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Written Representations of the Respondent (moving party)

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FEDERAL COURT

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

and

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

Respondents

RESPONDENTS' WRITTEN REPRESENTATIONS
(for motion to seek leave to file additional affidavit evidence)**PART I - OVERVIEW**

1. This Court should grant the respondents leave to file additional affidavit evidence relevant to a serious allegation made against the Canadian government by the applicant in his memorandum of fact and law. The applicant claims that officials of the Canadian Security Intelligence Service ("CSIS") requested his detention by the Sudanese authorities in 2003 which led to a breach of his rights under section 6 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The Director of the CSIS recently requested that the Security Intelligence Review Committee ("SIRC") investigate the CSIS' performance of duties and functions with respect to the applicant's case.
2. This new evidence meets all the requirements with respect to the admission of supplementary material on an application for judicial review. The admission of this evidence will serve the interests of justice, assist the judge hearing the application,

will not cause prejudice to the applicant and was not available prior to the cross-examination of the applicant.

3. More specifically, this new information should be admitted into evidence so that the judge hearing the application can properly and fully assess the strength of the applicant's allegations. The respondents rely on documentary evidence which directly contradicts the allegations. This further evidence reinforces the respondents' argument that the applicant's allegations are unfounded and that the Court should be reluctant to ground a *Charter* breach on the basis of such evidence.

PART II - FACTS

4. The applicant is a citizen of Canada and Sudan who has been in Sudan since 2003.
5. In May 2008, the applicant commenced an application seeking a declaration that his rights under s. 6 of the *Charter* rights have been violated and a mandatory order that the respondents repatriate him to Canada.
6. The hearing of this judicial review application is scheduled for May 7, 2009.
7. In his memorandum of fact and law filed on March 10, 2009, the applicant levies some very serious allegations about the conduct of Crown officials in the handling of the applicant's case. In particular, the applicant alleges that CSIS officials requested that Sudanese authorities detain the applicant in September 2003. The applicant claims that this was the beginning of his "misadventure".¹ This allegation was not made in either the Notice of Application or the affidavits filed in support of the application.

¹ Applicant's Memorandum of Fact and Law, para. 1, Respondents' Motion Record, Tab 2, p. 4.

8. This allegation is repeated and relied on several times throughout the applicant's factum to argue that the respondents' breached his *Charter* rights:

- CSIS was directly responsible for the Applicant's arrest.²
- As the Applicant was arbitrarily detained by Sudanese authorities at the request of the Respondents, he was unable to return to Canada with his family.³
- Most shocking of all is the revelation that Canadian officials recommended that the Applicant be arrested in Sudan, an action which resulted in the arbitrary detention, torture and mistreatment of the Applicant for several years.⁴

9. In support of this allegation, the applicant relies on a single statement in an email written a full two years after he was first detained.⁵ The email recounts information a consular officer received from Sudanese authorities during a meeting in December 2005 with the Sudanese National Security & Intelligence Agency to discuss the Sudanese refusal to grant Canada consular access to the applicant during that period of his detention.

10. In the very same document, the consular officer notes that if it is indeed the case that the initial recommendations for the applicant's detention emerged from CSIS, "we have not been told of these communications".⁶ Other documents filed on the Court record further support the conclusion that the Canadian government was not involved in the applicant's detention.

² Applicant's Memorandum of Fact and Law, para. 10, **Respondents' Motion Record**, Tab 2, p. 6.

³ Applicant's Memorandum of Fact and Law, para. 55, **Respondents' Motion Record**, Tab 2, pp. 17-18.

⁴ Applicant's Memorandum of Fact and Law, para. 86, **Respondents' Motion Record**, Tab 2, p. 25.

⁵ Email dated December 16, 2005, Additional Exhibit to the Cross Examination of Sean Robertson, **Respondents' Motion Record**, Tab 4, p. 49. The statement relied on by the applicant appears in the first three lines under the heading "case Overview" and was partially expurgated based on section 38 of the *Canada Evidence Act*.

⁶ *Ibid.*, **Respondents' Motion Record**, Tab 4, p. 50.

