Date: 20071115

Docket: T-2066-03

Citation: 2007 FC 1184

Ottawa, Ontario, November 15, 2007

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] On September 18, 2007, I dismissed the plaintiffs' action. The issue of costs was reserved.

In my reasons, I stated:

> While success has been somewhat divided, the defendant has prevailed on most issues. Counsel are encouraged to resolve the issue of costs by agreement. The defendant should recall that Ms. Haj Khalil is a recipient of legal aid. Absent resolution on the issue of costs, counsel are to serve and file written submissions, not to exceed five pages double-spaced, within 35 days of the date of judgment. Responses to those submissions are to be served and filed within 10 days of service of the first submissions, or within 45 days of the date of judgment, at the election of counsel. I remain seized of this matter with respect to the determination of costs.

[2] No agreement was reached. I have received, reviewed and considered the submissions of the parties and the responsive submissions of the defendant. The plaintiffs did not file responsive submissions.

[3] The fundamental principle is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party: *Apotex Inc. v. Wellcome Foundation Ltd*. (1988), 159 F.T.R. 233 (T.D.) aff'd. (2001), 199 F.T.R. 320 (C.A.). The general rule is that costs follow the event and absent exceptional circumstances should be awarded to the successful litigant on a party-and-party basis. However, it remains the case that costs are within the discretion of the Court: *Federal Court Rules*, SOR/98-106. The non-exhaustive factors that may be considered in awarding costs are delineated in Rule 400(3) including "any other matter that [the Court] considers relevant": Rule 400(3)(g).

[4] The defendant seeks party-and-party costs for two counsel per day in court with double costs (exclusive of disbursements) from March 16, 2007, the date upon which the defendant served a formal offer to settle.

[5] The plaintiffs seek costs against the defendant based on the "strong factual findings on delay", the test-case nature of the action and the access to justice issues arising from the fact that the plaintiffs' second counsel acted, in part, on a *pro bono* basis. Alternatively, they seek an order that no costs be awarded to any party.

[6] As noted earlier, the defendant prevailed on most issues. The plaintiffs succeeded only in relation to a partial finding of delay (from July of 2002). Their claims were dismissed in their entirety. More specifically, the claims for more than $3,000,000 in damages (arising from alleged negligence and breach of Charter rights) and the request for a declaration that paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is unconstitutional were dismissed. I do not view this as a case of divided success.

[7] It is common ground that the proceeding involved a great deal of work for both sides. The trial encompassed 36 days. The plaintiffs assert that the issues were novel and complex while the defendant maintains that similar issues had been adjudicated previously. Further, the plaintiffs submit that the action was funded by legal aid as a test case. They insist that this was the first case to address the issue of the "government's liability in tort" to Convention refugee applicants for permanent residence as well as the first trial with respect to the "issue of refugees' section 7 Charter rights when their applications for permanent residence are severely delayed".

[8] I agree that the issues were novel in the context of an action. However, as I opined in my reasons, administrative law remedies were available to address the matter of delay. The plaintiffs' Charter arguments could have been advanced on an application for judicial review. As for legal aid funding, there is no information before me as to the criteria for funding or the basis upon which funding was approved.

[9] The plaintiffs characterize their action as public interest litigation because there is a "clear public interest in deciding the issues of tort liability and issues of Charter rights". The defendant

describes the matter as a private action in which the plaintiffs sought more than $3,000,000 in damages. From the Crown's perspective, the mere fact that the action involved a public authority is insufficient to transform the "nature of this negligence/personal injury litigation". I agree with the defendant in this respect.

[10] There is strong authority for the proposition that it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation: *Odhavji Estate v. Wood house*, [2003] 3 S.C.R. 263. Moreover, where issues of public importance exist, the bringing of such issues to the courts does not automatically entitle a litigant to preferential treatment with respect to costs: *Little Sister Book and Emporium v. Canada*, [2007] 1 S.C.R. 38 at para. 35.

[11] Notably, the plaintiffs' submissions are silent with respect to their request for a declaration of constitutional invalidity regarding paragraph 34(1)(f) of the IRPA, a matter that had been determined by the Supreme Court of Canada: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

[12] The plaintiffs suggest that this action raises an "access to justice" issue. The underlying rationale is that junior counsel was funded for only two weeks of trial. In this respect, they rely on the comments of the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd*. (2006), 82 O.R. (3d) 757 (C.A.) wherein the Court stated that the availability of costs orders in favour of *pro bono* counsel is a tool to potentially reduce the necessary financial sacrifice associated

with taking on *pro bono* work and to increase the willingness and number of counsel to accept *pro bono* work. I do not disagree with that proposition. However, I do not interpret it to mean that a successful litigant should be denied costs because an unsuccessful litigant was represented by *pro bono* counsel. In the noted case, the litigant represented by *pro bono* counsel was successful.

[13] It is well-established that the Crown is entitled to its costs, if successful: *R. v. James Lorimer & Co.*, [1984] 1 F.C. 1065 (C.A.); *Canada (A.G.) v. Georgian College of Applied Arts and Technology*, [2003] 4 F.C. 525 (C.A.). Moreover, in deciding whether costs should be awarded, neither the ability to pay nor the difficulty of collection should be a deciding factor. The awarding or refusal of costs should be based on the merits of the case: *Soloski v. The Queen*, [1977] 1 F.C. 663 (T.D.) aff'd., [1978] 2 F.C. 632 (C.A.).

[14] All of which is to say that I see no reason to depart from the normal rule that costs should follow the event. The defendant submitted its bill of costs based on the mid-range of Column III of Tariff B. The plaintiffs chose not to file responsive submissions and have taken no issue with the defendant's bill of costs. The bill of costs appears to be in order and to be reasonable. In the absence of any representations that it is not in order or that it is not reasonable, I am prepared to assess costs on the basis of those put forward.

[15] That said, there are disbursements (item 5 of the "expert fees" and items 1 and 3 of "travel for counsel") for which the appropriateness and reasonableness have not been established. Also, with respect to Rule 400(3)(i), the defendant's position in relation to earlier orders of the court and

its request that I “revisit” those orders and its rigorous and unyielding position on the issue of delay will result in some reduction to counsel fees.

[16] Recognizing that an award of costs is not an exact science and considering the submissions and the factors to which I have referred, in the exercise of my discretion, I fix costs on a lump sum basis in the amount of $125,000 and disbursements in the amount of $180,000 for a total amount of $305,000 to be paid by the plaintiffs to the defendant.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT costs are fixed on a lump sum basis in the amount of $125,000 with disbursements in the amount of $180,000 for a total amount of $305,000 to be paid by the plaintiffs to the defendant.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2066-03
STYLE OF CAUSE:	NAWAL HAJ KHALIL, ANMAR EL HASSEN, and ACIL EL HASSEN, by her Litigation Guardian, NAWAL HAJ KHALIL and Her Majesty The Queen
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	April 16-19, 23-27, 30, 2007 May 1-4, 7-11, 14, 18, 22-24, 28-30, 2007 June 5-8, 13, 14, 27-29, 2007 Further submissions: July 31, 2007 August 9, 24, 31, 2007 Costs submissions: October 23, November 2, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Layden-Stevenson J.
DATED:	November 15, 2007

APPEARANCES:

Ms. Barbara Jackman Ms. Leigh Salsberg	FOR THE PLAINTIFFS
Mr. John Loncar Ms. Lois Knepflar Ms. Marina Stefanovic Ms. Amy Lambiris Mr. Tamrat Gebeyehu Ms. Janet Chisholm Ms. Ladan Shahrooz	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Jackman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANT