and possibly inside as well) given their suspected participation in atrocities and possible war crimes committed by Daesh/ISIS against various regional populations.

[12] In particular, northeastern Syria remains unstable and is marked by long-standing intra-Kurdish tensions, Kurdish-Arab tensions, and tension between Turkey and Kurdish political and armed groups. Since January 2020, infighting between various Turkish-backed militia groups has added an additional element of insecurity. Between January 2020 and October 2021, over 2800 security events were reported, including explosions/remote violence, protests, riots and instances of violence against civilians.

[13] The conditions in the camps holding the Canadian women and children originally listed as Applicants in this proceeding are to say the least, very poor. In my view they are dire. These individuals live in crowded and unsanitary conditions. They are held without charge or trial, and lack adequate food and medical attention. For example, the Al-Hawl detention camp for women and children houses 60,000 detainees, approximately 10,000 – 12,000 of whom are not from Iraq or Syria. According to the Applicant's affidavit of Leah West, the tents in which the former Applicant women and children detainees live and sleep are overcrowded, and the camp has a low level of general sanitation and hygiene. The camp has been reported as extremely unsafe for both women and children. Gunfire and malnutrition are commonplace. Children have reportedly died from malnutrition, dehydration, and other medical issues. In addition, there may be factions loyal to Daesh/ISIS within the camp who have executed other detainees. In this connection, a report indicate 19 residents of the camp were executed in January of 2021.

[14] Similar conditions are reportedly present in Camp Roj, where other Canadian women and children previously Applicants live, with emissions from adjacent oil fields having caused

asthma, deep coughing, and lung inflammation. It is feared these camps are breeding grounds for potential supporters of Daesh/ISIS in that some may be controlled by Daesh/ISIS supporters.

[15] Communication with the outside world is only available every 8 to 10 days, and the guards are known to be violent.

[16] Current conditions in the prisons where the Canadian men are held are not known with precision. None of the men have been heard from since 2019. From information received at that at and before 2019, their condition are even more dire than those of the Canadian women and children. While women and children live in tents, at least some of the men and perhaps many are held in small rooms or cells that are overcrowded and unsanitary. There is evidence BOLOH 13, for example is held in a cell with as many 30 other men that was built for 6. The overwhelming evidence which is not seriously disputed is that these male prisoners lack adequate food and adequate medical attention.

[17] The Canadian men are imprisoned against their will without charge or trial. One of the Canadian men, BOLOH 13 says and reported to Canadian government officials that he had been tortured.

(2) Daesh/ISIS

[18] Daesh/ISIS, the organization these Canadian men and women are suspected of fighting for or assisting, is an extremist fundamentalist militant group based largely in the middle-east that in the past controlled a great deal of territory in both Iraq and Syria.

[19] Daesh/ISIS secured global infamy through videos of beheadings and other atrocities and war crimes it carried out and posted on social media. Daesh/ISIS is known for extreme violence and grave violations of human rights. There is evidence Daesh/ISIS engaged in slavery, genocide, and destruction of cultural heritage sites.

[20] Daesh/ISIS is designated a terrorist organization not only by Canada, but by the United Nations and many other nations.

(3) The Syrian conflict

[21] By way of further background, the Syrian conflict led to the imprisonment and detention of these Canadian women, children and men. The Syrian conflict began in 2011 after the Assad regime used excessive force against protestors at local demonstrations inspired by the Arab Spring. Protestors expressed their frustrations over the oppressive regime and discontent with the economic situation.

[22] According to the Respondent, the Syrian conflict developed into a violent, protracted crisis, negatively affecting regional and international security. Further, this conflict caused one of the most severe humanitarian disasters of the 21st century.

[23] Since its beginning, the conflict in Syria and Iraq attracted a high volume of extremists from all over the globe, including from Canada, who chose to leave their homes and fight for and with Daesh/ISIS. The Canadian men are imprisoned because they are suspected to have fought for or assisted those fighting for Daesh/ISIS.

[24] According to the Respondent, in 2014, Daesh/ISIS declared the creation of a caliphate, an Islamic State under the leadership of an Islamic spiritual leader, and renamed itself to “Islamic State” (IS) to reflect its ambitions of expanding territorial control. At its peak in 2014-2015, Daesh/ISIS reportedly comprised some 33,000 fighters, and controlled a large territory in eastern Syria and western Iraq, housing some six million people (Affidavit of Cynthia Termorshuizen, para 12).

[25] In response, Kurdish forces together with nations from around the world formed the Global Coalition in September, 2014 to stop the rise of Daesh/ISIS. By 2017, Daesh/ISIS' control began to falter, following significant efforts by the Coalition-backed SDF. While Daesh’s territorial caliphate in Syria was formally defeated in March 2019, the organization retains influence in eastern and southern Syria and has maintained sleeper cells across the country (Affidavit of Cynthia Termorshuizen, para 12).

[26] The Canadian Armed Forces provided various levels of support to the Global Coalition to degrade and ultimately defeat Daesh in Iraq and Syria. (Supplementary Affidavit of Cynthia Termorshuizen, para 3).

[27] In this connection, and according to Rojava Information Center (RIC), an independent media organization based in Qamishli relied upon by the Respondents, 572 attacks, presumably carried out by Daesh/ISIS were reported in the SDF-controlled north-eastern Syria in 2020. 299 people were reportedly killed in these attacks. According to the RIC, the authorities conducted 221 security operations targeting Daesh/ISIS sleeper cells and 575 arrests targeting alleged

Daesh-affiliated individuals. The RIC notes that the majority of the attacks were carried out in eastern Deir Ez-Zor governorate, with 134 attacks reported in other parts of the SDF-controlled areas, which include Al-Hasakah governorate. In 2020, Daesh/ISIS reportedly changed its tactics and focused on an assassination campaign of high-valued targets (foreign governments or symbols associated with foreign interests). As in the previous year, Daesh also used improvised explosive devices (IED) and vehicle-borne IEDs in its attacks (Affidavit of Cynthia Termorshuizen, para 24).

[28] Daesh/ISIS reportedly conducted 153 attacks specifically in Al-Hasakah governorate (where the SDF-run prisons for men and detention camps for women are located) between March 2019 and May 2020, and continues to be active. On November 8, 2021, the SDF reportedly thwarted a Daesh/ISIS attack plot against an SDF-run prison holding Daesh/ISIS fighters in Al-Hasakah governorate (Affidavit of Cynthia Termorshuizen, para 25).

[29] In March 2019, SDF forces captured the last Daesh/ISIS stronghold in the city of Baghouz, southeast of Deir Ez Zor, ending the five-year battle against Daesh/ISIS's caliphate fought by SDF and the Global Coalition against Daesh/ISIS. Daesh/ISI no longer controls territory and millions of people have been freed from its control in Iraq and Syria, but the threat posed by the group remains (Affidavit of Cynthia Termorshuizen, para 13).

[30] It is reported that tens of thousands of innocents and combatants perished in Daesh/ISIS’s fight for supremacy and defeat. Many of those suspected of having fought for Daesh/ISIS were killed leading up to and after the fall of its caliphate in 2019.

(4) AANES' SDF-run prisons for men

[31] After the territorial defeat of Daesh/ISIS, AANES took *de facto* control of northeastern Syria and, despite ongoing tensions with local Arab tribes, has retained it to this day. AANES considers itself an autonomous government and therefore does not seek permission from the Syrian regime for matters of governance or "foreign'' policy. AANES has maintained limited relations and coordination with the regime, mainly on issues of security. The regime and AANES have an unofficial non-aggression understanding and have cooperated in battles against Turkish-backed opposition groups and Daesh/ISIS (Affidavit of Cynthia Termorshuizen, para 14).

[32] While the area under AANES/SDF control is mostly stable, it is marked by longstanding tension between Kurdish political movements and neighbouring Turkey, as well as among local Syrian-Kurdish populations and Arab tribes. Turkey considers the Democratic Union Party (PYD) and the People's Protection Units (YPG), both part of the AANES/SDF to be the Syrian branches of the Kurdistan Workers Party (PKK), which is a designated terrorist entity in Turkey and Canada (Affidavit of Cynthia Termorshuizen, para 15).

[33] Following the U.S. announcement of troop withdrawal from northeastern Syria in 2019, Turkey launched Operation Peace Spring (OPS), a unilateral military offensive (air/ground) into north-eastern Syria aimed at pushing back Kurdish-led forces. Canada and most allies quickly and widely condemned the Turkish operation. The Turkish incursion strengthened the coordination between the AANES and the Syrian regime, because the regime's forces entered the north-east to help counter the Turkish military incursion (Affidavit of Cynthia Termorshuizen, para 16).

[34] Today, Turkish military operations/aggression against Syrian Kurds and regime affiliated militias continue across northern and north-eastern Syria. Tensions escalated in October 2021 following an attack by the YPG that killed two Turkish police officers in Syria's Azaz region, in response to which Turkish President Erdogan has threatened a military action. Recently, on November 9. 2021, three people were reportedly killed after an SDF armoured vehicle was hit by a Turkish drone strike in Qamishli. In April 2021, armed clashes between the SDF and regime affiliated militias were recorded in the city of Qamishli, resulting in casualties and injuries (Affidavit of Cynthia Termorshuizen, para 17).

[35] Materially for the purposes of this Application, after the fall of the Daesh/ISIS caliphate, AANES has imprisoned suspected male Daesh/ISIS fighters in what the Respondents describe as "SDF-run prisons". It also holds women suspected of Daesh/ISIS association and their children, in camps such as Al Hol and Al Roj, including the Canadian women and children former Applicants. The SDF as noted is AANES' military wing. The SDF-run prisons hold approximately 10,000 detainees of whom around 2,000 are foreigners (Affidavit of Cynthia Termorshuizen, paras 26, 28).

(5) The parties

[36] The status of some of the Applicants has changed since this Application was filed in September, 2021. BOLOH is an acronym to represent any given Applicant composed of a Canadian resident, their family members and a Canadian citizen currently detained in northeastern Syria. BOLOH stands for 'Bring Our Loved Ones Home'. The following individuals are affected by this application, and I have also indicated their status if known:

1. BOLOH 1 has 3 family members in Al-Hawl, a daughter (27-years-old) and two granddaughters (5-years-old, and 3-years-old). BOLOH 1 is no longer detained in any of the camps and their current whereabouts are unknown. Discontinued January 19, 2023.
2. BOLOH 1a has a brother (31-years-old), who is currently at Derik Prison. The status of this individual is not known. Discontinued.
3. BOLOH 2 has a daughter in Al-Hawl (31-years-old). BOLOH 2 met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Discontinued January 19, 2023.
4. BOLOH 2a has 5 family members in North East Syria. A son (36-years-old), a daughter (40-years-old), and three granddaughters (11-years-old, 14-years-old, and 13-years-old). 4 are in Al-Hawl and one is in the Hasakah Province Prison. BOLOH 2a met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Discontinued January 19, 2023 except for male. Presumably in prison.
5. BOLOH 3 has 4 family members in Camp Roj. A daughter (37 years-old), and 3 grandsons (9-years-old, 7-years-old, and 3-years-old). BOLOH 3 met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Discontinued January 19, 2023.
6. BOLOH 5 has 4 family members in Camp Roj. A sister (29-years-old), and 2 nieces (6 years-old, and 7 years old), and a nephew (3-years-old). BOLOH 5 met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Discontinued January 19, 2023.
7. BOLOH 6 has 3 family members in Camp Roj. A daughter (27-years-old), and two granddaughters (7-years-old, and 2-years-old). BOLOH 6 met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Discontinued January 19, 2023.
8. BOLOH 12 has a brother in Qamishli prison (42-years-old). In common with all Canadian men in AANES prisons in this Application, BOLOH 12 while subject to the Policy Framework, was not advised he met its threshold criteria. Presumably in prison.

9. BOLOH 13 includes Jack Letts imprisoned in one of the AANES prisons. In common with all Canadian men in AANES prisons in this Application, BOLOH 12 while subject to the Policy Framework, was not advised he met its threshold criteria. Letts is represented by Barbara Jackman. All other Applicants are represented by Lawrence Greenspon. Presumably in prison.
10. BOLOH 14 is Kimberly Polman. On October 25, 2022, Officials of GAC travelled to north-eastern Syria to assist in her repatriation to Canada. At the same time GAC assisted in the repatriation of another Canadian woman and her two children. These repatriations were undertaken in accordance with the *Policy Framework to Evaluate the Provision of Extraordinary Measures to Assist Canadian Citizens detained in North-Eastern Syria*. A terrorism peace bond application has been initiated under section 810.001 of the *Criminal Code of Canada* in relation to Ms. Polman. The other woman has been charged with terrorism-related offences under sections 813.18(1), 83.181, 83.03 and 465(1)(c) of the *Criminal Code of Canada*. Discontinued January 19, 2023.
11. BOLOH 15 has 3 family members in Camp Roj, a sister (31-years-old), and two nephews (6-years-old, and 4-years-old). BOLOH 15 met one of the threshold criteria in the *Policy Framework* as of November 24, 2022. Presumably in prison.

(6) Canadian contact with AANES

[37] Global Affairs Canada (GAC) has been in communication with AANES. Dr. Abdulkarim Omar has been the primary interlocutor between AANES and GAC. Dr. Omar has been described as the *de facto* minister of foreign affairs for AANES.

[38] AANES has maintained foreign governments should repatriate their nationals currently held in AANES custody, at least their women and children. Dr. Omar has reportedly mused about international trials for suspected Daesh/ISIS fighters and its supporters.

