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Abdelrazik v Minister of Foreign Affairs et al

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Affidavit of Yavar Hameed

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FEDERAL COURT

B E T W E E N:

ABOUSFIAN ABDELRAZIK

Applicant

-and-

MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

AFFIDAVIT OF YAVAR HAMEED

(Sworn June 17, 2008)

I, Yavar Hameed, of the City of Ottawa in the Province of Ontario SOLEMNLY AFFIRM:

1. I am the Applicant's solicitor in the underlying application and as such I have knowledge of the matters to which I hereinafter depose. Where my knowledge is based on information or belief, I have stated the source of same.
2. I make this affidavit in support of the Applicant's Motion for Advance Costs and for no other purpose.
3. I am an associate at the law firm Hameed Farrokhzad St-Pierre, located in Ottawa. Hameed Farrokhzad St-Pierre is a small size firm formed by the association of three lawyers who work as independent sole practitioners. I have one junior associate to assist me in my practise.
4. In August 2007, I was retained by the Applicant, Mr. Abdelrazik, to secure his safe

return to Canada. Mr. Abdelrazik is a Canadian citizen who, because of the Respondent's nonfeasance and malfeasance, has been *de facto* exiled in Sudan since 2003.

BRIEF CHRONOLOGY

5. Mr. Abdelrazik traveled from Canada to Sudan under a valid Canadian passport in March 2003. I am informed by Mr. Abdelrazik that he traveled to visit his ailing mother, and to escape harassment by officers of the Canadian Security Intelligence Service (CSIS), who placed him and his family in Montreal under intense scrutiny.
6. In August 2003, Mr. Abdelrazik was arrested and detained by the Sudanese authorities. I am informed by Mr. Abdelrazik that at no time was he given formal reasons for his detention.
7. I am informed by Mr. Abdelrazik that while he was in Sudanese custody, he was interviewed by persons who identified themselves as being from Canadian security services. A Canadian government memo written following that interview and released by the Department of Foreign Affairs and International Trade under the *Privacy Act* mentions that Mr. Abdelrazik was held in Sudanese custody "at our request" (i.e. at Canadian request). A copy of that memo is attached as **Exhibit "A"** to my affidavit.
8. In July 2004, in anticipation of releasing Mr. Abdelrazik from prison, efforts were made by the Respondent's officials to repatriate Mr. Abdelrazik to Canada. An airline ticket from Khartoum to Montreal was purchased, and Canadian government officials were assigned as escorts for the flight and en route. However, only days before travel it was discovered that Mr. Abdelrazik was on the "no-fly" list of various commercial airlines. Numerous routings via different airlines and connections were

further attempted by Mr. Abdelrazik's family and Canadian or Sudanese officials, to no avail. Attempts by Mr. Abdelrazik's family to arrange sea travel were also fruitless.

9. Following the failed attempt to repatriate Mr. Abdelrazik by commercial airlines, in August 2004, the Government of Sudan downgraded Mr. Abdelrazik's detention from a prison to house arrest in Khartoum. At no time during or after his custody was Mr. Abdelrazik criminally charged.
10. Sudan tried to solve the problem posed by no-fly list of the commercial airlines in October 2004, by offering Canada the use of a private aircraft to fly Mr. Abdelrazik to Montreal. Rather than respond affirmatively to Sudan's offer, Canadian officials presented obstacles, such as to refuse to contribute toward the cost of the flight, and to withdraw the services of Canadian government escorts. The Sudanese offer of a private flight subsequently failed to materialize. A copy of Canada's diplomatic note to the Government of Sudan is attached as **Exhibit "B"** to my affidavit.
11. In May 2005, the consular case officer assigned by the Respondent to Mr. Abdelrazik's file wrote a memo about Mr. Abdelrazik's situation. In this memo, the case officer recommended "having him returned to Canada escorted by two/three RCMP if necessary". A copy of the case officer's memo is attached as **Exhibit "C"** to my affidavit.
12. In June 2005, the Director of the Consular Case Management Division for the Respondent wrote a memo summarizing Mr. Abdelrazik's plight. In this memo, the Director recommends to repatriate Mr. Abdelrazik, and bluntly notes that "As a Canadian citizen he has a right to return to Canada". A copy of the Director's memo is attached as **Exhibit "D"** to my affidavit.

