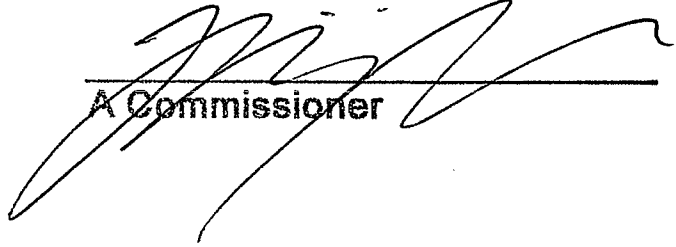


This is Exhibit " A " referred to
in the Affidavit of Paul Champ
sworn before me, this 14th day
of April, 2009



A Commissioner

FEDERAL COURT

B E T W E E N:

ABOUSFIAN ABDELRAZIK

Applicant

-and-

MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

**APPLICANT'S WRITTEN REPRESENTATIONS
ON THE MOTION FOR ADVANCE COSTS**

PART I – FACTS

Overview

1. The Applicant is a Canadian citizen who claims that his right to enter Canada has been violated by the Respondent. More than five years ago, he travelled to Sudan, his country of origin. He has been prevented from returning to Canada since that time, separating him from his children. He has also been subjected to lengthy periods of arbitrary imprisonment by Sudanese authorities and is presently being given temporary safe haven in the Canadian embassy in Khartoum.
2. By the the present motion, the Applicant is seeking an interim advance costs order that will allow him to pursue this litigation. The Applicant is entirely without means and it is a criminal offence for anyone to provide him with funds. The Applicant's legal counsel has been providing *pro bono* services and paying for disbursements, but is uncertain how long he can continue in that arrangement.

3. This case is rare and exceptional. The record suggests that the Respondent played a role in the Applicant's imprisonment by Sudanese authorities. By refusing to repatriate the Applicant, the Respondent is subjecting the Applicant to *de facto* exile in a country where his health and safety are at risk. It would be a grave injustice if the Applicant were unable to challenge these violations of his fundamental human rights.

Background

4. The Applicant traveled from Canada to Sudan in March 2003 to visit his ailing mother. In August 2003, the Applicant was arrested by Sudanese authorities and detained without charge for almost one year. 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. As one document states, "Sudanese authorities readily admit that they have no charges pending against him but are holding him at our request."¹

5. Following his release from detention in 2004, the Applicant learned that commercial airlines would not allow him to board their aircraft as he was on some kind of "no fly" list. This left the Applicant trapped in Sudan, unable to re-join his wife and children in Canada. In the meantime, Sudanese authorities kept the Applicant under a form of custody in a "half way" house.²

¹ Affidavit of Yavar Hameed, paras. 5-7 [Applicant's Motion Record ("AMR"), Tab 3, p. 13]; and Canadian Government Internal Memo [AMR, Tab 3, p. 26]

² Affidavit of Yavar Hameed, paras. 8-9 [AMR, Tab 3, p. 13-14]

6. In October 2004, Sudan tried to solve the problem posed by the commercial airlines' "no-fly" list by offering the use of a private aircraft to fly the Applicant to Montreal. The Canadian government declined to share any costs for the flight and refused to provide escorts. The private flight never materialized. Until this year, the Applicant was unaware of the Sudanese offer or Canada's response.³

7. From 2004 to 2005, the Applicant approached the Canadian embassy numerous times for assistance. According to a memorandum dated June 23, 2005, the Respondent was aware of the Applicant's desperate circumstances, noting that he was out of money, could not work, and was getting "more and more despondent". The same memo states, "As a Canadian citizen he has a right to return to Canada", and acknowledges that, "[o]ur inability to arrange for his return to Canada could result in a situation in which his health and safety are placed in jeopardy".⁴

8. An earlier draft of the same memorandum contained a strong recommendation that the Respondent should make arrangements for the Applicant's return to Canada without delay. The draft memo adds, "By not assisting him, we are in fact condemning him to a life without basic freedoms which all Canadians take for granted." There is also a suggestion that other government departments or agencies were opposed to providing assistance to the Applicant: "Under no circumstances should we allow the concerns of other departments and/or agencies to restrain our efforts to provide appropriate consular services in this or any other case."⁵

³ Affidavit of Yavar Hameed, para. 10 [AMR, Tab 3, p. 14]; and Consular Affairs' Diplomatic Note to the Sudanese Government [AMR, Tab 3, p. 29]

