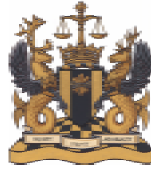
Federal Court  Cour fédérale

**Date: 20110727**

**Docket: DES-2-10**

**Citation: 2011 FC 945**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, July 27, 2011**

**PRESENT: The Honourable Mr. Justice Yves de Montigny**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**HANI AL TELBANI**

**Respondent**

**REASONS FOR ORDER AND ORDER**

I. Introduction

[1] Mr. Al Telbani is of Palestinian origin and has been a permanent resident of Canada since 2004. On June 4, 2008, when he was about to board an Air Canada flight to Saudi Arabia, he was denied boarding and was given a copy of an Emergency Direction dated the same day stating that the Minister of Transport, Infrastructure and Communities (the Minister) had determined that he posed an immediate threat to aviation security.

[2] Mr. Al Telbani subsequently filed two applications for judicial review (T-973-08 and T-1696-09) related to the decision to add his name to the list of people prohibited from flying (the no fly list). The Attorney General of Canada (the AGC) then asked the Federal Court to issue an order to protect certain information in connection with these judicial reviews that he believes to be potentially injurious or "sensitive" under sections 38.01 and following of the *Canada Evidence Act*, RSC 1985, c C-5.

[3] In the context of the proceeding filed by the AGC, and seeking a confidentiality order from the Federal Court (DES-2-10), Mr. Al Telbani filed the motion for advance costs presently before the Court. More specifically, Mr. Al Telbani is seeking an order compelling the AGC to pay his professional fees. Although the motion is somewhat ambiguous in that respect and can be interpreted as seeking the payment not only of Mr. Al Telbani's costs in docket DES-2-10, but also the costs connected to his two applications for judicial review, it should be clarified that in the context of the present proceeding, this Court does not have to rule on the merit of the two judicial review applications, but only the AGC's application under the *Canada Evidence Act*. Indeed, the AGC is not a party and has no interest in the applications for judicial review filed by Mr. Al Telbani, and does not intend to take a position on the claims related to these two cases.

[4] At the hearing, counsel for Mr. Al Telbani admitted that the present motion could concern only the costs for docket DES-2-10. She argued, however, that the Court had to consider the two applications for judicial review in its assessment of the motion for advance costs, since the evidence that would be available to the **respondent**—which would, in part, be decided in the

context of this motion—would have an impact on the two underlying proceedings. I do not disagree that there is a link between the application filed by the AGC under section 38 of the *Canada Evidence Act* and the applications for judicial review filed by the respondent. The fact remains that the analysis the Court must undertake to determine whether advance costs should be granted in the present matter must first and foremost be performed in light of the issues raised in the AGC's application to remove certain information from the Court's records in dockets T-973-08 and T-1696-09. It will be for the judge who will ultimately be responsible for ruling on the two applications for judicial review to determine, if he or she is asked to do so, whether advance costs should be awarded in those two cases.

II. Facts

[5] As mentioned above, on June 4, 2008, Mr. Al Telbani was denied boarding on an Air Canada flight destined for Saudi Arabia. He was given an Emergency Direction issued in accordance with section 4.76 of the *Aeronautics Act*, RSC, 1985, c A-2. The Direction simply stated that the Minister was of the opinion that Mr. Al Telbani posed an [TRANSLATION] "immediate threat to aviation security or to any aircraft or aerodrome or other aviation facility, or to the safety of the public, passengers or crew members". Under the Passenger Protect Program created by the Department of Transport in June 2007, under the *Aeronautics Act*, the names of individuals for whom there are reasonable grounds to suspect that they pose an immediate threat to aviation security are recorded on the Specified Persons List (commonly known as the no fly list). Airlines cannot allow individuals on that list to board an aircraft leaving or heading to Canada.

[6] In response to the Minister's decision, Mr. Al Telbani applied to Transport Canada's Office of Reconsideration to request a reconsideration of the decision. On June 19, 2008, Mr. Al Telbani also filed a notice of application for judicial review of the Minister's decision to add his name to the Specified Persons List and to issue an Emergency Direction in his regard. The application also contests the constitutional validity of the measure and the statutory and regulatory provisions.