13. The aforesaid Director's memo observes that because Mr. Abdelrazik was unable to return to Canada, he lost his wife and young son in a divorce, and his health and safety could be placed in jeopardy. I am informed by Mr. Abdelrazik that he echoed these same concerns, and repeatedly warned the Respondent's officials that if he was not repatriated, his well-being could be at risk, particularly as the Sudanese authorities might again detain him.
14. In October 2005, the Sudanese authorities arrested and detained Mr. Abdelrazik for the second time. He remained in a Sudanese prison until July 2006, at which time he was again released from custody without charge.
15. Only three days after Mr. Abdelrazik's release from prison, the United States government added one "Abu Sufian Al-Salamabi Muhammed Ahmed Abd Al-Razziq" to its list of suspected terrorists. Then, another five days later, the United Nations' Al-Qaida and Taliban Sanctions Committee (also called the "1267 Committee", after UN Security Council Resolution 1267, which established it) also added "Abu Sufian Al-Salamabi Muhammed Ahmed Abd Al-Razziq", as well as several aliases of this person, to its Consolidated List of persons allegedly associated with Al-Qaida.
16. Because of his purported inclusion on the Consolidated List, Mr. Abdelrazik is subject to various sanctions imposed by the UN member states and the Respondent, including a travel ban. However, per UN Security Council Resolution 1735, inclusion on the Consolidated List does not oblige a state to deny entry into its own territory of its own nationals, as Canada is effectively doing in this instance. A copy of UN Security Council Resolution 1735 is attached as Exhibit "E" to my affidavit.
17. Throughout his ordeal, Mr. Abdelrazik has never been charged with a criminal

offence in Sudan or Canada, or it appears anywhere else in the world.

18. As early as March 2004, officials of the Respondent wrote that "Canada has examined the evidence available and ... there are no grounds for bringing charges against Mr. Abdelrazik in Canada." A copy of the memo from which these quoted words are taken is attached as Exhibit "F" to my affidavit.

19. The Respondent Minister stated in Parliament on April 30, 2008, "Mr. Abdelrazik is currently not able to return to Canada on his own". Mr. Abdelrazik agrees, and has given me instructions to bring these proceedings to compel the Respondent to assist to repatriate him.

BAD FAITH BY THE RESPONDENT

20. The Government of Canada has at times provided false information to solicitors inquiring about Mr. Abdelrazik's case. Examples are:

a. *Disinformation about Sudan's offer of a private flight:* On April 18, 2008, a senior official of the Respondent advised me in writing that Sudan had never offered a private airplane to transport Mr. Abdelrazik to Canada. This official wrote "*I would like to confirm that no such offer was ever made to Departmental officials by the Sudanese government*". A copy of this correspondence is attached as **Exhibit "G"** to my Affidavit. (The fact that Sudan actually did offer a flight is attested to in the letter attached as **Exhibit "B"** to my affidavit, and it would not have been known to the Respondent that I possessed this letter.)

b. *Disinformation concerning Mr. Abdelrazik's whereabouts.* On December 13, 2004, a lawyer of Canada's Department of Justice, Daniel Roussy,

responded to a question posed the previous week by a lawyer in Montreal, Danielle Larochelle. Ms. Larochelle had asked Mr. Roussy where Mr. Abdelrazik was. Mr. Roussy informed Ms. Larochelle in writing: "*Nous vous confirmons que nous n'avons pas personnellement ces informations*". This response was untrue, since the Government of Canada at that date was aware that Mr. Abdelrazik was in Sudan and unable to travel. Further, Mr. Roussy cross-examined a witness the year prior, who personally informed him under oath that Mr. Abdelrazik was in Sudan. Copies of Mr. Roussy's letter to Ms. Larochelle, and a transcript of the cross-examination done by Mr. Roussy, are attached to my Affidavit as **Exhibits "H" and "I"**, respectively.