⁴ Memo by Dave Dyet, Director of Consular Case Management Division, dated June 23, 2005 [AMR, Tab 3, p. 34-35]

⁵ Canadian Government Internal Memo [AMR, Tab 3, p. 26]

9. The Applicant's fears were realized when he was arrested and detained by Sudanese authorities again in October 2005. He remained in a Sudanese prison until July 2006, at which time he was again released from custody without charge.⁶

10. Shortly after the Applicant's release from prison in 2006, the United Nations' Al-Qaida and Taliban Sanctions Committee formally placed the Applicant on a list of persons allegedly associated with Al-Qaida. As a result of this designation, the Applicant is also subject to Canada's *United Nations Al Qaida and Taliban Regulations* (SOR/99-444). Under section 3 of the *United Nations Act*, R.S.C. 1985, c. U-2, it is potentially a criminal offence for any person to provide funds to the Applicant.⁷

11. The Applicant is presently impecunious and lives in extremely precarious circumstances. As of April 2008, he was living on handouts in Khartoum, as well as a monthly loan of \$100 from the Canadian embassy. He has no assets remaining in Canada or Sudan.⁸

12. On April 29, 2008, the Applicant sought refuge in the Canadian embassy in Khartoum as he feared for his safety. The Respondent granted the Applicant "temporary safe haven" to remain in the embassy. He has remained on the embassy's premises continuously since that date.⁹

13. There are other cases of Canadian Muslim men being arrested and detained abroad, with at least some degree of involvement by Canadian officials. While there are similarities with those cases, the Applicant's circumstances – *de facto* exile from Canada – are unique. Human rights

⁶ Affidavit of Yavar Hameed, para. 14 [AMR, Tab 3, p. 15]

⁷ Affidavit of Yavar Hameed, paras. 15-16 and 35 [AMR, Tab 3, p. 15 and 21]

⁸ Affidavit of Yavar Hameed, paras. 22-25 [AMR, Tab 3, p. 18]

⁹ Affidavit of Yavar Hameed, paras. 28-29 [AMR, Tab 3, p. 19]

groups such as Amnesty International, Canadian Islamic Congress, International Civil Liberties Monitoring Group and the Council on American-Islamic Relations have publicly expressed concern about the Applicant's situation and the Respondent's inaction on the matter.¹⁰

The Present Application and Legal Representation

14. By the present application, the Applicant is seeking an order of *mandamus* that would compel the Respondent to repatriate the Applicant to Canada.¹¹ The Applicant's legal services in the application have been provided by his solicitor, Mr. Yavar Hameed, on a *pro bono* basis. Mr. Hameed has also been paying for disbursements related to the file out of his own pocket. Other legal professionals have also been assisting in the case on a volunteer basis.¹²

15. The Applicant is not entitled to legal aid funding. He is forbidden from receiving funds from family or friends.¹³

16. Mr. Hameed works in a small practice. The costs of carrying this litigation are not insignificant. Mr. Hameed estimates that he has already incurred \$20,500 in legal costs, not including the time of volunteers. Every month, he must reconsider whether he can continue representing the Applicant under the circumstances.¹⁴

¹⁰ Affidavit of Yavar Hameed, paras. 41-43, plus referenced exhibits [AMR, Tab 3, p. 22-23]

¹¹ Notice of Application for Judicial Review [AMR, Tab 2, p. 5]

¹² Affidavit of Yavar Hameed, paras. 36-38 [AMR, Tab 3, p. 21-22]

¹³ Affidavit of Yavar Hameed, para. 35-36 [AMR, Tab 3, p. 21]

¹⁴ Affidavit of Yavar Hameed, paras. 36 and 38-39 [AMR, Tab 3, p. 21-22]

PART II – ISSUES

17. The Applicant submits that the issues in the present motion are:
- (a) Should the Court make an advance costs order given the rare and exceptional nature of this case?
 - (b) Should the Court order the Respondent to make reasonable efforts to arrange for solicitor client communications between the Applicant and his counsel?

