

Date: 20080704

Docket: T-727-08

Citation: 2008 FC 839

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

and

**MINISTER OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE**

Respondent

REASONS FOR ORDER

MACTAVISH J.

[1] Abousfian Abdelrazik is a Canadian citizen currently taking safe haven in the Canadian Embassy in Khartoum, Sudan. He has commenced an application for judicial review in this Court seeking a mandatory order requiring that the Minister of Foreign Affairs and International Trade repatriate him immediately by any safe means at the Minister's disposal. Mr. Abdelrazik also seeks a declaration that the Minister violated his right to enter Canada, contrary to subsection 6(1) of the *Canadian Charter of Rights and Freedoms*.

[2] In the context of this application for judicial review, Mr. Abdelrazik has brought a motion seeking an order requiring that the Minister pay for his legal costs in this matter on a solicitor and client basis, in advance, and in any event of the cause. He also seeks an order requiring the Minister to permit, and, if necessary, to facilitate, confidential communications between Mr. Abdelrazik and his Canadian legal counsel while Mr. Abdelrazik is given safe haven in the Canadian Embassy in Khartoum.

[3] For the reasons that follow, Mr. Abdelrazik's request for advance costs will be dismissed. However, an order will issue stipulating that the respondent not read any documents passing between Mr. Abdelrazik and his Canadian counsel or impede the passage of communications between Mr. Abdelrazik and his counsel.

The Hameed Affidavit

[4] As a preliminary matter, the Crown seeks to have paragraphs 16, 20, 21, 30, 40, 42 and 45 struck from the affidavit of Yavar Hameed on the basis that they are irrelevant, scandalous, vexatious, or contain legal opinion.

[5] Mr. Abdelrazik consents to the striking of paragraphs 16, 30 and 40, as well as to the striking of the first sentence of paragraph 45, but submits that the other paragraphs are indeed relevant, and are properly before the Court.

[6] Paragraph 20 deals with false information allegedly provided by senior officials of the respondent to counsel for Mr. Abdelrazik. This paragraph also contains references to exhibits attached to the affidavit which allegedly support Mr. Abdelrazik's allegations of misfeasance on the part of the respondent.

[7] On a motion for an advance order of costs, the Court is bound, amongst other things, to consider whether there are "special circumstances" that would support an extraordinary order of this sort, as well as whether there are any other factors which might militate for or against the granting of relief: see *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* [2008] F.C.J. No. 723, at paragraph 20.

[8] Given the broad range of matters that may be considered on a motion of this nature, I am not persuaded that paragraph 20 of the Hameed affidavit should be struck as scandalous or irrelevant. For the same reasons I am also not persuaded that paragraph 21 of the Hameed affidavit, which deals with information provided to journalists by government representatives should be struck.

[9] I do agree with the respondent that paragraph 42 of the Hameed affidavit, which discusses the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin is irrelevant, and should be struck.

[10] The remaining portions of paragraph 45 contain the assertion by counsel that granting the motion and allowing this litigation to go ahead will ultimately result in savings to the public purse,

as it will thereby obviate the need for a future public inquiry such as that which was conducted in the case of Mr. Arar. Given the teachings of the jurisprudence in this area that an advance order of costs is not intended to be a substitute for the public inquiry process, as well as the entirely speculative nature of this contention, I am of the view that the paragraph should be struck in its entirety.

Background

[11] Mr. Abdelrazik submits that the facts of this case are so rare and exceptional that they justify the granting of the admittedly extraordinary interim relief of an order for the payment of advance costs. As a consequence, in order to appreciate Mr. Abdelrazik's argument, it is therefore necessary to have some understanding of the allegations giving rise to his application for judicial review.

[12] Mr. Abdelrazik was born in Sudan, and as such is a citizen of that country. He came to Canada in 1990 as a refugee, and became a landed immigrant in 1992. He obtained his Canadian citizenship in 1995.

[13] In March of 2003, Mr. Abdelrazik returned to Sudan to visit family. In August of that year, he was arrested and detained by Sudanese authorities. Although Mr. Abdelrazik was never charged with an offence, his detention lasted for nearly a year.

