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## Written Representations of the Applicant (moving party)

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FEDERAL COURT

BETWEEN:

**ABOUSFIAN ABDELRAZIK**

Applicant

-and-

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

Respondents

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**WRITTEN REPRESENTATIONS OF THE APPLICANT  
(MOVING PARTY TO THIS MOTION)  
(Motion returnable on November 26, 2008)**

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**PART I - FACTS**

**Overview and Nature of the Motion**

1. The Applicant (moving party in this motion), Abousfian Abdelrazik, is a Canadian citizen who in 2003 travelled to Sudan, his country of origin. He claims that his right to enter Canada has been violated by the Respondents. Since 2003, the Applicant has been arbitrarily detained by Sudanese authorities on two occasions for a cumulative period approximating two years. During this time, he claims to have been mistreated and abused while in detention.

*Affidavit of Kourosch Farrokhzad, para. 3 Tab 2 of the Applicant's Motion Record, and Amended Notice of Application, Tab 2 of the Applicant's Motion Record, Exhibit 1*

2. In April 2008 he sought refuge in the Canadian Embassy in Khartoum given the newly emergent media profile of his case and the increased fear of

repercussion, arbitrary detention or mistreatment by Sudanese or other authorities. He has remained in the Canadian embassy in Sudan in a status known as “temporary safe haven” since April 2008.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant’s Motion Record, at para. 4 and Amended Notice of Application, Tab 2 of the Applicant’s Motion Record, Exhibit 1*

3. The instant motion is being brought to compel reattendance of an affiant of the Respondents, Sean Robertson, at cross-examination for the purpose of answering questions objected to by Respondents’ counsel and to admit as part of the record two documents, namely the Globe and Mail article by Paul Koring “Ottawa Withholding Travel Papers for Canadian” dated September 12, 2008 and the “Etihad Itinerary”.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant’s Motion Record, at paras. 13-14, Exhibits C and D and Notice of Motion, Tab 1 of the Applicant’s Motion Record*

#### **Procedural History of the Matter**

4. The Applicant filed an affidavit in support of the underlying application on June 29, 2008. A second affidavit was filed in this matter by Jo Wood on the same date.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant’s Motion Record, at para. 8*

5. On September 12, 2008, the Respondents filed four public affidavits in response to the underlying application. The Respondents tendered a Senior Consular official from the Canadian Embassy in Sudan, Eric O’Connor, an Ottawa based Senior Consular Affairs representative from Department of Foreign Affairs, Sean Robertson, and two military personnel, Michel Latouche and

Geoffrey Everts as affiants.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant's Motion Record, at para. 9*

6. The Applicant sought only to orally cross-examine Mr. Robertson and accordingly his examination was held on October 7, 2008.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant's Motion Record, at para. 10*

7. During the course of cross-examination of Mr. Robertson, which was conducted by Professor Amir Attaran as agent for Mr. Hameed, Professor Attaran posed several questions to the witness, to which counsel for the Respondents objected. These questions include questions 167 to 170 and questions 582 to 586 as per the transcript of Mr. Robertson's cross-examination.

*Affidavit of Kourosh Farrokhzad, Tab 2 of the Applicant's Motion Record, at para. 12*

**Refusal to Answer Questions Regarding Passport Application**

8. At Question 167 of the cross-examination of Sean Robertson, counsel for the Applicant inquires as to the reason for which a passport has not been issued to the Applicant as per the Manual of Consular Instruction (Exhibit 4 to the Cross-Examination of Sean Roberston):

15      167.      Q. Has the passport in this case not been issued  
16      because Mr. Abdelrazik does not present sufficient  
17      information to establish his identity or Canadian  
18      citizenship, which is ground A?