PART III – ARGUMENTS

A. Advance Interim Costs

18. Costs awards in litigation can serve a variety of public policy objectives. The Supreme Court of Canada confirmed in *Okanagan Indian Band* that, in exceptional cases, it may be appropriate to order advance costs to ensure “ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance.” The Court identified three criteria for an advance costs order:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity

to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.¹⁵

19. The Supreme Court revisited this issue in *Little Sisters*. The Court emphasized that, in analyzing the above requirements, courts should be satisfied, with a view to all the circumstances, that the “case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application.”¹⁶

20. The Applicant submits that he meets all three *Okanagan Indian Band* criteria and his case is indeed “rare and exceptional”. He has been separated from his children for more than five years, subjected to arbitrary imprisonment, and relegated to abject poverty. The Respondent acknowledges that the Applicant, a Canadian citizen, cannot fly home without the help of the Canadian government and that his safety is sufficiently in jeopardy that he has been granted “safe haven” in the Canadian embassy. Moreover, it would appear that the Respondent played some role in the Applicant’s detention and overall circumstances. The Applicant’s case raises fundamental human rights issues that are rarely litigated – the right to enter one’s country of citizenship.

(i) Impecuniosity

21. There can be little question that the Applicant is utterly without financial resources. He has been living in Sudan, alternatively incarcerated

¹⁵ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76 at paras. 38-40

¹⁶ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2 at para. 37

and without work, since 2003. He has been living on handouts and \$100 monthly loans from the Canadian embassy. He has no assets.

22. Furthermore, there are also no other realistic options to fund the Applicant's legal case. He does not qualify for legal aid because he is not a resident of Canada. More significantly, by law no one can provide any funds to the Applicant, directly or indirectly. Section 3 of the *United Nations Al-Qaida and Taliban Regulations* clearly state:

No person in Canada and no Canadian outside Canada shall knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by the Taliban, a person associated with the Taliban, Usama bin Laden or his associates.¹⁷

23. The Applicant fell within the above definition when the United Nations' Al-Qaida and Taliban Sanctions Committee added the Applicant to the prohibited list of persons associated with Al-Qaida.¹⁸ By operation of the above Regulations and section 3 of the *United Nations Act*, it is an indictable offence for any person to provide funds "to be used" by the Applicant.¹⁹

24. Apparently, even the Respondent deems it necessary to obtain permission from the United Nations before it can consider raising the Applicant's monthly loan from \$100 to \$600.²⁰ These circumstances amply demonstrate that the Applicant is a litigant who is uniquely without access to resources.

¹⁷ *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444 [AMR, Tab 6]

¹⁸ Affidavit of Yavar Hameed, paras. 15-16, plus exhibit [AMR, Tab 3, p. 15]

¹⁹ *United Nations Act*, R.S.C. 1985, c. U-2, section 3 [AMR, Tab 5]

²⁰ Letter from S. Robertson, DFAIT, to Y. Hameed, dated April 18, 2008 [AMR, Tab 3, p. 52-53]

(ii) Meritorious Case

25. There are very few cases that have interpreted *Okanagan Indian Band* or *Little Sisters*. In one recent case, *Hagwilget Indian Band*, the Federal Court attempted to describe the standard to be met for a moving party to establish a sufficiently meritorious case. The Court indicated that the threshold as "somewhat higher" than the standard in a motion to strike, and says there must be "a reasonable possibility of success notwithstanding that there are substantial difficulties in the plaintiffs' way."²¹

26. The Applicant submits that the present case has sufficient merit to meet this branch of the test. Section 6(1) of the *Canadian Charter of Rights and Freedoms* protects the mobility rights of Canadian citizens. Specifically, section 6(1) guarantees to every Canadian citizen "the right to enter, remain in and leave Canada."²² While there are very few cases on section 6(1), this Court held that the Canadian government must consider repatriation requests from Canadians imprisoned abroad in a manner consistent with the constitutional right to enter Canada.²³ More recently, this Court held that, given the necessity of a Canadian passport for international travel, the denial of a passport constituted a Charter violation that must be justified.²⁴

27. Furthermore, there is troubling evidence in this case that Canada may have played a role in the Applicant's lengthy arbitrary detention in Sudan. Government records also suggest that Canada declined to take any steps that would have allowed the Applicant to return to Canada from Sudan. Most significantly, Sudan offered a private aircraft to fly the Applicant to Montreal

²¹ *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2008] F.C.J. No. 723, para. 16

²² *Canadian Charter of Rights and Freedoms*, section 6

²³ *Van Vlymen v. Canada (Solcitor General)*, [2004] F.C.J. No. 1288

²⁴ *Kamel v. Canada (Attorney General)*, [2008] F.C.J. No. 423

in 2004, but the Respondent did not take up the offer. This evidence alone demonstrates that the Applicant's case, though novel, has some merit.

