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April 2009

Abdelrazik v Minister of Foreign Affairs et al

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Written Representations of the Applicant

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FEDERAL COURT

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant
(Responding Party)

-and-

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

Respondents
(Moving Parties)

**APPLICANT'S WRITTEN REPRESENTATIONS
(Respondents' Motion for Leave to File New Evidence)**

PART I - FACTS

Overview

1. More than three weeks after the Applicant filed his Application Record, and less than one week before the Respondents' Record was due, the Respondents brought the within motion for leave to file additional affidavit evidence. The affidavit does not raise "new facts" and the information was in the possession of the Respondents long before the application was even commenced. More seriously, the affidavit is deficient as it improperly and unfairly adduces hearsay evidence in a transparent attempt to bolster weaknesses in the Respondents' Record while shielding those with direct evidence from cross examination. The Applicant submits that the motion ought to be dismissed.

2. The Applicant also requests pursuant to Rule 369(2) of the *Federal Courts Rules* that the present motion be heard orally. The Applicant is in a precarious situation, living in the safe haven of the Canadian Embassy in Khartoum. Given that the application seeks a remedy that would save the Applicant from this dire situation, the Court has granted him an expedited hearing of the within application for judicial review on May 7, 2009. If this motion is not resolved in a summary manner by way of an oral hearing, the application hearing date may be placed in jeopardy.

Background

3. The Applicant commenced the within application for judicial review on May 7, 2008. The Applicant claims that the Respondents have acted in bad faith to block his return to Canada and leave him stranded in *de facto* exile in Sudan, in violation of his right to enter Canada under section 6 of the *Canadian Charter of Rights and Freedoms*.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 2.

4. The Applicant brought a motion early in the application for an order for advance costs. While the motion was dismissed, the Applicant relied upon a document produced under the *Privacy Act* to argue that the Respondents were responsible for his detention in Sudan. The internal government document, entitled "Consular Case relating to Abousfian Abdelrazik", was produced by the Department of Foreign Affairs and contained the following statement: "Sudanese authorities readily admit that they have no charges pending against him but are holding him at our request."

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at paras. 3-4.

5. The Applicant's written representations dated June 19, 2008 relied on the above "Consular Case" document and made the following argument:

Canadian government documents disclosed under the *Privacy Act* suggest that the Applicant's detention – or at least the length of detention – was at the request of Canada.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, Exhibit A.

6. The Respondents had the Consular Case document drawn to their attention in an earlier argument before this Court, and they were definitely made aware of its significance before filing their evidence on the merits, since the Consular Case document was cited by a judge of this Court in her reasons for order. Justice Mactavish wrote:

“A Canadian government memo obtained by Mr. Abdelrazik's counsel under the provisions of the *Privacy Act* states that the Sudanese authorities were holding Mr. Abdelrazik at the request of the Canadian government.”

Abdelrazik v. Canada (Minister of Foreign Affairs and International Trade), [2008] F.C.J. No. 1046, at para 14.

7. On July 29, 2008, the Applicant filed affidavits in support of his application. One of the affiants, Jo Wood, attached as exhibits documents that were obtained by the Applicant from the Department of Foreign Affairs under the *Privacy Act*, including the above mentioned “Consular Case” document.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 4.

8. The Respondent Minister of Foreign Affairs filed supporting affidavits on September 12, 2008. One of the affiants was Sean Robertson, a Director of Consular Case Management employed by the Department of Foreign Affairs. In responding to the application, the Respondents viewed it as important to have Mr. Robertson attest to the following at paragraph 22 of his affidavit:

The respondent did not request that the applicant be detained by Sudanese authorities and at no time did the respondent request his continued or further detention.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 6.

9. On September 29, 2008, Chief Justice Lutfy issued an order amending the application to include the Attorney General of Canada. The Respondents consented to the amendment without terms.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 7.

10. Mr. Robertson was cross-examined on his affidavit on October 7, 2008. The following line of questioning ensued between Mr. Robertson and counsel for the Applicant:

Question 272: Paragraph 22 you mention that, "The respondent did not request that the applicant be detained by Sudanese authorities and at no time did the respondent request his continued or further detention". Correct?

A. That's correct.

Question 273: At the time you swore this Affidavit the only Respondent was the Minister of Foreign Affairs and International Trade; correct?

A. I believe so, yes.

Question 274: So your reference to the Respondent there is solely reference to the Minister of Foreign Affairs and International Trade; correct?