[39] According to the affidavit of Leah West [“West Affidavit”], Dr. Omar indicated that AANES is willing to assist in the repatriation of Canadians.

[40] Ms. West I should say served with the Canadian Armed Forces, travelled to, interviewed and or participated in interviews of various actors in this matter in Syria and northeastern Syria, in 2019 and who both studies and teaches in relation to this region. Some years ago she served as a Clerk to Justice Mosley of this Court. Given these factors I generally accept her first hand evidence. Where Ms. West’s evidence is based on hearsay whether directly given to her or based on what she obviously considers credible media accounts, I also generally accept her testimony on the principled exception bases of necessity and reliability (*R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915). There are certainly difficulties in obtaining information on the regional situation given its unstable nature meeting the test of necessity. I recognize the potential for bias and misreporting in media reports regardless of source or platform. That said, given the consistency of the evidence across various reports relied upon by Ms. West I accept it as reliable.

[41] Indeed, and buttressing the credibility of Ms. West’s testimony, the Respondent agrees that AANES is on record as wanting countries such as Canada to repatriate their nationals from the detention camps under its control. Ms. West reports in this regard that AANES requires only a formal request from the Canadian government is required, and the presence of a Canadian

official or delegate at the region's border to take custody of the Canadian citizen(s) to be repatriated.

[42] According to the West Affidavit, I also accept that many other countries have met AANES at the Iraq border to repatriate their nationals. This includes the United States, which has also acted as an intermediary to assist in the repatriation of foreign nationals of other countries.

[43] The Respondent is in material agreement with the foregoing. The Respondents' evidence is that since 2018, AANES has advised GAC officials that in order to release a Canadian citizen in their custody, it requires a Canadian government delegation to visit its *de facto* capital city Qamishli to proceed with the hand-over.

[44] Also according to the Respondents' evidence provided by Ms. Termorshuizen, AANES told Canada that any Canadian delegation would have to follow AANES protocols for release, which consist of at least one face-to-face meeting and the signing of a handover document by a senior Canadian government official (Affidavit of Cynthia Termorshuizen, paras 63-64).

[45] Differences between the Applicant and Respondent in relation to AANES and its conditions for repatriation appear to be that (1) Dr. Omar indicates a hand-over may take place at the region's border while GAC's evidence is the hand-over must take place at their *de facto* capital city Qamishli, and (2) Dr. Omar indicates Canada need only be represented by a delegate while GAC's evidence appears to be that AANES requires the presence of a senior Canadian government official.

[46] The issue of AANES' requirements for repatriation was discussed at the hearing. With respect neither party presented the Court with current of up to date information on the requirements of AANES concerning the repatriation of Canadians in its detention camps and prisons. The Respondent's evidence was set out in the affidavit of Ms. Termorshuizen, a senior public servant with Global Affairs Canada ["GAC"], which in this respect is second hand and based on 'staff advice;' it did not set out how current Canada's understanding of AANES's repatriation requirements is.

[47] Similarly, Ms. West did not provide the date on which she received her information from Dr. Omar. That said it would appear to date from her meetings and interviews dated from 2019. Any preconditions required by AANES will doubtless be provided when Canada makes a formal request for repatriation as declared in the Court's Judgment.

[48] For completeness in connection with Canada's contact and relationship with AANES, I note that despite the closure of our embassy, Canada has been able to provide some consular assistance to Canadians detained in northeastern Syria, mainly through engagement with the AANES. For example, in June 2017, when GAC officials became aware of the first cases of Canadian citizens detained by the AANES, it undertook efforts to identify and establish contact with the appropriate AANES representative. A communication channel with Dr. Omar was not established until January 2018. Since then GAC has established communications with AANES representatives in both Lebanon and the United States. In this connection it appears AANES has some support from the United States government.

[49] GAC has also established communications with representatives of the Syrian Democratic Council [“SDC”] and the Kurdish Commission of Foreign Affairs. To recall, the SDC is political/legislative wing of the AANES, and the Syrian Democratic Forces (SDF) are its military wing.

[50] According to the Respondent’s affidavit of Ms. Termorshuizen, consular assistance to Canadians detained in northeastern Syria has included verifying the whereabouts and well-being of Canadians, requesting available medical care and conveying Canada’s expectations that Canadians be treated humanely, in line with the applicable principles of international humanitarian law and international human rights law. As it pertains to the Applicant BOLOH 13, while GAC officials did not specifically raise his allegations of torture with the AANES because of a fear of reprisal, they did raise the “expectation of humane treatment consistent with international law.”

[51] Ms. Termorshuizen’s Affidavit also indicates Canadian officials have requested direct consular phone calls with detainees, inquired about a potential system for families to transfer funds or items to loved ones and inquired about the possibility of access to mental health resources. Moreover, in-person and telecommunication meetings between Government of Canada representatives and AANES representatives provided additional opportunities to raise the consular cases of Canadians in their custody, to seek updates on their health status, and to try to find new avenues to deliver consular assistance to Canadians in northeastern Syria.

[52] Government officials have also provided consular assistance through engagement with international organizations and non-governmental organizations (NGOs) operating in the region to verify the well-being of Canadians and seek medical assistance.

B. *Early history of this proceeding starting with the Applicant's requests for assistance in January, 2021*

(1) Request for assistance, Respondents' repeated failures to respond, its belated disclosure of *Policy Framework* and unilateral assessment of the Applicants

[53] All current and previous Applicants retained Lawrence Greenspon as their counsel to advance their repatriation to Canada. On February 25, 2021, Mr. Greenspon sent a letter to GAC requesting:

1. Please confirm that GAC will provide a passport or equivalent once an itinerary is confirmed.
2. Please confirm that GAC will make an immediate request for the repatriation of these persons.
3. Please confirm that GAC will authorize a representative, (Canadian official, charitable and/or humanitarian organization, 3rd party nation representative, or other person designated by GAC) for the purpose of the "hand-over" portion of the repatriation.

[54] This letter requested a response to the above questions within 10 days. Despite receiving a confirmation of receipt, GAC chose not to respond.

[55] On May 26, 2021, Mr. Greenspon sent a second letter restating his February 25, 2021 request. This letter requested an answer within 30 days. Once again, GAC chose not to answer.

[56] In continuing default of the provision of information by the respondent, Mr. Greenspon commenced this Application September 27, 2021.

[57] In November 2021, Counsel for the Applicants learned for the first time that the Respondent had created – back in January, 2021 – a *Policy Framework* covering the very subject of Mr. Greenspon's two neglected letters of February and May, 2021. The *Policy Framewo*rk is called "Government of Canada Policy Framework to Evaluate the Provision of Extraordinary Assistance: Consular Cases in North-Eastern Syria" [*Policy Framework*].

> (2) Respondents unilaterally and without notice assessed the Applicants under a previously undisclosed January 2021 *Policy Framework* and advised the Applicants of the results in November, 2021

[58] The *Policy Framework* contains "threshold criteria" that, unknown to the Applicants, they had to meet before Canada would advance repatriation efforts for Canadians such as themselves who wanted to be repatriated from northeastern Syria.

[59] Notably, despite their letters of February 25, 2021 and May 26, 2021, the Respondents for unknown reasons chose not to tell the Applicants of the *Policy Framework* until November 2021. The Court was not provided with a satisfactory explanation for what it considers an unreasonable delay in informing the Applicants of the *Policy Framework*. The Respondents delayed from February, 2021 to November, 2021 to respond – a delay of nine months.

[60] The Respondents then advised the Applicants that as of November, 2021, only previous Applicant BOLOH 14 met the threshold criteria under the *Policy Framework.*

[61] All other Applicants, Canadian women, children and men had also been assessed as of November 2021, but in the Respondents' view none met the threshold criteria for repatriation under the *Policy Framework*.

[62] Both the *Policy Framework* and letters from GAC to Mr. Greenspon in November 2021 reporting on the Respondents' assessment of each Applicant under the *Policy Framework* are contained in the affidavit of the Respondents' Ms. Termorshuizen filed in response to this Application on November 22, 2021.

(3) Further procedural history including section 38 of the *Canada Evidence Act*

[63] In January, 2022, the Court was informed that Ms. Barbara Jackman had been retained by BOLOH 13, identified as including a male prisoner detained in northeastern Syria named Jack Letts. Mr. Lett's mother subsequently filed affidavit material in support of his application.

[64] After various filings and other steps, the Chief Justice set November 2-3, 2022 as the hearing dates for this Application.

[65] However, on August 29, 2022, shortly before filing deadlines for the hearing, the Respondents filed a Notice of Motion requesting leave to file a supplementary affidavit of the Respondents' Ms. Termorshuizen. The Respondents stated that it was necessary to "clarify" and "correct" certain statements made by her in her previous affidavit dated November 22, 2021. The Respondent filed a second affidavit of Ms. Termorshuizen stating:

> 1. I affirmed an affidavit in the above-noted matter on November 22. 202 1. At the time of affirming that affidavit. I was

employed as the Assistant Deputy Minister of the Consular. Security and Emergency Branch of Global Affairs Canada (GAC). I was subsequently appointed to the position of Associate Deputy Minister of Foreign Affairs in January 2022.

2. In paragraph 31 of my November 22, 202 1 affidavit. I stated that “Canada does not have a military presence in territories held by the Syrian Regime or by the AANES, unlike other countries". At the time of affirming my affidavit, I understood that to be the case, but I am now advised that this statement requires clarification. I am advised by Major-General Paul Prevost and do verily believe that Canada, other than Op IMPACT air missions that took place in Syrian airspace, does not have military missions in territories held by the Syrian Regime or by the AANES, unlike other countries. The Canadian Armed Forces have, however, provided various levels of support to the Global Coalition to degrade and ultimately defeat Daesh in Iraq and Syria. A similar statement about Canada's lack of military presence was included in paragraph 37 of my November 22, 2021 affidavit, as well as in the Policy Framework to Evaluate the Provision of Extraordinary Measures to Assist Canadian Citizens detained in North-Eastern Syria that was produced by the Respondents as part of these proceedings.

3. At paragraph 68 of my affidavit, I stated that "Since the closure of the Embassy of Canada in 2012. Government of Canada officials have only been to north-eastern Syria once, in 2020, to accompany an orphaned child publicly known as 'Amira' out of the region". At the time of affirming my affidavit 1 believed this statement to be true. I have now been informed by Martin Benjamin, Director-General of GAC's Intelligence Bureau, and do verily believe that while this statement was true in respect of GAC officials, there have been other Government of Canada officials who travelled to north-eastern Syria both before and after the date of my affidavit.

4. Steps were taken to clarify and correct my November 22. 2021 affidavit, including necessary consultations with other government departments and agencies, as soon as I was made aware of this information.

5. I make this affidavit to clarify and/or correct certain statements made in my affidavit affirmed on November 22. 202 1 and in support of the Respondents' response to this application and for no other purpose.

[66] The Respondents also advised the Court that notice had been given under the confidentiality provisions of section 38 of the *Canada Evidence Act*, RSC, 1985, c. C-5.

[67] The Respondents requested an adjournment of the hearing and case management conference re next steps given the Respondents were unable to file their record in time for the scheduled hearings.

[68] The Respondents' request to delay the hearing was based on its submission it could no longer proceed on November 2-3, 2022. The Court notes it is not unusual for section 38 proceedings to take two or three months and sometimes much more to resolve. This is because the Court generally needs to appoint an *amicus curiae* to assist it, confidential information must be prepared in relation to the allegedly confidential information, additional confidential material may be required to show injury to Canada under section 38, summaries may be prepared for public counsel for applicants who are otherwise excluded from participation in the section 38 proceedings, cross-examinations may be conducted, legal submissions must be prepared by both the *amicus curiae* and the Attorney General of Canada, case management hearings may be required, there may be further public and *in camera ex parte* hearings on the admissibility and confidentiality of the material to be filed, and ultimately the Court must prepare a decision with respect to the admissibility and confidentiality of the new information which itself may be subject to redactions and even further proceedings in relation to redactions.

[69] The Court held a public case management hearing at which both Mr. Greenspon and Ms. Jackman, to minimize delay, agreed to waive any rights they might have in relation to the

Respondents' request that the Court hear and consider a request to file new evidence at a secret hearing, i.e., a hearing that would proceed *in camera* and *ex parte* under section 38 of the *Canada Evidence Act.* The section 38 hearing while it would not include counsel for the Applicants, would include counsel for the Respondents together with an experienced lawyer who I appointed as *amicus curiae* to represent the interests of the Applicants, namely Mr. Gib van Ert.

[70] I granted the Respondents' motion to file the supplementary affidavit of Ms. Termorshuizen to correct and clarify her previous evidence, and did so over the objections of the Applicants who they were (legitimately in my view) concerned the Respondents' request would cause further delay to the prejudice of the individual women, children and male Applicants detained and or imprisoned in northeastern Syria. I granted the motion in the interests of procedural fairness. I was not persuaded the Respondents' information was irrelevant.

[71] Matters were thereafter kept on a lengthened but tight timeline. The Chief Justice granted a one-month adjournment of the public hearings to December 5-6, 2022.

