Federal Court Cour fédérale

Date: 20150429

Docket: T-1322-13

Citation: 2015 FC 548

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

ABOUSFIAN ABDELRAZIK

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion by Abousfian Abdelrazik [the Plaintiff] pursuant to Rule 225 of the *Federal Courts Rules*, SOR/98-106 for an order for disclosure of relevant documents that are in the possession, power, or control of Her Majesty the Queen in Right of Canada [the Defendant].

II. Facts

[2] The Plaintiff commenced an action before the Federal Court claiming damages arising from a leak to the media of Canadian government documents containing prejudicial and unsubstantiated allegations against him. This leak occurred in August 2011 [the August 2011 leak or 2011 leak].

[3] The Plaintiff's claim is for compensatory and punitive damages based on allegations regarding a pattern of behaviour for which the Defendant is said to be responsible. This pattern of behaviour concerns:

1. Deliberate leaks of government documents to discredit individuals suspected of terrorist activities;

2. Failure to properly investigate and identify perpetrators when such leaks occur; and

3. Failure to improve safeguards over sensitive and highly confidential personal information concerning former targets of national security investigations in order to prevent future leaks (Plaintiff's Motion Record [PMR] page 198, at para 4).

[4] The Plaintiff alleges that the Defendant tacitly encouraged efforts to damage his reputation by ensuring that he remained a terrorist suspect in the public's eyes.

[5] The Plaintiff sent a letter, dated April 1, 2014, to the Defendant requesting him to identify documents said to be relevant to the action. The Plaintiff requested that they be included in the Defendant's affidavits of documents. The Plaintiff requested the following documents:

1. All investigation reports (criminal or administrative) and related records regarding leaks of government information pertaining to: i) Maher Arar (which occurred between July 2003 and July 2005) and; ii) Adil Charkaoui (which occurred in or around June 2007) [the 2007 leak]; and

2. All briefing materials, emails, notes, "media lines" or other communications to or from the office of Immigration Minister Jason Kenney regarding the leak, including but not limited to such records prior to Mr. Kenney's media comments regarding this matter. This includes any email correspondence regarding this issue that may have been sent to or from Minister Kenney's private email accounts (Plaintiff's Motion Record [PMR], page 200 at para 9).

[6] In a case management conference and via written correspondence, the Defendant objected to disclosing investigation reports and related records regarding leaks of government information pertaining to Maher Arar [Mr. Arar] and Adil Charkaoui [Mr. Charkaoui] on grounds of relevance.

[7] The Plaintiff then filed a motion before this Case Management Judge seeking an Order pursuant to Rule 225 of the *Federal Courts Rules*. This motion is the subject matter of these Reasons and Judgment.

III. Plaintiff's Submissions

[8] The Plaintiff argues that his claim is "based on an allegation of a pattern of behaviour including leaks to the media of Canadian government documents or information about other individuals including Maher Arar and Adil Charkaoui who were, like the Plaintiff, subjects of national security investigations". He adds that the comments of high-ranking Canadian officials tacitly encouraged efforts to damage his reputation (PMR, page 205 at para 21).

[9] The Plaintiff submits "that the Defendant's failure to improve safeguards over sensitive and highly confidential information concerning former targets of national security investigations will, if proven, contribute to a finding of unreasonable conduct causing injury, and warrant a remedy including compensatory and punitive damages" (PMR page 206, at para 24). The Plaintiff states that these documents are relevant and that the disclosure of the earlier investigations would provide relevant information that goes to the heart of the issue.

[10] Moreover, the Plaintiff states that the disclosure regarding the investigations related to leaks prior to the August 2011 leak would provide him with relevant information that goes to the issues of fact that separates the parties.

[11] The Plaintiff further submits that the documents already disclosed by the Defendant demonstrate that the comments made by CSIS Director Richard Fadden and Minister Kenney's comments following the August 2011 leak were construed as part of a communication strategy intended to shape the public's opinion about him, that CSIS evaluated whether non-publicly

available information could be released in order to promote a "counter narrative" about him and that the media reports about the Plaintiff were monitored and reviewed by the Defendant. The Plaintiff therefore argues that the requested documents are directly relevant to the issues raised in his claim and ought to be disclosed.

IV. Defendant's Submissions

[12] Regarding Minister Kenney's comment published on August 5, 2011, by the *Globe and Mail*, the day after the *La Presse* article, the Defendant states that a further affidavit produced by Mr. Michel Dupuis, Director General of the Case Management Branch at Citizenship and Immigration Canada [CIC] dated March 18, 2015, confirms that, to date, no documents were found regarding the "briefing notes and other preparatory materials relating to Immigration Minister Jason Kenney's media comments" in relation to the present matter. The affidavit of Mr. Chris Day, Chief of Staff to the present Minister of Citizenship and Immigration, dated March 25, 2015, also confirms the same information. The Defendant adds that there is no indication that CIC is seeking not to produce any documents or material on this matter. The Defendant thus argues that since no briefing notes and other preparatory materials concerning Minister Kenney have been found, he has satisfied his obligation to produce affidavits of documents for the present matter pursuant to Rule 223(2) of the *Federal Courts Rules*.

[13] Regarding the Plaintiff's request for disclosure of the reports and related documents relative to the unauthorized disclosure of information concerning Mr. Arar and Mr. Charkaoui that is said to have taken place between 2003 and 2005 and in 2007, the Defendant refers the Plaintiff to the affidavit of documents of Mr. Bradley Evans, Director General of the Litigation

and Disclosure Branch at CSIS, dated August 14, 2014. According to the Defendant, Schedule 1 of the affidavit of documents contains a number of draft versions of Mr. Fadden's October 29, 2009, speech to the Canadian Association for Security and Intelligence Studies [CASIS], including document "AGC 0611". Thus, no further disclosure can be made to the Plaintiff regarding this speech.

[14] The Defendant also submits that this Court should not render an order that goes beyond the parameters of this action, which concerns only Mr. Abdelrazik and not Mr. Arar or Mr. Charkaoui. Doing so would amount to authorizing a fishing expedition. The Defendant submits that the documents regarding Mr. Arar or Mr. Charkaoui do not fall under any of the four categories of documents that may be discovered as noted in *AstraZeneca Canada Inc. v Apotex Inc.*, [2009] 4 FCR 243 at paragraph 11, which include: (1) The parties own documents which the parties rely upon; (2) Adverse documents; (3) Documents that are part of the story or background to the case; (4) Train of Inquiry documents. The Defendant further argues that "they are not part of the "story" or "background" of the Plaintiff's case nor will they likely serve to establish a "train of inquiry" of use to the Plaintiff. The requested documents are neither necessary nor relevant for trial" (Defendant's Motion Record [DMR] page 62, at para 19).

[15] The Defendant further submits, with regard to the documents requested by the Plaintiff concerning Mr. Arar and Mr. Charkaoui, that the Plaintiff has no legal standing to make arguments for third parties, and that the "Defendant's fault, if any, and the Plaintiff's damages, if any, rests with the events that led to the August 2011 article published in La Presse. Actions of the government between 2003 and 2005 (Arar) and in 2007 (Charkaoui) are of no relevance to

events that occurred years later" (DMR page 64, at para 24). The Order for further disclosure sought by the Plaintiff should thus be denied.

[16] The Defendant also explains that the Affidavit of Documents from Inspector Randal Walsh of the RCMP, dated May 29, 2014, states that the RCMP "O" Division Ottawa Integrated National Security Enforcement Team [INSET] is conducting an ongoing investigation into the August 2011 alleged unauthorized disclosure of CSIS documents to *La Presse* and the *Montreal Gazette*. It is submitted that such investigation, at least at this stage, is protected from any disclosure. The Defendant notes that this investigation began days after the newspapers' disclosure.

