Date: 19980702

Docket: IMM-4616-97

BETWEEN:

ALBERT LOMINADZE

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
SECRETARY OF STATE

Respondent

ASSESSMENT OF COSTS - REASONS

G.M. SMITH,

ASSESSMENT OFFICER

[1] These proceedings were commenced by way of an Originating Notice of Motion filed October 31, 1997 which sought judicial review of a decision of a visa officer dismissing the applicant's request for permanent residence. On November 24, 1997, the respondent moved the Court for an order striking the affidavit of Charlotte M. Janssen which had been filed by the applicant in support of his originating motion. The respondent also requested that the Originating Notice of Motion itself be struck.

[2] The Court dismissed the respondent's application. In her Reasons, Madame Justice Reed said:

> [23] In conclusion: (1) it is only minor and inconsequential aspects of the affidavit in question that are based on hearsay; (2) it is at least arguable that the content of the affidavits filed with respect to reviews of visa officer decisions are not governed by *Federal Court Rule* 332(1), but by Rule 1603, and that the latter is less restrictive than the former; (3) there is no jurisdiction to strike out affidavits or originating notices of motion in a judicial review proceeding; (4) the appropriate procedure, in general, is to leave the particular affidavit for evaluation by the judge that hears the application on the merits.
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> [24] There is jurisdiction to dismiss an originating notice of motion, in a summary manner, where the notice of motion is so clearly improper as to be bereft of any possibility of success. This is not one of those circumstances.
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> [25] Counsel for the applicant asked that I award costs to his client, in this case, on a solicitor/client basis. The usual rule is that costs are not awarded to either party in judicial review proceedings. Counsel for the applicant argues that the motion to strike has created unnecessary costs for his client, which the client should not have to bear. It is argued that the motion to strike was frivolous and completely unwarranted on the basis of the facts and the applicable jurisprudence.
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> [26] I agree that there is some uncertainty about which provision of the *Federal Court Rules* is applicable to supporting affidavits in these proceedings. I accept that there are two Trial Division decisions that appear to have taken a different approach from that set out in the *Pharmacia* decision. These are on appeal. They are *Moldeveneau v. Minister of Citizenship and Immigration* (A-413-97) and *Romachkine v. Minister of Citizenship and Immigration* (A-412-97). At the same time, so little of the impugned affidavit is of a type that, in any event, could be classified as inadmissible hearsay, that I must accede to the characterization of the motion as frivolous. The costs that are sought will therefore be awarded.

On April 8, 1998, the applicant filed his Bill of Costs, supported by the affidavit of Nancy Chaves. The assessment took place at Toronto, Ontario on May 26, 1998. William E.M. Naylor and Rocco Galati appeared on behalf of the applicant and Jeremiah A. Eastman appeared for the respondent.

[3] The respondent took the position at the assessment that, given the narrow and simple issues the applicant was required to address in defending against the respondent's motion, the hourly rate of $325.00 claimed by applicant's counsel is excessive. He further argued that certain of the work claimed by the applicant, such as consultation and research on the issue of contempt and the time claimed for preparing the applicant's Book of Authorities, was either unnecessary or over-indulgent.

[4] Mr. Galati explained that this case had come to him because of its distinct and unusually challenging nature. In fact, other solicitors who had expertise in this area of caselaw had turned it down. The Court's findings in disposing of the respondent's application were extremely important and conclusive, not only for this applicant but also for establishing jurisprudence for others. The applicant was put to the unnecessary effort of having to defend against a motion which was frivolous, counsel argued, and it is unfair for the respondent to now attempt to evade the ensuing costs which the Court, in awarding the solicitor and client scale, clearly intended the applicant should recover.

[5] Counsel for the respondent objected to the claimed hourly rate in comparison as well to those common in the industry. He noted that other experienced and prominent solicitors in the immigration field charged between $150 and $250 per hour. Counsel for the applicant responded that his expertise should not be characterized in the restricted sense of immigration law alone. The precepts, jurisprudence and concepts with which he had to navigate were no less complex than in many other fields of the law. In any event,

he added, the fact that he over others practicing in immigration law took up the applicant's case is evidence of the value of his erudite status in his profession. In fact, Mr. Galati offered, a prothonotary of this Court had approved one of his accounts at $250 per hour in the early 1990's. With the passing of seven or eight years, his present rate of $325 should not be considered unreasonable, especially given the circumstances of this particular case.