*Transcript of Cross-Examination of Sean Robertson, Tab 3 of the Applicant's Motion Record, at page 47 of Transcript*

9. Counsel for the Respondents then refused that the witness should answer questions regarding the issuance of a passport on the ground that it is not relevant to the instant application and that the instant application does not relate to a judicial review of a refusal of issuance of a passport. As Ms. Turley stated:

19 MS. TURLEY: Mr. Attaran, I've given you a lot of  
20 leeway with respect to this passport issue but I'll go  
21 back to my objection before and I'm not going to allow him  
22 to answer this, is, with respect to the Notice of  
23 Application this isn't a judicial review of any refusal  
24 and it's an application with respect to section 6 rights  
25 and order of repatriation. There is no issue in the  
48  
1 application about the refusal to provide a passport or the  
2 reasons underlying it. So I'm going to refuse it. \*O\*

Transcript of Cross-Examination of Sean Robertson, Tab 3 of the Applicant's Motion Record, at page 48 of the Transcript

### **Refusal to Answer Questions Regarding Travel Itinerary**

10. With respect to questions 582 through 586, counsel for the Applicant requested the Respondents' witness to identify two documents: 1) a Globe and Mail article dated September 11, 2008 by Paul Koring entitled, "Ottawa Withholding Travel Papers for Canadian"; and 2) a travel itinerary for Mr. Abdelrazik's proposed travel from Sudan to Canada on September 15, 2008 on Etihad Airlines.

11. Counsel for the Respondents objected to Mr. Robertson identifying the documents and further objected to counsel for the Applicant attaching the documents to the cross examination of Mr. Robertson as documents subject to identification for the purpose of a subsequent motion. The objection is very broad-based as it is made on the grounds of settlement privilege, litigation privilege or solicitor-client privilege. Counsel for the Respondents suggested that the documents in question should be submitted as part of a motion to compel answers from the witness.

21 582. Q. Are you aware that a flight reservation was  
22 made for Mr. Abdelrazik from Khartoum back to Toronto on  
23 Etihad Airways departing on September 15th?

24 MS. TURLEY: We're not answering questions about  
25 that. We have previously noted on the record that was a

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1 settlement proposal put forward. It's after the  
2 litigation and any questions about that would be covered  
3 under either settlement privilege, litigation privilege or  
4 solicitor/client privilege. \*O\*

5 PROFESSOR ATTARAN: I'm not asking about the  
6 settlement offer. I'm simply asking whether he has  
7 knowledge of the existence of an itinerary.

8 MS. TURLEY: It's part of the settlement offer  
9 so...

10 PROFESSOR ATTARAN: No, it isn't.

11 MS. TURLEY: ...my objection stands.

12 PROFESSOR ATTARAN:

13 583. Q. I'd like to pass a Globe and Mail article over  
14 to you.

15 MS. TURLEY: He's not going to answer questions

16 about that. And we already made our position quite clear  
17 that it was improper for that even to be leaked to the  
18 Globe and Mail because it was a settlement proposal. \*O\*

19 PROFESSOR ATTARAN: And I believe the  
20 Chief Justice reminded you of Section 2(b) of the Charter  
21 on that issue.

22 MS. TURLEY: Not in respect of the settlement he  
23 didn't. \*O\*

24 PROFESSOR ATTARAN: Ms. Turley, I'll put on the  
25 record that the letter of August 26th to yourself from

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1 Mr. Hameed was not marked without prejudice.

2 MS. TURLEY: It doesn't matter whether it's marked  
3 without prejudice or not. It says it's a settlement  
4 proposal so that the Application for Judicial Review would  
5 be discontinued. That is a clear settlement offer.

6 PROFESSOR ATTARAN: Then what we'll do is this, is  
7 as we've done with Exhibits A and B. We're going to  
8 attach this --

9 MS. TURLEY: No. I'm not agreeing that it gets  
10 because it does not belong on the public record. So that  
11 you can bring a separate motion on because it does not  
12 belong on the record at all. \*O\*

13 PROFESSOR ATTARAN: The Globe and Mail article is  
14 public record.

15 MS. TURLEY: I'm not agreeing that that goes  
16 before Mr. Robertson.

17 PROFESSOR ATTARAN: So you're disagreeing that  
18 that even gets in as Exhibit C or as a numbered exhibit?

19 MS. TURLEY: Because you're wanting to ask  
20 questions again about your settlement proposal.

21 PROFESSOR ATTARAN: Do you want me to ask my  
22 questions on the record now to be dealt with for a motion  
23 later?

24 MS. TURLEY: No, because with respect to that,  
25 it's a blanket refusal to answer any questions respect of

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1 the settlement proposal.

Transcript of Cross-Examination of Sean Robertson, Tab 3 of the  
Applicant's Motion Record, at pages 155-158 of the Transcript

12. Counsel for the Applicant proceeded to ask questions 584 through 586 relating to the Etihad Airlines itinerary. The witness was directed not to answer these questions by Respondents' counsel.

