

Federal Court



Cour fédérale

Date: 20101215

Docket: T-1173-09

Citation: 2010 FC 1294

Ottawa, Ontario, December 15, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SUAAD HAGI MOHAMUD

Applicant

and

**THE MINISTER OF FOREIGN AFFAIRS,
THE ATTORNEY GENERAL OF CANADA,
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

**REASONS FOR ORDER AND ORDER
(MOTION FOR COSTS)**

[1] This is the background to a fiercely contested motion for costs. With ticket and valid passport in hand, Ms. Mohamud presented herself at the Jomo Kenyatta International Airport in Nairobi. She was booked to fly to Amsterdam with KLM Royal Dutch Airlines, and from there home to Toronto. She only arrived two and a half months later.

[2] The KLM gate staff thought the person before them did not match her passport photo. Paul Jamieson, a migration integrity officer with the Canadian High Commission, was consulted. He did not have time to get to the airport, but, based on a telephone interview, was also not satisfied that the individual with whom he was speaking was the rightful holder of the passport. KLM denied her boarding and referred her to the Kenyan immigration authorities.

[3] Mr. Jamieson interviewed her twice more, in person, over the next few days. From her immigration file, he was aware that the real Suaad Hagi Mohamud immigrated from Somalia in 1999, sponsored by her husband, that she became a citizen in 2004 and had a 10-year old son. In a lengthy affidavit he explained why he thought his initial suspicions were confirmed. She was woefully ignorant of Canada in general and Toronto in particular. The birth date of her son did not match that in the file, nor did the particulars of her siblings. She insisted she was only married once, in 2006, and not in 1999. Having dealt with a number of passport frauds, he suspected that the person before him might well be Ms. Mohamud's younger sister.

[4] Be that as it may, the Kenyan authorities were informed in writing that she was an impostor. She was arrested, jailed and charged with fraud. She later made bail. Her Canadian passport was confiscated.

[5] Over the next two months she had various discussions with the Canadian authorities, always adamant that she was who she said she was. However things only began to happen when she retained Mr. Boulakia, a well-known immigration specialist, who has been acting *pro bono*.

[6] Mr. Boulakia moved this Court for an interlocutory order by way of *mandamus* requiring the respondents to repatriate Ms. Mohamud. The underlying application for judicial review sought a declaration that she was indeed a Canadian citizen and declarations that her mobility rights under section 6 of the *Charter of Rights and Freedoms* were violated, and as well that her liberty and security of the person rights were put at risk without due process as required by section 7 of the Charter.

[7] The interlocutory motion was withdrawn at the last moment on a no-costs basis as the respondents agreed, at their expense, to carry out a DNA test on Ms. Mohamud, her former husband in Toronto, and her son. These tests established beyond doubt that she was the mother of the boy in Toronto. The respondents then conceded that she was who she said she was, took steps to notify the Kenyan authorities that the whole affair was a misunderstanding, and repatriated her to Canada.

[8] Promptly on her return, she, and family members, instituted a multi-million dollar action in the Ontario Superior Court of Justice. There was some jockeying in the Federal Court over the next few months over the issuance of a fresh passport and other matters. Eventually it was agreed that the merits of her case would proceed in the Ontario action, reserving the question of costs for this Court.

[9] The costs motion was originally first made presentable last year, but took on a life of its own. Mr. Jamieson filed an affidavit against the motion. Ms. Mohamud has not filed an affidavit.

[10] There has been no order on the merits of Ms. Mohamud's case, and only one previous order as to costs. Mr. Jamieson was cross-examined on his affidavit. He refused to answer certain questions and refused to provide certain documents. Prothonotary Aalto compelled him to answer and to provide. He awarded Ms. Mohamud costs.

[11] This motion deals with the costs on the balance of the proceedings.

[12] Ms. Mohamud seeks costs on a solicitor/client basis. She submits that the respondents knew perfectly well before these proceedings were instituted that she was who she said she was. They were arrogant, dismissive, refused to come to her aid and circled the wagons when cracks in their case began to appear. It was only the pressure of these proceedings (and media publicity attendant thereon) that forced them to agree to DNA tests. The affidavit of Mr. Jamieson was a red herring in that he was transferred out of Nairobi while key events were taking place.

[13] The Government is just as adamant that there should be no costs. Although the person presenting herself at the KLM counter and the valid Canadian passport holder turned out to be one and the same, they claim she is the author of her own misfortune. There is a scam afloat, probably involving family members who have used the passport to illegally smuggle persons into Canada.

[14] Thus, both parties invite me to mount the bully pulpit to sing their respective praises.

ISSUE

[15] The issue is whether Ms. Mohamud should be awarded costs. If so, should they be on a solicitor/client basis, an enhanced basis such as party-and-party costs, or in accordance with Federal Courts Tariff B?