[6] In my view, one must be careful to avoid fixating on hourly rates in an assessment such as this. Quantification commensurate with counsel's experience and competence is certainly a factor which is helpful at arriving at an amount for which a party should properly be compensated, but it should not be applied at the exclusion of other relevant factors such as the volume of work, the amount of time spent, the amount of money involved, the importance and complexity of the issues, and the result achieved.

[7] For example, I would undoubtedly be willing to attribute a greater amount to a solicitor with many years of experience and demonstrated practical acumen than for someone with only two or three years of limited experience for the same service. On the other hand, compensation for a highly complicated service performed by a solicitor with only a few years experience may very well deserve more than senior counsel performing a simple and incidental matter.

[8] Quantification of costs using an hourly rate may serve to be more helpful in one

case than in another, or even for one service as opposed to another, but any solicitor-client assessment which relies exclusively on that factor is bereft, in my view, of fairness and reasonableness in the process of determining the extent to which the losing party should indemnify the winning party for the work it was required to perform. In *Re Solicitors* (1967) 2 O.R. 137 (H.J.C.) , at p.142, Jessup J. wrote:

> The taxation of a bill of costs, as between solicitor and client payable by an opposite party, should proceed on the principle that it is intended, so far as is consistent with fairness to the opposite party, to provide complete indemnity to the client as to costs essential to, and arising within the four corners of litigation.... (my underline)

[9] That principle was confirmed in this Court by the late Mr. Justice Cattanach in *Scott Paper Co. v. Minnesota Mining and Manufacturing Co.,* 70 C.P.R. (2nd) 68 at 71 and later again in *Apotex v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Gen. Div.) was restated as:

> The general principle that guides the court in fixing costs as between parties on the solicitor and client scale ... is that the solicitor and client scale is intended to be complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action of proceeding, but is not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary. (again my underline)

Also, see *Coghlin v. Mutual of Omaha Insurance Co.,* 10 O.R. (3d) 787 and *Deloitte Haskins & Sells Ltd. v. Bell Canada,* 10 O.R. (3d) 761.

[10] Now, in defending against the respondent's challenge to the affidavit supporting the originating motion, and in turn the originating motion itself, I note that the applicant

was required to address two issues. The first was whether or not the rules of the Court require an affidavit based on personal knowledge, rather than hearsay evidence, and the second was whether there was jurisdiction to summarily dismiss the applicant's originating motion. These issues were quite important to the applicant. I appreciate as well that they will likely be of equal importance to others who may find themselves in the same scenario. On the other hand, I agree with the respondent that these issues were neither especially complex nor required an inordinate amount of work.

[11] Counsel for the applicant submitted at the assessment that his client was in fact billed $325.00 per hour. I have not been convinced that I should detour from the approach of full indemnity in this case. At the same time however, as I have already expressed, the issues addressed by the applicant were neither unusually complicated nor particularly voluminous. Certain of the services claimed by the applicant will therefore be reduced where I perceive them not to have been reasonable or necessary in the circumstances.

[12] A total of 11.8 hours is claimed for reviewing the respondent's motion. At the hourly rate of $325.00, this claim equates to $3,835.00. I can well appreciate the attention that the applicant would have given to the respondent's motion. After all, the applicant risked summary disposition of his whole case. This will be allowed.

[13] The respondent's motion was made returnable in writing without the personal

appearance of counsel. The applicant replied by requesting the application be dismissed or set down for oral hearing. In responding to that request, Mr. Justice Richard, as he then was, directed on December 9, 1997:

> In his written representations dated November 27, 1997, counsel for Albert Lominadze requests that the motion to strike brought by counsel for the Minister be (i) dismissed; or (ii) set down to be heard orally. If counsel wishes to request an oral hearing he should do so in an unqualified manner.
>
> Counsel is to file and serve such a request no later than December 12, 1997. If such a written request is made the motion is to be placed on the list of motions to be heard on a regular motions day in Toronto. Otherwise the motion will be dealt with without personal appearance.