[7] On July 31, 2008, in response to Mr. Al Telbani's request for disclosure of the tribunal record, Transport Canada filed in the Court docket a letter from the Director General, Aviation Security, Transport Canada, stating that a certified copy of the following documents had been appended, namely the Emergency Direction issued by a Transport Canada intelligence officer on behalf of the Minister on June 4, 2008. According to this letter, the other documents contained in the tribunal record could not be disclosed because they were covered by a notice given to the AGC on June 24, 2008, under subsection 38.01(1) of the *Canada Evidence Act*.

[8] On September 15, 2008, the applicant filed a notice of application under sections 317 and 318 of the *Federal Courts Rules* (the Rules) and section 38 of the *Canada Evidence Act* challenging Transport Canada's refusal to disclose the record that resulted in the Minister's decision. The request was denied by the Court in a decision dated November 3, 2008.
Judge Frenette also ordered a stay of the application for judicial review and concluded that the question of whether Transport Canada had to disclose the sensitive or potentially injurious

information sought by the applicant had to be dealt with in a separate hearing under subsection 38.04(1) of the *Canada Evidence Act*.

[9] At the same time as these legal proceedings, Transport Canada's Office of Reconsideration issued a report and recommendations in response to Mr. Al Telbani's request o reconsider the Minister's decision to put his name on the Specified Persons List. This report is dated October 29, 2008, but was only disclosed to counsel for Mr. Al Telbani on June 12, 2009. The Office set out its three conclusions as follows at page 2 of its Report:

> First, the Deputy Minister of Transport, Infrastructure and Communities was not provided with the information necessary for him to decide whether the fact of the Applicant's case, when considered in light of the requirements of paragraph 4.81(1)(*b*), justified the exercise of the power to compel the air industry to provide information and the placing of him on the specified Persons List (SPL). Second, subsequent decisions of the Specified Persons List Advisory Group (SPLAG) to maintain the Applicant on the SPL were made without legal authority. Third, the decision to issue an Emergency Direction to deny boarding to the Applicant was made without legal authority because the officer who issued the Emergency Direction was not authorized by the Minister of Transport, Infrastructure and Communities to do so. We would also add that, even if he had been authorized, the officer would not have formed the opinions necessary to justify issuance of the Emergency Direction.
>
> (Applicant's Request Record, p. 149)

[10] On the basis of these findings, the Office recommended that the Deputy Minister declare that the decisions to put Mr. Al Telbani's name on the Specified Persons List and to issue an

Emergency Direction prohibiting him from boarding an aircraft were of no effect, and remove his name from the list. Taking note of these recommendations, Transport Canada re-examined Mr. Al Telbani's file. On September 10, 2009, the Minister decided to keep Mr. Al Telbani's name on the Specified Persons List. On October 14, 2009, Mr. Al Telbani filed a second application for judicial review, this time of the Minister's decision to keep his name on the Specified Persons List (docket T-1696-09).

[11] On June 29, 2010, the AGC filed a notice of application in the present matter, in accordance with subsection 38.04(1) of the *Canada Evidence Act*. The AGC is thus seeking to protect sensitive or potentially injurious information that he wishes to use in support of his position in the two applications for judicial review filed by Mr. Al Telbani.

[12] The only issue in the present motion is whether Mr. El Talbani's situation warrants that the Court exceptionally award him advance costs in the context of the AGC's application under subsection 38.04(1) of the *Canada Evidence Act*.

III. <u>The law of advance costs</u>

[13] Section 400 of the *Federal Courts Rules* gives the Court full discretionary power over the amount and allocation of costs. According to the traditional approach to awarding costs, costs are usually awarded to the successful party at the end of the judgment.

[14] In its leading decision on the awarding of advance costs, the Supreme Court of Canada reiterated the basic rules for costs. It quoted with approval from the Divisional Court of the Ontario High Court of Justice's decision in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 OR (2d) 23; [1985] OJ No 1881, where (at page 32) the Ontario High Court of Justice described the usual standard characteristics of costs awards. The Supreme Court of Canada summarized these in the following terms:

> [20] . . .
> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]
>
> *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.

[15] These factors reflect the traditional approach to the awarding of costs, namely indemnifying the successful party for the expenses it incurred to defend against an action without merit or to pursue a valid legal right. As the Supreme Court took pains to point out, these principles should normally be followed, unless some special circumstances are established:

> [22] These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. . . .
>
> *British Columbia (Minister of Forests) v Okanagan Indian Band*, *ibid*.

