Federal Court  Cour fédérale

Date: 20090811

Docket: T-727-08

Citation: 2009 FC 816

Ottawa, Ontario, August 11, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS
and THE ATTORNEY GENERAL OF CANADA

Respondents

SUPPLEMENTAL REASONS FOR JUDGMENT AND JUDGMENT

[1] In my Reasons for Judgment dated June 4, 2009, I remained seized should the parties be unable to agree upon appropriate safe travel arrangements to return Mr. Abdelrazik to Canada within 30 days. He was ordered to appear before me at the Court in Montreal, on Tuesday, July 7, 2009. Costs of the application were reserved to be dealt with after receipt of submissions from the parties.

[2] The further involvement of this Court was not required as the Government of Canada issued the required travel document and made appropriate arrangements for Mr. Abdelrazik's return to Canada. He appeared before me in Montreal, on July 7, 2009.

[3] The Court has now received the parties' submissions concerning costs. These are my Supplemental Reasons on that last remaining outstanding issue.

The Position of the Parties

[4] The applicant is seeking solicitor-client costs, set as a lump sum in the amount of $127,600.00, inclusive of fees, disbursements and GST. It is submitted that solicitor-client fees were incurred of $116,294.00, plus GST, and disbursements of $5,501.52.

[5] The applicant advances a number of factors in support of his claim, including the following:

(a) "Complex and novel issues of constitutional and international law were central to the case, and the importance of the matter to the [a]pplicant cannot be overstated";

(b) "[T]he [a]pplicant enjoyed overwhelming success in the application, with serious findings that the [r]espondents acted in bad faith and violated his constitutional rights";

(c) There was a written offer to settle delivered early in the litigation that was rejected by the respondents;

(d) Counsel was required to spend a considerable amount of time communicating with the applicant by telephone “to build and maintain trust” and “to keep his spirits up as he was living in a very trying environment”.

[6] The applicant was represented by five lawyers throughout and at various stages of the application. Their names, year of call and hourly billing rates are as follows:

i. Yavar Hameed (2001) - $180

ii. Audrey Brousseau (2008) - $125

iii. Khalid Elgazzar (2006) - $135

iv. Paul Champ (2000) - $225

v. Amir Attaran (1999) - $225

[7] All but Mr. Attaran appeared at the hearing of this application which occurred over two days. Mr. Attaran is a law professor and the Court was advised that “he will not be billing for his fees, although his time is being claimed” in the draft bill of costs.

[8] As an alternative submission to his claim for solicitor-client costs throughout, the applicant submits that he ought to be entitled to recover party-party costs to the date of the settlement offer and solicitor-client costs thereafter, in a lump sum of $97,000, inclusive of fees, disbursements and GST. In the further alternative, he seeks party-party costs throughout in the amount of $78,766.00, being 60% of legal fees and GST plus full reimbursement of disbursements.

[9] The respondents submit that the appropriate award of costs is in accordance with Column III of Tariff B of the *Federal Courts Rules.* They submit that this is not one of those rare and extraordinary circumstances where an award of solicitor-client costs is appropriate.

[10] The respondents further submit that it is relevant that all counsel for the applicant were providing there services on a *pro bono* basis and, as a result, the Court in making any award of costs is not compensating Mr. Abdelrazik for actual legal costs incurred by him.

[11] They further submit that the hours claimed by counsel for the applicant is excessive. For example, they submit that there is an excessive amount of hours claimed because, in some instances, more than one counsel was involved unnecessarily. As an illustration they point to the hearing where four lawyers were present although only two made oral submissions. They also point to the excessive preparation time for cross-examinations on affidavits that resulted from more than one counsel conducting the examinations. They also raise questions as to the appropriateness of some of the claimed disbursements, suggesting that some of the claimed disbursements relate to other disputes between the applicant and the Government of Canada.

