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## Written Representations of the Applicant (moving party)

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**FEDERAL COURT**

BETWEEN:

**ABOUSFIAN ABDELRAZIK**

Applicant  
(Moving Party)

-and-

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

Respondents  
(Responding Parties)

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**WRITTEN REPRESENTATIONS OF THE APPLICANT  
(For motion to seek leave to file additional affidavit evidence)**

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**PART I - FACTS**

**A - Overview and Nature of the Motion**

1. The Applicant makes the instant motion pursuant to Rule 312 of the *Federal Court Rules* for leave to file a supplementary affidavit in order to introduce new evidence relevant to the proceeding, which arose after the filing of the Applicant's Record on March 10, 2009. The evidence which the Applicant seeks to introduce is directly relevant to the relief being sought, properly informs and adds to the existing factual record and would be in the interests of justice for the Court to consider.

**B - Statement of Facts**

2. The Applicant initiated the underlying application in this matter on May 7, 2008 pursuant to sections 18 and 18.1 of the *Federal Courts Act* seeking a

mandatory order that the Respondents provide his safe passage back to Canada from Sudan.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 4.***

3. The proceeding was placed into Case Management in July 2008 and a timetable was set out for the filing of affidavits for the Applicant and Respondent. An order for the filing of affidavits by the Applicant and Respondents was made by the Chief Justice dated July 28, 2008.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, paras. 5-6.***

4. The Applicant and Jo Wood filed initial affidavits in support of the application on July 29, 2008.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 7.***

5. On September 12, 2008, the Respondent filed four affidavits in response to the underlying application. The Respondents tendered the manager of consular affairs at the Canadian Embassy in Sudan, Eric O'Connor, the Ottawa-based director of consular affairs management representative from Department of Foreign Affairs (hereinafter "DFA"), Sean Robertson and two military personnel, Michel Latouche and Geoffrey Everts as affiants.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 8.***

6. On October 6, 2008, the Applicant amended the style of cause in the application to include the Attorney General of Canada.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 9.***

7. On November 26, 2008, a motion was heard before this honourable court in respect of the filing of supplementary affidavits further to which two orders were issued by Prothonotary Tabib. Pursuant to the order, the Applicant's travel

itinerary for his flight from Khartoum to Toronto aboard Etihad Airlines on September 15, 2008 was accepted as relevant to this Application. The Respondents were also permitted to file three affidavits relating to allegations that the Applicant had been tortured while in the custody of Sudanese officials.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 10.***

8. Pursuant to the above-mentioned orders, on December 1, 2008, the Respondents filed three additional affidavits from DFA officials, David Hutchings, Alan Bones and Michael Pawsey. On January 6, 2009, the Applicant and Jo Wood filed further affidavits in support of the instant application. The Applicant's new affidavit introduced the September 15, 2008 Etihad itinerary. Ms. Wood's new affidavit filed with consent of the Respondents attached additional information obtained thereafter from *Privacy Act* requests made to the DFA and Transport Canada.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, paras. 11-12.***

9. On December 23, 2008, the Applicant was informed by the Respondents that upon provision of a paid and confirmed itinerary to the Canadian Embassy in Sudan he would be issued an emergency passport.

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, para. 2.***

10. Further to the completion of cross-examinations and written interrogatories in respect of all filed affidavits, the Applicant approached the Court to schedule an early hearing date. By way of Order dated March 9, 2009, the Applicant was directed to file his record by March 10, 2009 and the Respondents' factum was to be filed on April 9, 2009. Subsequently the Court ordered, on March 16, that the hearing of the Application would proceed on May 7, 2009.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 13.***

11. On March 10, 2009, the Applicant filed his record.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 14.***

12. On March 12, 2009, 115 Canadian supporters of the Applicant announced that they had purchased a ticket for his return back to Canada. The confirmed itinerary was aboard Etihad Airlines from Khartoum to Toronto departing Khartoum on April 3, 2009 at 15:45 local time.