4 584. Q. Are you aware, Mr. Robertson, of a flight  
5 reservation that was made for Mr. Abdelrazik on  
6 Etihad Airways returning on September 15th from Khartoum  
7 to Toronto?

8 MS. TURLEY: He's not answering that question. \*O\*

9 PROFESSOR ATTARAN:

10 585. Q. Was that itinerary which was provided to  
11 Ms. Turley in turn provided to you?

12 MS. TURLEY: He's not answering that question. \*O\*

13 PROFESSOR ATTARAN:

14 586. Q. Are you aware that there is  
15 regularly-scheduled service on Etihad Airways and that  
16 Etihad Airways has agreed to carry the Respondent from  
17 Khartoum to Canada?

18 MS. TURLEY: He's not answering that but for a



19 different reason why he's not answering that. He's not  
20 here to give evidence upon which he didn't even swear in  
21 his Affidavit anything about. \*O\*

22 PROFESSOR ATTARAN: I believe the matter is highly  
23 relevant to the relief sought in this Application,  
24 Ms. Turley.

25 MS. TURLEY: It's not relevant to the relief

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1 sought. \*O\*

2 PROFESSOR ATTARAN: We will be seeking a direction  
3 for his re-attendance to answer these and related  
4 questions. Before we do so I'd like to advise you we'll  
5 be seeking solicitor/client costs unless you are prepared  
6 to let some questions go ahead.

7 MS. TURLEY: You're able to do that and I've said  
8 to you before we'll take them under and you can bring your  
9 motion and maybe we can work it out. \*A\*

10 PROFESSOR ATTARAN: I'm ask you one last time  
11 whether you'll agree to have these documents marked as  
12 Exhibits C and onward.

13 MS. TURLEY: No, because they don't belong as part  
14 of the public record and then you can just simply put them  
15 in your record and that's not proper and that will be  
16 defeating what our very objection is. \*O\*

*Transcript of Cross-Examination of Sean Robertson, Tab 3 of the Applicant's Motion Record, at pages 158-159 of the transcript*

13. The questions regarding the travel itinerary could not be put to the witness, nor was the witness permitted by Respondents' counsel to identify the travel

itinerary or a media article in which the travel itinerary was referenced. The Applicant brings the instant motion to compel the re-attendance of Mr. Robertson for cross-examination so that he can be asked whether he is aware of the proposed travel itinerary of the Applicant and so that he may answer questions regarding same.

### **Refusal to Produce Documents Requested in a Direction to Attend**

14. On September 15, 2008, the Applicant served the Respondents with a Direction to Attend addressed to Sean Robertson. In the Direction to Attend, the Applicant sought production of certain documents, including documents listed at item 10 therein relating to the Applicant's request to be provided with an emergency travel document and to be repatriated on an Etihad Airlines flight set to depart from Khartoum on September 15, 2008.

*Affidavit of Kourosch Farrokhzad at para. 10 and Exhibit "C", Tab 2 of the Applicant's Motion Record*

15. The Respondents have refused to produce the documents requested at item 10 of the Direction to Attend on the basis that those documents are not relevant. To date, the aforementioned documents have not been produced by either the Respondents or Mr. Robertson.

*Affidavit of Kourosch Farrokhzad, Tab 2 of the Applicant's Motion Record, at para.11 and Exhibit "D", Tab 2 of the Applicant's Motion Record*

## **PART II - ISSUES**

16. The issues in this motion are the following:

- (a) Should Mr. Robertson be ordered to re-attend for further cross-examination to answer questions regarding the application of Mr. Abdelrazik for a passport and the status of said application?
- (b) Should Mr. Robertson be ordered to re-attend for further cross-examination to answer questions regarding the existence of a proposed travel itinerary for the Applicant on Etihad Airlines?
- (c) Should the Applicant be allowed to include in his public Application Record the document record of the travel itinerary and the article from the Globe and Mail describing same?
- (d) Should the Respondents be ordered to produce the documents requested at item 10 of the Direction to Attend addressed to Mr. Robertson?
- (e) Are documents related to the ongoing effort to repatriate the Applicant to Canada relevant to the Application?