11. By letter dated March 5, 2009, Jim Judd, the Director of CSIS, requested that the SIRC “investigate and report on the performance of the Service’s duties and functions” with respect to the applicant’s case. Mr. Judd requested this in light of recent media reporting that “has gone so far as to allege that Abousofian Abdelrazik was arrested by Sudanese authorities at the request of CSIS”.⁷ This letter was recently posted on the CSIS website.⁸

PART III - ISSUE

12. Whether this Court should grant the respondents leave to file the affidavit of Kathleen Mongeon sworn April 2, 2009.

PART IV - ARGUMENT

13. Rule 312 of the *Federal Courts Rules* allows a party, with leave of the Court, to file additional affidavits. In deciding whether to grant leave for the filing of additional affidavits, the Court will consider the following factors:⁹

- (i) whether the evidence to be adduced will serve the interests of justice;
- (ii) whether the evidence will assist the Court;
- (iii) whether the evidence will cause substantial or serious prejudice to the other side;
- (iv) the relevance of the proposed affidavits;
- (v) whether the moving party has acted with due diligence; and
- (vi) whether the filing will unduly delay the proceedings.

⁷ Affidavit of Kathleen Mongeon, sworn April 2, 2009, Exhibit “A”, **Respondents’ Motion Record**, Tab 5, p.55.

⁸ Affidavit of Kathleen Mongeon, sworn April 2, 2009, para 2, **Respondents’ Motion Record**, Tab 5, p.52.

⁹ *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, at para. 8, **Respondents’ Motion Record**, Tab 7.

14. In the present case all these considerations favour the granting of leave to the respondents to file an additional affidavit.

1. The evidence will serve the interests of justice and assist the Court

15. It is always in the interest of justice that the Court be provided with evidence relevant to the determination of an issue. Here, the applicant makes some very serious allegations and asks the Court to find a *Charter* breach based on those allegations. The respondent argues that the allegations are not supported by a sufficient factual foundation. This new evidence casts further doubt on a statement very selectively relied on by the applicant.

16. It is in the interests of justice that the judge hearing this application be made aware that the CSIS has responded to the applicant's allegations and indeed asked the SIRC to review the matter.

2. The evidence will not cause substantial or serious prejudice to the other side

17. The applicant will not be prejudiced by the filing of the additional affidavit because the evidence is being tendered solely to respond to the applicant's allegations as raised in his memorandum of fact and law. The affidavit does not raise any additional new issues to the detriment of the applicant.¹⁰

3. The proposed affidavit is relevant

18. On a motion for leave to file additional affidavits, the Court will consider whether the new evidence sought to be filed is relevant. For purposes of this motion, the Court should determine relevance broadly by reference to the facts as tendered by

¹⁰ *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2008 FC 912, at para. 12, Respondent's Motion Record, Tab 8.

the applicant, the questions the applicant has put in issue and the allegations he has made.

19. The question of relevance that faces the Court on this motion is a different from the relevancy issues to be decided by the application judge. The application judge will determine the significance of the numerous facts and issues raised by the evidence. It should be left to him or her to decide as a matter of law whether the allegations and the responding evidence are relevant to the relief sought.
20. For this motion, by contrast, the Court should determine relevance by simply examining whether the proposed additional affidavit is relevant to matters raised by the applicant. The applicant has put in issue the role played by Canadian officials in his detention by the Sudanese authorities in September 2003. He is asking the Court to make serious findings against the Crown.
21. The respondents will argue that, in the absence of a sufficient factual foundation the Court should be reluctant to find a *Charter* violation. In addition, in this case, documentary evidence filed on the Court record directly contradicts the applicant's allegations. The proposed affidavit further calls into question the applicant's allegations. The evidence will assist the judge hearing the application in weighing the evidence presented by the parties on this issue. As such, the proposed affidavit evidence is clearly relevant to a matter raised by the applicant.

4. The respondents have acted with due diligence

22. This is new evidence that was not available until recently. The Director of CSIS' letter is dated March 5, 2009 and was only recently posted publicly on the CSIS website. As a result, this new information was not available until now. The respondents have moved quickly since the information was made publicly available to proceed with this motion. The respondents therefore clearly meet the due diligence requirement.

5. Filing the additional affidavits will not delay the proceedings

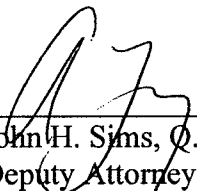
23. The filing of this additional affidavit will not cause any delay in these proceedings. The affidavit is sworn and can be served and filed as soon as the Court grants leave. It will not delay the service and filing of the respondents' record which is due on April 9, 2009 or the hearing of the application scheduled for May 7, 2009. The respondents can simply file a supplemental record including the additional affidavit.

PART V - RELIEF REQUESTED

24. The respondents request an order granting leave to file the affidavit of Kathleen Mongeon sworn April 2, 2009.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, this 3rd day of April, 2009.



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