[14] The applicant claims 5.7 hours for services relating to Mr. Justice Richard's direction, including 4.3 hours to consult with senior counsel and to research the possibility of contempt flowing from his subsequent request that Justice Richard recuse himself from hearing the respondent's motion. According to the applicant, an earlier ruling by Justice Richard on the point of hearsay evidence indicated a predisposition toward the respondent's motion..

[15] Respondent's counsel argued that the burden of any expense occasioned by the applicant's attempts to avoid appearing before a particular judge should not fall on the respondent. First of all, the issue of contempt was irrelevant to the respondent's motion and, second, a finding of contempt would in any event have to follow a show cause hearing and be the subject of a separate and distinct disposition by the Court. The possibility of contempt may very well have been a consideration for applicant's counsel,

respondent reasoned, but it is too distant from the issue at hand to suggest the respondent should have to pay for such adventurous research.

[16] For the applicant's part, counsel argued that, had not the respondent pursued its frivolous motion, the applicant would not have had to incur these expenses, including the research on the contempt. It is all well and good, applicant's counsel submitted, to surmise that offense might not be taken to the request that Justice Richard recuse himself, but any counsel worth his salt in sober thought would be loathe to take that step without first giving it the greatest possible consideration.

[17] With deference to the applicant's view, I will assess these services in favour of the respondent's argument. The costs incurred by the applicant regarding the issue of contempt were extraneous, in my view, to those awarded by the Court in relation to the respondent's motion. I will reduce these items to 1.4 hours of work in total for responding to the Court's direction and will allow the lower amount of $455.00.

[18] An amount of $5,005.00 is claimed for review and research relating to the respondent's further 8-page factum, for review of the application record and tribunal record and for compiling a book of authorities. Counsel for the respondent objected to the amount of time claimed for performing these services given the relatively simple nature of the questions at issue. I have reviewed the court record and, while I perceive some duplication of work reflected in the hours claimed, I cannot find any reason to

reduce them as dramatically as the respondent would prefer. I will reduce the number of hours to 13 and will allow $4,225.00 for these services.

[19] An amount of $2,502.50 is claimed for preparation for the motion, for attendance and subsequent consultation. A separate lump sum of $3,500.00 is also claimed as counsel's fee for attendance on the motion. The respondent argued at the assessment that $6,002.50 for a motion of this nature that only lasted one and one-half hours is grossly unreasonable. I appreciate the applicant's point about the Court's finding that the respondent's motion was frivolous, but an award of solicitor and client costs does not justify opening wide a penstock of limitless charges. In the circumstances, and based on the representations of both counsel at the assessment, I will reduce these services for preparation for the hearing, attendance and subsequent consultation to $1,800.00 in total.

[20] An amount equal to $390.00 is requested for reviewing and analysing the Court's decision. This takes into account reading the decision and consulting with the applicant. This is fair and will be allowed.

[21] Services of 2.1 hours are claimed for telephone calls, correspondence and faxes for instructing counsel, and communication between counsel, the Court and Justice counsel. These services will be allowed as well in the amount of $682.50.

[22] A second lump sum of $8,000.00 is also claimed by the applicant. This cost is

explained as being a "Premium to instructing solicitor for achievement of good, conclusive, and binding result in the face of the history of A-412-97, A-413-97 and importance of result to client with respect to preventing problems in Court with such motions as affecting instructing solicitor." Counsel for the respondent opposed this amount in total as duplication of the other services already accounted in the applicant's Bill and fully outside the realm of expenses the respondent should, in all reasonableness, be expected to pay. Applicant's counsel took the position that he had succeeded where others had not in resolving the issues surrounding the questions of evidence and, concomitantly, the striking of originating motions. The premium charged, he argued, is commensurate with the result achieved and his client, who has actually been billed this amount, should be compensated in full.

[23] I have no hesitation in refusing the applicant's claim against the respondent for a premium. It quite clearly falls within the categorization alluded to in the *Apotex* case (supra) as being an extra service which, in the absence of a special order, was not reasonably necessary in defending against the respondent's motion. I would add furthermore that even if I were wrong in this decision, I would nevertheless have refused the premium as duplication of charges already assessed above to the applicant.

[24] Finally, the applicant claims 2.4 hours for preparation of the Bill of Costs, an unascertained amount at the hourly rate of $325.00 for preparation for the assessment, which counsel later clarified took 4 hours, and a lump sum of $3,500.00 as counsel's fee

for attendance. The total claim relating to this assessment is therefore $5,580.00.

[25] Here too, counsel for the respondent argued that the applicant's claim is excessive. The Bill of Costs was straightforward, he suggested, and the assessment itself was brief, uncomplicated and uneventful. In reply, counsel for the applicant responded that their appearance on the assessment was a direct result of respondent's refusal to pay the costs which the Court awarded against the respondent for it's frivolous action. Had the respondent been reasonable in agreeing to reimburse the applicant as the Court directed, the assessment would not have been necessary. Mr. Eastman replied that, on the contrary, the respondent's refusal to accede to the applicant's Bill was a direct result of the exorbitant and excessive posture taken by the applicant in portraying his costs.

[26] Mr. Naylor explained at the assessment that he spent 1 hour in preparation for the assessment, 3 hours going over the cases and 1 hour consulting with co-counsel, Mr. Galati. He also revealed that his normal fee for a half day in court was $875.00. Counsel for the respondent argued that Mr. Naylor's participation at the assessment was minimal and the presence of second counsel was therefore unnecessary.

[27] The affidavit filed in support of the Bill was but one page. It consisted of two paragraphs, one which identified the affiant and the other a succinct statement that the disbursements were necessary and proper. A copy of the Bill of Costs was the only exhibit appended to the affidavit.

[28] I note that Mr. Galati conducted almost all of the argument at the assessment on the applicant's behalf. Mr. Naylor's participation was indeed negligible. The time requested for preparation for the assessment will be allowed except that I will reduce to 2 hours the amount of time claimed for going over the cases. None were cited at the assessment. In my experience as an assessment officer, I am inclined to agree with the respondent that, comparatively speaking in the solicitor and client context, this was a simple and straightforward assessment. For that reason, and it being quite evident as well that the presence of two counsel was unnecessary at this assessment, I will also reduce dramatically the lump sum fee of $3,500.00 for attendance to $875.00. I allow 4 hours, as mentioned above, for preparation time but at the lower rate of $185.00 per hour. I will reduce the claim for preparation of the Bill of Costs as well to $444.00.

[29] Disbursements are claimed for photocopying, faxes and process servers. Some of the photocopies were made in-house by the law firm representing the applicant. Although the Bill of Costs claims 75¢ per page for those copies, it was agreed by the parties at the assessment that 10¢ per page would be more appropriate. The parties also agreed on 200 per page for faxes. Accordingly, and on consent of the respondent at the assessment, I will allow $28.80 for external photocopies and binding, $10.40 for internal photocopies, $4.40 for faxes and $95.00 for process servers, including the Bill of Costs and Appointment, for a total of $148.30 inclusive of G.S.T. ($9.70).

[30] In accordance with the above reasons, I have therefore assessed the applicant's

Bill of Costs in the amounts of $13,446.50 for fees, $138.60 for disbursements and $950.96 for the Goods and Services Tax. A Certificate of Assessment will issue in the total amount of $14,536.06.

"Gregory M. Smith"

Gregory M. Smith
Assessment Officer

Ottawa, Ontario
July 2, 1998

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS OF RECORD

COURT FILE NO.: IMM-4616-97

BETWEEN:

ALBERT LOMINADZE

Applicant -

and -

THE MINIS "I'ER OF CITIZENSHIP AND IMMIGRATION, SECRETARY OF STA'L'E

Respondent

PLACE OF ASSESSMENT: Toronto, Ontario

DATE OF ASSESSMENT: May 26, 1998

ASSESSMENT OF COSTS - REASONS BY G. SMITE ASSESSMENT OFFICER

DATE OF REASONS: July 2, 1998

APPEARANCES:

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SOLICTI'ORS OF RECORD:

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for the Respondent

for the Applicant

for the Respondent