A. Correct.

Question 275: Are you aware if other departments of the Government of Canada have at any time -- do you have full information to categorically say that other government departments of the Government of Canada did not at some time request his arrest or detention?

A. No.

Question 276: Do you know if other government departments did request his arrest or detention?

A. No, I do not.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 8.

11. Pursuant to Rule 91 of the *Federal Courts Rules*, Mr. Robertson was also directed to produce documents within his possession, power or control. However, he did not bring the documents to the cross examination on October 7, 2008, as the Attorney General invoked section 38 of the *Canada Evidence Act*.

The Attorney General claimed that disclosure of the documents could cause injury to Canada and subsequently commenced a review of the documents to determine whether they could be produced in whole or in part under the *Act*.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 9.

12. For different reasons, the parties were allowed to file additional affidavit evidence. The Respondents filed three new affidavits on December 1, 2008. The Applicant filed two supplementary affidavits on January 6, 2009.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 10.

13. On February 26, 2009, the Respondents finally delivered documents to the Applicant which had been requested pursuant to directions to attend served upon the Respondents' affiants. Delivery of the documents had been delayed by the Attorney General's internal review process under section 38 of the *Canada Evidence Act*. All of the documents had passages that were redacted pursuant to that Act.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 11.

14. One of the documents produced by the Respondents on February 26, 2009, was an internal government email dated December 22, 2005, forwarding an earlier email dated December 16, 2005 (together referred to hereinafter as the "NSI document"). The later email was stamped "SECRET – CANADIAN EYES ONLY" and the name of the recipient was blacked out and kept secret by the Attorney General pursuant to the *Canada Evidence Act*. The earlier email described a meeting between Canadian Embassy officials in Khartoum with the Sudanese National Security & Intelligence Agency (NS). The December 16, 2005 email contains the following two statements:

Abusofian [sic] Abdelrazik was arrested on September 10, 2003 [*****] and recommendation by CSIS, for suspected involvement with terrorist elements.

[...]

NSI maintains that all recent interactions have resulted in repeated statements to them by Canadian security officials in the field reiterating that Mr. Abdelrazik's case "is a consular case," despite the fact that initial recommendations for his detention emerged from CSIS [KRTM notes that if this is indeed the case, we had not been told of these communications].

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 12.

15. Other large portions of the NSI document were blacked out and kept secret by the Attorney General.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 13.

16. On March 10, 2009, the Applicant filed his Application Record. Both the "Consular Case" document and the NSI document are included in the record and relied upon for the assertion that CSIS recommended to Sudanese authorities that he should be detained in 2003.

Affidavit of Paul Champ, Applicant's Motion Record, Tab 1, at para. 14.

Respondents' Motion

17. The Respondents' Record and Memorandum of Fact and Law was due April 9, 2009. On April 3, 2009, the Respondents' brought the within motion to place a new affidavit before the Applications Judge in a supplementary record.

18. The affidavit in question is sworn by Kathleen Mongeon, who identifies herself as the legal assistant to Anne Turley, counsel for the Respondents. Ms. Mongeon's affidavit does nothing more than attach a document from the CSIS website. Ms. Mongeon attests that the document is a letter from Jim Judd, Director of CSIS, to Gary Filmon, Chairman of the Security Intelligence Review Committee. In the letter, Mr. Judd writes that CSIS "does not, and has not, arranged for the arrest of Canadians citizens overseas".

19. In the Respondents' Written Representations, it is submitted that the "new evidence" was not available prior to the cross-examination of the applicant and

the Respondents seek to introduce the evidence as it “reinforces the respondents’ argument that the application’s allegations are unfounded”.¹

20. On the same day that Ms. Mongeon swore her affidavit, Mr. Judd was in Ottawa appearing before a Parliamentary Standing Committee on Parliament Hill.

Affidavit of Paul Champ, Applicant’s Motion Record, Tab 1, at para. 15.

PART II - ISSUES

21. The issue raised by the motion is the following:

- (a) Whether the Respondents have met the test for filing supplementary material under Rule 312 of the *Federal Courts Rules*.

PART III - ARGUMENT

22. While the Court may grant leave under Rule 312(a) of the *Federal Courts Rules* to introduce additional material or information after a supporting affidavit has been filed, the law is clear that this discretionary power must only be exercised in exceptional circumstances. In *Mazhero*, the Federal Court of Appeal set out the following general test:

- (a) will the additional material serve the interests of justice;
- (b) will the material assist the Court;
- (c) will it seriously prejudice the other side;
- (d) will the material 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, nor unduly delay the proceedings.