***Affidavit of Shannon Lee Mannion, Applicant's Motion Record, Tab 3, para. 15.***

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, para. 4.***

13. The Applicant presented the paid and confirmed itinerary to the Manager of Consular Affairs in the Canadian Embassy in Sudan on March 15, 2009. He requested to be issued a travel document for his flight scheduled April 3, 2009

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, paras. 4-5.***

14. On March 16, 2009, the Applicant's counsel also provided a copy of the itinerary to the Respondents' counsel seeking that they take "all necessary steps" including issuance of necessary travel documents to ensure Mr. Abdelrazik's confirmation aboard the April 3<sup>rd</sup> confirmed flight.

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, para. 6.***

15. On April 3, 2009, without any prior notice, counsel for DFA provided a letter to the Applicant's counsel approximately two hours before the scheduled departure of Mr. Abdelrazik's flight. The letter was a refusal by the Foreign Affairs Minister of the Applicant's emergency passport on the basis of section 10.1 of the *Canadian Passport Order*. By virtue of this decision, the Applicant was not provided an emergency passport and was not able to board his flight.

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, para. 4 and Exhibit E.***

16. On April 2, 2009, Maxamed Cabdullaah, an individual listed on the UN 1267 List travelled from London to Mogadishu, Somalia. This flight was approved by the UN 1267 Committee.

***Affidavit of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, para. 9 and Exhibit F.***

## **PART II - ISSUES**

17. The issue in this motion is the following:

- a) Whether the Court should grant the Applicant leave to file additional affidavit evidence pursuant to Rule 312?

## **PART III – ARGUMENTS**

18. Rule 312 of the *Federal Court Rules* provides that a party may, with leave of the Court, file additional affidavits to those identified by Rules 306 and 307 and conduct cross examinations and file a supplementary record in respect of same.

***Federal Court Rules, (SOR/98-106), rule 312.***

19. The general test applicable to the filing of supplementary material is as follows:

- a) That the material will serve the interests of justice;
- b) That the material will assist the Court;
- c) That there material will not cause serious prejudice to the other side;
- d) Whether the material will unduly delay the proceedings; and
- e) If the material is a supplementary affidavit, it cannot deal with material that could have been available at an earlier date.

***Mazhero v. Canada Industrial Relations Board, [2002] F.C.J. No. 1112.***

20. As a general matter, a moving party is not permitted to file an additional affidavit where the information sought to be adduced into evidence could have been included as part of the party's original evidence – the evidence must be

“new”. The Court does not permit a party to better the evidence that it received by way of cross examination through the introduction of new information.

***Mazhero, supra, at para. 5.***

21. In the case at bar, however, the supplementary affidavit seeks to introduce truly fresh evidence that occurred after the date that the Applicant's Record was filed. It is not an attempt to correct previous answers or evidence obtained through cross-examination as the relevant facts sought to be adduced had not arisen at the time when the Applicant closed his factual record. The new evidence sought to be introduced will assist the Court because it shows that the Respondents have reneged on promises made to the Applicant to issue a passport for homeward travel. The Respondents' promises are already in the record, and therefore, the fresh evidence is probative of whether the promises were upheld. In touching on the ability of the Applicant to return to Canada, the new evidence directly relates to the merits of the application and it is in the interests of justice to admit it.

22. In essence, the supplementary affidavit of the Applicant seeks to introduce three new documents: a) the confirmed and paid itinerary of the Applicant on Etihad Airlines departing Khartoum on April 3, 2009 (“Etihad Itinerary”) and purchased on March 12, 2009; b) the decision to refuse the Applicant an emergency passport on April 3, 2009; and c) the April 1-2, 2009 travel of a person listed under the UN1267 List from London to Mogadishu. The events relating to the proposed documents all post date the filing of the Applicant's Record on March 10, 2009, but more importantly, they significantly post date the closing of the Applicant's factual record which occurred on January 6, 2009 with the filing of supplementary affidavits by Jo Wood and the Applicant himself.

23. The additional attachments to the supplementary affidavit of Abousfian Abdelrazik provide necessary factual context to documents already in the record or to those that are being sought to be introduced into the record.