[72] By Order dated October 20, 2022, in my capacity as a designated judge under section 38 of the *Canada Evidence Act*, R.S., 1985, c. C-5, I appointed Mr. Gib van Ert as *amicus curiae*. I gave Mr. van Ert a special mandate to "represent the interests of the Applicants" in this proceeding and in the related section 38 *Canada Evidence Act* proceedings, following the precedent of my colleague Justice Simon Noël in *Brar et al. v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 in a matter under the *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11 [*"SATA"*]. I did so because both neither the statutory regime under *SATA* nor the

proceedings in the case at bar had specific provision for the appointment of the equivalents to "special advocates" provided in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, at section 85 and following.

[73] In terms of the section 38 proceedings, and after hearing from the Respondents and Mr. van Ert, I was persuaded confidential material could be filed by the Respondents that might be considered by the Court in coming to its conclusions in the public proceeding. To that end, the *amicus curiae* Mr. van Ert was authorized to attend the public hearings in this matter so that he could make submissions as he deemed advisable at a further *in camera* and *ex parte* proceeding that would take place after the conclusion of public hearings.

[74] In the interim, the Respondents with the Court's approval provided the Applicants and Mr. van Ert with redacted confidential material and summary information.

[75] By the end of the hearing on December 6, 2022 unfortunately and for very sad reasons but without any fault, the two-day public hearings were not complete. Therefore an additional half-day public hearing was schedule for January 6, 2023. That hearing took place albeit for almost a full day.

[76] Thereafter the Court resumed on January 13, 2023, to hear *in camera ex parte* submissions from the Respondents, and from *amicus curiae* Mr. van Ert representing the interest of the Applicants, concerning the confidential material admitted under section 38 of the *Canada Evidence Act*.

C. *The Policy Framework of January 2021*

[77] As noted, in January, 2021, the Respondent adopted a *Policy Framework* to guide decision-making on whether to extend extraordinary assistance to Canadian citizens, or to those with a claim to Canadian citizenship, detained in northeastern Syria. Pursuant to the *Policy Framework,* extraordinary assistance would be provided only where an individual meets one or more of the following three "threshold criteria":

1) The individual is a child who is unaccompanied;
2) Extraordinary circumstances make it necessary for a child who is accompanied to be separated from their parent(s) leaving the child in a de facto unaccompanied state; and/or
3) The Government of Canada has received credible information indicating that the individual's situation has significantly changed since the adoption of the Policy Framework.

[78] If an individual was determined to meet one or more of these threshold criteria, relevant departments within the Government of Canada would initiate an assessment of whether to extend extraordinary assistance, considering the following guiding principles:

A. Unaccompanied children will be prioritized.
B. Children will not be separated from their parents except in extraordinary circumstances.
C. The individual's identity and claim of Canadian citizenship must be established.
D. Canadian government officials must not be put in harm's way.
E. Canadian government actions must not worsen the situation of the individual.
F. The threat to public safety and national security, if any, posed by the individual during transit and on arrival in Canada can be mitigated.

[79] Under Principles A and B, GAC would engage with the AANES and with organizations operating in the region to seek to clarify the situations of children and parent(s) in order to assess the specific circumstances. For Principle B, this would also include consulting the relevant subject matter experts, such as child protection services, to determine if separating a child from their parents is in the best interests of the child. Under Principle C, an individual's identity and citizenship must be assessed by IRCC. Principle D requires an assessment of whether Canadian government officials could safely travel to north-eastern Syria.

[80] Under Principle E, GAC would carefully assess the possible outcomes, intended and unintended, that the Government of Canada's positive actions could have for the individual. Once a decision to provide extraordinary assistance is made under the Policy Framework, prior to and in addition to seeking their release from AANES custody, risks to the safety and security of any released detainees would need to be mitigated in order to enable their transit from northeastern Syria to Iraq for onward travel to Canada. Under Principle F, the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) are separately responsible for providing threat assessments.

[81] At the end of this process, the *Policy Framework* required Ministerial decisions at two separate final stages before extraordinary consular assistance might be extended to an individual:

- Ministerial Decision 1: approval to extend extraordinary measures in principle, pending development of a concept of operations (CONOPS) that outlines the logistical specifics of how those measures will actually be extended; and,
- Ministerial Decision 2: approval of a final CONOPS.

D. *Developments on November 24, 2022*

[82] On November 24, 2022, two weeks before public hearings set for December 5-6, 2022, the parties advised the Court of further developments. By and agreed statement of facts, the parties advised:

> 1. On October 25, 2022, officials of Global Affairs Canada (GAC) travelled to north-eastern Syria to assist in the repatriation of Kimberly Polman, the Applicant in this matter otherwise known as BOLOH 14, as well as another Canadian woman and her two children, who are not applicants in this proceeding. These repatriations were undertaken in accordance with the Policy Framework to Evaluate the Provision of Extraordinary Measures to Assist Canadian Citizens detained in North-Eastern Syria (the Policy Framework). A terrorism peace bond application has been initiated under s.810.011 of the Criminal Code of Canada in relation to Ms. Polman. The other woman has been charged with terrorism-related offences under sections 83.18(1), 83.181, 83.03 and 465(1)(c) of the Criminal Code of Canada.
>
> 2. The Applicants known as BOLOH 1 are no longer detained in any of the camps in north-eastern Syria, and their current whereabouts are unknown.
>
> 3. By letters dated November 24, 2022 to their legal counsel, all of the remaining BOLOH women and children, namely BOLOH 2, 2(a), 3, 5, 6 and 15, were advised that GAC determined they had met one of the threshold criteria in the Policy Framework. They were further advised that GAC has initiated assessments in accordance with the six guiding principles of the *Policy Framework* to evaluate whether to extend extraordinary assistance to them and they were given 30 days to provide any comments and supporting documentation they may have in relation to the assessment of these principles.

II. Decision under review

[83] Notably, as of November 24, 2022, the Respondents once again found none of male prisoners Applicants including BOLOH 13 eligible for repatriation: none met the threshold criteria. However, all remaining Canadian women (and their children) were found eligible for further consideration for repatriation.

[84] To recall, none of the male prisoner Applicants were considered eligible by GAC's initial assessments reported by letters dated November 21, 2021. At that time, only BOLOH 14, (Ms. Polman) was deemed eligible for further repatriation consideration. In November, 2021 all other Canadian women and children were deemed ineligible.

[85] As per the new evidence submitted November 24, 2022, all of Mr. Greenspon's women and children clients were found to meet the threshold criteria and because eligible for further repatriation consideration under the *Policy Framework*. That said, when asked at the hearing for his position, Mr. Greenspon requested an Order: "(1) That all decisions regarding the Applicants made by the Respondents between January 2021 and November 2021 pursuant to the "Policy Framework" are hereby declared null and void." That request no longer applies to his women and child clients, who have discontinued. However that request continues to apply in respect of his three Canadian male prisoner clients. In addition, Ms. Jackman takes the same position in respect of her Canadian male prisoner BOLOH 13, Mr. Letts.

[86] At the hearing December 6, 2022, both counsel for the Applicants when asked what specific remedy they requested advised they also sought the following additional Orders:

Order #2

Having found that the continuing failure to act of the Respondents is causally connected to the ongoing violations of the Applicants Charter Rights under sections 7, 9, 12 and/or 15,

And given the consent of AANES to the repatriation of the Applicants,

Pursuant to Sections 3(a) and/or Section 44 of the *Federal Courts Act* and/or Section 24(1) of the *Charter of Rights and Freedoms*

THIS COURT ORDERS the Respondents to do the following acts or thing(s) it has unlawfully failed or refused to do or has unreasonably delayed in doing, namely:

1) Within 7 days of the date of this Order, make an official request to AANES, which has de facto control of the Roj and Al Hawl camps, the Derrick, Hasakeh and Qamishli prisons and the territory where they are all located, requesting the repatriation of the 23 Canadian men, women, and children BOLOH applicant detainees,

2) Within 15 days of the date of this Order, provide to the 23 Canadian children, women and men BOLOH applicant detainees, Canadian passports or the equivalent or Emergency Travel Documents (ETD's) in order to enable their return to Canada pursuant to section 6(1) of the Charter of Rights and Freedoms. 3) Within 30 days of the date of this Order, appoint a representative or delegate of the Respondents for the purpose of attending in Qamishli at the "hand-over" of the 23 Canadian men, women and children BOLOH applicant detainees.

3) Within 30 days of the date of this Order, appoint a representative or delegate of the Respondents for the purpose of attending in Qamishli at the "hand-over" of the 23 Canadian men, women and children BOLOH applicant detainees.

4) That repatriation of all 23 BOLOH applicants take place within 90 days of this Order. It is further ordered that this Court retain jurisdiction in order to and shall receive reports from the Respondents concerning progress as to compliance with the above Order(s).

III. Issues

[87] The Applicants submit the following issues:

1. That the Applicants were not afforded procedural fairness;
2. That the inaction by Global Affairs Canada constituted a decision not to repatriate the Applicants from northeastern Syria, which was unreasonable;
3. That the *Canadian Charter of Rights and Freedoms* applies extra-territorially to those unlawfully detained in North Eastern Syria, and imposes positive obligations on the Canadian government under sections 6(1) and 7 of the *Charter*;
4. That the Applicants' *Charter* protected rights under sections 6(1) and 7, 9, 12, and 15 of the *Charter*, were breached by GAC's inaction;
5. That the Government of Canada breached its international obligations by failing to repatriate the Applicants from northeastern Syria; and
6. In the alternative, that *Habeas Corpus* is available to produce the unlawfully detained Applicants before the Court

[88] The Applicant BOLOH 13 adopts the submissions of the other Applicants in their entirety, and submits additionally:

1. Canada is in breach of section 6 of the *Charter* in effectively subjecting BOLOH 13 to exile and/or banishment;
2. Canada is in breach of section 7 of the *Charter* by failing to take steps to repatriate BOLOH 13 to Canada.

[89] The Respondents submits the following issues:

1. the admissibility and/or relevance of the Applicants' affidavit evidence;
2. whether Canada has a legal obligation to facilitate repatriation of citizens detained abroad under the *Charter* or international law;
3. whether the Applicants' challenge to the procedural fairness and reasonableness of decisions made under the *Policy Framework* and/or the

adoption of the *Policy Framework* itself are amenable to judicial review and/or founded; and

4. whether *habeas corpus* can issue.

[90] In my respectful view it is only necessary to consider section 6 of the *Charter*, which is sufficient to provide the Applicants the relief to which they are entitled consistent with relevant binding jurisprudence and Canada's international obligations.

IV. Preliminary considerations

[91] Before setting out my reasons for granting this Applications, it is important to appreciate two important points.

(1) The Court is not asked to and makes no finding why the Applicants went to the region where they are now imprisoned or detained. Further

[92] First, there is no evidence identifying why any of the Applicants went to Syria or Iraq, and there is no evidence before this Court as to what any of them did there. The Applicants, with one exception, filed no evidence on the reasons for their travel or their activities in the region. The Respondents filed no evidence identifying the Applicants' motives for their travel or of their activities in the region. Notably the Respondents do not allege any of the Applicants engaged in or assisted in terrorist activities. The Respondents affirmed this position at the hearing.

[93] BOLOH 13 is an exception. His counsel said he went there to study. The affidavit of his mother in support says the government of the United Kingdom revoked his UK citizenship in 2019 based on its perceptions of his activities. Her affidavit adds that after his parents sent

money to him, a British court convicted them of sending the sum of £223 to a contact of his in Lebanon, “due to the very broad wording of the UK terrorism legislation, which states that any money sent to an individual that 'might' be used for terrorism purposes (or fall into the wrong hands)” but that the judge accepted the money was not, in fact, used for terrorism purposes and described BOLOH’s parents as “defendants who are of positive good character and devoted parents. They are clearly desperately concerned about their son….Two perfectly decent people have ended up in custody because of the love of their child.”

[94] I also agree with counsel for BOLOH 13 who notes that as per Supreme Court jurisprudence in *R. v. Zundel*, [1992] 2 S.C.R. 731, and *R. v. Keegstra*, [1990] 3 S.C.R. 697, Canadians are entitled to have political opinions, no matter how abhorrent they may be to other Canadians. The limitation is when Canadian opinion holders take actions, whether inside of outside of Canada, that constitute offences against Canadian law including the *Criminal Code of Canada*. However there is no evidence to that effect before this Court.

[95] To emphasize, the remaining Applicants are Canadian men imprisoned without charge or trial in northeastern Syria. The evidence is and I accept the adult Applicants are in prison because their captors suspect they are Daesh/ISIS fighters.

(2) No charges against the Applicants are known, and none have been tried; other Canadians who have been repatriated were arrested and made subject to proceedings under the *Criminal Code of Canada* immediately upon their return

[96] Secondly, there is no evidence any of the remaining Canadian men Applicants, who are now in prison, face any charges. There is do evidence any of them have been tried or convicted, let alone tried in a manner recognized or sanctioned by international law.

[97] I also note that the women and children repatriated with Canadian assistance in October, 2022, were made subject to proceedings under the *Criminal Code of Canada* by way of terrorist peace bond or charges under its anti-terrorist provisions. Immediately on their return to Canada – they were arrested and taken into custody.

B. *Analysis*

(1) The Application under subsection 6(1) of the *Charter* it allowed and declaratory relief is granted consistent with Supreme Court of Canada's decision in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3

[98] As seen from the foregoing, a large number of issues are raised by the Applicants and Respondents as bases for this Court to grant or refuse relief.

[99] In summary, for the following reasons, the Court will grant declarations requested by the Applicants, with modifications.