[14] A Canadian government memo obtained by Mr. Abdelrazik's counsel under the provisions of the *Privacy Act* states that the Sudanese authorities were holding Mr. Abdelrazik at the request of the Canadian government.

[15] According to the evidence adduced on behalf of Mr. Abdelrazik, while he was in Sudanese custody, he was interviewed by individuals identifying themselves as representatives of "the Canadian security services".

[16] In anticipation of Mr. Abdelrazik's release from jail, in July of 2004, efforts were made by the respondent, and by members of Mr. Abdelrazik's family, to bring him back to Canada. To this end, a commercial airline ticket from Khartoum to Montreal was purchased for him. However, it was subsequently determined that Mr. Abdelrazik's name appeared on the "no fly lists" of various airlines, and, as a result, he was unable to leave Sudan at this time.

[17] Mr. Hameed's affidavit also contains an October 31, 2004 letter from the Head of the Canadian office at the Canadian Embassy in Khartoum which seemingly suggests that an offer had been made for the use of a private plane to transport Mr. Abdelrazik from Khartoum to Montreal.

[18] The identity of recipient of the letter has been redacted from the copy of the letter provided to counsel and to the Court. As a result, it is not clear from this letter alone that the offer was in fact made by the Sudanese government. However, a May, 2005 memo from a consular case officer assigned to Mr. Abdelrazik's case confirms that an offer was indeed made by Sudanese officials to

send Mr. Abdelrazik home on a private plane. The memo goes on to note that for reasons that were not clear, “this never materialised”.

[19] In October of 2005, Mr. Abdelrazik was again arrested by Sudanese authorities. This time, he was held, again without charge, until July of 2006. Shortly thereafter, the United Nations’ Al-Qaida and Taliban Sanctions Committee added Mr. Abdelrazik’s name to its consolidated list of persons allegedly associated with Al-Qaida. This Committee is also known as the “1267 Committee”, after United Nations’ Security Council Resolution 1267, under which it was established.

[20] Mr. Abdelrazik has made efforts to have himself removed from the 1267 list, which efforts were evidently supported by the Canadian government. However, these efforts were not successful, and Mr. Abdelrazik remains on the 1267 list. Despite this listing, Mr. Abdelrazik has never been charged with a criminal offence.

[21] Mr. Abdelrazik continued to fear for his safety at the hands of Sudanese officials, and on April 29, 2008, he sought refuge at the Canadian Embassy in Khartoum. He was granted temporary safe haven, and is currently living in the public areas of the Embassy building.

[22] Mr. Abdelrazik has advised his counsel that he is currently impecunious. The Canadian Embassy in Khartoum has been loaning him \$100 a month to cover his basic living expenses.

The Law Governing Advance Orders of Costs

[23] As a result of two recent decisions of the Supreme Court of Canada, it is now clear that this Court does have the power, in advance of the final determination of a given case, to order that the costs of plaintiffs or applicants be paid by the responding party: see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38.

[24] However, as Justice Hugessen recently observed in the *Hagwilget* case cited earlier, these decisions, along with ordinary prudence and common sense, dictate that extreme caution should be used in the exercise of this power.

[25] Indeed, Justice Hugessen observed that requiring a respondent to fund, on a possibly unrecoverable basis, legal proceedings against itself before there has been any finding of legal right on the part of the applicant, is a drastic and unusual step, and one that should be taken only on the imperative dictates of the interests of justice: see *Hagwilget*, at paragraph 1.

[26] At paragraph 40 of the *Okanagan* case, the Supreme Court of Canada identified the three criteria that must be satisfied in order to justify an award of interim costs. That is, the burden is on the party seeking such an order to show that:

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.

[27] The Supreme Court then went on in the next paragraph to observe that:

These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

[28] Finally, not every case of interest to the public will satisfy the test. Moreover, as the Supreme Court has made clear, the justice system must not become a proxy for the public inquiry process: see *Little Sisters*, at paragraph 39.

Mr. Abdelrazik's Position

[29] While recognizing that advance orders of costs are rarely made, and that the test is strict, Mr. Abdelrazik argues that several considerations bring this case within the very limited class of cases in which an advance order of costs is appropriate.

[30] Specifically, counsel for Mr. Abdelrazik argues that the evidence demonstrates that Canada played a role in Mr. Abdelrazik's detention in Sudan, and that, by refusing to repatriate Mr. Abdelrazik when it had the chance to do so, Canada has subjected him to *de facto* exile in a country where his health and safety are at risk.

[31] Not only is Mr. Abdelrazik impecunious, counsel argues that as a result of his name having been added to the United Nations' Resolution 1267 list of persons allegedly associated with Al-Qaida, Mr. Abdelrazik is subject to Canada's *United Nations Al-Qaida and Taliban Regulations*. This has the effect of preventing anyone from assisting Mr. Abdelrazik with his legal expenses, without exposing themselves to the risk of potential criminal prosecution.

Analysis on the Advance Order of Costs Issue

[32] It should be noted at the outset that while counsel for Mr. Abdelrazik made a brief passing reference in his oral submissions to two funding cases dealing with section 7 of the Charter, namely

the decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] S.C.J. No. 47 and that of the Ontario Court of Appeal in *R. v. Rowbotham* [1988] O.J. No. 271. However, neither party addressed the law that has developed in this regard in the criminal and administrative law contexts. Indeed, counsel did not even provide the Court with copies of either the *G. (J.)* or *Rowbotham* decisions, nor was any reference made to the cases in Mr. Abdelrazik's memorandum of fact and law.

[33] Given that it is section 6 rather than section 7 of the Charter that is relied upon by Mr. Abdelrazik in this case, coupled with the fact that both parties limited their submissions to the issue of advance orders of costs as contemplated by the Supreme Court of Canada in the *Okanagan* and *Little Sisters* cases, the Court will confine its analysis to this issue.

[34] In determining whether the circumstances of this case are such as to justify the granting of the exceptional interim relief of an advance order of costs in Mr. Abdelrazik's favour, the first of the *Okanagan* factors to be considered is that of impecuniosity. That is, Mr. Abdelrazik must demonstrate that he genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial, such that the litigation will be unable to proceed if the order were not made.

[35] In this regard, in *Little Sisters*, the Supreme Court of Canada noted that having regard to the exceptional nature of an advance order of costs, there was an obligation on an applicant to clearly

demonstrate that there was no other way that the litigation would be able to proceed. In this regard, the Court noted at paragraph 40 of the decision that:

... Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances ...

[36] It appears that Mr. Abdelrazik is indeed impecunious. However, on the basis of the current record, he has not satisfied me that absent an advance order of costs, there is no other way that this litigation will be able to proceed.

[37] Mr. Abdelrazik has, to this point in the litigation, been represented by counsel acting on a *pro bono* basis. Mr. Abdelrazik's primary counsel has been Yavar Hameed, an Ottawa lawyer practicing in a small firm. To his credit, Mr. Hameed has been representing Mr. Abdelrazik for

nearly a year, and has expended considerable time on the file and has also incurred disbursements on Mr. Abdelrazik's behalf.

[38] It is not at all clear from the evidence before me that this state of affairs will not continue in the future. On this point, Mr. Hameed states in his affidavit that:

36. While it is my goal to give his case the fullest possible treatment, as a practical matter it is a month-to-month decision whether I can afford to continue representing him. I make the decision of whether to continue providing *pro bono* services in light of the available financial resources within my law practice and the hours of time or disbursements that his case demands.

37. I am assisted in Mr. Abdelrazik's file by the *pro bono* help of others. I have assigned part of the work in Mr. Abdelrazik's file to my junior associate, Audrey Brousseau, who is volunteering significant overtime hours. I also have sought help with expert legal research from Professor Amir Attaran, of the Faculty of Law and the Faculty of Medicine at the University of Ottawa, who has refrained from billing me for his time or disbursements. Professor Attaran has informed me that he wishes to go on assisting Mr. Abdelrazik's file, but that his decision to keep giving *pro bono* services is subject to similar constraints as my own. Both Ms. Brousseau and Dr. Attaran inform me that they re-evaluate every few weeks if they have sufficient resources to dedicate to Mr. Abdelrazik's case.