***Mazhero v. Canada (Industrial Relations Board)*, [2002] F.C.J. No. 1112 (C.A.), at para 5.**

¹ Respondents’ Written Representations dated April 3, 2009, para. 3 [RMR, p. 57]

23. The Applicant submits that the Respondent cannot meet any of the factors in the above test. The affidavit is also improper and cannot be relied upon in an application as it constitutes hearsay evidence. Moreover, the direct evidence of Jim Judd from CSIS is available to the Respondents, but the Respondents elected not to lead evidence from him.

Interests of Justice

24. Introduction of the proposed evidence would not serve the interests of justice. The Respondents were aware the Applicant's allegation as early as June 2008. While he did not name CSIS at that time, this was because he was unaware that it was the responsible department or agency. The only evidence he had at the stage – the "Consular Case" document – states that the Sudanese authorities "are holding him at our request".

25. It would not be fair or just to allow the Respondents to bolster their record at this late stage. The motion comes months after the last cross examinations, weeks after the Applicant's Application Record has been filed, and mere days before the Respondent's own record became due. The Court should not countenance this transparent attempt to "reinforce" a weak point in the Respondents' case.

Serious Prejudice

26. The evidence is clearly prejudicial to the Applicant. Aside from arriving at such a late stage, and placing an expedited hearing date in jeopardy, the proposed affidavit cannot be cross-examined. Ms. Mongeon is not the author of the exhibit, nor does she work for CSIS. She cannot speak to Mr. Judd's assertions, nor can she produce documents from CSIS that could shed light on Mr. Judd's claims.²

² *Federal Courts Rules*, Rule 91(2)(c)

27. Moreover, the Applicant's record is already completed and filed. The cost of any further efforts or delays to respond to the materials would be a burden given the fact that he is impecunious and cannot pay for his legal costs.

28. The Respondents' motion cannot succeed because they did not act with due diligence to introduce the evidence at an earlier stage in the proceeding. While Mr. Judd's letter may be new, the assertions it contains are not. The Applicant was detained in 2003, and documents suggesting Canadian involvement date from 2005. The Applicant advanced the claim in June 2008 that Canadian officials had requested that he be detained by Sudanese authorities.

29. Notwithstanding all the above, the Respondents chose to introduce only the affidavit of Sean Robertson to rebut this claim. As Mr. Robertson conceded in his cross-examination, he had no knowledge if other Canadian government departments or agencies requested the Applicant's detention. Most significantly, it was the Respondents who produced the NSI document which contains the allegation that CSIS recommended the Applicant's detention. The Respondents were aware that evidence of such a serious allegation existed, yet chose not to put forward affiants who could directly contradict the claim.

30. Evidently, the Respondents made the strategic choice not to put forward an affiant who could be compelled to produce documents from CSIS. While the Respondents may be having second thoughts about this approach, having made this election they are bound to take the record as it stands.

Hearsay is Impermissible

31. Rule 81 of the *Federal Courts Rules* does not permit a party to rely on hearsay evidence in an application, particularly when a person with direct

evidence is available to the party. The Rule states:

81(1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefore, may be included.

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of the facts.

32. While the jurisprudence allows the normal common law exceptions to the hearsay rule, none would apply in the present circumstances. Mr. Judd was available to provide his own direct evidence, but the Respondents did not make him available. The motion ought to be dismissed for this reason alone.

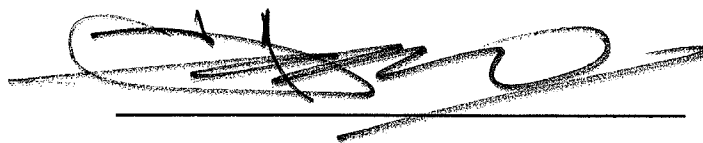
PART IV - ORDER

33. For all the foregoing reasons, the Applicants requests the following orders:

- (a) The motion be dismissed, with costs payable forthwith at Column IV of the Tariff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 14, 2009



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PART V - AUTHORITIES

1. *Abdelrazik v. Canada (Minister of Foreign Affairs and International Trade)*, [2008] F.C.J. No. 1046.
2. *Mazhero v. Canada (Industrial Relations Board)*, [2002] F.C.J. No. 1112 (C.A.), at para 5.