[16] The Supreme Court of Canada has however recognized that indemnity to the successful party is not necessarily the sole purpose, or even the primary purpose of costs awards. A review of the case law in this matter has led the Court to conclude that concerns about access to justice and the desirability of mitigating severe inequality between litigants may be considered. In public interest litigation, it is also important that issues of significance to the broader community can be determined. In such cases, the public importance of the questions at issue may be regarded as “special circumstances” warranting the awarding of advance costs.

[17] In that context, the Supreme Court of Canada has established three conditions that must be met to justify an award of advance costs:

> [40] . . .
> 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.
>
> *British Columbia (Minister of Forests) v Okanagan Indian Band*, *ibid*.

[18] These three conditions must be met for advance costs to be ordered. On the other hand, the Court may also conclude that it is not appropriate to order the payment of costs in the course of the proceeding even if the three conditions are met. The Court reiterates that advance costs are an extraordinary remedy that should be granted sparingly, as the following excerpt from its reasons demonstrates:

> [41] 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. . . .
>
> *British Columbia (Minister of Forests) v Okanagan Indian Band*, *ibid*.

[19] The Supreme Court of Canada returned to this issue in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, reiterating that advance costs orders must be granted with caution, as a last resort and in circumstances where the need for them is clearly established (para. 36). The Court added that it

is only a "rare and exceptional" case that is "special enough" to warrant an advance costs award (para. 38). A number of excerpts underscore that such orders should not be issued lightly or routinely:

> [44] . . . People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them all through the mechanism of advance costs awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.
>
> [71] The impecuniosity requirement from *Okanagan* means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered. Advance costs should not be used as a smart litigation strategy; they are the last resort before an injustice results for a litigant, and for the public at large.
>
> [78] The rule in *Okanagan* arose on a very specific and compelling set of facts that created a situation that should hardly ever reoccur. As this Court held in *Okanagan*, an advance costs award should remain a last resort. . . .
>
> *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, *ibid*.

See also the more recent *R v Caron*, 2011 SCC 5, [2011] SCJ No 5, at para. 39.

[20] On the basis of these principles, I will now examine the motion filed by Mr. Al Telbani in the present matter.

A. *Mr. Al Telbani's financial situation*

[21] Mr. Al Telbani stated in his affidavit filed in support of his motion that, as of January 1, 2011, he was no longer eligible for the Province of Quebec's legal aid program. This was not contested. The *Regulation respecting Legal aid* (LRQ 1981, c A-14) does in fact stipulate that a single person is not eligible for gratuitous legal aid if his or her gross annual income exceeds $13,007, while single people whose gross income exceeds $18,535 are not eligible for contributory legal aid. Mr. Al Telbani has had a full-time position as a software developer since November 15, 2010, and receives a gross annual salary of $56,004, three times as much as the maximum eligibility amount established according the schedule of annual income for the contributory component.

[22] Mr. Al Telbani nonetheless submits that he will be unable to pay for all the costs of the present proceeding because he has no savings and has to reimburse his student loans totalling about $25,000, which he is reimbursing at $250 a month, and an equivalent amount that his parents lent him.

[23] It is difficult to get a clear picture of Mr. Al Telbani's financial situation since he has not submitted a proper financial statement. The only evidence before the Court concerning Mr. Al Telbani's expenses is one paragraph from his affidavit, where he alleges that his (monthly) expenses include $700 in rent, $335 in transportation, $190 in utilities (electricity and telecommunications) and $900 in living expenses. In addition to that, he reimburses $250 a month for his student loan. He also states that he is reimbursing his parents, without clarifying at

what pace he has to do so. In these circumstances, and on the basis of these facts alone, it is hard to conclude that Mr. Al Telbani is impecunious and does not have the means to pay his legal fees.

