

FEDERAL COURT OF CANADA (TRIAL DIVISION)

Between:

OMAR AHMED KHADR by his Next Friend FATMAH EL-SAMNAH

Plaintiff

-and-

**THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF FOREIGN AFFAIRS**

Defendants

AFFIDAVIT OF MUNEER AHMAD

Dated February 8, 2005

I, Muneer Ahmad, Attorney and Associate Professor of Law, of the City of Washington, District of Columbia, do hereby make oath and say as follows:

1. I am an attorney retained to act for the Plaintiff Omar Ahmed Khadr ("Omar") and as such have personal information of the matters hereinafter deposed to save and except where stated to be based upon information in which case I do verily believe such information to be true.
2. I am a law professor at American University, Washington College of Law, and I have expertise regarding the law and procedure governing the detention of prisoners in Guantánamo Bay, Cuba, including Omar. Attached to this my Affidavit and marked as Exhibit 'A' is a copy of my *curriculum vitae*.
3. I along with Professor Richard Wilson act as Omar's counsel of record in a *habeas corpus* proceeding assigned case number 1:04-CV-01136 currently before the United States District Court, District of Columbia. Attached to this my Affidavit and marked as Exhibit 'B' is a copy of the Petition which initiated this proceeding.

4. As Omar's counsel in the above proceeding, I strenuously object to any future interviews of my client, including any and all interviews conducted by agents or officials of the Canadian government. Omar hereby invokes his rights under the *Canadian Charter of Rights and Freedoms*, the domestic law of the United States, and international law, including his right to remain silent, his right to counsel, and his right to be advised as to the nature of any and all allegations raised against him.
5. Omar is a Canadian citizen. His birthdate is September 19, 1986. He is presently detained as a prisoner in Guantánamo Bay. Attached to this my Affidavit and marked respectively as Exhibits 'C', 'D' and 'E' is a photo of Omar, copies of his Canadian identification, and a copy of correspondence sent by Omar to his family members in Ontario.
6. My ability to advise and communicate with Omar is limited. On November 7 to 10, 2004, Richard Wilson and I were permitted to meet with Omar at Guantánamo Bay for a total of approximately 20 hours. Omar is generally also provided with the letters we send to him, although these letters are subject to review.
7. My communications with Omar are subject to attorney-client privilege and Omar does not waive that privilege.
8. We were permitted to meet with Omar on the condition that all information passing between us and our interview notes are subject to security restrictions. All our interview notes and other materials relating to Omar's case are presently held in a secure facility and may only be reviewed by us at that facility.
9. Due to the conditions of Omar's detention, as well as the restrictions upon our ability to communicate with him, it is not presently possible for Omar to present evidence to this Court or to be cross-examined thereon.

10. Omar is presently 18 years of age. He was first captured when he was 15. While Omar has never been formally charged, the allegations raised against him relate to events said to have been committed when Omar was 15 and younger.
11. On approximately January 28, 2005, certain aspects of our interview notes with Omar were determined unclassified by the U.S. government and are now available for release. As these notes indicate, when I interviewed Omar, he told me that since his capture, agents of the United States government have subjected him to acts of abuse and torture. These acts are detailed in the declassified interview notes attached to this my Affidavit and marked as Exhibit 'F'.
12. Based upon my observation of Omar's demeanour as well as the context in which his statements were provided to me, I do verily believe the acts of abuse and torture perpetrated against Omar by his captors to be true.
13. I notice that the details of Omar's descriptions of the abuse and torture he has suffered are strikingly similar to those disclosed in certain documents obtained pursuant to requests under the *Freedom of Information Act* from the Federal Bureau of Investigation ("FBI") by the American Civil Liberties Union ("ACLU"). These documents contain statements made by employees of the FBI detailing events witnessed at Guantánamo Bay. Neither Professor Wilson nor myself in any way disclosed these independent allegations to Omar before he described the nature of his own treatment. I am therefore of the view that these materials provide independent corroboration of the types of interrogation techniques. Attached to this my Affidavit and marked as Exhibits 'G', 'H', 'I', and 'J' are copies of several of these documents. The entire collection of the documents obtained by the ACLU from the FBI and other agencies of the United States government are available at <http://www.aclu.org/torturefoia/released/>.
14. Omar's description of the interrogation techniques used against him are also consistent with the United States Department of Defense document entitled "GTMO Interrogation Techniques" describing interrogation techniques which have been approved and used on

detainees in Guantánamo Bay. Attached to this my Affidavit and marked as Exhibit 'K' is a copy of this document. The entire collection of documents about interrogation policy released by the United States government on June 22, 2004, can be found at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>.