DISCUSSION

[16] The Court enjoys wide judicial discretion under rule 400 and following of the *Federal Courts Rules* which deal with costs. All things being equal, costs usually follow the event. Ms. Mohamud obtained most of what she sought without court order. An award of damages is not one of the available remedies under judicial review. While she had various options, such as moving to transform the judicial review into an action, or to institute a separate action in this Court, she chose to file suit in the Ontario Superior Court of Justice which has concurrent jurisdiction. That was her right. On the other hand, since the judicial review did not proceed, she was not obliged to file an affidavit, and could not be subjected to cross-examination. As a result of her choice, this Court is deprived of her evidence.

[17] In the circumstances, I have come to the conclusion that Ms. Mohamud is entitled to costs. In awarding costs, the Court may consider, among other things, the result of the proceeding, the importance and complexity of the issues, any written offer to settle, the amount of work, whether the public interest in having a particular proceeding litigated justifies an award, the conduct of a party, the failure to admit anything that should have been admitted, and whether any step was improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution.

[18] A decision of considerable assistance is that of Mr. Justice Zinn in *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267, with supplementary reasons as to costs reported at 2009 FC 816, [2009] F.C.J. No. 956 (QL). Mr. Abdelrazik lived for some time within the sanctuary of the Canadian Embassy in Khartoum, Sudan, the country in which he was born. Although a Canadian citizen, he feared detention and torture should he leave the embassy and alleged that the Canadian Government was thwarting his return to Canada. The Canadian Government took the position that Mr. Abdelrazik could not return to Canada because the United Nations Security Council 1267 Committee had listed him as an associate of Al-Qaeda and as a result he was on a no-fly list. Following a full judicial review, Mr. Justice Zinn found his Charter right to enter Canada had been breached by the respondents. He ordered the Canadian Government to immediately take steps to repatriate him. Unlike the present case, Mr. Abdelrazik's identity was never in doubt, and there was a decision on the merits of the application for judicial review.

[19] As Justice Zinn pointed out in his subsequent order for costs, solicitor/client costs are unusual and are intended to punish reprehensible behaviour during litigation. Mr. Justice Zinn did not award solicitor/client costs. In this case, it was only two days after the filing of proceedings in this Court that the defendants agreed to conduct the DNA test which led to Ms. Mohamud's return home. If the respondents' behaviour prior thereto caused her damage, that is a matter to be dealt with in the Ontario action. Even if there were enough material in the record before me, which there is not, it would be inappropriate for me to comment, just as there is insufficient material in the record to substantiate the allegations that Ms. Mohamud was engaged in fraudulent activity and was the author of her own misfortune.

[20] Mr. Boulakia's fallback position, somewhat reluctantly, was party-and-party costs. He is a certified immigration specialist and equated himself with the special advocates in security certificate cases who are paid \$275 an hour. This case was not nearly as complicated as Mr. Abdelrazik's, a case which involved complex issues of international law. Mr. Boulakia was admittedly extremely diligent and had Ms. Mohamud home within weeks of his retainer. In my view, there is no real public interest in this case in that the issue was Ms. Mohamud's identity. Once that was sorted out, she was returned home. If the behaviour of the respondents during litigation is in any way questionable, it has to relate to instructing Mr. Jamieson not to answer questions and not to produce certain documents during his cross-examination. However that matter was dealt with by Prothonotary Aalto who awarded costs of \$5,000 and disbursements of \$3,602.29 plus applicable HST. Based on Mr. Boulakia's time records, this award was on an enhanced basis. However, as to the balance I see no reason to go beyond the tariff.

[21] The respondents' fallback position is that costs should be awarded in accordance with Tariff B, Column 3, mid-range, but only until 11 August 2009, the date on which they agreed to repatriate Ms. Mohamud. They also submit that no costs are owing on the motion for an interlocutory order by way of *mandamus* in that they agreed to carry out DNA tests on the basis that the motion would be adjourned without costs. As it was that motion was never heard on the merits.

[22] In light of the agreement between the parties, no costs should be awarded with respect to the interlocutory motion for an order by way of *mandamus*. However with respect to events after 11 August 2008, although costs were the prime consideration, there were some other issues which

eventually fell by the wayside. In addition, there was never a settlement offer. The respondents were every bit as adamant as the plaintiff with respect to costs, either solicitor/client costs or nothing.

[23] Basing myself on Mr. Boulakia's time records for his work, and that of a law student, I hold that costs should be awarded calculated in accordance with Table B, Column 3, high-end. Rounding matters out slightly, this works out to 100 units at \$130 a unit or \$13,000 in fees. Disbursements are awarded in the amount of \$510.06 plus HST.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the respondents pay the applicant lump sum costs of \$13,510.06 plus HST.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1173-09

STYLE OF CAUSE: MOHAMUD v. THE MINISTER OF FOREIGN
AFFAIRS, THE ATTORNEY GENERAL OF CANADA,
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 6, 2010

**REASONS FOR ORDER AND
ORDER (MOTION FOR COSTS):** HARRINGTON J.

DATED: DECEMBER 15, 2010

APPEARANCES:

Raoul Boulakia FOR THE APPLICANT

Greg George FOR THE RESPONDENTS
Mélissa Mathieu

SOLICITORS OF RECORD:

Raoul Boulakia FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENTS
Deputy Attorney General of Canada
Toronto, Ontario