## PART III - ARGUMENTS

### Relevance of Question

17. The Federal Court has previously addressed the issue of scope of cross-examination on affidavits filed in an application for judicial review. The Court is clear that cross-examination may extend to matters beyond the four corners of the affidavit, provided the questions are relevant.

18. The standards of formal and legal relevance require that questions be related to issues defined by the notice of application for judicial review and affidavits by the parties in connection with the application. The key question is whether the question can “assist the Court in determining whether or not the remedy sought can be granted.”

*Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, [2005] F.C.J. No. 805, at paras. 12-13.

*Stanfield v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 719 at paras. 23-24

19. Moreover, a motion’s judge or prothonotary should be cautious about excluding evidence at an early stage of a proceeding. Generally, a determination of issues such as relevance and admissibility is best left to the application’s judge.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [1998] F.C.J. No. 1673, at para. 11

## **Relevance of Documents**

20. All relevant evidence should be admitted unless there is some exclusionary rule. There is no such exclusionary rule preventing a party to an application for judicial review from putting an apparently relevant document to a witness “in order to see if the witness knows of the document or recognizes it and if the answer is affirmative, cross-examination ought to follow”.

*Sierra Club of Canada, supra, para. 13*

21. In the present case, the Respondents have objected to their affiant, Mr. Robertson, answering questions in respect of the status of a passport application of Mr. Abdelrazik and a proposed travel itinerary of the Applicant from Sudan to Canada via Etihad Airlines.

## **Status of Passport Application**

22. The status of an outstanding application for a passport made by Mr. Abdelrazik is clearly relevant to the matter of his repatriation to Canada since without the passport he could not return to Canada and the remedy sought by the Applicant could never be effected. This fact is conceded by the Respondents' witness, Mr. Robertson, himself.

*Transcript of Cross-Examination of Sean Robertson, Tab 3 of the Applicant's Record, at page 49, question 169*

23. Respondents' counsel's objection that the question of the status of the Applicant's passport application is irrelevant to the underlying application for repatriation of Mr. Abdelrazik is without merit. Moreover, the notion that the relevance of this question is precluded by the absence of reference to the

question of an issuance of a passport in the Notice of Application presupposes that the application in question is a judicial review of a decision of a federal tribunal pursuant to section 18.1(2) of the *Federal Courts Act*.

24. The instant application is a challenge by way of judicial review to the Respondents' role and responsibility in the Applicant's effective exile in Sudan. As such, the application is in respect of a "matter" under section 18.1(1) of the *Federal Courts Act* and is not a judicial review of any specific decision of a federal tribunal. The scope of relevance in this application is therefore much broader than that suggested by Respondents' counsel in that all evidence pertaining to issues underlying the application, including remedy, should be part of the record.

*Krause v. Canada*, [1999] 2 F.C. 476 (C.A.); *Amnesty International and B.C. Civil Liberties v. Chief of the Defence Staff for the Canadian Forces*, 2007 FC 1147 at paras. 53-69

### **Proposed Travel Itinerary on Etihad Airlines**

25. The Applicant also sought to ask Mr. Robertson about his awareness of a proposed travel itinerary for Mr. Abdelrazik's return to Canada on September 15, 2008. Counsel for the Respondents immediately objected to this line of questioning on the basis of settlement privilege, litigation privilege or solicitor client privilege. The Applicant submits that none of these privileges claimed apply in respect of the itinerary in question.

26. Settlement privilege relates to discussions of settlement and documents or memoranda, which outline an offer to settle or response to same. A travel itinerary can be considered as none of these.

27. A travel itinerary exists independently of a settlement offer save and except if

the itinerary itself were a product of settlement between the parties. In the instant case, the travel itinerary was not produced by the Respondents or elicited by the Respondents directly or indirectly. Just as the Respondents cannot claim authorship of the itinerary, they could not and still cannot control its dissemination to third parties by Etihad Airlines. The document, therefore, by its very nature is not privileged, but rather reflects a record of information produced by Etihad Airlines, which exists simultaneously on different databases for the purpose of airline travel.

28. Litigation privilege does not apply in the instant case as the itinerary in question was again, not produced by the Respondents, and therefore could not be claimed as a document created in contemplation of litigation to be held confidentially by the Respondents. The document was not created for the purpose of litigation, but rather, as a means to assist the Applicant to return home to Canada. In any event, no litigation privilege is claimed by the Applicant in respect of the document.