15. The use of interrogation techniques described by Omar is consistent with the highly restricted interpretation of the legal prohibition against "torture" under 18 U.S.C. §§ 2340-2340A and international law which is contained in the legal Memorandum of Alberto R. Gonzales, Counsel for the President, dated August 1, 2002 and attached to this my Affidavit as Exhibit 'L'. This document reflects the view that the prohibition against "torture" under U.S. law does not apply to "the mere infliction of pain or suffering on another", but rather only applies to prohibit "intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function would result." (see p. 13) The author of this memorandum has now been confirmed as the Attorney General of the United States. Although the memorandum has been superseded by a new one, as of December 30, 2004, it was in effect for the vast majority of time that O.K. has been in U.S. custody.
16. Based upon the existence of these allegations of torture as detailed in the ACLU documents and elsewhere, the United Nations has recently released Press Release HR/4812 which expresses serious concerns regarding the situation in Guantánamo Bay, including "[t]he need to objectively assess the allegations of torture, and other cruel, inhuman or degrading treatment or punishment, particularly in relation to methods of interrogation of detainees, that have been brought to the attention of the Special Rapporteur on torture." Attached to this my Affidavit and marked as Exhibit 'M' is a copy of this United Nations Press Release.
17. Omar generally appears to be in good health. However, he does have serious health problems, including those resulting from injuries sustained when he was captured. These injuries include multiple gunshot wounds, which have resulted in the near-total loss of vision in one eye, and numerous pieces of shrapnel that are still in his body. While at Guantánamo, Omar has been kept in solitary confinement along with the adult detainee population.

18. Due to his age, the conditions of his detention and his physical and mental condition, I am concerned as to Omar's ability to understand questions put to him under interrogation, as well as the seriousness of the potential consequences of his answers to such questions. I am concerned that Omar may be too willing to cooperate with those in authority in order to obtain relief from his current and ongoing detention such that any statements he makes would be unreliable.
19. I have also met with Omar's Canadian relatives. The family generally and Omar in particular are distrustful and apprehensive of Americans. However, they are much less distrustful and apprehensive of Canadians, and tend to be more trustful of the Canadian government than the American government. Consequently, I am concerned that Omar might be particularly susceptible to interrogations by Canadian officials as opposed to his American captors.
20. The allegations against my client are serious. Attached to this my Affidavit and marked as Exhibit 'N' is a copy of the declassified portion of the factual return provided by the United States government setting out the public aspects of the allegations which are presently raised against Omar as the basis for his ongoing detention.
21. I have reviewed a binder of documents provided to me by Omar's counsel in this proceeding. I am advised that these documents reflect redacted summaries of interview notes prepared in relation to the interviews of Omar by Canadian government officials, including those conducted in February and March of 2003 (the "interviews"). I note that most of the information contained in these documents is redacted.
22. Based upon my review of the unredacted portions of these documents, I do verily believe that the interviews related to, among other things, the allegations raised against Omar by the United States as the basis for his ongoing detention, as well as the evidence in the possession of the United States in support of these allegations.

23. The documents include notes relating to questions put to Omar regarding the relationships amongst Omar, his family and certain high ranking members of Al Qaeda including Osama Bin Laden and Ayman al-Zawahiri. This document also indicates that my client spoke with the Canadian interviewers regarding Omar's involvement in a certain "firefight" which involvement constitutes the primary basis for his ongoing detention as well as the likely basis for any future charges. Attached to this my Affidavit and marked as Exhibit 'O' is a copy of one such document which is listed as document 8 in Schedule I of the Affidavit of Robert Young.
24. Another document which is listed as document 38 in Schedule I the Affidavit of Sabine Nölke indicates that in an interview conducted on March 30, 2004, the interviewer from the Criminal Investigation Task Force, Jim Gould, offered Omar certain "treats" like chocolate bars in an effort to encourage him to co-operate in the interview. Attached to this my Affidavit and marked as Exhibit 'P' is a copy of this document.
25. Another document appearing as document 15 of Schedule I of the Affidavit of RCMP Sgt. Rejean Labonte indicates that U.S. authorities were "very eager for Canadian security and law enforcement officials to visit Khadr" since they "would like to share intelligence information with us on these matters". The document also indicates that "[w]e asked [the U.S. officials] how the information gleaned as part of the interview process would be shared." However, the rest of the paragraph on this subject is redacted. Attached to this my Affidavit and marked as Exhibit 'Q' is a copy of this document.
26. Another document which is listed as document 3 in Schedule I of the Affidavit of Sabine Nölke indicates that on August 29, 2002, Canada requested that Omar be permitted by the United States to receive a consular visit from Canadian officials. The document also indicates "we were informally told that it was unlikely to be granted." Attached to this my Affidavit and marked as Exhibit 'R' is a copy of this document.
27. Another document which is listed as document 15 in Schedule I of the Affidavit of Sabine Nölke indicates that in communications leading to one of the interrogations of Omar by

