

Federal Court



Cour fédérale

Date: 20220301

Docket: T-479-18

Citation: 2022 FC 285

Ottawa, Ontario, March 1, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

AYAN ABDIRAHMAN JAMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS
(COSTS)

I. Overview

[1] These reasons concern the costs and disbursements payable between the parties as a result of this Court's judgment in *Jama v Canada (Attorney General)*, 2022 FC 37 [*Jama* #2].

[2] Ayan Abdirahman Jama sought judicial review of a decision by the Minister of Public Safety and Emergency Preparedness [Minister] to deny her a passport pursuant to s 10.1 of the *Canadian Passport Order*, SI/81-86. The Minister also determined that Ms. Jama should be refused passport services for a period of four years commencing on December 31, 2015, the date on which she submitted her passport application.

[3] Ms. Jama became eligible to apply for a passport on December 31, 2019. In *Jama #2*, the Court held that the application for judicial review had become moot, and none of the considerations identified by Ms. Jama and the Attorney General of Canada [AGC] warranted hearing the application for judicial review on its merits, or deciding Ms. Jama's constitutional question in the absence of a live controversy.

[4] For the reasons that follow, costs are payable to Ms. Jama by the AGC in the fixed amount of \$10,000.00, including disbursements. This is intended to reflect the public interest in resolving the legal issues raised in this proceeding, and the Court's disapproval of the Minister's failure to decide the underlying passport application within a reasonable time.

[5] The latter consideration is reinforced by the possibility that the Minister may refuse a future request for passport services by Ms. Jama based in part on the same adverse information. If so, the legal and constitutional issues raised by this application may once again be before the Court. The Minister and his staff must decide passport applications, including those that raise national security concerns, in a timely manner. This is necessary to ensure the availability of effective judicial review where warranted.

II. Positions of the Parties

A. *Ms. Jama*

[6] Ms. Jama requests costs in the fixed amount of \$25,000.00, which she says is a lower sum than costs on a solicitor-client basis. She has not provided a draft Bill of Costs or any other information that would permit the Court to ascertain the actual quantum of legal fees she incurred in advancing the application for judicial review.

[7] Ms. Jama maintains that an award of costs in the amount of \$25,000.00 is fair, given the complexity and nature of the proceeding and her efforts to clarify the law of judicial review under the *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42 [PTTA]. She argues that the application for judicial review was rendered moot for reasons beyond her control, and the issues will likely have to be addressed again should she apply for a passport in the future.

[8] Ms. Jama relies on the decision of Justice Russel Zinn in *Galati v Harper*, 2014 FC 1088 [*Galati*], in which an application for judicial review was rendered moot by, among other things, the referral by the Governor in Council of two questions to the Supreme Court of Canada concerning the appointment of Justice Marc Nadon to that Court. The applicants sought costs on a solicitor-client basis in the approximate amount of \$70,000.00. Justice Zinn acknowledged that one could argue the applicants had done Canada a service and should not be out-of-pocket in so doing. However, he also noted that very little work needed to be done by the applicants, and the

mere filing of the application appeared to have had the desired result. Justice Zinn awarded one set of costs to both applicants in the fixed sum of \$5,000.00 (*Galati* at paras 12-15).

[9] Ms. Jama says this proceeding was the first application for judicial review to proceed under the PTTA. The lack of specificity in the PTTA or guidance in prior jurisprudence required the Court and the parties to devote a significant amount of time to determining the appropriate procedure, both in the public hearings and those conducted *in camera, ex parte*. The jurisprudence that has resulted from this proceeding will serve as a framework for the conduct of future applications for judicial review under the statute.

[10] Ms. Jama therefore asserts that the matters raised in the application were important and complex. They engaged the substantive and procedural rights of Canadians in the national security context under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. It was necessary to address unique and challenging questions concerning procedure, record production, evidence vetting, and a variety of other issues. Many of these issues are now resolved.

[11] Ms. Jama says the same considerations that led the Court to award costs to the applicants in *Galati* are present here, although she should receive a more generous award than was granted in that case.

B. *Attorney General of Canada*

[12] The AGC notes that he would ordinarily be entitled to costs, given the result of the proceeding. It is a well-established principle that costs normally follow the event. While the application was not determined on its merits, the AGC was the successful party and the decision under review remains in place.

[13] The AGC concedes that the issues raised in this proceeding were of some importance, but says the portions that took place in public were not particularly complex. The public proceedings consisted almost entirely of a series of case management conferences. The complexity and novelty of the application arose in the context of *in camera*, *ex parte* proceedings in which Ms. Jama did not participate and for which she incurred no expense.

[14] In light of the public interest in resolving the issues raised by the application, the AGC does not seek costs. While this was not the first case involving judicial review under the PTTA, it was the first to advance beyond preliminary stages. The AGC acknowledges that it was necessary for the Court, with the help of the parties, to establish a process to assess information the disclosure of which could be injurious to the national security of Canada. The AGC accepts that a public value was served by the application, but notes that most of this arose from the proceedings conducted *in camera* and *ex parte*.