[39] While Mr. Hameed does assert that the ongoing expense of continuing to represent Mr. Abdelrazik will cause him personal hardship, and that he does not believe that the litigation will be able to proceed on the *pro bono* basis which has brought it to this point, based upon the statements

in his affidavit quoted above, it is not all clear from the record that either Mr. Hameed or his associates will indeed be forced to withdraw from the file if the motion is denied.

[40] As a consequence, I am not satisfied that no other realistic option exists for bringing the issues in this case to a hearing, or that the litigation will be unable to proceed if the order for advance costs is not made.

[41] I am also not persuaded that Mr. Abdelrazik has fully explored the funding alternatives potentially available to him to assist him in bringing this litigation forward.

[42] I am satisfied that legal aid is not available to Mr. Abdelrazik. Ms. Brousseau has evidently contacted the Legal Aid authorities in both Ontario and Quebec, and has been advised that Mr. Abdelrazik is not eligible for legal aid in either province, as he is not resident in either Ontario or Quebec. This makes sense, given that these are provincially administered plans. I agree with Mr. Abdelrazik that in the absence of any evidence from the respondent suggesting that this information is not correct, he should not be obliged to pursue a funding option that is quite clearly doomed to failure.

[43] That said, it appears that Mr. Abdelrazik has family and friends in Canada, and there is no evidence before the Court to suggest that they are not in a financial position to assist Mr. Abdelrazik with the cost of this litigation. Moreover, Mr. Hameed has deposed to the interest that groups such as the Canadian branch of Amnesty International, the Canadian Islamic Congress, and the Canadian

Branch of the Council on American-Islamic Relations have expressed in Mr. Abdelrazik's case.

Other members of the community have also expressed an interest in supporting Mr. Abdelrazik.

[44] However, counsel for Mr. Abdelrazik is of the view that the provisions of the *United Nations Al-Qaida and Taliban Regulations* preclude Mr. Abdelrazik's Canadian family or friends or others from providing funds to pay for Mr. Abdelrazik's legal expenses, given that he is on the United Nation's consolidated list of persons allegedly associated with Al-Qaida. Counsel is further of the view that it would amount to an ethical breach if counsel were to ask Mr. Abdelrazik's family or friends to fund his litigation, since this would amount to counselling them to commit a criminal offence.

[45] In particular, Counsel points to section 3 of the Regulations, which provides that:

3. 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.

3. Il est interdit à toute personne au Canada et à tout Canadien à l'étranger de fournir ou de collecter sciemment, par quelque moyen que ce soit, directement ou indirectement, des fonds avec l'intention qu'ils soient utilisés par le Taliban, toute personne liée au Taliban ou Oussama ben Laden ou ses associés.

[46] Government representatives have evidently advised counsel for Mr. Abdelrazik that in accordance with section 5.7 of the Regulations, it is possible to obtain an exemption from the application of the Regulations to cover the basic expenses of a listed individual. In accordance with

United Nations Security Council Resolution 1452 (2002), legal fees and reasonable disbursements are considered basic expenses.

[47] Despite having received this advice, no such exemption has yet been sought by Mr. Abdelrazik.

[48] The parties disagree in their interpretation of the Regulations, and it does not appear that the scope of the exemption provision has ever been considered by the courts. Given that the issue was not fully argued before me, I prefer not to offer an opinion at this point on the proper interpretation of the Regulations. This issue is better determined in the future, on the basis of a complete evidentiary record, including whatever reasons may be given with respect to Mr. Abdelrazik's request for an exemption, as well as fully developed arguments.

[49] Suffice it to say that at this juncture, there is at least a chance that Mr. Abdelrazik may be able to obtain an exemption from the application of the *United Nations Al-Qaida and Taliban Regulations* so as to allow his supporters to assist him with his legal expenses.

[50] Until this possibility has been fully explored, Mr. Abdelrazik will not have demonstrated that he has exhausted all other possible funding options, as he is required to do before the Court can consider his request for an advance order of costs: see *Little Sisters*, at paragraph 68.

[51] Given my conclusion in relation to the first of the *Okanagan* factors, it is not necessary to address the remaining factors, nor is it necessary to consider whether this case involves “special circumstances” that support the making of an extraordinary order of the type sought here.

