

Federal Court



Cour fédérale

Date: 20150409

Docket: T-2556-14

Citation: 2015 FC 435

Toronto, Ontario, April 9, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**INTERNATIONAL RELIEF FUND FOR THE
AFFLICTED AND NEEDY (CANADA)**

Applicant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

ORDER AND REASONS

[1] The International Relief Fund for the Afflicted and Needy (Canada) (IRFAN) is a not-for-profit corporation whose registration as a charity has been revoked by the Minister of National Revenue. In April of 2014, IRFAN was added to the list of terrorist entities established by the Governor in Council under section 83.05 of the *Criminal Code*. The result of this listing is that IRFAN's property and assets have been frozen.

[2] Following the listing, IRFAN sought an exemption from the Minister of Public Safety and Emergency Preparedness to unfreeze monies held in its lawyer's trust account to allow for

the payment of legal fees that IRFAN had already incurred. IRFAN sought a further exemption from the Minister to permit it to raise funds to pay for legal advice in relation to a variety of issues arising out of the listing.

[3] By letter dated November 27, 2014, the Minister granted an exemption to allow for the transfer of funds to pay for legal services that had been rendered to IRFAN prior to it becoming a listed entity. The Minister refused, however, to authorize an exemption to allow for the raising of funds to pay for legal advice.

[4] IRFAN commenced an application for judicial review of the Minister's decision, and has brought this motion seeking an order compelling the Attorney General of Canada to pay for its legal costs associated with its application. IRFAN says it would prefer to raise money for its legal costs rather than seek state funding, but the Minister has refused its request to do so. As a result, IRFAN finds itself in a "Catch-22" situation in that it seeks to challenge the Minister's denial of the exemption permitting IRFAN to raise funds that would allow it to advocate for its de-listing, but it cannot fund the application to challenge the denial precisely because the exemption has been denied.

[5] IRFAN submits that the absurdity of this situation cries out for court-ordered state funding of its legal costs. This is especially so, IRFAN says, given the exceptional circumstances of this case, circumstances that have not previously been encountered in Canadian law.

[6] I have concluded that the motion should be dismissed as the evidence provided by IRFAN in support of its motion is deficient in at least two respects.

I. The Nature of the Relief Sought

[7] IRFAN's Notice of Motion seeks either a "*Rowbotham* order" requiring the Attorney General of Canada to remunerate counsel representing IRFAN in this application, or, in the alternative, an order for advance costs.

[8] A "*Rowbotham* order" takes its name from the decision of the Ontario Court of Appeal in *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1. In contrast, the authority for making an order of advance costs comes from the Supreme Court of Canada's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.

[9] Justice Stratas discussed the similarities and differences between the two types of orders in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 296 at para. 12, [2012] F.C.J. No. 1698. He observed that while the two lines of authority have developed separately, they are aimed at the same thing: namely, the provision of court-ordered state funding for legal representation. As a result, the tests that have been developed share common features.

[10] *Rowbotham* orders are primarily issued in criminal cases, in situations where trial fairness requires that an accused be represented by state-funded counsel. The legal foundation for making such orders is found in sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c.11, which guarantee an accused a fair trial in accordance with the principles of fundamental justice.

[11] Before a *Rowbotham* order will be made, an accused must establish that he or she is:

1. Indigent;

2. Ineligible for Legal Aid;
3. Unable to represent him- or herself adequately; and
4. Involved in a serious and complex legal proceeding affecting the individual's liberty interests.

[12] Although *Rowbotham* orders have primarily been made in criminal cases, the Supreme Court granted a *Rowbotham* order in a non-criminal child welfare proceeding that implicated the section 7 *Charter* rights of a mother: *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47. Amongst other things, the mother in *G.(J.)* was able to satisfy the Court that she had no other way of securing legal representation in a proceeding concerning the custody of her child.

[13] The respondent argues that a *Rowbotham* order is not available in this case because, as a corporate entity, IRFAN cannot invoke the protections of section 7 of the *Charter*. For the purposes of this motion, I will assume, without deciding, that section 7 *Charter* rights are at stake in this proceeding, whether they be those of IRFAN itself or the derivative rights of its members.

[14] In contrast to the *Rowbotham* test, the Supreme Court of Canada identified three criteria that must be satisfied in order to justify an award of advance costs: *Okanagan* above, at para. 40. That is, the burden is on the party seeking such an order to show that:

1. It 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.

[15] The Supreme Court went on in *Okanagan* to observe that even if these criteria have been satisfied, it is still in the Court's discretion to determine whether the interests of justice would be best served by making the order: at para. 41. This is consistent with Rule 400 of the *Federal Courts Rules*, S.O.R./98-106, which confer full discretion on this Court in relation to matters of costs.

[16] However, as Justice Stratas noted in *Mahjoub*, above, an order for advance costs involves "an extraordinary exercise of discretion": at para. 24. Moreover, as this Court noted in *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* 2008 FC 574 at para. 1, 328 F.T.R. 215, the decision of the Supreme Court in *Okanagan* and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1

S.C.R. 38, along with ordinary prudence and common sense, dictate that extreme caution should be used in the exercise of this power.