29. The suggestion that the document could be the subject of solicitor-client privilege supposes that the document was part of communications between a solicitor and her client. In the instant case, not only is the document not one that was produced by the Respondents it cannot be claimed as part of its own solicitor client communications as it was provided to the Respondents by the Applicant's counsel. The law does not recognize solicitor client privilege applying to a document that is furnished by counsel to his or her opposing counsel.

30. In all of the circumstances, it is submitted that all privileges claimed against the Etihad travel itinerary must fail by reason that they are not founded in law and in fact.

## **Production of Documents Requested in Direction to Attend**

31. Rule 94 (1) of the Federal Court Rules provides that a person who is to be examined or the party on whose behalf the person is to be examined “shall produce for inspection at the examination all documents and other materials requested in the direction to attend that are within the that person’s or party’s possession and control”. The stated exceptions to this rule include documents over which privilege has been claimed or for which relief from production has been granted under Rule 230, documents which are irrelevant and material which would be unduly onerous to produce.

*Federal Court Rules, Rule 94.*

32. As set out above, in the Direction to Attend addressed to Mr. Robertson, the Applicant requested production of documents relating to the Applicant’s request to be provided with an emergency travel document and to be repatriated on an Etihad Airlines flight set to depart form Khartoum on September 15, 2008. The Respondents have refused to produce the aforementioned documents solely on the basis that they are not relevant to the Application. The Respondents have not made a claim of privilege in relation to the documents requested at item 10 of the Direction to Attend.

*Affidavit of Kourosh Farrokhzad at paras. 10 and 11*  
*Exhibits “C” and “D” of the Affidavit of Kourosh Farrokhzad, Tab 2 of*  
*the Applicant’s Motion Record*

33. The Applicant submits that, in light of the fact that the question of repatriating Mr. Abdelrazik is expressly outlined in the Notice of Application for this matter, and in view of the fact that this Application is in respect of certain “matters” under Section 18.1 (1) of the Federal Courts Act, including matters



of repatriation, issues relating to the means of Mr. Abdelrazik's repatriation as well as all ongoing efforts to repatriate him from the Sudan are clearly relevant to the underlying Application.

*Krause v. Canada*, [1999] 2 F.C. 476 (C.A.); *Amnesty International and B.C. Civil Liberties v. Chief of the Defence Staff for the Canadian Forces*, 2007 FC 1147 at paras. 53-69

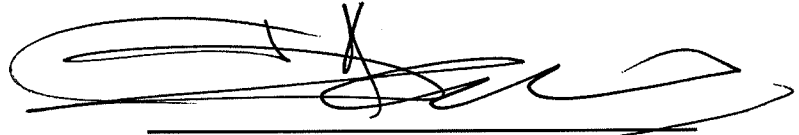
#### **PART IV - ORDER REQUESTED**

34. The Applicant requests the following relief:

- (a) An Order compelling Sean Robertson, a deponent in support of the Respondents, to re-attend cross-examination of his affidavit and answer questions put to him by the Applicant, at the cost of the Respondent;
- (b) An Order allowing the Globe and Mail article by Paul Koring entitled "Ottawa Withholding Travel Papers for Canadian" dated September 12, 2008 regarding the Applicant's proposed travel itinerary and the "Etihad Itinerary" itself, to form part of the public record;
- (c) An Order compelling the production of documents listed at item 10 of the Amended Direction to Attend addressed to Sean Robertson;
- (d) A Declaration that documents relating to the ongoing efforts to repatriate Mr. Abdelrazik to Canada by any safe means at its disposal are relevant to the underlying Application; and
- (e) All costs, to be paid forthwith and in any event of the cause, on a substantial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 7<sup>th</sup> day of November 2008.

A handwritten signature in black ink, appearing to read 'Hameed Farrokhzad St-Pierre', written over a horizontal line.

**HAMEED FARROKHZAD ST-PIERRE  
Barristers & Solicitors  
43 Florence Street  
Ottawa, ON K2P 0W6**

**Per: Yavar Hameed  
Tel. (613) 232-2688 ext 228  
Fax. (613) 232-2680**

**Solicitors for the Applicant (Moving  
Party to this Motion)**