[12] The respondents also object to the inclusion of time spent that was not actually and directly related to the litigation. In this respect the additional hours spent communicating with Mr. Abdelrazik on a daily basis is resisted.

[13] They also point out that costs of pre-hearing motions have been previously determined to be costs in the cause and submit, on the basis of the decision of the Court of Appeal in *Merck & Co. v. Apotex Inc.* (2006), 354 N.R. 355, 2006 FCA 324, that I have no discretion to vary the default scale for these matters.

[14] Lastly, they submit that the settlement offer had expired on September 15, 2008, and contained no element of compromise and, as such, should be given no consideration.

[15] The Respondents submit that the maximum allowable award of costs under Column III of Tariff B is $24,827.40. Alternatively, they submit that if costs are fixed in accordance with the upper end of Column IV (save for costs associated the interlocutory motions which were fixed in accordance with Column III), the costs should be fixed at $35,683.20. They submit that disbursements properly incurred total an additional $3,380.93.

Analysis

[16] An award of costs is not an exact science; it is to be made on a principled basis. As the respondents have submitted, the usual practice in this Court is to award costs on the basis of Column III of Tariff B. However, Rule 400(4) of the *Federal Courts Rules* permits the Court to award "a lump sum in lieu of, or in addition to, any assessed costs."

[17] There is a significant advantage to the parties when the Court makes a lump sum award of costs, namely the savings in costs that would otherwise be incurred in the assessment process. In

this case I am of the view that a lump sum award is appropriate, given the detailed submissions of the parties and the unique circumstances of this case.

[18] Rule 400(3) sets out factors that the Court may consider in making an award of costs, as follows:

400.(3) In exercising its discretion under subsection (1), the Court may consider	400.(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
(*a*) the result of the proceeding;	*a*) le résultat de l'instance;
(*b*) the amounts claimed and the amounts recovered;	*b*) les sommes réclamées et les sommes recouvrées;
(*c*) the importance and complexity of the issues;	*c*) l'importance et la complexité des questions en litige;
(*d*) the apportionment of liability;	*d*) le partage de la responsabilité;
(*e*) any written offer to settle;	*e*) toute offre écrite de règlement;
(*f*) any offer to contribute made under rule 421;	*f*) toute offre de contribution faite en vertu de la règle 421;
(*g*) the amount of work;	*g*) la charge de travail;
(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;	*h*) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	*i*) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;	*j*) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
(*k*) whether any step in the proceeding was	*k*) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) improper, vexatious or unnecessary, or	(i) était inappropriée, vexatoire ou inutile,
(ii) taken through negligence, mistake or excessive caution;	(ii) a été entreprise de manière négligente, par erreur ou avec

	trop de circonspection;
(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;	*l*) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;
(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;	*m*) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;
(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and	*n*) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
(*o*) any other matter that it considers relevant.	*o*) toute autre question qu'elle juge pertinente.

[19] Some of these factors have been specifically addressed by the parties in their submissions and have been considered in the costs award that follows.

Importance and Complexity of the Issues

[20] The importance of the litigation to Mr. Abdelrazik is obvious. Absent a favourable ruling he may well have found himself in Sudan and a resident of the Canadian Embassy for the reminder of his days. Moreover, the issue of the rights of a Canadian citizen to enter Canada and the obligations

of the Government of Canada to issue travel documents to facilitate that return is an issue of importance to all Canadians.

[21] The issues were also complex involving an analysis and understanding of legislation including the *Canadian Charter of Rights and Freedom*, United Nations Security Council Resolution 1822, and *Canadian Passport Order* S1-81-86, as well as a consideration of the international obligations of Canada with respect to UN determinations, the interplay of domestic and international law, and the Royal prerogative.

[22] This factor points to an increased award of costs.

Conduct of the Respondents

[23] Where the conduct of a party has been reprehensible, scandalous or outrageous, an award of solicitor-client costs may be appropriate: *Young v. Young*, [1993] 4 S.C.R. 3.

[24] The applicant relies on the findings, on the record before the Court, that CSIS was complicit in his detention in Sudan and that the respondents were continually moving the goal posts as he attempted to return to Canada, as a basis for an award of solicitor-client costs. I do not accept this submission.

[25] The relevant conduct, in the context of a costs award, is conduct in the course of the litigation – it is litigation misconduct – it is not the conduct that gave rise to the litigation. If that

were the proper test then virtually all litigation would meet the test. As Mr. Justice Gibson observed in *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1182, at para. 16:

> …[W]here, as here, a party seeks solicitor-and-client costs, the Court must bear in mind that such costs are awarded only in rare instances and where the party against whom solicitor-and-client costs are sought has demonstrated in his conduct of the proceeding "scandalous" or "outrageous" behaviour, or misconduct that is "deserving or reproof or rebuke". (emphasis added)

[26] The applicant has raised only two suggested improprieties with respect to the respondents' conduct of the litigation and neither warrants costs on a solicitor-client basis.

[27] The first relates to questions put to the applicant during his cross-examination and, in particular, relates to questions that were alleged to suggest that his wounds were self-inflicted rather than the result of torture. In circumstances where the applicant had not once previously alleged that he was tortured, these were proper. Further, counsel would have failed her client had she not raised them.

[28] The second relates to an allegation that the respondents delayed producing documents requested in a Direction to Attend. I fully accept the submission of the respondents that any delay that was occasioned was as a direct result of the breadth of the documents sought by the applicant. In the end there was no complaint at the hearing that insufficient documents had been produced. The applicant suffered no prejudice from any alleged delay in production.

[29] Accordingly, I find that there was no litigation misconduct that would point to an increased award of costs.

Pro Bono

[30] The respondents submit that as counsel for the applicant were acting *pro bono* and the applicant was not exposed to the risk of paying legal costs throughout the litigation (as the respondents did not seek costs in the various interlocutory motions, the appeal in which they were successful, and in the main application) an award of costs under Column III of Tariff B is appropriate.

[31] I can see no principled basis to outright refuse an order for costs solely on the basis that counsel agreed to act *pro bono*. Counsel in this instance, taking on Mr. Abdelrazik's case in circumstances where he was unable to do so personally and was impecunious, conducted themselves in the best tradition of the Bar. I agree with and endorse the observations of the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd*. (2006), 82 O.R. (3d) 757, at para. 35, that there are positive consequences to having *pro bono* counsel receiving some reimbursement for their services from the losing party:

> … [A]llowing pro bono parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-pro bono party and the pro bono party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work pro bono in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act pro bono, there is no anticipation that the potential for costs

> awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

[32] However, as the costs awarded belong to the successful party and not his counsel, the Court, in my view, should only make an award of costs if satisfied that there is an arrangement between the litigant and his counsel that any costs awarded will be paid over to the counsel. Absent such a payment over, the litigant would be unjustly enriched by an award of costs. As was noted by Justice Layden-Stevenson, as she then was, in *AB Hassle v. Genpharm Inc.*, 2004 FC 892, at para. 15, "Costs should be neither punitive nor extravagant." An award of costs to a party litigant who keeps those funds when he has incurred no costs would be extravagant and unjust.

[33] In this case, Mr. Hameed advised the Court that Mr. Abdelrazik has agreed that any costs awarded will be paid to his counsel, save and except for Mr. Attaran, who has agreed to forgo any payment for his services, and that Mr. Abdelrazik will retain nothing. That being the case, it is appropriate to make an award of costs notwithstanding that counsel were acting *pro bono*, except that it is not appropriate to make any award with respect to services provided by Mr. Attaran, as doing so, in my view, would be unjust and unfair.

Offer to Settle

[34] The applicant did make an offer to settle. There is no dispute that the offer is not valid for the purposes of a double cost award under Rule 420; however, pursuant to Rule 403(3) it may be considered even though it expired prior to the hearing.