[17] With this understanding of the relevant tests, I will next examine the evidence provided by IRFAN in support of its motion. Given the overlap in the two tests, I will consider the related elements of the *Rowbotham* and *Okanagan* tests together.

II. IRFAN's Financial Position

[18] I would start by recognizing that if IRFAN wanted to use its own resources to fund this litigation, it would first have to obtain an exemption from the Minister to allow it to do so. As noted earlier, the Minister has previously granted IRFAN an exemption to allow it to pay its legal fees. The question is, however, whether IRFAN has established that it no longer has any assets available to it.

[19] Common to both the *Rowbotham* and *Okanagan* tests is the requirement that the party seeking state-funded costs be unable to pay for its own legal costs. That is, the moving party must show that it is indigent and ineligible for Legal Aid (*Rowbotham*) or that it genuinely cannot afford to pay for the litigation, and that the litigation would be unable to proceed if the order were not made (*Okanagan*).

[20] Although these requirements are phrased somewhat differently, at the end of the day, the burden is on the party seeking either a *Rowbotham* order or an order for advance costs to demonstrate that its financial position is such that it cannot pay for its own legal costs.

[21] The Supreme Court held in *Little Sisters* that a party seeking an order of advance costs must first explore various funding options such as private funding, fundraising campaigns and

loans: at para. 40. I accept that as a result of the listing, these avenues are not available to IRFAN. Indeed, as counsel for IRFAN noted at the hearing, it is the decision of the Minister refusing an exemption to allow it to fundraise that is the subject of this application for judicial review.

[22] Based upon the affidavit filed in support of IRFAN's motion, I also accept that Legal Aid is not available to the organization in this case.

[23] That said, as the Federal Court of Appeal observed in *Al Telbani v. Canada (Attorney General)*, 2012 FCA 188 at para. 9, 441 N.R. 173, a litigant who asks the state to subsidize the costs of a dispute against the state must demonstrate its financial inability to pay "by filing, at the very least, a detailed statement of their income and expenditures and a complete financial statement". Bald assertions of impecuniosity will not suffice: *Metrolinx (GO Transit) v. Canadian Transportation Agency*, 2010 FCA 45 at para. 10, [2010] F.C.J. No. 192

[24] The only evidence that has been provided to the Court with respect to IRFAN's financial situation is a statement in the affidavit of a legal assistant working in the office of Yavar Hameed, the lawyer who has been assisting IRFAN in this matter. Based on information obtained from Mr. Hameed, the legal assistant states that "the Applicant has no available funds or assets in its possession or held in the possession of the RCMP capable of paying for legal fees even if an exemption or Judicial Order for release of [...] assets currently held by the Applicant was granted": at para. 29. There is no indication in the affidavit as to the source of Mr. Hameed's own knowledge of IRFAN's financial situation.

[25] IRFAN recognizes that there are “shortcomings” in the evidence it provided to the Court with respect to its financial situation, and that the evidence “could be more detailed and specific”. IRFAN submits, however, that as a listed entity, it has a statutory duty to disclose all of its assets, and that the RCMP is thus fully aware IRFAN’s financial position. Given that the RCMP reports to the Minister whose decision underlies this application for judicial review, IRFAN says that I should accept the evidence it submitted regarding its financial position, notwithstanding its shortcomings. IRFAN further submits that I should draw an adverse inference from the failure of the Minister to adduce evidence disputing the legal assistant’s assertion that IRFAN is impecunious.

[26] I do not accept IRFAN’s arguments.

[27] The jurisprudential requirement that an applicant provide information regarding its financial position when seeking a *Rowbotham* order or an order for advance costs is designed to provide the Court with the information necessary to determine whether the applicant has established the existence of exceptional circumstances that would justify the granting of such an order. The fact that IRFAN may have provided financial disclosure to the RCMP is of no assistance to me in deciding whether a *Rowbotham* order or order for advance costs should be granted in this case.

[28] Moreover, by arguing that it should be excused from the requirement to provide the sort of detailed financial information contemplated in *Al Telbani* because the RCMP already has information regarding its financial position, IRFAN is essentially trying to shift the onus to the respondent to prove that IRFAN is *not* impecunious. This is not appropriate, given that the

jurisprudence clearly puts the burden on the party seeking a *Rowbotham* order or order for advance costs to demonstrate that extraordinary relief of this nature is justified.

[29] I would further note that by relying solely on affidavit evidence provided by a legal assistant in counsel's office who has no apparent first-hand knowledge of IRFAN's financial situation, the respondent is unable to test the reliability of the limited evidence that has been adduced by IRFAN in a meaningful way.

[30] As a consequence, IRFAN has not satisfied the indigency requirement of the *Rowbotham* test, nor has it demonstrated that it genuinely cannot afford to pay for the litigation such that it should be entitled to an order for advance costs.