[15] According to the AGC, this application was ultimately personal to Ms. Jama. While she later sought to challenge the PTTA on constitutional grounds, the fundamental purpose of the

application was judicial review of a decision to deny her passport services. The application was not brought wholly in the public interest, and Ms. Jama's reliance on *Galati* is therefore misplaced.

[16] Even if the Court finds that Ms. Jama should receive an award of costs, the AGC says the amount she seeks is excessive. Unlike the applicants in *Galati*, Ms. Jama has not provided the Court with any means of assessing her request for costs in the amount of \$25,000.00.

[17] The AGC has prepared a draft Bill of Costs based on the presumptive application of Column III of Tariff B. This suggests that the successful party would be entitled to costs in the amount of \$9,907.50 for the public portions of the application. These consisted primarily of a series of case management conferences, many of which pertained to scheduling or administrative matters. The only contested public hearings concerned the meaning of one aspect of the Court's directions in February 2019, and submissions respecting the question of mootness in December 2021.

[18] The AGC's draft Bill of Costs does not include costs in the amount of \$500.00 awarded to the AGC by Justice René LeBlanc in any event of the cause following a successful motion to strike the affidavit of an expert on counter-radicalization and counter-terrorism filed by Ms. Jama in support of her application (*Jama v Canada (Attorney General)*, 2020 FC 308).

C. *Amicus Curiae*

[19] The AGC objects to the *Amicus Curiae* [*Amicus*] making written submissions in support of Ms. Jama's request for costs. The AGC says this issue is personal to Ms. Jama, and the *Amicus* has not offered any perspective or information that Ms. Jama could not have provided herself.

[20] The *Amicus* was appointed to assist the Court in the conduct of the *in camera, ex parte* proceedings. The Court gave the *Amicus* an opportunity to address costs because some relevant considerations may have arisen in the closed hearings. However, no restriction was placed on the scope of the *Amicus*' submissions. I agree with the AGC that the considerations raised by the *Amicus* are a matter of public record. I nevertheless consider his perspective to be distinct, and useful to the Court in assessing the question of costs. I therefore exercise my discretion to consider the *Amicus*' submissions.

[21] The *Amicus* has provided the following timeline of the process that led to the Minister's decision to refuse Ms. Jama passport services for a period of four years:

- (a) Ms. Jama's passport application was received by the Minister's delegate on December 31, 2015.

- (b) The Minister's delegate first responded to Ms. Jama's passport application approximately eight and a half months later, on September 14, 2016, with a form letter explaining the process to be followed.
- (c) Ms. Jama received the first substantive response to her passport application 13 months after it was submitted. This consisted of a six bullet point summary of allegations the Minister might rely on to withhold passport services. The *Amicus* notes that the six bullet points failed to reveal a significant number of key allegations against Ms. Jama that were subsequently ordered to be disclosed by Justice LeBlanc in *Jama v Canada (Attorney General)*, 2019 FC 533 [*Jama*].
- (d) Ms. Jama, through counsel, responded promptly to the six bullet point summary, just 33 days later.
- (e) Almost three months later, on June 1, 2017, the Minister's delegate again informed Ms. Jama that consideration was being given to a recommendation to refuse her passport services. The *Amicus* characterizes this communication as a *pro forma* exercise that did not advance Ms. Jama's understanding of the concerns raised by the Minister's delegate.
- (f) Four weeks later, on June 29, 2017, Ms. Jama submitted what the *Amicus* describes as "a relatively personal statement describing the impact on her of the Minister's decision to refuse passport services".

- (g) Almost six months later, the Minister's delegate responded to Ms. Jama with a recommendation to the Senior Assistant Deputy Minister [ADM] that she be refused passport services.

- (h) It then took the Minister's delegate another three weeks, until February 8, 2018, to communicate the decision of the Senior ADM to Ms. Jama refusing passport services.

[22] The *Amicus* notes that the Minister and his staff took more than twenty-five months to refuse Ms. Jama's request for a passport, which was more than half the duration of the eventual refusal of passport services. In all of the circumstances, the *Amicus* says the conduct of the Minister and his staff cannot find favour with the Court, given the statutory and constitutional rights at stake. The *Amicus* submits that the Court may reasonably expect greater urgency on the part of the Minister and his staff in processing passport applications, including those that raise national security concerns. The *Amicus* therefore argues that the Court should grant Ms. Jama an award of costs that is a fitting and appropriate expression of the Court's disapproval of the Minister's "nonchalant approach to the timely fulfillment of his statutory mandate".