[17] The Defendant is therefore of the opinion that the affidavits of documents provided satisfies his obligation to provide documents relevant to the present litigation.

V. The Recent Disclosure of the Transcript of the Minister of CIC Press Conference of August 15, 2011

[18] On April 16, 2015, 16 days after the hearing held at the end of March 2015, counsel for the Defendant forwarded to the Court a transcription of a news conference given by Minister Kenney on August 5, 2011, a day after the publication of the 2011 newspapers leak disclosing among other things the discussion between the Plaintiff and Mr. Charkaoui about the hijacking of an Air France plane and exploding it, the subject matter of the Abdelrazik disclosure request.

[19] Counsel for the Plaintiff in response to this disclosure responded by letter on the same day and said the following:

a. Although the disclosure of the transcript is not done pursuant to the Rules of the Federal Courts, the Plaintiff does not object to its production;

b. Such disclosure calls into question the thoroughness of the searches made to identify relevant documents in response to the requests made and the affiants statements that all documents have been disclosed;

c. It gives crucial support to the argument made by the Plaintiff's counsel that further documents from Minister Kenney's news conference needed to be disclosed and also that there was a CSIS media strategy developed in 2009. This media strategy suggests that the Ministers would be better spokespersons than CSIS director Mr. Fadden and furthermore that the reference by the Minister to Mr. Fadden's speech of two years before had to be supported by a media line and should not be seen as coincidental;

d. Such important disclosure gives weight to the conclusion sought that: "The Defendant is directed to conduct a further search and prepare and serve further better affidavit(s) of documents listing documents relevant to Mr. Kenney's comments to the media on August 5, 2011."

The Plaintiff also requests costs to be paid forthwith pursuant to Rule 401(2) of the *Federal Courts Rules*.

[20] In reply to the response of the Plaintiff, the Defendant had this to say:

a. The Rules of the Federal Courts did not have to be followed since the transcription of the news conference was produced as a result of an undertaking made at the hearing by counsel for the Defendant following a request from the Court;

b. The subject of the news conference was the Minister's trip to New Zealand and Thailand the discussion that occurred on the 2011 leak was limited to one question and answer. One of the affiants, Mr. Day, the Chief of Staff of the current Minister, provided his own affidavit of documents which already disclosed the response given by the Minister on the specific subject matter and there was no attempt to conceal the transcript;

c. The Defendant does not concede that the previous affidavits of documents were deficient and submits that the reference to the CSIS Director's speech by the Minister does not give support to the argument that there were documents given to the Minister which suggested to him some media response in relation to the 2011 leak.

[21] On the costs issue, the Defendant submits that the production of the transcription and his submissions to the disclosure requests were reasonable and in no way abusive. Therefore, there is no basis to depart from the principle that costs should be dealt with at the conclusion of this matter.

[22] I have reviewed my notes of the hearing and can only agree with counsel for the Defendant when he says that the transcript came as a result of an undertaking made by counsel

for the Defendant in response to a suggestion made by the undersigned. I would add that the discussion about the transcript began with comments made by counsel for the Plaintiff at the beginning of his reply and resulted in the undertaking made. The disclosure of this transcript does not in the present circumstances give support to the argument that the disclosure process followed by the Defendant is incomplete or inappropriate.

[23] Should that transcript have been disclosed in one of the affidavits of documents in response to the disclosure requests? It may have been better but the Defendant says that the pertinent extract of the question and answer about the 2011 leak was disclosed as part of the disclosure process and that this information was in specific response to the Plaintiff disclosure request as formulated.

[24] In light of all of that, this Court cannot make a negative finding about the disclosure made by the Defendant and more so when the transcript was disclosed in response to a request from the Court as a result of an exchange with counsel from the Plaintiff. In addition, the pertinent question and answer had already been disclosed and the remaining part of the transcript deals with other matters not related to the August 2011 leak. I will now deal with the substantial matters related to the motion for disclosure.

VI. Issue

[25] I have reviewed the parties' submissions and respective records and I frame the issue as follows:

1. Are the documents at issue relevant for purposes of discovery of documents pursuant to Rules 223 to 232 and 295 of the *Federal Courts Rules*?

VII. Analysis

A. *Introduction*

[26] My colleague Justice Richard Mosley summarized the test for disclosure in *Khadr v Canada*, 2010 FC 564 at paragraphs 9 to 11 in the following way:

> [9] Discovery of documents in Federal Court actions is governed by Rules 222 to 233 of the *Federal Courts Rules*. The test as to which documents are required to be produced by a party is relevance (Rule 222(2)). A document is relevant if it either directly or indirectly advances a party's case or damages that of its adversary or may fairly lead to a "train of inquiry" that may have either of these two consequences: *Apotex Inc. v. Canada*, 2005 FCA 217, [2005] F.C.J. No. 1021.
>
> [10] There are limits to the reach of the "train of inquiry" line of discovery. The test is whether there is a reasonable likelihood that a document sought for production would lead to information relevant under Rule 222(2): *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, [2008] F.C.J. No. 1372. The focus of the rule is clearly on matters that are necessary and relevant for the trial: *AstraZeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301, [2008] F.C.J. No. 1696, at para 6.
>
> [11] Relevance is to be determined by reference to the issues of fact which separate the parties, as defined by the pleadings: *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, (1997), 146 F.T.R. 249, [1997] F.C.J. No. 1847, at para. 7. […]

[27] In the case at bar, the Plaintiff seeks to obtain the following documents from the Defendant:

1. All Investigation Reports (Criminal or Administrative) and related records regarding leaks of government information pertaining to: i) Maher Arar (which occurred between July 2003 and July 2005) and; ii) Adil Charkaoui (which occurred in or around June 2007); and

2. All briefing materials, emails, notes, "media lines" or other communications to or from the office of Immigration Minister Jason Kenney regarding the leak, including but not limited to such records prior to Mr. Kenney's media comments regarding this matter. This includes any email correspondence regarding this issue that may have been sent to or from Minister Keeney's private email accounts (PMR page 200 at para 9).

[28] The Plaintiff seeks these documents on the basis that the Defendant took actions to damage his reputation by making sure he remained a terrorist suspect in the public's eyes, similarly to what had been done to Maher Arar and Adil Charkaoui.

[29] In order to dispose of all the requests made by the Plaintiff in this motion, I intend to deal with each one of them in the following manner:

1. All Investigation Reports (Criminal or Administrative) and related records regarding leaks of government information pertaining to Maher Arar (the Arar leaks disclosure request);

2. All Investigation Reports (Criminal or Administrative) and related records regarding a leak on or about June 2007 of government information pertaining to Adil Charkaoui (the "Charkaoui leak disclosure request");

3. All briefing materials, e-mails, notes, "media lines" or other communications to or from the Office of Minister Jason Kenney regarding the leak of August 2011 concerning the Plaintiff and Mr. Charkaoui, including but not limited to such records prior to Mr. Kenney's media comments regarding this matter. This includes any e-mail correspondence regarding this issue that may have been sent to or from Minister Kenney's private e-mail account ("the media response to the Abdelrazik leak disclosure request").

[30] During the hearing, counsel for the Defendant at the end of his submissions suggested a different wording for the Charkaoui leak disclosure request which was agreed by counsel for the Plaintiff:

> "Any Criminal and Administrative Investigation Reports and any corrective measures taken that relate to a leak of government information to the media in or around June 2007 that became the subject matter of a La Presse Newspaper Article on June 22, 2007."