[52] As a consequence, I am not prepared to make an advance order of costs in Mr. Abdelrazik’s favour at this time. The motion will be dismissed, without prejudice to Mr. Abdelrazik’s right to bring a further motion in the future, in the event that circumstances change, or in the event that his request for an exemption from the application of the *United Nations Al-Qaida and Taliban Regulations* is not dealt with in a timely manner.

[53] However, any such future request for advance costs should also include a budget for the litigation, as the Court is required to consider the potential cost of the litigation. No such information has been put before the Court in this case: see *Little Sisters*, at paragraph 69.

Communications between Mr. Abdelrazik and his Counsel

[54] Mr. Abdelrazik also seeks an order requiring the Minister to permit, and, if necessary, to facilitate, confidential solicitor-client communications between Mr. Abdelrazik and his Canadian legal counsel while he is given safe haven in the Canadian Embassy in Khartoum.

[55] Mr. Abdelrazik initially complained of both the timing and frequency of his opportunities to contact his counsel by telephone. At the hearing of this motion, the Court was advised that these

issues have largely been resolved, but that there is still a concern about the potential monitoring of telephone discussions between Mr. Abdelrazik and his counsel.

[56] It appears that the Minister of Foreign Affairs and International Trade has given an undertaking that neither Ministry representatives nor embassy personnel in Khartoum will monitor Mr. Abdelrazik's telephone discussions with his counsel. However, the Minister takes the position that he has no power to control the activities of other government departments or agencies, or those of foreign governments, none of whom are parties to this litigation. I agree, and decline to make the order sought in this regard.

[57] Mr. Abdelrazik's counsel also states that he has encountered significant difficulties in exchanging documents such as draft affidavits with Mr. Abdelrazik because the respondent will not give the assurance that it will respect the solicitor and client privilege attaching to such documents.

[58] Counsel for the respondent submits that Mr. Abdelrazik has other alternatives available to him, such as using an international courier service to transmit documents or engaging local counsel in Khartoum to facilitate such communications. Moreover, the respondent has expressed its willingness to extend the time limits for filing materials in order to accommodate the delays that may result from difficulties in communications between Mr. Abdelrazik and his counsel.

[59] The respondent also says that given that Mr. Abdelrazik has made allegations of mistreatment against embassy personnel, it would put embassy officials in an untenable position should Mr. Abdelrazik later assert that his privileged communications had been interfered with.

[60] Finally, the Minister says that what is being sought by Mr. Abdelrazik is effectively an interim order of *mandamus*, which is not something that can be granted by this Court on an interim basis.

[61] This is unquestionably an unusual case. In my view, in the peculiar circumstances of this case, the ability of this Court to control its own process so as to safeguard the integrity of the litigation process and ensure the timely advancement of the case through the justice system extends to allow the Court to order that the respondent, including personnel in the Canadian embassy in Khartoum, not read communications passing between Mr. Abdelrazik and his counsel, or make copies of those communications.

[62] Moreover, the delivery of documents from Mr. Abdelrazik's counsel to Mr. Abdelrazik himself should not be delayed, once those documents have been received by the Canadian embassy in Khartoum, nor should the delivery of documents from Mr. Abdelrazik to his counsel be delayed by representatives of the respondent, including personnel in the Canadian embassy in Khartoum.

Specially Managed Proceeding

[63] Counsel for the respondent submits that having regard to the nature of this matter, and the fact that interlocutory motions may reasonably be anticipated, the case would benefit from case-management. I agree, and an order will go directing that the matter continue as a specially managed proceeding.

Conclusion

[64] For these reasons, the motion is granted, in part. Given the fact that success was divided, there will be no order as to costs.

[65] Counsel are to consult between themselves with respect to the form that the order should take, particularly as it relates to the issue of the facilitation of communications between Mr. Abdelrazik and his counsel, and to provide the Court with a draft order in this regard. In the event that the parties are unable to agree to the form of the order within 10 business days, an order will issue.

“Anne Mactavish”

Judge

Ottawa, Ontario
July 4, 2008

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-727-08

STYLE OF CAUSE: ABOUSFIAN ABDELRAZIK v.
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INTERNATIONAL TRADE

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 24, 2008

REASONS FOR ORDER: Mactavish J.

DATED: July 4, 2008

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