[100] However, and while the Court undoubtedly has jurisdiction to make these *declarations* in connection with the conduct of Canada's foreign affairs and international relations, particularly under subsection 6(1) of the *Charter* as in this case, it will not make *Orders* compelling the Respondents to take specific actions given the executive government's need for flexibility in these matters, the general desirability of maintaining separation of responsibilities between the

courts and the executive government (whose authority is vested in the Respondent Crown by section 9 of the *Constitution Act, 1867*), and in the expectation the executive government will act in good faith as its counsel represented to the Court.

[101] Therefore this Judgment follows the course taken by the Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [*Khadr 2010*] which granted declarations of *Charter* rights and breaches. There the Supreme Court held that while it *could* order Canada to ask the United States to repatriate Mr. Khadr, it declined to make such an order at that time. In this connection I note the Supreme Court of Canada's decision was dated November 13, 2010, Canada initially declined to request the US government to repatriate Mr. Khadr, Canada subsequently accepted Mr. Khadr's May, 2011 application to be repatriated through transfer from a US to a Canadian prison, and that the US government returned Mr. Khadr to Canada on a US government aircraft September 29, 2012.

[102] This Court's judgment therefore complies with the Supreme Court of Canada's conclusions in *Khadr 2010* which ruled:

> [47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

[103] In my respectful view, there is also very considerable jurisprudence from the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada relating to subsection 6(1)

of the *Charter* that requires this Court to grant the Applicants success in their Application. My reasons follow.

(2) Governing jurisprudence from the Supreme Court of Canada in *United States of America v. Cotroni*, (1989) 1 S.C.R. 1469 at 1481/1482 and *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, the Federal Court in *Kamel v. Canada (Attorney General)*, 2008 FC 338, the Federal Court of Appeal in *Kamel v. Canada (Attorney General)*, 2009 FCA 21, and the Federal Court in *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, which require this Court to find breaches of the Applicants subsection 6(1) *Charter* rights

(a) *Supreme Court of Canada jurisprudence: Cotroni and Divito*

[104] In my view this case is determined by reference to the constitutionally entrenched and jurisprudentially affirmed rights of Canadians to "enter, remain and leave Canada" guaranteed by subsection 6 of the *Charter*. The Applicants, having left Canada, ask the assistance of this Court to exercise their constitutional right to "enter", that is, to return to Canada. Subsection 6(1) of the *Charter* provides:

> 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

[105] To begin with, the Supreme Court of Canada established three decades ago that subsection 6(1) is aimed at prohibiting the banishment or exile of Canadian citizens by their government. It is aimed at preventing the Government of Canada and any and all of its emanations from severing or interfering with the right of Canadian citizens to leave and return to Canada. As Justice LaForest , speaking for a majority of the Supreme Court of Canada, put it in *United States of America v. Cotroni,* (1989) 1 S.C.R. 1469 at 1481/1482: "Like the international

and constitutional documents I have referred to, the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community."

[106] It is significant this right belongs only to Canadian citizens (such as the Applicants). Notably, subsection 6(1) does not protect permanent residents of Canada, it does not protect those on various temporary visas nor is it available to refugees. It has no application to corporations. The right to return ("enter") to Canada is a right only a citizen may claim.

[107] What is the scope of the subsection right? The Federal Court, the Federal Court of Appeal and the Supreme Court of Canada have considered the scope and applicability of subsection 6(1) of the *Charter*. In a word it is an expansive, generous and powerful right.

[108] To begin with and most importantly, the Supreme Court of Canada comprehensively reviews the scope and purpose of the citizen's right to return ("enter") to Canada in *Divito v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 47 [*Divito*]. I suggest with the greatest respect that the following description of the scope of subsection 6(1) is relatively remarkable in *Charter* jurisprudence.

[109] *Divito* directs that subsection 6(1) rights are "foundational", "fundamental", are of both "expansive breadth" and "plentitude", and must be "generously interpreted" by this and other Courts. In *Divito*, the Supreme Court of Canada also directs that citizen's right to return to Canada is protected not only by subsection 6(1) of the *Charter* but by Canada's many obligations under numerous duly ratified international treaties entered into by Canada.

[110] In *Divito*, the Supreme Court of Canada confirms the "expansive breadth" and "plentitude" of the subsection 6(1) right to return to Canada guaranteed by subsection 6(1) may not be overridden by the notwithstanding clause (section 33 of the *Charter*).

[111] *Divito* unequivocally states the right to enter or return to Canada guaranteed by subsection 6(1) must be defined generously - and not in a legalistic manner - in light of the interests it is to protect. It is "foundational" right because without the ability to enter one's country of citizenship, the "right to have rights" cannot be fully exercised. The right to return to Canada, says *Divito*, is a "fundamental right associated with citizenship".

[112] *Divito* says that the right to return to Canada is generally "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents" ratified by Canada. In this connection, *Divito* determines that the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (*"ICCPR"*), ratified by 167 states, including Canada is binding on Canada. Article 12(4) of the ICCPR states: "4. No one shall be arbitrarily deprived of the right to enter his own country." Notably, in 1999, the U.N. Human Rights Committee issued guidelines for the interpretation of Article 12 of the ICCPR in its "General Comment No. 27: Freedom of Movement". Paragraph 19 states, in part, that "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country". The U.N. Human Rights Committee's interpretation of the scope of the right is that there are "few, if any" limitations on the right to enter that would be considered reasonable.

[113] Importantly, Canada's international obligations not only inform *Charter* rights. *Divito* confirms earlier Supreme Court jurisprudence that: "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[114] The right to enter protected by subsection 6(1) of the *Charter* must be interpreted in a way that is consistent with or greater than Canada's international treaty obligations.

[115] The foregoing is a but a summary of what the Supreme Court of Canada directs with respect to the right of the Applicants to return to Canada under subsection 6(1). For the record, *Divito's* full reasons in this respect are:

> [18] The focus of this appeal is on s. 6(1). There are three rights found in s. 6(1): the right to enter, remain in, and leave Canada. Only the right to enter is at issue in this appeal.
>
> [19] We must first consider the scope of the s. 6(1) right. We start with this Court's primordial direction that rights be defined generously in light of the interests the *Charter* was intended to protect: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53. In *Big M Drug Mart Ltd*., Dickson J. summarized the requisite approach as follows:
>
> > In *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; *it was to be understood, in other words, in the light of the interests it was meant to protect*.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question*, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added; emphasis in original deleted; p. 344.]

[20] Accordingly, the inquiry necessarily begins with an analysis of the purpose of the guarantee in s. 6(1) and a consideration of what the right of citizens to enter Canada was intended to protect.

[21] The protection for citizens in s. 6(1), like most modern human rights protections, had its origins in the cataclysmic rights violations of WWII. Writing in the aftermath of that war about her own experience, Hannah Arendt observed that a "right to have rights" flows from citizenship and belonging to a distinct national community: *The Origins of Totalitarianism* (new ed. 1967), at p. 296; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (2012), at p. 5. Without the ability to enter one's country of citizenship, the "right to have rights" cannot be fully exercised. The right of a Canadian citizen to enter and to remain in Canada is therefore a fundamental right associated with citizenship.

[22] Canada's international obligations and relevant principles of international law are also instructive in defining the right: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney*

General), 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, Dickson C.J., dissenting, described the template for considering the international legal context as follows:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. [p. 349]

[23] More recently, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, McLachlin C.J. and LeBel J. confirmed that, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" (para. 70). This helps frame the interpretive scope of s. 6(1).

[24] The international law inspiration for s. 6(1) of the *Charter* is generally considered to be art. 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), which has been ratified by 167 states, including Canada: John B. Laskin, "Mobility Rights under the *Charter*" (1982), 4 *S.C.L.R.* 89, at p. 89; Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4th ed. 2009), at p. 212.

[25] As a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the *Charter*. Article 12 of the ICCPR states:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals

> or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

[26] In 1999, the U.N. Human Rights Committee issued guidelines for the interpretation of art. 12 of the ICCPR in its "General Comment No. 27: Freedom of Movement". Paragraph 19 of the General Comment states, in part, that "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country". The General Comment also provides some guidance on the interpretation of "arbitrarily" in art. 12(4):

> In no case may a person be *arbitrarily deprived* of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law *should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.* A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. [Emphasis added; para. 21.]

[27] Although art. 12(4) protects against *arbitrary* interference with the right to enter, the U.N. Human Rights Committee's interpretation of the scope of the right suggests that there are in fact "few, if any" limitations on the right to enter that would be considered reasonable. The right to enter protected by s. 6(1) of the *Charter* should therefore be interpreted in a way that is consistent with the broad protection under international law.

[28] The expansive breadth of the protection is also consistent with the fact that s. 6(1) of the *Charter* is exempt from the legislative override in s. 33: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11. Moreover, the other rights conferred by s. 6 of the *Charter* in s. 6(2) are subject to express limitations within the provision itself in ss.

> 6(3) and 6(4). The fact that s. 6(1) is not subject to such limitations also confirms its plenitude.
>
> [29] And, finally in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, a case involving extradition, this Court recognized that the "intimate relation between a citizen and his country" invited a generous interpretation of a related right in s. 6(1), namely the right to remain in Canada (p. 1480).
>
> [Emphasis added]

(b) *Related doctrine and enactments*

[116] In addition to the foregoing, given Canada has a "constitution similar in principle to that of the United Kingdom" per the preamble to the *Constitution Act, 1867*, it is notable that as long ago as the *Magna Carta* (*Great Charter of Liberties*) of 1215, subjects of the English Crown were granted the right to leave and return to England. These are undoubtedly precursor rights to those in subsection 6(1) of the *Charter*. Article 42 of the *Magna Carta* provides: "It is allowed henceforth to any one to go out from our kingdom, and to return, safely and securely, by land and by water…" except for short duration in times of war.

[117] With respect, from its antiquity I conclude the 808 year old promise to end banishment and exile illustrates how long our constitutional order has concerned itself with protecting the right to enter and return to one's country: see *Magna Carta*, article 42 in full, *Select Documents of English Constitutional History*, The Macmillan Company, London: MacMillan & Co., LTD., 1918:

> 42. It is allowed henceforth to any one to go out from our kingdom, and to return, safely and securely, by land and by water, saving their fidelity to us, except in time of war for some short time, for the common good of the kingdom; excepting persons imprisoned and outlawed according to the law of the realm, and

> people of the land at war with us, and merchants, of whom it shall be done as is before said.
>
> [Emphasis added]

[118] Article 41 of the *Magna Carta* gave merchants similar guarantees of the right to return to their country:

> 41. All merchants shall be safe and secure in going out from England and coming into England and in remaining and going through England, as well by land as by water, for buying and selling , free, from all evil tolls, by the ancient and rightful customs, except in time of war, and if they are of a land at war with us; and if such are found in our land at the beginning of war, they shall be attached without injury to their bodies or goods, until it shall be known from us or from our principal justiciar in what way the merchants of our land are treated who shall be then found in the country which is at war with us; and if ours are safe there, the others shall be safe in our land.
>
> [Emphasis added]

[119] The primacy of the right to return to Canada is reinforced in Canadian law. This is also a critical factor in this Judgment. Simply put, there is no known offence in Canada that carries with it exile or banishment as a penal consequence.

[120] See also subsection 2(a) of the *Canadian Bill of Right*, S.C. 1960, c. 44, an earlier attempt by Parliament to forbid Canada's ability to exile any person:

> **Construction of law**
>
> **2** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law

> of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person;
>
> [Emphasis added]

(c) *No issue of justification under section 1 of the Charter*

[121] I also place importance on the Applicants' right to return to Canada because on how this case was pleaded. Justification under section 1 of the *Charter* is not raised. The *Charter*-protected rights of the Applicants to enter and return to Canada per subsection 6(1) are - by the words of our Constitution itself—"subject only" [emphasis added] to the reasonable limit provisions in section 1. Section 1 is a general provision that enables the legislatures – in this case Parliament—to limit *some* constitutionally protected rights by laws that provide "reasonable limits" to those rights.

[122] Thus while there might be law limiting subsection 6(1) rights, no such law or limits are advanced by the Respondents. While the Respondents submit relief under subsection 6 should not be granted, they do not ask the Court to find any of their submissions constitute section 1 'reasonable limits'. As noted, by its very words, the right to return to Canada is "only" subject to section 1 justification which in this case the Respondents have not pursued.

[123] In a word, there is no need to consider section 1 justification. Even if there was, the necessary factual background for such an assessment is absent: *Front commun des personnes assistées sociales du Quebec v. Canada (Canadian Radio-Television and Telecommunications Commission)* 2003 FCA 394 at para 9 and cases cited therein including *Mackay v. Manitoba*, [1989] 2 S.C.R. 357.

(d) *Exercise of royal prerogative [prerogative] is not exempt from constitutional scrutiny*

[124] Nor is there any support for the proposition that the government of Canada is exempt from constitutional scrutiny in the conduct of international relations and foreign affairs, whether it acts under the prerogative or otherwise. Indeed the Supreme Court of Canada held exactly to the contrary in *Khadr 2010* at para 36: "[I]n exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the Charter (Operation Dismantle) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, 1986 CanLII 2 (SCC), [1986] 2 S.C.R. 539)." And see *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, where Justice Stratas for the Federal Court of Appeal concluded:

> [70] Assessing whether or not legal rights exist on the facts of a case lies at the core of what courts do. Under the constitutional separation of powers, determining this is squarely within our province. Canada's justiciability objection has no merit.