B. *General Comments about the Three (3) Requests*

[31] It became evident at the hearing that both the Charkaoui and Abdelrazik leaks (June 2007, August 2011) had common points. Both leaks concerned at least two (2) of the same individuals (Charkaoui and Abdelrazik) and the same subject matter (a conversation between them discussing the hijacking of an airplane, etc.). They both relate to secret government documents which were disclosed to "*La Presse*" journalists in early summer 2007 and journalists of "*La Presse*" and "*The Montreal Gazette*" in early August 2011. A CSIS Administrative

Investigation began in 2007 but was then replaced by a RCMP investigation and in 2011, a RCMP investigation was undertaken which has not been finalized as of the date of these reasons.

[32] The same cannot be said about the Arar leaks disclosure request. The leaks refer to Mr. Arar and others and do not relate to either Mr. Charkaoui nor the Plaintiff. There were RCMP investigations into the leaks and also of importance was that the Report of the Commission of Inquiry into the actions of Canadian Officials in relation to Maher Arar (2006) (the Arar Inquiry) dealt at length with these leaks and made pertinent, informative and insightful findings about them. The same cannot be said about the other leaks disclosure requests.

[33] The Plaintiff argues that the main common point on the three (3) sets of leaks is that there is a pattern for the government of disclosing information on specific non accused individuals to discredit them, and failing to properly investigate and successfully identify the perpetrators of such leaks. It is also submitted that the Defendant did not improve safeguards of sensitive information concerning personal information that relate to former targets of national security investigations in order to prevent future leaks. It is also suggested that there may be a common thread among them since some of the evidence shows that following the 2011 leak, CSIS officials inquired about the procedures followed to investigate the Arar and Charkaoui leaks and that there is no evidence that proper measures were instigated in order to prevent further occurrences of these types of leaks.

C. *The Arar Leaks Disclosure Request*

[34] These leaks go back to ten years and more. They do not relate to the Plaintiff. As mentioned earlier, they refer to Mr. Arar and to some other individuals. As noted above, the Arar Inquiry has dealt substantially with the leaks that relate to Mr. Arar and made important findings and conclusions on the matter. The request as formulated is general, large in scope and gives an impression that it is made without specific reference to any particular documents that could be of some use. It is most general and would probably generate the production of a list of documents which would have very little use to the Plaintiff, if any. By making such a general request, the Plaintiff gives an impression that he wants to replace the Arar Inquiry. This is not what Rules 225, 227 and 229 of the *Federal Courts Rules* contemplate. Relevancy has to be rooted in a factual foundation to which the request may be linked. Here, the Arar leaks disclosure request does not relate to the Plaintiff. It is based on leaks that go back to more than six (6) years at least, if compared to the Abdelrazik August 2011 leak. It has also been investigated by the Arar Commission and findings and conclusions were made which can surely be of some use for the Plaintiff in support of the allegations made in this Statement of Claim.

[35] As for the train of inquiry test, Justice Mosley in *Khadr* (already referred to) at paragraph 10 said that there were limits to it. The test is that there must be "reasonable likelihood" that a category of documents sought would be relevant to what separates the parties as the pleadings may show. Again here, the fact that an investigation into a leak occurred does not in itself make this document relevant nor does it create a "reasonable likelihood" that it will be relevant. I say this with full knowledge of what the Arar Inquiry said about the Arar leaks and the conclusions it made. They shall be useful to the Plaintiff if it is his intention to use them to support his claim.

[36] Counsel for the Plaintiff drew the attention of the Court to a few e-mails created as a result of the 2007 and 2011 leaks which disclosed that officials at the time inquired as to what was respectively done on the matter of investigation into the "Arar leak" and then the "Chark Fil" (see PMR at pages 159 and 153). What these exchanges show was that the officials were seeking precedents as to how to do the investigation of the leaks but also that no administrative investigation would be ongoing if the RCMP began its own investigation. Counsel argued that the enquiries justified the disclosure of documents related to these respective investigations. I do not think that these e-mails exchanges create any relevancy as to the documents being sought nor does it give support to the train of inquiry approach. They are inquiries on how to proceed about the leaks. As a brief reminder, a document is relevant if it can advance directly or indirectly the cause or damages being claimed by a party or that there is a reasonable likelihood that the document sought would lead to relevant documents. Such is not the case here.