[35] The applicant challenges the respondents' assertion that there was no element of compromise in the offer, submitting that he would have forgone any costs had it been accepted. This element of alleged compromise in the circumstances of this case, given the timing of the offer, was minimal; however it should not be ignored.

[36] I find that the offer is a relevant consideration in fixing an award of costs under Rule 400(3). I do not, however, in the circumstances of this case, give much significance to the offer. In large part the offer reflected exactly the remedy sought. While the applicant was prepared at that early stage of the litigation to forgo his costs, it cannot be ignored that this was in the context of *pro bono* proceedings where he was personally giving up nothing – it was his lawyers who were prepared to forgo compensation.

The Appropriateness of Claimed Time and Disbursements

[37] In my view, the applicant's draft bill of costs included time that is not properly compensable in an award of costs. I have no reason to doubt the sincerity of counsel when he states that daily contact with Mr. Abdelrazik was important to develop his trust and provide contact in his unique circumstances. However, it was not directly related to the litigation and it would be punitive to consider that time in the context of an order for costs.

[38] I am also of the view that some time claimed is not appropriate even though it has a direct bearing on the litigation. Not even the most complex case often justifies having four counsel paid for attending the hearing, especially when only two make oral submissions. The Court does not

question that the silent counsel were of assistance to main counsel; however, it is not a cost the respondents ought to bear.

[39] Although it would no doubt have resulted in less time spent had all of the cross-examinations been done by one lawyer rather than many, it is not appropriate for the respondents or this Court to dictate how *pro bono* counsel managed the case. In such circumstances it is more likely that the work would be shared – spreading the personal costs of the lawyers rather then unduly burdening one. This would necessarily result in some duplication. In these circumstances the duplication was warranted.

[40] Some of the disbursements related to daily telephone calls are not properly compensable. Without a time consuming analysis of each call it is not possible to be precise as to the amount of disbursements that ought to be allowed; however, these costs were minimal and the vast majority of the claimed disbursements are properly compensable.

Conclusion

[41] I agree with the respondents that this is not a case where solicitor-client costs are justified. On the other hand, there is merit to the applicant's submission that the stakes were high for him personally and that there were very complex legal issues at play.

[42] The amount of work done by counsel was evident from the volume of evidence placed before the Court as well as the thoughtful submissions made both in writing and orally. It is deserving of more than an award of costs on Column III of Tariff B.

[43] I am of the view that the award of costs in this proceeding must reflect the complexity and importance of the issues raised and the significant work done by counsel directly related to the application as well as the fact that they were largely successful.

[44] Recognizing that an award of costs is a matter of principled judgment, and considering the submissions and the factors discussed above, in the exercise of my discretion, I fix costs on a lump sum basis in the amount of $47,500.00 inclusive of fees, disbursements and GST, to be paid to the applicant by the respondents. Given the advice of Mr. Hameed as to the agreement in place with Mr. Abdelrazik, the costs awarded are to be paid by the respondents only after Mr. Abdelrazik provides a written direction to the respondents that the costs awarded to him hereby are to be paid directly to the law firm Hameed Farrokhzad Elgazzar Brousseau, in Trust for Yavar Hameed, Khalid Elgazzar, Audrey Brousseau and Paul Champ.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT costs are fixed on a lump sum basis in the amount of $47,500, inclusive of fees, disbursements and GST to be paid to the applicant by the respondents after Mr. Abdelrazik provides a written direction to the respondents that the costs awarded to him hereby are to be paid directly to the law firm Hameed Farrokhzad Elgazzar Brousseau, in Trust for Yavar Hameed, Khalid Elgazzar, Audrey Brousseau and Paul Champ..

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-727-08
STYLE OF CAUSE:	ABOUSFIAN ABDEKLRAZIK v. THE MINISTER OF FOREIGN AFFAIRS and THE ATTORNEY GENERAL OF CANADA
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DATED:	August 11, 2009

APPEARANCES:

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