21. The Government of Canada has at times provided false or misleading information to the public and/or journalists inquiring about Mr. Abdelrazik's case. Examples are:

- a. *False accusation about evidence in the Federal Court:* In 2004, the Government of prepared a document of "key messages", comprising talking points and prepared answers to questions that might be posed by journalists, the public, or certain companies (e.g. Air Canada). The "key messages" contain the allegation that "*The Federal Court of Canada has accepted evidence which the Government of Canada introduced that Mr. Abdelrazik presents a valid security concern because of his association with persons linked to terrorism*". I believe this statement is false, as I have been unable, despite my best efforts, to locate any proceeding in which the Federal Court "accepted evidence" that Mr. Abdelrazik presents a valid security concern. A copy of the "key messages" is attached to my Affidavit as **Exhibit "J"**.
- b. *Concealment of parallels between the cases of Mr. Abdelrazik's case and Mr. Maher Arar:* The "key messages" document shows that the Government of

Canada denied any linkage between Mr. Abdelrazik's situation, and the well-known situation of Mr. Maher Arar, and of that comparison, it reads that "*Every case is different*". However, an email written in July 2005 shows that the Respondent kept Scott Heatherington in the "-SAI" office, which is a bureaucratic acronym for the "Arar Inquiry Office", abreast of developments and talking points in Mr. Abdelrazik's case. A copy of this email is attached to my Affidavit as **Exhibit "K"**.

THE APPLICANT'S CURRENT PLIGHT

22. I am informed by Mr. Abdelrazik that he is impecunious, and that he lives in extremely precarious circumstances. This is known to the Respondent, whose officials wrote to me in April 2008, that "We are fully aware that Mr. Abdelrazik's living conditions are poor."
23. Despite not being criminally charged, the stigma of Mr. Abdelrazik's arrest, detention, and alleged affiliation with Al-Qaeda has made it often impossible for him to be employed. As of April 2008, he was living on handouts in Khartoum, with no fixed address.
24. Even if Mr. Abdelrazik were to become fully employed, his income likely would be very low. I am informed by Sean Robertson, an official of the Respondent, that the minimum wage in Sudan is only \$60 a month. A copy of Mr. Robertson's letter to me is attached as **Exhibit "L"** to my affidavit.
25. To assist Mr. Abdelrazik, the Respondent provides him a monthly loan of \$100 (U.S.), which he collects at the Canadian embassy in Khartoum. This loan is intended to meet his basic needs, including *inter alia* all his needs for rent, food, drugs and doctor visits.

26. In March 2008, I was instructed by the Applicant to seek an increase of his allowance to \$600 monthly. I made this request to the Respondent, and specified that a decision on the request should be received within 7 days. The Respondent has never informed me of any decision to change Mr. Abdelrazik's allowance, which remains as a \$100 monthly loan.
27. Mr. Abdelrazik has informed me of serious, indeed life-threatening, health concerns. He has been diagnosed at various times with asthma, heart problems, eye problems, malaria, and depression. The cost of his treatments exceeds his meager allowance from the Canadian embassy.
28. I am informed by Mr. Abdelrazik that he fears for his safety in Khartoum. Accordingly, on April 29, 2008, he sought refuge in the Canadian embassy.
29. The Respondent has granted Mr. Abdelrazik "temporary safe haven" to remain in the embassy. He remains in the reception area of the embassy's premises at this writing, although he may be ejected at the Respondent's sole discretion at any time and without warning. The terms on which the Respondent has granted Mr. Abdelrazik temporary safe haven are attached as **Exhibit "M"** to my affidavit.
30. Mr. Abdelrazik has informed me that, contrary to the promised terms, several of his basic needs have gone unmet while in the temporary safe haven of the embassy. He was not given medical care, although he has complained of dysentery and blood in his stool. He has been fed sporadically, and some days had nothing more than rice to eat. After hours, he is not given access to much of the embassy, and until recently he had to sleep on the floor of the embassy's toilet, using cushions he took from the poolside. To stay in touch with the outside world, the embassy staff gave him a radio, but when the batteries died they were not replaced.