(iii) Public Interest

28. There is a strong public interest in having the Applicant's matter litigated. Over the past six years, Canada's response to terrorism threats has been questioned at times as balancing security at the expense of fundamental human rights. In particular, the actions and practices of Canadian officials in the cases of four other Canadian Muslim men who were imprisoned abroad became the subject of two public inquiries, one of which is still ongoing. The evidence in this case suggests that other government "agencies" were opposed to the Applicant being allowed to return to Canada.²⁵

29. The right to enter Canada has not been the subject of much litigation. The Applicant submits that his case raises an odious practice – *de facto* exile of a Canadian citizen. There is a public interest in having this matter litigated to ensure that no Canadian citizen is caught in legal limbo again, in danger and separated from one's family.

(iv) Special Circumstances

30. The Federal Court in *Hagwilget Indian Band* also suggests that *Little Sisters* imposed another requirement on a moving party to show special circumstances that justify the relief. In the present case, the Applicant's circumstances are truly dire and unique. He has been effectively exiled from his country of citizenship and separated from his children for more than five

²⁵ Canadian Government Internal Memo [AMR, Tab 3, p. 26]

years. For two of those years, he has been imprisoned without charge. His liberty was also restrained by a form of house arrest for another year, again without charge. His health is poor and he cannot work.

31. The Respondent has acknowledged that the Applicant is despondent, and his health and safety are in jeopardy. The Respondent also recognizes that the Applicant is at risk because he has been granted "safe haven" in its embassy. Despite being aware that the Applicant may be in danger, and that he has a right to enter Canada, the Respondent has refused to assist or arrange for the Applicant's repatriation.

32. It would also appear that Canada would not co-operate with Sudan's efforts to return the Applicant to Canada on a private aircraft. This is particularly disturbing and unjust given that the Respondent recently seemed happy to arrange and pay for a private charter to repatriate a Canadian woman who had been convicted of fraud in Mexico.²⁶ Again, the Applicant has never been charged or convicted of any offence.

33. The Respondent's conduct in respect of the Applicant has been troubling on other fronts. In 2005, Crown counsel pretended not to know where Applicant was. More recently, a DFAIT official falsely informed the Applicant's legal counsel that Sudan never offered an aircraft to fly the Applicant back to Canada. Both of these representations were demonstrably false.²⁷

Summary

34. The Applicant is in a rare and exceptional situation. Without an advance costs order, there is a real risk that his case will not be litigated and

²⁶ Affidavit of Yavar Hameed, para. 46, plus exhibit [AMR, Tab 3, p. 25]

²⁷ Affidavit of Yavar Hameed, para. 20, plus exhibits [AMR, Tab 3, p. 17-18]

he will be left in Sudan, in danger and, in the words of one of the Respondent's agents, condemned "to a life without basic freedoms which all Canadians take for granted."

B. Solicitor Client Privilege

35. The Respondent has granted the Applicant safe haven in the Canadian embassy in Khartoum. Effectively, the embassy has become the Applicant's residence. Yet counsel for the Respondent has taken only limited steps to facilitate communication between the Applicant and his counsel. He is not allowed to receive or send confidential faxes, and is restricted to one specific hour per day when he can entertain telephone calls.

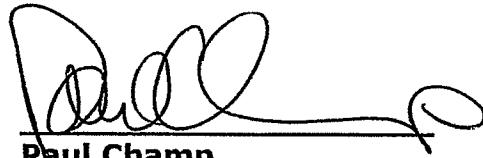
36. Most seriously, the Respondent has declined to guarantee that privilege will be respected in most circumstances. The Respondent also refused to confirm or guarantee that the Applicant's phone calls with his counsel would not be monitored by other government agencies.

37. There is no good reason why the Respondent cannot make reasonable arrangements for confidential access to Applicant's counsel, unless the objective is to frustrate litigation and make it more costly. The Applicant submits that the Respondent should be ordered to permit and, if necessary, provide the means to facilitate confidential solicitor-client communications between the Applicant and his counsel.

PART IV – ORDER REQUESTED

38. The Applicant requests that the motion allowed on the following terms:
- (a) An order that the Respondent pay the solicitor-client legal costs of the Applicant, on an advance interim basis,
 - (b) An order that the Applicant's legal accounts be monitored and approved on a regular basis by a case management judge;
 - (c) An order requiring the Respondent to permit and, if necessary, provide the means to facilitate, confidential solicitor-client communications between the Applicant and his solicitor, including facsimile transmissions, while the Applicant is given safe haven in the Canadian embassy; and
 - (d) Costs on the motion, payable forthwith.

Dated: June 19, 2008



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**Solicitors for the Applicant on the
Motion**