[24] Moreover, Mr. Al Telbani has not shown the Court that there is no other alternative to an advance costs order to allow him to assert his rights before the Court. In his affidavit, Mr. Al Telbani stated that his attempts to seek assistance from non-government organizations, such as the Civil Liberties Monitoring Group and the Muslim Council of Montreal, in June and July 2008 had been unsuccessful. It is true that Mr. Al Telbani's cannot be criticized for not persevering in these attempts while he was receiving legal aid. It remains, however, that he could have resumed and pursued his efforts when he stopped receiving legal aid, both with these and other organizations. This is especially so as the affidavit sworn by Mr. Salam Elmenyawi, on behalf of the Muslim Council of Montreal, attests that the organization would undoubtedly not be able to financially support a challenge concerning Mr. Al Telbani's presence on the Specified Persons List, but is silent on the funding that might be granted to Mr. Al Telbani in the context of the proceeding instituted under the *Canada Evidence Act*.

[25] Once again, it is important to recall that advance costs are an exceptional measure the use of which may be justified when there is no other alternative, as the Supreme Court of Canada wrote in *Little Sisters*, above:

> [40] . . . 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. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. . . .

[26] In *Abdelrazik v Canada (Minister of Foreign Affairs and International Trade),* 2008 FC 839, [2008] FCJ No 1046, this Court dismissed a motion for advance costs, relying, among other things, on the fact that the applicant had not fully explored the funding alternatives potentially available to him (at para. 41). The Court also noted that counsel for the applicant had not demonstrated, in his affidavit, that he would be forced to withdraw from the file if the motion for costs was not granted to his client (at para. 39). In the present matter, counsel for Mr. Al Telbani did not file any personalized evidence concerning her inability or refusal to act because of financial considerations. The only evidence on that issue can be found at paragraphs 28 and 29 of Mr. Al Telbani's affidavit, where he claims to believe, according to information obtained from his counsel, that his counsel would not be able to continue working on this file without a source

of funding. I find such a statement on the part of Mr. Al Telbani to be clearly insufficient to obtain advance costs.

[27] Finally, it is important to note that nowhere in Mr. Al Telbani's affidavit does it suggest that he or his parents are unable to contribute to the payment of the fees in this matter. Mr. Al Telbani received financial support from his family from January 2006 until he started working in November 2010, and he writes at paragraph 38 of his affidavit that his relatives cannot pay [TRANSLATION] "all the legal fees" associated with this proceeding. At paragraph 39 of his affidavit, he adds that he is unable to pay [TRANSLATION] "all the legal fees" associated with this proceeding himself. At the hearing, counsel for Mr. Al Telbani indicated that Mr. Al Telbani could set aside $750 a month to pay for part of his legal fees; there is no mention of this, however, in Mr. Al Telbani's affidavit. In the absence of further clarifications in that respect, it is difficult to determine what contribution he or his family could make to his case.

[28] Given the circumstances described before the Court, it is not possible to conclude that the first condition set out by the Supreme Court of Canada to warrant an advance costs order has been fulfilled. Not only has Mr. Al Telbani not proven his impecuniosity, but he has also failed to establish that there is no other alternative that would allow him to pay his legal fees. In these circumstances, I must dismiss his motion, since the three conditions that emerge from the case law of the Supreme Court of Canada are conjunctive, and not disjunctive.

[29] It would be remiss of me, however, not to make the following few comments. First, in regard to the second condition described by the Supreme Court of Canada, it must be remembered that the application the merit of which must be assessed is the one filed by the AGC under section 38.04, and not the applications for judicial review filed as dockets T-973-08 and T-1696-09. Mr. Al Telbani is therefore not a respondent in the usual sense of the term in docket DES-2-10, let alone an accused, contrary to what he claims, but rather a person whose interests are affected by the application, in accordance with subsection 38.04(5) of the *Canada Evidence Act*. Indeed, subsection 38.04(5) of the *Canada Evidence Act* provides that the Federal Court can rule on the application solely on the basis of the AGC's representations. Only if the judge decides that a hearing should be held does he or she determine who should be given notice of the hearing (subparagraph 38.04(5)(*c*)(i)).

[30] On November 10, 2010, this Court appointed two experienced counsel as *amici curiae*. The *amici curiae* will participate at the hearings held in Mr. Al Telbani's absence and will have every opportunity to cross-examine the witnesses heard by the AGC and to submit written and oral representations to the Court. It was also ordered that the fees of the *amici curiae* will be paid by the AGC. Given the active role to be played by the *amici curiae* and the fact that only 31 documents are at issue (and that of this number, several overlap), it is hard to imagine that Mr. Al Telbani's interests will not be represented. Even assuming that he insists on being represented by his counsel, his counsel's workload will necessarily be reduced. In the circumstances, it seems exorbitant to order advance costs.