[23] With respect to the quantum of costs, the *Amicus* notes that Ms. Jama, through counsel, has filed numerous motions, facts and other materials. She has participated in case management in good faith and in a manner that was helpful to the parties and the Court. The *Amicus* therefore supports Ms. Jama's request for costs in the fixed sum of \$25,000.00.

III. Analysis

[24] The awarding of costs, including quantum, is a matter falling within the Court's discretion (*Federal Courts Rules*, SOR/98-106, Rule 400(1); *Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10). In determining an award of costs, the Court is guided by the considerations found in Rule 400(3).

[25] The principal considerations that inform the assessment of costs in this case are the following:

- (a) the result of the proceeding;
- (b) the importance and complexity of the issues;
- (c) the amount of work;
- (d) whether the public interest in having the proceeding litigated justifies a particular award of costs; and
- (e) any other matter the Court considers relevant.

[26] Ms. Jama's application for judicial review was dismissed on the ground it was moot. Ordinarily, costs would follow the event and would be payable by Ms. Jama to the AGC.

However, as illustrated by Justice Zinn's decision in *Galati*, the Court may award costs to an unsuccessful litigant in appropriate circumstances.

[27] The issues raised by this application for judicial review were of moderate importance and complexity. This was the first case of its kind to reach an advanced stage of litigation, and it was also one of the first cases to be decided by the Minister's delegate under procedures that were newly implemented in 2015. The amount of work was greater than would ordinarily have been required in an application for judicial review, and the public interest supported having the matter litigated.

[28] Justice LeBlanc's decision in *Jama* addressed numerous procedural issues arising from the application of s 6(2) of the PTTA. His analysis included a consideration of Ms. Jama's constitutional arguments, albeit in the context of determining whether s 6(2) permits public interest balancing (*Jama* at paras 43-46). Justice LeBlanc's ruling in *Jama* has a jurisprudential value that exceeds the interests of the parties in this case. Furthermore, it may have continued relevance if the Minister again refuses Ms. Jama passport services based in part on the same adverse information.

[29] The AGC denies that he was in any way responsible for the delay in bringing the application to a hearing on its merits. According to the AGC, several factors beyond the control of the parties delayed the proceeding, including the establishment of a process not explicit in the PTTA whereby the Court could assess information that raised national security concerns, the

COVID-19 pandemic, and the elevation of Justice Leblanc to the Federal Court of Appeal in 2020.

[30] In my view, this is an incomplete account of the factors that caused this application to become moot before the legal issues, including the constitutional question, could be resolved on their merits. It took the Minister and his staff more than twenty-five months to refuse Ms. Jama's request for a passport. The refusal was then made retroactive to December 31, 2015, the date on which she submitted her application. As a result, less than two years remained before the refusal of passport services would expire.

[31] The Federal Court of Appeal has confirmed that an unreasonable and unjustified delay by a government official in rendering a decision may justify an award of costs against the Minister (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7(6)(iv), citing *Nalbandian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128, *John Doe v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 535 and *Jaballah v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1182.

[32] I agree with the *Amicus* that the Court may reasonably expect greater urgency on the part of the Minister and his staff in processing passport applications, including those that raise national security concerns. Without attributing any improper motives to the Minister or his staff, the *Amicus* warns that "slow walking" an application for passport services may have the effect of denying passport services in a manner that immunizes the decision from judicial review. The *Amicus* notes that even more egregious delays were encountered in *Nefkha-Bahri c Canada*

(*Citoyenneté et Immigration*), Court File No T-780-21 (mentioned in *Jama #2* at para 66). By Order dated January 31, 2022, Justice Sylvie Roussel granted the Minister's request to hold that case in abeyance to permit the parties to engage in settlement discussions.

IV. Conclusion

[33] Given the lack of substantiation for Ms. Jama's request for costs in the amount of \$25,000.00, and the AGC's draft Bill of Costs in the approximate amount of \$10,000.00, I exercise my discretion to award costs to Ms. Jama in the amount of \$10,000.00, including disbursements. This is intended to reflect the public interest in resolving the legal issues raised in this proceeding, and the Court's disapproval of the Minister's failure to decide the underlying passport application within a reasonable time.

[34] The latter consideration is reinforced by the possibility that the Minister may refuse a future request for passport services by Ms. Jama based in part on the same adverse information. If so, the legal and constitutional issues raised by this application may once again be before the Court. It is imperative that the Minister and his staff resist any temptation to "slow walk" passport applications that raise national security concerns, to ensure the availability of effective judicial review where warranted.

ORDER

THIS COURT ORDERS that costs are payable to Ayan Abdirahman Jama by the Attorney General of Canada in the fixed amount of \$10,000.00, including disbursements.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-479-18

STYLE OF CAUSE: AYAN ABDIRAHMAN JAMA v ATTORNEY
GENERAL OF CANADA

ORDER AND REASONS: FOTHERGILL J.

DATED: MARCH 1, 2022

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