(e) Federal Court of Appeal and Federal Court of Appeal jurisprudence

[125] Between 2008 and 2010, both the Federal Court and the Federal Court of Appeal adjudicated on the applicability of a citizen's right to return established by subsection 6(1) of the *Charter*. Notably they did so before the Supreme Court of Canada's seminal 2013 judgment in *Divito*. Even so, both found the right to return a substantial one, and a right that may be enforced

by judicial order against the executive government even when acting pursuant to the prerogative in the context passports.

[126] Both the Federal Court and the Federal Court of Appeal also found—as this Court does—that a citizen's right to "enter" Canada is not restricted to matters under the control of border officials inside Canada.

[127] Indeed, it is critical to appreciate that for many if not most practical purposes, the subsection 6(1) right in today's closely regulated global travel environment is one that by definition embraces and contemplates actions with implications outside Canada, not just at a point of entry.

[128] These cases also confirm and establish the jurisdiction of this Court and its duty to ensure Canada's executive government respects and complies with rights of Canadian citizens to return to Canada. Equally, subsection 6(1) of the *Charter* forbids the executive from frustrating the rights of Canadians to enter and return whether by executive actions taken in Canada or abroad.

[129] The first decision I wish to rely on is that of Justice Noël in *Kamel v. Canada (Attorney General)*, 2008 FC 338 [*Kamel FC*]. By exercise of its prerogative powers the executive refused to issue a passport to a Canadian citizen on national security grounds. He needed it to leave Canada and return. This Court found a passport is essential to the exercise of the mobility rights guaranteed by subsection 6(1) of the *Charter*. It also found section 1 was of no assistance to the executive because the relevant section in the passport regulations was not a law. Thus (as here)

section 1 of the *Charter* had no application. The Court found at para 103: " In order for mobility rights respecting travel outside Canada to be truly meaningful, it seems to me more is needed than the right to enter or leave, because entering means coming back from somewhere, and leaving means going to a foreign destination. In both cases, returning and leaving imply a foreign destination where a passport is required. This mobility right cannot be exercised without a passport." [Emphasis added] The Court declined to order the issuance of a passport but instead gave the executive time to re-write the passport regulation.

[130] The Crown appealed *Kamel FC* to the Federal Court of Appeal: *Kamel v Canada (Attorney General)*, 2009 FCA 21 [*Kamel FCA*]. The Federal Court of Appeal dismissed the Crown's appeal in part and confirmed Justice Noël's conclusion that the passport regulation infringed subsection 6(1) of the *Charter*, although it went on to hold the infringement was justified by section 1 of the *Charter*.

[131] Materially for present purposes, *Kamel FCA* disposed of issues very similar to those before this Court today. The executive advanced a narrow view of its *Charter* obligations under subsection 6(1) alleging the Crown was under no duty to facilitate international travel by Canadian citizens. In the case at bar the executive advances a different but still narrow view of subsection 6(1): that it is under no duty to provide its citizens with consular assistance. Notably, the Federal Court of Appeal did not even consider it useful to hear from Crown counsel on this, holding its submissions required interpreting the *Charter* in an "unreal world". It found instead that subsection 6(1) must be assessed "in the light of present-day political reality" which I will do here:

> I. Section 6 of the *Charter*
>
> [14] The appellant submits that subsection 6(1) of the *Charter*, which gives every Canadian citizen "the right to enter, remain in and leave Canada", does not impose a duty on the state to facilitate the international travel of Canadian citizens. The appellant also maintains that the respondent has not demonstrated that a passport is required to enter or leave Canada.
>
> [15] At the hearing, we did not consider it useful to hear the respondent on this issue. In fact, we agree substantially with Justice Noël's remarks on this point. To determine that the refusal to issue a passport to a Canadian citizen does not infringe that citizen's right to enter or leave Canada would be to interpret the Charter in an unreal world. It is theoretically possible that a Canadian citizen can enter or leave Canada without a passport. In reality, however, there are very few countries that a Canadian citizen wishing to leave Canada may enter without a passport and very few countries that allow a Canadian citizen to return to Canada without a passport (A.B., Vol. 7, p. 1406, Thomas Affidavit). The fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re-enter Canada without a passport are, on their face, restrictions on a Canadian citizen's right to enter or leave Canada, which is, of course, sufficient to engage Charter protection. Subsection 6(1) establishes a concrete right that must be assessed in the light of present-day political reality. What is the meaning of a right that, in practice, cannot be exercised?

[132] The Applicants also refer to this Court's decision in *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 per Justice Zinn. In that case again, the executive refused to issue a passport to a Canadian citizen because he was an alleged terrorist, as basis for which the Court found insufficient evidence (para 11). The same provision of the passport regulation was at issue. The Federal Court followed *Kamel FCA* and found a breach of subsection 6(1). Importantly for the case at bar, this Court also held the executive had a positive obligation to issue an emergency travel document because otherwise the *Charter* right to return to Canada would be "illusory".

> [152] I agree with the Court of Appeal. In my view, where a citizen is outside Canada, the Government of Canada has a positive

> obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the *Charter* is illusory. Where the Government refuses to issue that emergency passport, it is a prima facie breach of the citizen's *Charter* rights unless the Government justifies its refusal pursuant to section 1 of the Charter. As noted in *Cotroni*, the Supreme Court held that such interference must be justified as being required to meet a reasonable state purpose. In *Kamel* the Federal Court of Appeal held that section 10.1 of the Canadian Passport Order was a reasonable state purpose; however, the respondent must still establish that the decisions made under section 10.1 are "justified" on a case-by-case basis.
>
> [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. […]

[133] *Abdelrazik* relies on another decision of the Supreme Court of Canada, *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84; [2002] 4 S.C.R. 429 where the Supreme Court acknowledged that one day the *Charter* may be interpreted to include positive obligations such that the failure to do the positive act will constitute a breach of the *Charter*: "The question therefore is not whether s. 7 has ever been—or ever will be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards."

[134] In this connection, the Court is not fashioning a novel application of subsection 6(1), but rather will make the same and similar declarations as arrived at in the conclusions reached in *Kamel FC*, *Kamel FCA*, and *Abdelrazik* These declaration are informed by the wide purposes

and applicability of subsection 6(1) confirmed in *Divito* in the Supreme Court of Canada, and are also informed by Canada's international treaty obligations.

[135] Notably also, while *Abdelrazik* assessed whether the executive's decision to deny a passport was justified under section 1 of the *Charter*, section 1 is not raised here.

(3) Canada's international obligations, *Divito*, Report of the United Nations Special Rapporteur June 8, 2022, the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention of the Rights of the Child*

[136] *Divito* confirms the relevance of Canada's international obligations in informing the content and applicability of *Charter* rights such as those in subsection 6(1). Very significantly, *Divito* holds "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified". In this connection, *Divito* reviews the applicability of the *International Covenant on Civil and Political Rights* to the right of Canadians to return ("enter") Canada. With respect, I accept that subsection 6(1) is presumed to provide at least as great a level of protection as *International Covenant on Civil and Political Rights*.

[137] Also in connection with Canada's treaty obligations, the United Nations' Special Rapporteur on the promotion and protection of human rights and fundamental freedoms [Special Rapporteur] investigated the situation of Canadian men detained in makeshift prisons by AANES in northeastern Syria. On June 8, 2022, the Special Rapporteur submitted their observations to Canadian officials. The Special Rapporteur noted other nations have successfully repatriated

their nationals and concluded Canada should do the same as the only international law-compliant response: "*Considering the above, we reiterate again that the urgent, voluntary and human rights compliant repatriation of all the citizens of your Excellency's Government is the only international law-compliant response* to the complex and precarious human rights, humanitarian and security situation faced by those detained in inhumane conditions in overcrowded prisons or other detention centres in North-East Syria, with limited access to food and medical care putting detainees' lives at increased risk." [Emphasis added]

[138] After setting out BOLOH's situation, the Special Rapporteur raised specific concerns relating to Canada's responsibilities under the *International Covenant on Civil and Political Rights*, the treaty considered in *Divito*. The Special Rapporteur considered Canada's obligations under the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights.* The Special Rapporteur concluded the only international law-compliant response open to Canada is the ***urgent*** [Emphasis added] voluntary repatriation of its citizens. I find this conclusion advances the claims of the Applicants.

[139] Because of its importance, I will set out the Special Rapporteur's findings, and later Canada's response, in full:

> While we do not wish to pre-judge the accuracy of these allegations, we express our serious concern regarding Mr. Letts' continued detention since 2017 in North-East Syria and his rights to life, security, and physical and mental health due to the dire conditions of detention. We also expressed our concerns about his allegedly arbitrary detention. According to the information received, there is allegedly no legal basis, no judicial authorisation, review, control, or oversight of his detention which entirely lacks in predictability and due process of law.

We underscore that the prohibition of arbitrary detention, recognised both in times of peace and armed conflict, is absolute and well-established under international law, a peremptory or *jus cogens* norm of international law. Together with the right of anyone deprived of liberty to bring proceedings before a court in order to challenge the legality of the detention, these rights are non-derogable under international treaty and customary law. Arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations that a State may invoke pursuant to derogation are already factored into the arbitrariness standard itself. Thus, a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital security or other interest or proportionate to that end. The sub-contraction or direct facilitation of liberty deprivation by non-State actors does not negate a State obligations to protect, promote and fulfil its human rights treaty obligations.

We also note that administrative security detention presents severe risks of arbitrary deprivation of liberty. As noted by the Human Rights Committee and the Working Group on Arbitrary Detention, such deprivation of liberty would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available in countries of citizenship.

We are deeply concerned about the facilitation of arbitrary detention by States both directly and indirectly in these detention facilities in North-East Syria. Administrative ± including security ± detention can only be invoked by States under the most exceptional circumstances where a present, direct and imperative threat exists. The burden of proof lies on States to show that an individual poses such a threat which cannot be addressed by alternative measures. States also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Canada on 19 May 1976. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken. There is no legal basis in international human rights law for non-State actors to engage in administrative, security or other detention practices.3 We stress that there is no human rights-based legal basis for the detention by

the non-State actor, which would be a necessary condition for any detention, during or after conflict. In any event, both international human rights law and international humanitarian law clearly prohibit arbitrary and indefinite detention where individuals are held without proper charge, due process of law, and on the basis of individual responsibility for imperative reasons, which requires an individual assessment of the risk, and a right of review by a judicial authority. There is also no permissible human rights basis for States to sub-contract directly or indirectly administrative or security detention to non-State actors on the territory of third States.

We remain extremely concerned that in the case of deprivation of liberty of Mr. Letts, despite the exceptional circumstances, it appears that none of the conditions to prevent arbitrary detention ± a right so fundamental that it remains applicable even in the most extreme situations ± are respected, and that no steps towards terminating or reviewing the legality of detention have been taken, despite Mr. Letts having being detained for five years, which in practice amounts to the possibility of indefinite detention. We are further concerned about the lack of consular assistance to Mr. Letts by the Government of Canada.

We are also profoundly concerned that what is now emerging is capacity building and technical assistance provision supporting such indefinite detention of your nationals enabled and supported in part by the Coalition of which your Excellency's Government is a member. The entrenchment and protraction of allegedly arbitrary deprivation of liberty in these inhumane conditions in North-East Syria of men and boys is premised on the direct security assistance provided by the Coalition, which your Excellency's Government has supported, to a non-State entity. We maintain the firm opinion that the perpetuation of a situation where detainees' non-derogable right to not be arbitrarily detained and to have their detention judicially authorised and reviewed appears violated can raise serious questions of State responsibility and of complicity in the facilitation, sustainment and continuation of the serious human rights violations that are taking place in the prisons and detention centres in North-East Syria.

We recall that in addition to a due diligence duty aimed at ensuring that any security aid or assistance is compliant with international human rights law (A/76/261), where serious breaches of international law are committed, States must not render aid or assistance in maintaining the situation created by the serious breach and must cooperate to bring it to an end. The requirements of effectively demonstrated due diligence have an element of

proportionality: the greater the links and control a State exercises, the greater the standards of diligence that this state shall demonstrate.

Considering the above, we reiterate again that the urgent, voluntary and human rights compliant repatriation of all the citizens of your Excellency's Government is the only international law-compliant response to the complex and precarious human rights, humanitarian and security situation faced by those detained in inhumane conditions in overcrowded prisons or other detention centres in North-East Syria, with limited access to food and medical care putting detainees' lives at increased risk. In light of such exposure to extremely dire detention conditions, such as malnutrition and potential infection with diseases without adequate medical care, we wish to emphasize that the right to life, as enshrined in Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 ICCPR, constitutes an international customary law and *jus cogens* norm from which no derogation may be made by invoking exceptional circumstances such as internal political instability or other public emergency as provided for in Article 4(2) ICCPR. We note that the right to life is accompanied by a positive obligation to ensure access to the basic conditions necessary for the maintenance of life, including access to food and medical care (ICCPR General Comment No. 6, para. 5; ICCPR General Comment No. 36, para. 21). In addition, article 12 of the International Covenant on Economic, Social and Cultural Rights (³ICESCR´), ratified in 1976 by Canada to guarantee the right of all people, including prisoners and detainees, to the highest attainable standard of physical and mental health and article 6(1) ICCPR states that no one shall be arbitrarily deprived of life. Accordingly, States parties must also exercise due diligence to protect the lives of individuals from deprivations caused by persons or entities whose conduct is not attributable to the State. This obligation requires States to take special measures to protect individuals in vulnerable situations whose lives are particularly endangered by specific threats (Human Rights Committee, General Comment No. 36, para. 23). Moreover, we recall that under Article 2 UDHR and Articles 2 and 26 ICCPR, as well as several other United Nations declarations and conventions, everyone is entitled to the protection of the right to life without distinction or discrimination of any kind, and all persons must be guaranteed equal and effective access to remedies for violations of this right.