24. The Applicant further submits that his application for judicial review is not in relation to any single decision. Rather, he is challenging an ongoing course of conduct to unlawfully frustrate or block his efforts to return to Canada. The application therefore relates to an ongoing “matter” under subsection 18.1(1) of the *Federal Courts Act*. Indeed, the Respondents could potentially effect the Applicant’s repatriation by means that would not require a travel document – such as a Canadian Forces flight. Nevertheless, evidence of the refusal to issue an emergency travel document despite the promise to do so is highly relevant to the within application for judicial review.

***Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (C.A.) at paras. 15-16; *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.) at paras. 23-24.**

#### **A - Etihad Itinerary (Exhibit “C” to the Abdelrazik Affidavit)**

25. On December 23, 2008, the Respondents promised to issue the Applicant an emergency passport if he would present to the Canadian Embassy in Sudan a paid and confirmed travel itinerary, notwithstanding an ongoing security investigation relating to his request for a full passport. Despite the foregoing, when the Applicant presented the Manager of Consular Affairs a paid and confirmed travel itinerary, he was denied an emergency passport by the Minister himself on the day his flight was to depart.

***Affidavit of Abousfian Abdelrazik, Applicant’s Motion Record, Tab 2, para. 2 and Exhibit A.***

26. It is important for the Court to be aware that a commercial airline not only agreed to reserve a ticket in Mr. Abdelrazik’s name (as is evident from the September 15, 2008 Etihad itinerary contained in the record), but rather, that the



same airline accepted payment and issued an actual paid and confirmed itinerary for a scheduled return flight from Khartoum to Toronto on April 3, 2009. The latter fact cannot be proved except by admitting the supplementary affidavit.

27. The supplementary affidavit is clearly relevant to the issue of the Applicant's repatriation to Canada and the remedy sought in this Application. Indeed, had the Applicant been able to travel back to Canada via the April 3<sup>rd</sup> flight, the order for repatriation would have become moot.

28. It is the interests of justice that the Court consider such information when both assessing the asserted violation of the Applicant's section 6 right to enter Canada and in terms of fashioning an appropriate remedy. Viewed another way, to prevent the introduction of this evidence in light of the nature of the underlying application which seeks to bring the Applicant back to Canada and in so doing to evaluate the measures taken by the Respondents to facilitate his return, would be to prevent the Court from exploring the relevant factual matrix of the issues under litigation. Justice requires that the record be revealed insofar as it will directly impact upon the relevant deliberations of the Court regarding repatriation of the Applicant and assessment of the Respondents' motives in dealing with the Applicant.

**B - Decision to Refuse Emergency Passport (Exhibit "E" to the Abdelrazik Affidavit)**

29. The April 3, 2009 decision to refuse Mr. Abdelrazik an emergency passport is part of the same chain of events relating to his scheduled April 3<sup>rd</sup> flight. To simply introduce the paid itinerary in the absence of the April 3<sup>rd</sup> decision would be to show a truly incomplete picture of events. It behooves the Court to know not only that a ticket was purchased but to understand what became of the Applicant's attempt to seek the necessary travel document to board his flight. It also is necessary to show that the Applicant remains in the Canadian Embassy in Khartoum and that therefore, the Application is not moot.

30. It is impossible for the Applicant to board any commercial flight without a travel document. Both from the perspective of evaluating available routes of repatriation as well as in terms of assessing the Respondents' efforts to assist with repatriation should the Court be made aware of the decision to refuse the Applicant an emergency passport.

31. Indeed, the Court does not sit in judicial review of the decision to deny Mr. Abdelrazik an emergency passport, but it is relevant for the Court to consider the fact that the only document by which he may be permitted to board an international flight has been refused by the Canadian government.

32. It can hardly be said to be in the interests of justice to suppress the fact that the Respondents have categorically denied Mr. Abdelrazik an emergency passport, particularly where there is already in the record an explicit promise to grant him an emergency passport under specific conditions. Moreover, the fact that such a travel document has been denied may affect the available means by which the Respondents may choose to repatriate the Applicant.