31. As counsel I have had great difficulty when telephoning the embassy to check on Mr. Abdelrazik's condition or to take instructions from him. On April 30 and May 5, 2008, I demanded that the Respondent respect solicitor-client privilege and give an assurance that the conversations I have with Mr. Abdelrazik on the embassy telephone are confidential. On May 14, 2008, the solicitor for the Respondent confirmed that the Department of Foreign Affairs and International Trade (DFAIT) itself will respect Canadian privacy legislation; however, no assurance was given that telephone calls with Mr. Abdelrazik will be free from interference or monitoring by other government departments (e.g. CSIS, or the Communications Security Establishment).

32. I also have great difficulty exchanging documents, such as draft affidavits, with Mr. Abdelrazik because the Respondent will not give an assurance to respect solicitor-client privilege. The Respondent has rejected my request to fax Mr. Abdelrazik documents at the embassy under a confidential covering letter, and has informed me that if I did so, solicitor-client privilege would be waived. The Respondent has instead advised me to send documents to Mr. Abdelrazik by DHL courier, which is too slow for the rapid preparation and review of pleadings (I am informed by the Respondent that DHL takes 6 working days in each direction). The Respondent has further not provided an assurance that documents sent by DHL would pass through embassy security without being opened and therefore compromising solicitor-client privilege.

LACK OF ALTERNATIVES TO AN ADVANCE COSTS ORDER

33. I am informed by Mr. Abdelrazik that he does not have any income or assets remaining in Canada, and that in Sudan, his current income (including handouts and the \$100 monthly loan he receives from the embassy) is insufficient to pay for food,

medical treatments, and other necessities of life. He is utterly lacking in resources out of which to pay for legal services.

34. On May 5, 2008, my articling student contacted Legal Aid Ontario and Legal Aid Québec to inquire about Mr. Abdelrazik's possible eligibility for those resources. She informs me that Mr. Abdelrazik is ineligible for legal aid funding in either province, as he is not a resident of Ontario or Québec at this time. Attached as **Exhibit "N"** are the eligibility policies for Legal Aid Ontario and Legal Aid Québec.
35. Further, and in the totally unique circumstances of this case, the law forbids Mr. Abdelrazik's Canadian friends or family (he has an ex-wife, three children and a stepchild in Ottawa and Montreal) giving him funds to pay for my legal services. Under section 3 of the *United Nations Al Qaida and Taliban Regulations* (SOR/99-444) in conjunction with the *United Nations Act*, R.S. 1985, c. U-2, it is a potentially indictable offence punishable by imprisonment for up to ten years for any Canadian or other person in Canada to provide funds to any person on the Consolidated List. I would commit an ethical breach if I were to ask Mr. Abdelrazik's friends or family to fund him, since that would amount to counseling them to commit a criminal offence.
36. In the absence of any alternative, since August 2007 I have represented Mr. Abdelrazik's on a *pro bono* basis. While it is my goal to give his case the fullest possible treatment, as a practical matter it is a month-to-month decision whether I can afford to continue representing him. I make the decision of whether to continue providing *pro bono* services in light of the available financial resources within my law practice and the hours of time or disbursements that his case demands.
37. I am assisted in Mr. Abdelrazik's file by the *pro bono* help of others. I have assigned part of the work in Mr. Abdelrazik's file to my junior associate, Audrey Brousseau, who is volunteering significant overtime hours. I also have sought help with expert

legal research from Professor Amir Attaran, of the Faculty of Law and the Faculty of Medicine at the University of Ottawa, who has refrained from billing me for his time or disbursements. Professor Attaran has informed me that he wishes to go on assisting Mr. Abdelrazik's file, but that his decision to keep giving *pro bono* services is subject to similar constraints as my own. Both Ms. Brousseau and Dr. Attaran inform me that they re-evaluate every few weeks if they have sufficient resources to dedicate to Mr. Abdelrazik's case.