[37] For all these reasons, the Arar leak disclosure requests should not be granted. Again, I emphasize that the real danger of such request is to turn this litigation into a lot more than what the Statement of Claim and Defence call for. As said earlier, the Arar Inquiry dealt with the Arar leaks and the Plaintiff will be able to rely on the findings and conclusions made subject to the applicable rules of evidence in such cases.

D. *The Charkaoui Disclosure Request*

[38] The Charkaoui leak disclosure request calls for a different conclusion. As mentioned before, the facts common to both leaks do create a context of relevancy. Both the 2007 and 2011 leaks relate to the same discussion that would have been held by at least the Plaintiff and Mr. Charkaoui. Another common fact is that both leaks were published by journalists of "*La Presse*".

I also note that in reference to the 2007 leak, it was also published in "*Le Droit*". As for the 2011 leak, it was also published in "*The Montreal Gazette*" by one of its journalists. In both cases, the RCMP was or is investigating. These common threads, contrary to the Arar leaks disclosure request, do indicate that such request can be relevant to the issues at play framed in the Statement of Claim and the Defence. I would also add that the leaks are closer in time than the 2003-2005 Arar leaks.

[39] Therefore, I will grant the Charkaoui leak disclosure request as newly formulated by counsel for the Defendant.

E. *The Media Response to the Abdelrazik disclosure Request*

[40] The Plaintiff is seeking the production of documents that would relate to any document that would have permitted the then Minister of Citizenship and Immigration, Mr. Kenny to comment on the August 2011 leak in the following way:

> "I read the protected confidential dossiers on such individuals, and I can tell you that, without commenting on any one individual, some of this intelligence makes the hair stand up on the back of your neck", he said, "I just think people should be patient and thoughtful and give the government and its agencies the benefit of the doubt" (PMR, page 157).

[41] Counsel for the Defendant submits that the documents that exist have already been produced and on some of them a privilege is claimed. Mr. Chris Day, Chief of Staff of the current Minister of Citizenship and Immigration and Mr. Michel Dupuis, Director General of the Case Management Branch at Citizenship and Immigration Canada, have both signed recent

affidavits in which they certify that in relation to the disclosure request: "no such documents have been found".

[42] Counsel for the Plaintiff submits that it is surprising and very unlikely that there would have been no briefing notes or other preparatory materials within the CIC Minister's Office prior to the Minister's comments to the media. As said earlier, the recent disclosure of the transcript of the Minister's press conference does not add any support to this argument.

[43] An affidavit is a very sacro-saint document. An individual under oath affirms that what is written in the affidavit is the truth. In our case, two senior officials have sworn that there are no such documents. An affidavit creates a presumption of veracity which can only be reversed by contradictory evidence (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302; *Villarroel v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 210 (CA); *Thind v Canada (Minister of Employment and Immigration)*, [1983] FCJ No 939 (CA)). The Plaintiff had the opportunity to cross-examine the affiants but did not do so.

[44] The Court, being put in such a situation, has no reason to doubt the sworn statement. No such documents have been found. Therefore, in such a case, a Court will not order the production of documents when the non-contradicted evidence shows that no documents have been found. It would be presumptuous to issue such an order with the evidence presented.

VIII. Conclusion

[45] I will therefore grant in part the motion for disclosure by granting the Charkaoui disclosure request but will not grant neither the Arar disclosure request nor the media response to Abdelrazik's disclosure request. Costs will be in the cause.

JUDGMENT

THEREFORE, THIS COURT ORDERS AND ADJUDGES that:

1. The motion pursuant to Rule 225 of the Federal Courts Rules is granted in part.

2. The Defendant shall disclose to the Plaintiff:

> Any criminal and administrative investigation reports and any corrective measures taken that relate to a leak of Government information to the media around June 2007 that became the subject matter of a "La Presse" newspaper article on June 22, 2007.

3. Costs in the cause.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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