As we had already stressed and as recent security developments confirm, given the geopolitical fluidity of the region currently controlled by various non-State armed groups, repatriations are key to States' long-term security interests. Any repatriation must

> comply with international law, including with the absolute prohibition of torture, ill-treatment, and refoulement. The building and support for the maintenance of prisons designed to keep these individuals in detention are incompatible with your Excellency's Government obligations under international law, particularly given the specific nature of the prohibition of arbitrary detention as *jus cogens* or non-derogable customary law norm.
>
> Given the presence of international coalition forces and other security agencies in North-East Syria, the number of civilian and other delegations that have had access to the camps and the prisons, and the number of successful repatriations including of men that have taken place, the lack or the difficulties of access to the detainees who are nationals of your Excellency's Government should not be put forward as a reason for not repatriating your nationals.

[140] The foregoing indicates that the male prisoner Applicants, including Mr. Letts, face conditions that may constitute violations of international treaties entered into by Canada, namely the *International Covenant on Civil and Political Rights*, the treaty considered in *Divito*, in addition to Canada's obligations under the *Universal Declaration of Human Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

[141] While the Court lacks a comprehensive evidentiary base, I have enough to conclude the Applicants, Canadian citizens, are held by AANES in prisons in conditions that would violate rights assented to by Canada in the international treaties noted by the Special Rapporteur, if the Applicants faced those conditions in Canada. With respect, not that Canada is a guarantor against such abuses when its citizens leaves territorial Canada, but if the Applicants were in Canada, the conditions they face now would not only on a balance of probabilities but as a certainty contravene Canada's treaty obligations. This is a matter the Court is unable to ignore or set aside in coming to its conclusions, and as noted advances the interests of the Applicants. I make these

findings having accepted that subsection 6(1) is presumed to provide at least as great a level of protection the three treaties relied upon by the Special Rapporteur per *Divito*.

[142] Canada responded to the United Nations. Some of its submissions are similar to those made before this Court. Canada also informed the Special Rapporteur of its substantial (more than $4 Billion since 2016) financial assistance to the region:

> 1. Information and comment on the allegations in the letter;
>
> Page 5 of the Joint Urgent Appeals includes comments on the scope of Canada's obligations under international human rights law, notably the obligation to protect the rights recognized in the International Covenant on Civil and Political Rights ("ICCPR"). According to the Appeal, this positive obligation is said to include a legal obligation to facilitate the return of one's nationals detained by foreign entities in the territory of another sovereign state.
>
> Canada's position is that the obligation to respect and ensure human rights is primarily restricted to the sovereign territory of a state and is limited by the sovereign rights of the other relevant states. International human rights law (including the ICCPR, other human rights treaties, and customary international law) does not create a positive obligation on states to protect the rights of persons who are detained by foreign entities in another state's territory.
>
> Such persons are entirely outside of Canada's territory and jurisdiction. Rather, the obligations apply to the state in whose territory the detentions are occurring. While this does not preclude the possibility that a state might be held responsible for aiding or assisting human rights violations in another state, this would require that the aid or assistance be given with a view to facilitating those wrongful acts. That is plainly not the case here, as further elaborated upon in the information provided in section 5 below.
>
> Moreover, the Government of Canada is aware of the reports mentioned in the letter and appreciates that the Special Rapporteurs share Canada's concern. The Government of Canada is monitoring the situation closely and is concerned by the ongoing health challenges facing Canadians in Syrian Kurdish detention. Canadian government officials are engaging with Syrian Kurdish authorities and with international organizations on the ground for

information on, and assistance to, Canadians in the Syrian camps and prisons.

2. Information on the measures taken by the Government to protect the most fundamental rights of Mr. Letts, including his right to life and health;

The safety and well-being of Canadian citizens abroad is a priority for the Government of Canada. Canada aims to deliver consular services to its citizens in a consistent, fair and non-discriminatory manner. Consular services are delivered in accordance with the rules of international law applicable to consular matters.

In the context of providing consular assistance to Canadian citizens who travelled to Syria the Government of Canada took measures as early as 2011 to advise Canadian citizens to avoid travel to Syria and to depart the country. In 2012, Canada closed its embassy in Damascus and further updated its travel advisory for Syria to reflect the closure of the Embassy and to advise Canadians that, due to the lack of a physical presence in country, Canada's ability to provide consular and other support throughout Syria is very limited.

Nevertheless, as noted above, Canada continues to reach out to Syrian Kurdish authorities and to international organizations on the ground to provide assistance to all Canadians in the camps and prisons to the extent possible. Canadian officials have conveyed to Syrian Kurdish authorities the expectation that all Canadian citizens in their custody be treated humanely, in line with the applicable principles of international humanitarian law and international human rights law.

3. Information on the steps taken by the Government to maintain contact with Mr. Letts in view of the protection of his rights, safety and wellbeing, as well as ensure contacts with his family

The Government of Canada cannot publicly release information on individual cases due to the prohibition against sharing personal information found in Canada's Privacy Act.

More generally, while Canada has received some information and updates on the status of Canadian women and children in the camps, Canada has received limited information and updates on the Canadian men detained in prisons in northeastern Syria from the Syrian Kurdish authorities.

Canada has been able to provide some consular assistance to Canadians detained in northeastern Syria, mainly through engagement with the Syrian Kurdish authorities. This has included verifying the whereabouts and well-being of Canadians, requesting available medical care and conveying Canada's expectations that Canadians be treated humanely and in a manner consistent with the applicable principles of international humanitarian law and international human rights law.

The Government of Canada has also made general requests that affect all detained Canadians on multiple occasions to the Syrian Kurdish officials, such as an update on their current status, and to have phone/messaging access to the Canadian detainees.

4. Information on the measures taken by the Government to repatriate Mr. Letts to Canada and provide him with adequate procedures that will ensure respect for his right to life, to liberty, and to a fair trial;

As noted above, due to privacy concerns, the Government of Canada cannot publicly comment on the provision of consular services to specific individuals.

Furthermore, despite the existing challenges mentioned above, Canadian government officials continue to explore possible ways to extend assistance to Canadians detained in northeastern Syria.

5. Information on the security support and stabilization assistance provided by the Coalition, its funding, and the use of these Coalition funds, as well as the actual financial or other engagement of the Government in this process;

Since 2016, Canada has committed more than $4 billion, through its Middle East Strategy, to respond to the crises in Iraq and Syria and address the impacts they have had on the region.

Canada is also a committed member of the Global Coalition against Daesh. Canada's Response by the Government of Canada to the Joint Urgent Appeal from Special Procedures programming is aligned with the Coalition's security and stabilization priorities and is funded through agreements with various implementing partners and not directly with the Coalition.

On May 11, 2022, Global Affairs Canada announced $46.5 million in funding for 15 projects in the Middle East, Central Asia and Africa. These projects are funded through Global Affairs Canada's Peace and Stabilization Operations Program and Counter-

Terrorism Capacity Building Program, and are aligned with the civilian lines of effort of the Global Coalition against Daesh.

Recently announced projects include:

- Funding Facility for Stabilization (Iraq) - Implemented by the United Nations Development Program, the Funding Facility for Stabilization (FFS) in Iraq aims to create conditions for the return of displaced Iraqis and supports reconstruction and recovery in Iraq. This project's activities include the restoration of basic services in areas liberated from Daesh, the creation of livelihood opportunities, particularly for women and youth, and the dimplementation of social cohesion activities in liberated areas. This project will also increase the Government of Iraq's capacity to implement stabilization activities in the country.

- Building Women's Movements for Sustainable Peace in Iraq - Implemented by MADRE, this project aims to enhance security and stability for communities affected by Daesh in Iraq, particularly women and girls. This will be done by increasing the effectiveness of local Iraqi civil society organizations, particularly women's organizations, to implement programs, deliver services, and advocate for legal and policy changes that advance women, peace and security priorities and enhance protections and reintegration of Iraqis who have survived Daesh violence.

- Supporting Iraqi National Efforts for an Enhanced Implementation of the National Strategies on the Prevention of Violent Extremism - The project will enhance the capacity of the Government of Iraq and civil society stakeholders to analyze and respond to drivers of violent extremism in communities that have shown an elevated susceptibility to recruitment. Furthermore, it will support the Prosecution, Rehabilitation and Reintegration round tables and the implementation of some key recommendations that derive from the round tables. The project was designed in collaboration with, and in support of, the Government of Iraq's 2019 National Strategy to Combat Violent Extremism, which links to Iraq's broader National Security Strategy, launched in 2015.

- Innovative Accountability for Syria - This project, implemented by the Syrian Legal Development Program, aims to help Syrian civil society organizations better understand and navigate the judicial system and public institutions to hold perpetrators of human rights violations accountable, including business entities.

> - Deir ez Zor Immediate Stabilization Support - Continuing on previous funding to People Demand Change, this project aims to build the resilience of communities in Deir ez Zor, Syria, by restoring essential water infrastructure and enabling local civil councils to better manage resource-driven conflicts, including through effective reconciliation services to the community. This project will also support civil society organizations to better engage with local councils and will provide youth and women with vocational training.

(4) Declarations to be granted

[143] Stripped to their essentials as I understand their original and Amended Applications, their letters to the executive, their submissions generally and their submissions to the Court at the December 6, 2022 hearing, the Applicants' requests include three actions by the Respondents:

1. that as soon as reasonably possible, Canada make a formal request to AANES that AANES allow the voluntary repatriation of the Canadian men held in prisons run by AANES military wing the SDF;
2. that Canada provide passports or emergency travel documents to the Applicants as soon as they are required after AANES agrees to allow the Applicants to be repatriated to Canada; and
3. that Canada appoint a representative(s) or delegate(s) to attend within AANES controlled territory or as otherwise agreed as soon as possible after AANES agrees to hand over the Applicants for their repatriation to Canada.

[144] I will deal with these slightly out of order.

(a) *Travel documents*

[145] In terms of point (2), the request for emergency travel documents, I will grant the application. I do so first of all because of the enhanced scope of subsection 6(1) enunciated by *Divito* over and above considerations of its applicability set out in previous decisions by the Federal Court and Federal Court of Appeal. Recalling that subsection 6(1) of the *Charter* must be construed generously, that its purpose is to allow Canadians to return to Canada, that the subsection 6(1) *Charter* right is "foundational", "fundamental", and of both "expansive breadth" and "plentitude", in my view subsection 6(1) of the *Charter* requires that appropriate travel documents be provided by the Respondents to the Applicants. The Court will declare that right. To hold otherwise would be contrary to the findings of the Federal Court in *Kamel FC*, the Federal Court of Appeal in *Kamel FCA* and the Federal Court in *Abdelrazik* all of which arrived at similar conclusions. The declaration granted also takes into account and are informed by Canada's international treaty obligations as discussed above.

6. No requirement for a *Charter* breach to issue declaratory relief

[146] The Respondents submits a *Charter*-breach is required to trigger the Court's jurisdiction in this matter. If that submission is intended to apply to the Court's power to grant declaratory relief, which it is granting in this case, the submission is not correct. While courts may remedy a *Charter breach* with a directive or declaratory order or such other remedy as it considers "appropriate and just in the circumstances" under its remedial powers conferred by section 24 of the *Charter*, it is well-settled law that courts have the jurisdiction to grant declarations of *Charter* rights in the absence of a breach. As then-author Robert J. Sharpe, a noted expert on the subject, put it in his 1987 text *Charter Litigation*, at page 340, "A litigant should not have to forbear from bringing suit until his or her constitutional rights have actually been infringed, and a court is not

precluded from granting relief prospectively." This conclusion was qualified by reference to considerations of standing that do not apply here.

[147] To the same effect are Hon. Robert J. Sharpe's conclusions in *The Charter of Rights and Freedoms*, seventh ed. [2021] that: "There is, however, a well-established jurisdiction to award declarations of rights in appropriate cases. In constitutional law, the declaration has proved to be an important remedy because of its flexibility. By declaring the right and going no further, the court defines the respective legal rights and obligations of the parties but leaves to them the task of implementing the demands of the Constitution. The court will make declarations where they can provide practical guidance for resolving disputes but will not issue declarations that simply reiterate settled law." The author cites cases including *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12, [2016] 1 SCR 99 at paras 53-56. In this connection I note that while declarations were not made in *Divito,* there is nothing in the Supreme Court of Canada's summary of the scope and applicability of subsection 6(1) in *Divito* that requires the executive to breach the *Charter* before a *Charter* right may be declared. Such a requirement would make no sense as discussed below.

[148] Notably, learned authors Mendes and Beaulac in their text *Canadian Charter of Rights and Freedoms*, 5th edition [2013] conclude at page 1136: "Despite the clear wording of subsection 24(1) which contemplates that a person whose Charter rights have been violated may seek a remedy, the Supreme Court has long held that 'remedies can be ordered in anticipation of future Charter violations, notwithstanding the retrospective language of s. 24(1)'". The authors cite to *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R.

456, at para 51. They further conclude on the same page: “A categorical refusal of courts to order a Charter violation until after it occurred would result in remedies that were not meaningful and effective for the applicant. It would also mean that courts would fail to vindicate Charter rights, deter Charter violations, and promote respect for the Charter.” In the case at bar I have concluded declaratory relief is required to vindicate the Applicants’ subsection 6(1) rights.