[31] My finding on this point is sufficient to dispose of IRFAN's motion. However, in the event that IRFAN were to bring another motion of this nature in the future, I will comment briefly on other shortcomings in the record before me.

III. Availability of Representation

[32] Under the *Rowbotham* test, an applicant for state-funded counsel must also demonstrate that he or she is unable to represent him- or herself adequately. In a motion for advance costs, the moving party must establish that no other realistic option exists for bringing the issues to trial.

[33] As Justice Stratas observed in *Mahjoub*, above, at para. 16, courts have repeatedly emphasized "the need for an accused seeking a *Rowbotham* order to establish that significant efforts have been made to find other legal representation or funding", citing, by way of example, *R. v. Rain*, 1998 ABCA 315 at para. 88, 223 A.R. 359; *R. v. Malik*, 2003 BCSC 1439, [2003]

B.C.J. No. 2167; *R. v Dew (E.J.)*, 2009 MBCA 101 at paras. 22 and 98, 245 Man.R. (2d) 211; *R. v. Rushlow*, 2009 ONCA 461 at paras. 28-30, 96 O.R. (3d) 302.

[34] Rule 120 of the *Federal Courts Rules* provides that corporations must be represented by counsel unless the Court, in special circumstances, grants leave for an officer to represent the corporation. The legal assistant's affidavit asserts that the unnamed "directing Board members" of IRFAN are "aged and are dealing with serious [unidentified] medical issues" and that they do not have the legal training or knowledge to represent IRFAN in connection with this matter. Even if I were prepared to accept this very general assertion, I have not been persuaded that IRFAN has no other realistic option for bringing this application before the Court.

[35] According to the legal assistant's affidavit, Mr. Hameed has been representing IRFAN on a *pro bono* basis to this point, but he would be unable to continue doing so without Court-ordered funding. Paul Champ represented IRFAN on the costs motion and advised the Court that he would not continue to act for IRFAN unless an arrangement was made for the payment of his fees.

[36] However, as Mr. Champ himself noted during the hearing, there are a number of other lawyers who are willing to take on cases such as this one on a *pro bono* basis. There is no suggestion that IRFAN has contacted any of these lawyers to see if they would be will to act in this case.

[37] A review of the three previous decisions involving IRFAN that were cited by the parties in argument also reveals that at least three other lawyers have acted for IRFAN in litigious matters in the past. It is, moreover, evident from the record that one of these lawyers has already

been involved in this matter. There is no suggestion that IRFAN has contacted any of these individuals to see whether they would be willing to represent IRFAN in this application on a *pro bono* basis.

[38] I recognize that an argument could be made that by acting for a listed entity such as IRFAN, counsel could at least theoretically contravene the provisions of section 83.03 of the *Criminal Code*, R.S.C. 1985, c. C-46 by providing services to a listed entity. There is no evidence before me, however, that this has been an impediment to finding counsel willing to represent IRFAN in this matter.

[39] That said, a final comment should be made for the benefit of counsel who IRFAN may consult in the future, who may be concerned that they could run afoul section 83.03 of the *Criminal Code* by agreeing to represent IRFAN.

[40] The Minister's counsel has clearly stated on the record that there would be no basis on which to prosecute counsel simply for representing IRFAN in connection with this application. Citing the Supreme Court's decision in *R. v. Khawaja*, 2012 SCC 69 at para. 53, [2012] 3 S.C.R. 555, counsel stated that Parliament's intent in enacting the terrorism offences of the *Criminal Code* "was not to prohibit innocent or socially useful conduct that does not materially enhance the abilities of a terrorist group to facilitate or carry out terrorist activity".

IV. Conclusion

[41] Given the shortcomings in the evidence adduced in support of this motion, IRFAN has not satisfied the test for either a *Rowbotham* order or an order for advance costs. I have also not

been persuaded that I should exercise the discretion conferred on me by Rule 400 of the *Federal Courts Rules* in IRFAN's favour.

[42] I am, however, satisfied that the underlying application for judicial review involves an unusual situation implicating new legislation that has not previously been tested. I will therefore dismiss the motion without prejudice to IRFAN's right to bring a further motion for state-funded costs on better evidence. In the exercise of my discretion, I make no order as to costs.

ORDER

THIS COURT ORDERS that:

1. This motion is dismissed without prejudice to IRFAN's right to bring a further motion for state-funded costs on better evidence.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2556-14

STYLE OF CAUSE: INTERNATIONAL RELIEF FUND FOR THE
AFFLICTED AND NEEDY (CANADA) v MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 18, 2015

ORDER AND REASONS: MACTAVISH J.

DATED: APRIL 9, 2015

APPEARANCES:

Paul Champ
Champ & Associates

FOR THE APPLICANT

Kirk Shannon

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed & Farrokhzad
Barristers and Solicitors
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Ottawa, Ontario

FOR THE RESPONDENT