Canadian officials, the “Americans have indicated that Canadian visit can take place on Dec. 8. However, they have objected to inclusion of official from embassy and we are trying to substitute a person from headquarters. This could delay visit beyond Dec 8. CSIS officers have been accepted.” Attached to this my Affidavit and marked as Exhibit ‘S’ is a copy of this document.

28. To my knowledge, Omar has only received visits from intelligence and law enforcement officers for the sole purpose of interrogation, and no visits in the nature of a consular visit.

29. Another document which is listed as document 24 in Schedule I of the Affidavit of Sabine Nölke indicates that Canada has sought assurances from the United States that the death penalty would not be imposed against Omar should he be found guilty of any charges against him. To my knowledge, no such assurances have been provided by the United States in response to this request. Attached to this my Affidavit and marked as Exhibit ‘T’ is a copy of this document.

30. I have further knowledge relating to the interviews, but I am not presently permitted to disclose this information.

31. When I met with him at Guantánamo, Omar told me specifically about the interrogations that Canadian officials conducted of him. The contents of the binder of redacted documents referred to above generally confirm Omar’s description of these interrogations. Omar advised me that when he was first told that these people were Canadians, he thought that someone had finally come to help him. He was therefore very co-operative with these Canadian interrogators at first. He described the individuals who interrogated him, the types of questions that they asked him, and the demeanor of the interrogators. He told me that the Canadian interrogators asked him extensive questions about his family, and showed him photographs of approximately 20 individuals and asked Omar to identify them. The Canadian interrogators never asked Omar how he was feeling or how he was holding up, nor did they ever ask him if he wanted to send a message to his family. The Canadian interrogators never advised Omar of his rights. One of the interrogators produced his Canadian passport for

Omar to see. That interrogator told Omar, "I'm not here to help you. I'm not here to do anything for you. I'm just here to get information."

32. I am gravely concerned about the questioning of my client by Canadian government officials regarding the serious allegations raised against him by the United States government. The product of any such interviews would be prejudicial to his interests in responding to the allegations raised against him.

33. No one may access the facility at Guantánamo Bay without the consent and co-operation of the United States government. We obtained a court ruling in a related case in order to ensure that our conversations with Omar would not be monitored. Based upon these considerations, I believe that any information elicited from Omar at the interviews or any future interviews would be shared with the United States.

34. Based upon my knowledge and expertise regarding the law and procedure governing Omar's detention, it is my opinion that any statements made by Omar may be used against him in the context of military commission hearings which could result in sentences of life imprisonment or death, and/or in the context of administrative review proceedings which could result in Omar's life imprisonment.

35. On November 13, 2001, the President of the United States issued a Military Order authorizing the Secretary of Defense to detain certain non-citizens "at an appropriate location... outside or within the United States" and directing that such persons "when tried, be tried by a military commission... and may be punished in accordance with penalties provided under applicable law, including life imprisonment or death." Attached to this my Affidavit and marked as Exhibit 'U' is a copy of the Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001), see s. 4(a).