[149] I have no difficulty finding on a balance of probabilities the Applicants have established their right to obtain travel documents from their government as Canadian citizens trapped against there will in prisons in AANES. In this respect, their ability to return to Canada – that is to exercise their *Charter* rights under subsection 6(1) - are illusory without travel documents, as *Abdelrazik* put it. To construe their situation as one in which they do not need travel documents would be, in my respectful view, to consider their situation in an “unreal world” as found by the Federal Court of Appeal in *Kamel FCA*. Put another way, the Court must consider the Applicants’ situation in light of the present-day political reality per *Kamel FCA*. Simply put at the appropriate time the Applicants must be provided necessary travel documents and I will so declare.

[150] That said, and while they have repeatedly asked for travel documents not only before commencing this proceeding but up and to the close of oral submission, none have been provided. Instead Canada relies on and requires the Applicants meet the conditions in its *Policy Framework*. With respect, I am not persuaded compliance with the *Policy Framework* is a precondition of the exercise of the Applicant’s *Charter* protected right to return to Canada. The Respondent did not argue the *Policy Framework* is a reasonable limit justifying a denial of the

subsection 6(1) right under section 1 of the *Charter.* As I see it, the *Policy Framework* is a likely very useful set of internal guidelines to assist the executive in assessing the situations of the Applicants, but it is no substitute for nor does it permit the executive to unilaterally derogate from subsection 6(1).

[151] It seems to me the Applicants have their rights under subsection 6(1) of the *Charter*, and while Canada may assess the situation as per the *Policy Framework*, it must do so conscious of the fact these Applicants have the substantial rights under the *Charter* set out in *Divito* and per Canada's treaty obligations and elsewhere discussed above. That is why this declaration will be granted.

[152] I note the Applicants also asked that travel documents be provided to them within 15 days of this Judgment. As noted and for the reasons set out earlier in these Reasons I decline to grant that aspect of the relief sought. It is obvious the situation in AANES controlled territory is dangerous to all concerned including employees of the Government of Canada and also the Applicants, violent, variable and far from assured or constant.

[153] The executive needs to know that in assessing the Applicants' situation under the *Policy Framework*, it does so in the context of the Applicants' *Charter* rights. That said it will not be ordered to proceed on a timeline that may in fact be counterproductive or otherwise unreasonable.

(b) Request to AANES to allow the repatriation of the Applicants

[154] It is also obvious to the Court and I find on a balance of probabilities that in the reality of the situation facing the Applicants per *Kamel FCA*, the Applicants will not be released by AANES unless and until Canada actually and formally requests AANES to allow their repatriation. I am not satisfied such a request has ever been made, notwithstanding the very long time the Applicants have been detained in detention camps and prisons – i.e., since at least 2019 and longer.

[155] I have no difficulty finding on a balance of probabilities, and the evidence is uncontradicted, that the Applicants' ability to return to Canada is illusory per *Abdelrazik* without Canada first asking AANES to allow their repatriation. Such a request, as with travel documents and Canada's appointment of a delegate or representative, is a *sine qua non* of the Applicants' ability to exercise their subsection 6(1) rights per *Divito* and other grounds already mentioned. The Applicants are Canadian citizens who are not able to return home in part because their government seems never to have formally requested their repatriation. They are not able to enjoy a truly meaningful exercise of their *Charter* right to return per *Kamel FC* unless and until Canada's executive makes a formal request to AANES on their behalf. Canada must make a formal request for their repatriation because otherwise the Court is asked to construe the *Charter* in an "unreal world", again as per *Kamel FCA*.

[156] In the previous paragraphs I used language of the Federal Court and Federal Court of Appeal in *Kamel FC*, and *Kamel FCA* and *Abdelrazilk*. But as noted, I also rely on the Supreme Court of Canada's binding judgment in *Divito*. Once again it must be recalled subsection 6(1) of the *Charter* is to be construed generously, that its purpose is to allow Canadians to return to

Canada which is what the Applicants seek to do here, and that the subsection 6(1) *Charter* right is “foundational”, “fundamental”, and of both “expansive breadth” and “plentitude”. I have concluded the application of these governing principles to the facts of this case require the Respondents to make a formal request to AANES to allow them to be repatriated, and will so declare. Of course I once again am informed by the consequences of Canada’s international obligations as discussed earlier.

[157] I have already determined it is not necessary for the Applicants to establish a *Charter* breach in this case.

[158] I note again that Canada relies on and requires the Applicants to meet the conditions in its *Policy Framework* before it will permit the Applicants to exercise their *Charter* right to return to Canada. With respect, I am not persuaded compliance with the *Policy Framework* is a valid precondition of the exercise of the Applicant’s *Charter* protected right to return to Canada. The Respondent did not argue the *Policy Framework* is a reasonable limit justifying a denial of the subsection 6(1) right under section 1 of the *Charter*. As noted earlier, the *Policy Framework* is a likely useful set of internal guidelines to assist the executive in assessing the situations of the Applicants, but it is no substitute nor derogation from the rights of the Applicant under subsection 6(1).

[159] Once again, it seems to me the Applicants have their rights under subsection 6(1) and that while Canada may assess the situation as per its *Policy Framework*, the executive must do so

conscious of the fact it does so within the context of the Applicants' rights required by *Divito* and elsewhere in these Reasons and as declared by the Judgment being issued.

[160] I also note the Applicants ask that the Respondents make a formal request for their repatriation within 7 days of this Judgment. However, as noted and for the reasons set out at the outset of these Reasons. I also decline to grant that aspect of the relief sought. As with the case of travel documents and the appointment of a delegate or representative, the situation in AANES controlled territory is dangerous to all concerned (including the Applicants and employees of the Government of Canada), violent, variable and far from assured or constant. The executive needs to know it is dealing with the Applicants' *Charter* rights, but will not be ordered to proceed on a timeline that may be counterproductive or otherwise unreasonable. That said this request must be made as soon as reasonably possible because as it stands now, a formal request for their repatriation is the starting point for the Applicants' exercise of their *Charter* right to return and "enter" Canada under subsection 6(1).

(c) *Appointment of a delegate or representative*

[161] For the reasons set out above in respect of necessary travel documents and the necessary formal requests to allow their repatriation, I have concluded on a balance of probabilities the Applicants are entitled to a declaration requiring Canada to appoint either a delegate or representative to accept their hand over by AANES. Once again I rely of the jurisprudence of the Federal Court and Federal Court of Appeal, and in addition, I am of the view this decision is required by the interpretative principles laid down in the *Divito* decision of the Supreme Court of Canada, and by reference to Canada's international obligations. With respect, it is abundantly

clear from both the evidence of the Applicants and the Respondents that if the Applicants are ever to exercise their subsection 6(1) rights to return to Canada, the executive must appoint delegate(s) or representative(s) as required AANES demands, the Court fully noting AANES is the Applicants' captor.

[162] I also note the Applicants requested such appointments by Canada six months before they commenced this Application, through Mr. Greenspon's February, 2021 letters to GAC. However, no such appointments been made. I appreciate this may not be the first step in the exercise of the Applicants' right to return, but it is still one that I find essential to the exercise of the *Charter* rights at issue. I also appreciate the *Policy Framework* has been put in place, in part to determine how and when the Respondents will allow the Applicants to exercise their right to return home. That said, the Applicants absolutely must have Canada make such appointments or they will never be able to return to Canada – unless matters change significantly in the AANES controlled territory.

[163] In this respect, it is also relevant when measuring the impact of the declaratory relief to be granted that Canada's executive government has already, and as recently as October, 2022, successfully repatriated Canadian citizens including BOLOH 14 and another Canadian woman and her two children. These Canadians were repatriated pursuant to the *Policy Framework*.

[164] The Respondents' initial affidavit of Ms. Termorshuizen noted one earlier Canadian, an orphaned child, repatriated with Canada's assistance:

> 68. Since the closure of the Embassy of Canada to Syria in 2012, Government of Canada officials have only been to north-eastern

> Syria once, in 2020, to accompany an orphaned child publicly known as ‘Amira’ out of the region. The AANES insisted that a Government of Canada delegation travel to north-eastern Syria for the child to be released into the temporary custody of the Government of Canada. The AANES rejected the option of releasing the child to the care of a third party. Despite our attempts at negotiating a handover point on the Iraqi side of the border, the AANES insisted on meeting in north-eastern Syria.
>
> 69. This extraordinary assistance was provided on a limited basis to bring the orphaned Canadian child safely to Canada to be united with their extended family. The decision to repatriate the child from north-eastern Syria was based on the exceptional circumstances facing this orphaned child. As an orphan, the child had no legal guardian to provide care, to advocate for their well-being or to make decisions on their behalf. Currently, all of the Applicant children in north-eastern Syria, of whom the Government of Canada is aware, are in the care of their mothers.

[165] Two other Canadians were repatriated in 2021, a child and mother, although without assistance from the Respondents. As per the affidavit of Ms. Termorshuizen:

> 75. In March 2021, another Canadian child, nicknamed Zara by the Applicants, was separated from their mother and exited north-eastern Syria into Iraq with the assistance of a third party. The Government of Canada was not involved in securing the child's exit from north-eastern Syria. The Government of Canada provided consular assistance to the child, once the child was already in Iraq, to facilitate their onward travel to Canada.
>
> 76. Separately, in June 2021, Zara's mother was released into the custody of the same third party who successfully arranged her exit from north-eastern Syria into Iraq. The Government of Canada was similarly not involved in securing the woman’s release. Based on information provided by the involved third party, it is GAC’s understanding that this individual was uniquely positioned to influence the Kurdish authorities to take the exceptional decisions to release this child and their mother, and that there were distinctive circumstances surrounding this particular Canadian family that contributed to that outcome.

[166] We also now know that the Respondents have agreed on January 19, 2023 to the repatriation of 19 Canadian women and children who were previously Applicants in the very Application.

[167] Since 2020, the pace of repatriations by other nations has increased and so has that of Canada.

[168] Evidence was put before the Court through the affidavit of Ms. West, which I accept, to the effect that and according to her research and study of the matter, as of August 5, 2021, 26 nations in addition to Canada (total 27) had successfully arranged for the repatriation of their citizens from AANES's detention camps and prisons, either directly or through intermediaries.

[169] Further, at the hearing on January 6, 2023, although opposed by the Respondents, I admitted the filing of very limited additional new information establishing that many nations successfully repatriated their nationals in 2022, with reasons set out orally at the hearing. From the letter of the United Nations' Special Rapporteur, dated January 4, 2023, filed by Mr. Greenspon, I accept that since October 2022 at least eight countries have brought nationals home: 659 to Iraq, 17 to Australia, 4 to Canada, 58 to France, 12 to Germany, 40 to the Netherlands, 38 to Russia, and 2 to the UK. In November 2022, Spain showed its willingness to repatriate at least 16 nationals by year's end. While Ms. Jackman relied on a new affidavit at the January 6, 2023 hearing, it was sworn on January 2, 2023, the Monday before. It was not filed before the January 6 hearing. The Court had no prior notice of it. The Respondents opposed its admission. After the hearing I considered it, but have determined not to admit this affidavit

because of its irregular late filing, and also because it did not materially add to the information put forward by Mr. Greenspon in terms of nations that had successfully repatriated their nationals in 2022, in that it only identified France, Belgium, Germany, the Netherlands, Australia, Tajikistan, Russia and Sweden.

[170] As discussed earlier, I do not accept the Respondents' submission that a declaration to this effect requires proof the Applicants' subsection 6(1) rights have already been violated by the Respondents. Indeed this is classic case in which to declare *Charter* rights prospectively.

[171] I note again Canada relies on and requires the Applicants to meet the conditions in its *Policy Framework* before permitting the Applicants to exercise their *Charter* right to return to Canada. With respect, I am not persuaded compliance with the *Policy Framework* is a valid precondition of the exercise of the Applicant's *Charter* protected right to return to Canada. As noted, the Respondents did not argue the *Policy Framework* is a reasonable limit justifying a denial of the subsection 6(1) right under section 1 of the *Charter*. As I've noted before, the *Policy Framework* is a likely useful set of internal guidelines to assist the executive in assessing the situations of the Applicants, but it is no substitute for nor derogation from the Applicants' subsection 6(1) rights.

[172] As already noted, it seems to me the Applicants have their rights to return under subsection 6(1) and while Canada may assess the situation as per the *Policy Framework*, the executive must do so alive and sensitive to the fact these Applicants have substantial subsection 6(1) rights under the *Charter* as set out in *Divito* and elsewhere discussed above.

[173] I also note the Applicants ask the Respondents to appoint delegate(s) or representative(s) within 30 days of this Judgment. However, as noted and for the reasons set out at the outset of these Reasons, I decline to grant that aspect of the relief sought. As in the case of travel documents and the initiating request to allow repatriation, I note the situation in AANES controlled territory is dangerous to all concerned including employees of the Government of Canada, violent, variable and far from assured or constant. The executive needs to know it is dealing with the Applicants' *Charter* rights but will not be ordered to proceed on a timeline that may be counterproductive or unreasonable. That said this appointment of delegate or representative must be made as soon as reasonably required because it is the third key to the Applicant's exercise of the right to return and "enter" Canada under subsection 6(1) of the *Charter*.