38. I estimate that were I billing Mr. Abdelrazik's case normally, to date I would have billed approximately \$21,000 in legal services and \$500 in disbursements. The expense of maintaining this *pro bono* case is not something my practice is likely able to sustain without personal hardship, even with the assistance of Dr. Attaran, whose contributions are not included in these figures.

39. Should this motion for advance costs be denied, I do not believe Mr. Abdelrazik's litigation will be able to proceed on the *pro bono* basis which has brought it to this point.

THE PUBLIC IMPORTANCE OF THIS CASE

40. Mr. Abdelrazik's case is of public importance, and the issues to be decided are not ones of sole concern to the Applicant.

41. On April 28, 2008, Amnesty International Canada, which is an esteemed human rights organization having won the Nobel Peace Prize, wrote to the Respondent expressing concern about Mr. Abdelrazik's inability to return to Canada. A copy of Amnesty International's letter is attached to my affidavit as **Exhibit "O"**.

42. The celebrated cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and

Muayyed Nureddin, which have been the subject of two Commissions of Inquiry (headed by Mr. Justice O'Connor and Mr. Justice Iacobucci), also concern instances where the security services raised allegations of terrorism which fell short of criminal charges, and which led Canada through malfeasance and nonfeasance not to protect and/or repatriate of its citizens from a foreign country where they were persecuted (Syria, in those cases).

43. Further, like Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin, Mr. Abdelrazik is a Canadian Muslim. According to the 2001 census, at that date there were about 600,000 Muslims in Canada. It is a matter of concern within this religious community to know that one can travel internationally, without fear of losing one's right to enter Canada as a Canadian citizen if one is wrongfully accused of terrorism. At their request, I regularly brief representatives of the Canadian Islamic Congress and the Canadian branch of the Council on American-Islamic Relations about Mr. Abdelrazik's case, and I am informed by those representatives that they gauge the case as having great public importance within the Canadian Muslim community. A copy of press releases issued by the Canadian branch of the Council on American-Islamic Relations on Mr. Abdelrazik's case is attached as **Exhibit "P"** to my affidavit.
44. History establishes that there can be extremely high costs associated with abandoning Mr. Abdelrazik in the situation analogous to these other Muslim men, rather than acting preemptively to bring him home. In the case of Maher Arar, I am aware from news reports that the cost to the federal government (meaning various departments and Mr. Justice O'Connor's operations) for the travesty of justice that occurred exceeded \$23 million at the inquiry stage.
45. Mr. Abdelrazik is in the unique position that he remains exiled in Sudan, and can be repatriated under an order of this Court pursuant to s. 6 of the *Canadian Charter of*

Rights and Freedoms. In short, the situation is at a stage where the breaches of justice can be mitigated by timely judicial intervention. My instructions from Mr. Abdelrazik are to take all necessary steps to repatriate him preemptively. Even if I pursued my instructions with the greatest possible vigor, the costs of this Application would remain very much less expensive than the *ex post facto* Arar situation of an inquiry. In my opinion, the ability to pursue this litigation is likely to represent a savings to the public purse, compared to the alternatives.

46. I am aware that the proposed remedy to fly Mr. Abdelrazik back to Canada on a chartered aircraft is feasible. On May 1, 2008, a private aircraft chartered by the Government of Canada was used to repatriate Brenda Martin to Canada from Mexico. Ms. Martin is a Canadian citizen who, unlike Mr. Abdelrazik, was criminally charged and convicted by a foreign court. News reports on the Brenda Martin case are attached as **Exhibit "Q"** to my Affidavit.

47. I am not aware of any other litigation pending which raises similar factual or legal issues under s. 6 of the *Charter* as this litigation. Absent an advance costs order, I believe there is no possible way for the issues of public importance to be litigated, and no possible way for Mr. Abdelrazik to be repatriated and rejoined with his family at the end of the tremendous hardship he has endured.

Affirmed before me at the
City of Ottawa in the Province of
Ontario on June 17, 2008

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Commissioner for Taking Affidavits


Yavar Hameed