36. In approximately the summer of 2002, Omar was arrested pursuant to the President's Military Order, and some months later was transported to Guantánamo Bay, Cuba. He has been held under the authority of the President's Military Order since that time.
37. On March 21, 2002 the Secretary of Defense issued an Order establishing procedures for the conduct of military commissions to be held in respect to prisoners detained under the President's Military Order and directing such commissions to "impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term." Attached to this my Affidavit and marked as Exhibit 'V' is a copy of the Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" (Mar. 21, 2002), see s. G.
38. From the date of Omar's initial arrest until at least June 28, 2004, the government of the United States took the position that Article II of the Constitution of the United States conferred an unfettered discretion upon the Executive to detain Omar for the duration of the "war on terror" without trial, and without any right of access to counsel. Further, the government of the United States took the position that Omar had no right to seek *habeas corpus* in the domestic courts of the United States.
39. On June 28, 2004, the Supreme Court of the United States issues landmark decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld* in which it was confirmed that Omar does in fact have a right to bring an application for *habeas corpus* in the U.S. federal courts (*Rasul*), and a concomitant right to counsel (*Hamdi*). Omar through his Next Friend had been granted standing as an *amicus curiae* in the former case.
40. Upon the release of *Rasul*, Professor Eric Freedman of Hofstra Law School in association with the Center for Constitutional Rights in New York commenced *habeas corpus* proceedings on behalf of Omar in the United States District Court, District of Columbia. Those proceedings were launched on July 2, 2004. Professor Wilson and I subsequently took over from Professor Freedman as counsel of record in these proceedings.

41. In response to the developments in *Rasul* and *Hamdi*, on July 7, 2004 the Deputy Secretary of Defense issued an "Order Establishing Combatant Status Review Tribunal". This Tribunal is distinct from the military commissions. It has been established for the purpose of reviewing the previous determination by the Defense Department that the prisoners in Guantánamo Bay are "enemy combatants". If the Tribunal determines that a detainee shall no longer be classified as an enemy combatant, that detainee may be released to the detainee's country of citizenship "or other disposition consistent with domestic and international obligations and the foreign policy of the United States." Attached to this my Affidavit and marked as Exhibit 'W' is a copy of the Order Establishing Combatant Status Review Tribunal (July 7, 2004), see p. 3-4, para. 1.
42. The detainees in Guantánamo Bay were provided on approximately July 8, 2004 with a document entitled "Combatant Status Review Tribunal Notice to Detainees". This document advises the prisoner of the upcoming Tribunal hearings and of the prisoner's right to challenge the legality of their detention in U.S. courts as established in *Rasul*. The document also states that prior to the hearing the prisoner "will be given a written statement of the unclassified factual basis for your classification as an enemy combatant." Attached to this my Affidavit and marked as Exhibit 'X' is a copy of the "Combatant Status Review Tribunal Notice to Detainees" (Jul 12, 2004).
43. Omar's case has was brought before a Combatant Status Review Tribunal on or about September 7, 2004. Prior to this hearing, Omar had not been accorded any hearing or legal process of any kind. This tribunal concluded that Omar was an "enemy combatant" such that his detention in Guantánamo Bay will continue. Omar elected not to participate in this proceeding. His case is now subject to an annual review by an "Administrative Review Board."
44. The procedures governing both the Military Commission hearings and the Administrative Review Board allow for the admission of hearsay evidence. Further, and in any event, the law of evidence in the United States recognizes admissions and confessions as an exception

to the hearsay rule. Consequently, any statements made by Omar in answer to interview questions could be taken down as evidence and used against him in these proceedings.

45. On January 31, 2005, United States District Judge Joyce Hens Green, sitting in respect of eleven *habeas corpus* proceedings, including Omar's, held that the CSRT proceedings which have been put forward as the legal basis for Omar's ongoing detention are constitutionally deficient on various grounds such that his ongoing detention is unlawful. This decision has been appealed. In my opinion, the aspects of this decision which hold that Omar's ongoing detention is unlawful are correct, and will be upheld on appellate review.
46. Omar is now subject to annual administrative reviews regarding the determination of his status as an enemy combatant. These reviews and the resulting detention may continue for the rest of Omar's life, or the duration of the war on terror.
47. Although Omar has not at this time been designated for Military Commission hearings, it is very possible that this will occur at some point in the future. It is also possible that life imprisonment or the death penalty could be sought against Omar at such a proceeding.
48. I am gravely concerned that any statements elicited from Omar at any future interrogations by Canadian government officials or agents would be raised against him, thereby prejudicing to his ability to defend himself at future proceedings which could result in his indefinite detention or death.
49. I make this Affidavit in support of a motion for an Order in the nature of an interim injunction prohibiting the Defendant and its agents from conducting any further interviews or interrogations of Omar pending the trial of this action, nothing in the nature of such Order to prevent the provision of consular services or humanitarian assistance.

SWORN BEFORE ME at the
City of Toronto, in the Province
of Ontario, this 8th day of
February, 2005



Matthew I. Milne-Smith
Barrister & Solicitor

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MUNEER AHMAD