33. Additionally, the policy context within which the Applicant was refused an emergency passport relates to the motives of the Respondents in reversing their earlier decision, which allowed for the issuance of an emergency passport under specific conditions. An old version of the Policy Backgrounder on "Refusal or revocation of passports on national security grounds" has already been introduced in the record as appended to the December 23, 2008 letter from Passport Canada.

***Affidavit of Abousfian Abdelrazik sworn on January 14, 2009 in response to Written Examination, Application Record, Volume 2, Tab 26.***

34. This version has since been replaced by Passport Canada with a new version of the Policy Backgrounder found on its website. It is the new version that was in force on the date (April 3, 2009) that the Applicant was denied a passport

under section 10.1 of the *Canadian Passport Order*. It is in the interests of justice that the Applications judge possess the correct, current version of the policy backgrounder, and not the old version which is now obsolete. The main difference between the old and new versions is that the new version mentions certain obligations that Passport Canada says are “specifically designed to ensure procedural fairness and compliance with the rules of natural justice”. As procedural fairness is an obviously relevant judicial consideration, it is in the interests of justice that the Court should be made aware of the current policy of Passport Canada.

***Affidavit of Abousfian Abdelrazik, Applicant’s Motion Record, Tab 2, Exhibit B.***

**C - Current 1267 Exemptions from Travel Ban (Exhibit “F” to the Abdelrazik Affidavit)**

35. It is important for the Court to be cognizant of the fact that travel of individuals listed by the UN 1267 Committee has recently taken place between non-contiguous states further to being granted an exemption to travel internationally through various countries’ land and airspace.

36. The listing of exemptions under the 1267 List is publicly accessible information, which is owned by neither the Respondents nor the Applicants, but is available to both as well as to the Court. There is no prejudice in it being part of the record, and on the contrary, it would be remiss of the parties not to bring to the attention of the Court the manner in which travel has been effected for listed individuals. It is clearly germane to the instant application in view of the Respondents’ reasoning.

37. Given the Respondents’ change of position on April 3 2009, to suppress information of recent travel of listed persons would be to force the Court to a speculative view of the functioning of the 1267 sanctions regime. Giving the Court a current precedent on how the 1267 Committee sanctions regime has

actually been applied in the case of a listed person traveling is clearly in the interests of justice because that means the Court can draw on fact rather than speculation. How other listed persons traveled with the 1267 Committee's agreement is clearly of probative value to this Application.

#### **E. No Prejudice to the Respondents**

38. The introduction of the new evidence sought to be entered by the Applicant does not prejudice the Respondents. Given that at the core of their submission, the Respondents contend that they have acted in good faith, the most recent events including the new ticket purchased by 115 Canadians, the refusal of Mr. Abdelrazik's emergency passport and the travel of a 1267 "listed person" should be consistent with what the Respondents have argued both legally and factually. The Respondents would not be precluded from referring to other jurisprudence to substantiate their position, but with the addition of these documents there is nothing further to add to the factual record.

39. Furthermore, the new evidence relates primarily to the Respondents' own conduct. The Respondents are free to raise any legal arguments they feel are appropriate to justify their conduct, but they cannot suppress information that is directly related to the Applicant's attempts at returning to Canada and their reaction to same.

40. Any concern that the Respondents may have regarding the new information may be addressed by way of cross-examination that is limited to the new facts raised. Such cross examination, however, should be scheduled without delay in order to preserve the May 7<sup>th</sup> hearing date of the Application on its merits.

**PART IV - ORDER REQUESTED**

41. The Applicant requests the following relief:

- (a) That leave be granted for the filing of a supplementary affidavit of Abousfian Abdelrazik as attached; or, in a form as directed by this Honourable Court;
  
- (b) That the Court schedule any required cross examinations of the supplementary affidavit in a manner so as to preserve the scheduled May 7, 2009 hearing date;
  
- (c) If opposed, costs payable forthwith on a substantial indemnity scale.

All of which is respectfully submitted,  
Ottawa, Ontario, this 14<sup>th</sup> day of April 2009.



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## **PART V – AUTHORITIES**

1. *Mazhero v. Canada Industrial Relations Board*, [2002] F.C.J. No. 1112.
2. *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (C.A.)