(d) *Objections by the Respondents*

[174] The Respondents opposed granting the Applicants relief. They submit the burden of proof rests on the Applicants to adduce evidence of a *Charter* breach on a balance of probabilities. While I might have found *Charter* breaches in terms of travel documents and making a formal request for repatriation, rights requested almost two years ago but not afforded, I do not consider that necessary because of well-established jurisprudence that a *Charter* breach is not a necessary pre-condition for the declaratory orders to be issued in this case as already determined.

[175] On these facts the Court must declare these Applicants' applicable subsection 6(1) rights and will leave it to the executive to see they are respected, assessing relevant considerations in

the *Policy Framework* for example, but being alive and sensitive and guided by the fact the Applicants do not merely depend on the goodwill or discretion of the executive but have the constitutional rights declared in this Judgment.

[176] I agree with the Respondents there is no evidence, or suggestion that Canada is complicit in the Applicants' detention. Indeed it advised them not to go to the region. And I agree the detentions in northeastern Syria by foreign entities are the reason the Applicants are unable to return to Canada. But that is not the issue. The issue is the scope and applicability to the Applicants of their undoubted subsection 6(1) right to return to Canada, as addressed and determined in these Reasons.

[177] The Respondents also argue that granting this Application would be an entirely inappropriate expansion of a citizen's right to enter as indicated by jurisprudence from both the Supreme Court and European Court of Human Rights. Again, I disagree. As noted in detail, I have followed *Divito*, Canada's international treaty obligations, and the jurisprudence of this Court and the Federal Court of Appeal. The Court is granting relief in accordance with binding jurisprudence. Again, imprisonment is not the issue; the issue is whether and to what extent our executive government has a duty to assist its citizens in the pursuit of their *Charter* rights under subsection 6(1).

[178] The Respondents also note the European Court of Human Rights took similar approach to the Respondents' position in assessing a citizen's right to enter in *Case of H.F. and Others v France*, Application Nos. 24384/19 and 44234/20, Decision of the Grand Chamber (14

September 2022). In that case, the Court found firstly, that States have no general obligation under international law, including in the area of human rights, to repatriate their nationals or otherwise provide diplomatic or consular protection. Secondly, the Court affirmed that a citizen's right to enter is primarily a negative right. This means it will impose positive obligations on states in exceptional circumstances only, which have been confined to the issuance of travel documents. The Court reasoned that the right to enter would be violated when the French legal system did not have sufficient protections against arbitrary or unfair decision-making, like a judicial review. The Court also noted that the right to enter as protected in the European system does not impose specific duties for States to aid their nationals abroad.

[179] With respect, the decision of the European Court of Human Rights does not bind this Court because it cannot be reconciled with the Supreme Court of Canada's determination of the scope and applicability of subsection 6(1) rights in *Divito*. Nor is there evidence in the European context of the centuries old Canadian and British context of seeking redress for banishment and exile as demonstrated by articles 42 and 41 of the *Magna Carta* of 1215, the *Canadian Bill of Rights* in 1960, and indeed the need to amend Canada's constitution to include subsection 6(1) in 1982. In any event, while foreign judgments are informative and useful as interpretative guides, this Court is obliged to follow the Supreme Court of Canada and Federal Court of Appeal in this regard and does so in respect of *Divito* and *Kamel FCA*, and also *Kamel FC* and *Abedlrazik* of the Federal Court.

[180] In the Respondents' view, the Applicants' proposed expansion of subsection 6 mobility rights to a right of repatriation would be an unprincipled expansion of the right to enter Canada.

The Respondent suggests that this is especially the case where the impediment to a citizen's return is a detention effected by a non-Canadian entity outside of Canadian territory. Neither, they argue, can the *Charter* impose extraterritorial obligations on government officials to intervene on foreign territory to secure the citizen's release. Furthermore, the Respondent submits that taking a far-reaching approach to the right to enter would encroach on the comparative expertise of the executive branch.

[181] There is no merit in the Respondents' concerns. The declarations in this Judgment for the most part may be respected by actions by the executive taken domestically within Canada, and do not require the provision of consular assistance with regards to, for example, the authorization of travel documents, and the initiation of a formal request for repatriation. While assistance from consular officials may be required, it is clear from the *Policy Framework* itself, particularly the requirements for sign off by at least two Ministers of the Crown, that the assessment and carrying out of efforts to repatriate these Canadians are reserved for the most senior members of the executive government. Further, as already explained to the extent it is an expansion of rights, which is not clear, the declarations granted also follow the Supreme Court of Canada's conclusions in *Divito,* which was not before the courts in 2008 to 2010.

[182] Further, and in my respectful view, the declarations flow from the very dire circumstances of the Applicants, are fact specific and grounded in findings on a balance of probabilities falling squarely within this contours of *Divito, Cotroni* and related jurisprudence of *Kamel FC, Kamel FCA* and *Abdelrazik* as well as out international treaty obligations as explained in these Reasons.

[183] Notably, the Respondent did not provide any justification under section 1 of the *Charter* as to why the Court should refuse any of these three declarations.

(5) Other remedies sought

[184] Given the above, it is not necessary to make determinations relating to the Applicants' claims for relief under section 7, 9, 12 and 15 of the *Charter* or for *habeas corpus*.

[185] As indicated above, at the hearing on December 6, 2023, the Applicants requested relief in respect of which declarations will be granted.

[186] At the same time, the Applicants asked for an order that all decisions regarding the Applicants made by the Respondents between January 2021 and November 2022 pursuant to the *Policy Framework*, be declared null and void. This request is based on the absence of procedural fairness in that the Applicants were not told of the *Policy Framework's* existence and were not given any opportunity for input into their respective assessments under it. To recall, each Applicant was assessed for eligibility, and all but one were rejected. Individual letter decisions were sent to each. With respect, I am not able to grant that relief because judicial review requires a court to review the record. The record is all the material that was before the decision maker resulting in the underlying the decision, not just the decision itself. That is not possible here because the Applicants did not ask for or file the required record for the Court's review.

[187] For the same reason, the lack of the underlying material considered by the executive in promulgating the *Policy Framework*, I am unable to judicially review for unreasonableness the *Policy Framework* itself.

[188] While the Applicants also claim were not involved in the development of the *Policy Framework*, and while third party non-government organizations [NGOs] likewise were not involved in its development, neither had any right to such involvement. There is no merit to any suggestion otherwise. In any event, the Applicants' submission is answered by Justice Kane's decision in *CUPE v. AG Canada et al*., 2018 FC 518 at para 178 where this Court confirms "there is no duty of procedural fairness owed in the exercise of powers of a legislative nature". While it is well-established that Canada has a duty to consult Aboriginal interests regarding matters relating to or derivative from treaty or other recognized rights, even there consultation is not a precondition to the introduction of legislation in Parliament: *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311; appeal dismissed *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765.

[189] That being the case, I find no reviewable error in the development of an administrative policy whether the document is legislative or administrative.

[190] Before leaving the merits of the *Policy Framework*, by way of *obiter dictum* and because judicial review of the *Policy Framework* is not before the Court, I am compelled to observe the three threshold criteria for eligibility to be considered under the *Policy Framework* appear

drafted to exclude the Canadian men imprisoned in AANES' prisons. If that is the case the *Policy Framework* as presently advised could not withstand subsection 6(1) *Charter* scrutiny.

[191] The threshold criteria as previously noted, are:

> 1) The individual is a child who is unaccompanied;
>
> 2) Extraordinary circumstances make it necessary for a child who is accompanied to be separated from their parent(s) leaving the child in a de facto unaccompanied state; and/or
>
> 3) The Government of Canada has received credible information indicating that the individual's situation has significantly changed since the adoption of the Policy Framework.

[192] The first two criteria apply only to Canadian children and their parents, and it appears many if not most of the parents would be women. The third threshold criterion appears to be the only one available to Canadian men held in very dire circumstances in makeshift prisons. These Canadian men may only be considered eligible if they show their condition has "changed significantly". In GAC's view, none of the four male Applicants have met the threshold criteria.

[193] With respect these conclusions are very problematic. I say this because, based on evidence before this Court, the conditions of the Applicant Canadian men are even more dire than those of the women and children who Canada has just agreed to repatriate. Numerous questions arise. Do those incarcerated men, who may be imprisoned with 30 others in cells designed for 6, need to demonstrate they are now with 35 others or more? Do these Canadian prisoners receiving inadequate food and inadequate medical care need to establish their rations have been further reduced or their medical treatment terminated? Do those who allege they have been tortured—as in the case of BOLOH 13—need to establish they have been tortured more

frequently or in even worse ways? And how exactly are *Policy Framework* administrators to determine if conditions in the prisons for men have worsened "significantly" given these men have not been heard of since 2019? This issue was discussed at the hearing where I suggested this aspect of the *Policy Framework* was inacceptable from a *Charter* point of view, a view I am not persuaded to abandon. I add these comments based on the evidence before the Court as of 2019, not knowing their current situation but assuming it is the same or worse, which may not be correct, in the hope the *Policy Framework* will be materially revised, or that the Canadian male prisoners be considered for repatriation as is now the case with the Canadian women and children.

[194] Finally, the Applicants seek an order pursuant to section 24(1) of the *Charter* that the Court retain jurisdiction to hear reports from the Respondents concerning their progress as to compliance with the terms of any order issued by the Court. During oral submissions, Counsel for Applicant BOLOH 13 relied on the Supreme Court of Canada's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*], which affirmed a supervisory order including continuing involvement by the Court to ensure compliance with the *Charter*. In that case, Chief Justice McLachlin stated:

> [56] […] an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. […]
>
> [57] Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court.

[195] The Respondents submit that should this Court find an unjustifiable limitation on the Applicants *Charter* rights, an order requiring Canada to take specific actions is not an

appropriate and just remedy under section 24 of the *Charter* in the circumstances. The Respondents submit that declaratory relief, which the Court is granting, would be the most appropriate, effectively leaving "it to the government to decide how best to respond". They rely on the Supreme Court's decision in *Khadr 2010*, where (as noted earlier) the Supreme Court stated:

> [39] Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the Charter.
>
> [Emphasis added]

[196] I agree, and as noted at the outset, will follow *Khadr 2010*.

[197] With respect, and in addition, I am not satisfied the executive will act in bad faith in response to the Court's declarations. While I remain perplexed as to why the Respondents did not share the *Policy Framework* with the Applicants when they requested relief and were in effect requesting it in February 2021, it is not sufficient to displace the Court's *prima facie* assumption the Respondents will act in good faith, as its counsel represented in Court. Therefore, I reject the request for the sort of supervisory order as made in *Doucet-Boudreau*.

[198] Moreover and in any event, the Court may be able to respond appropriately and in a timely manner in the event interim or other relief is sufficiently established.

(6) Submissions in by the amicus curiae Mr. Gib van Ert in connection with the *in camera ex parte* proceedings

[199] As noted previously, Mr. van Ert was appointed to represent the interests of the Applicants. As such he had access to all material filed in both the public and confidential hearings. He was authorized to and attended throughout the public hearings. He also attended the *in camera ex parte* hearing on January 6, 2023.

[200] The Court appreciates Mr. van Ert's diligence and submissions. His submissions are on record, and need not be repeated.

[201] Given the Court's findings as set out above, it is not necessary to rely on those submissions.

[202] It is likewise not necessary for the Court to deal with the submissions of the Respondents at the *in camera ex parte* hearing.

[203] In the result, the Court relies only on what took place on the public record in this case.

V. Conclusion

[204] The Application is granted in part and the declarations set out in the attached Judgment are issued. The Court wishes to thank all counsel for their thorough written and oral presentations.

VI. Costs

[205] The parties have until Friday, January 27, 2023 to file submissions on costs.

JUDGMENT in T-1483-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. It is hereby declared that the Applicants are entitled as soon as reasonably possible to the Respondents making formal requests to AANES that AANES allow the voluntary repatriation of the Canadian men held in the prisons run by AANES' military wing the SDF.

3. It is hereby declared that the Applicants are entitled to be provided by the Respondents with passports or emergency travel documents as soon as they are required after AANES agrees to allow the Applicants to be repatriated to Canada.

4. It is hereby declared that the Applicants are entitled appointment by the Respondents of a representative(s) or delegate(s) to attend within AANES controlled territory or as otherwise agreed as soon as possible after AANES agrees to hand over the Applicants for their repatriation to Canada.

5. The parties have until Friday, January 27, 2023 to file submissions on costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1483-21
STYLE OF CAUSE:	BOLOH 1(A), BOLOH 2(A) (ADULT MALE ONLY), BOLOH 12, AND BOLOH 13 v HIS MAJESTY THE KING AND THE MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 5-6, 2022 & JANUARY 6, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 20, 2023

APPEARANCES:

Lawrence Greenspon	FOR THE APPLICANTS (BOLOH 1(A), BOLOH 2(A) (ADULT MALE ONLY), AND BOLOH 12)
Barbara Jackman Farah Saleem	FOR THE APPLICANT (BOLOH 13)
Helene Robertson Anne M. Turley Sarah Jiwan	FOR THE RESPONDENTS
Gib van Ert	*Amicus Curiae*

SOLICITORS OF RECORD:

Lawrence Greenspon Greenspon Granger Hill Ottawa, Ontario	FOR THE APPLICANTS (BOLOH 1(A), BOLOH 2(A) (ADULT MALE ONLY), AND BOLOH 12)
Jackman & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT (BOLOH 13)

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Ottawa, Ontario

FOR THE RESPONDENTS