[31] Lastly, the questions raised by Mr. Al Telbani do not transcend his own interests. According to *Canada (Attorney General) v Ribic*, 2003 FCA 246, [2003] FCJ No 1964, the Court has to determine three issues in the context of an application under subsection 38.04(1) of the *Canada Evidence Act*:

(1) Is the information relevant?

(2) If the information is relevant, would the disclosure of the information be injurious to international relations, national defence or national security?

(3) If the disclosure would result in injury, does the public interest in disclosure outweigh in importance the public interest in non-disclosure?

[32] When it comes to the first two questions, the burden rests squarely on the AGC. Again, the two *amici curiae* appointed by the Court and whose fees will be borne by the AGD will be present at this stage of the proceeding. If the AGC succeeds in establishing that the disclosure would be injurious to international relations, national defence or Canada's national security, the Court must balance the public interest in disclosure against the public interest in non-disclosure. Although this is certainly an important exercise, it is not an exceptional one, and its outcome affects only Mr. Al Telbani. The interest this assessment might have for the general public will be limited, and certainly not sufficient to fulfill the third condition established by the Supreme Court of Canada.

[33] It is true that Mr. Al Telbani intends to raise the constitutional invalidity of the scheme established by section 38 of the *Canada Evidence Act*, which confers exclusive jurisdiction on the Federal Court to determine issues regarding the disclosure of information pertaining to

international relations, national defence or national security. That question was conclusively determined by the Supreme Court of Canada in *R v Ahmad*, 2011 SCC 6, [2011] S.C.J. No 6, and by the Ontario Court of Appeal in *Abou-Elmaati v Canada (Attorney General)*, 2011 ONCA 95, [2011] OJ No 474. The Federal Court and the Federal Court of Appeal have also examined section 38.11 of the *Canada Evidence Act* and confirmed the constitutional validity of *ex parte* hearings which the provision contemplates: see *Canada (Attorney General) v Khawaja*, 2007 FC 463, [2008] 1 FCR 621, aff'd. in 2007 FCA 388, [2008] 4 FCR 3. Consequently, Mr. Al Telbani's arguments as to the validity of section 38 of the *Canada Evidence Act* have already been decided by the courts, and one therefore cannot argue that these are issues of the utmost important and of public interest, especially as Mr. Al Telbani has failed to explain how the arguments he might raise would challenge the exhaustive analysis the Supreme Court undertook in *Ahmad*.

[34] Mr. Al Telbani is moreover basing his challenge on an element of speculation, in arguing that the judge who will be hearing the two judicial reviews might have to dispose of the applications on the basis of an incomplete record. Yet, at this stage, one cannot assume the outcome of the application filed by the AGC. Upon completion of the Court's assessment of the appropriateness of the partial or full disclosure of the information the AGC considers to be "sensitive" or "potentially injurious", Mr. Al Telbani's fears may well turn out to be unfounded. Consequently, the constitutional question is premature and cannot justify the awarding of advance costs.

[35] Taking all this into consideration, I therefore find that Mr. Al Telbani's motion to have the AGC pay for his legal fees for the proceeding instituted under the *Canada Evidence Act* must be dismissed. Mr. Al Telbani has fulfilled none of the three conditions developed by the Supreme Court of Canada in *British Columbia (Minister of Forests) v Okanagan Indian Band*, above, *Little Sisters Book and Art Emporium*, above, and *Caron*, above.

[36] In closing, I must say a word about the alternative argument raised by counsel for Mr. Al Telbani in her written submissions, an argument that she did not refer to at the hearing. Relying on, *inter alia*, *R v Rowbotham et al* (1988), 41 CCC (3d) 1, [1988] OJ No 271 (Ont CA), she submits that case law has recognized the right of an impecunious accused to be represented by state-funded counsel.

[37] Many decisions have indeed recognized that the right to a fair trial implies the possibility of retaining counsel. This right arises from section 7 and paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. But in the present case, Mr. Al Telbani has not been charged with a criminal or penal offence, and neither his freedom nor his safety is at stake. As mentioned above, the sole purpose of an application filed under section 38 of the *Canada Evidence Act* is to determine whether certain information must be protected because it is potentially injurious or sensitive within the meaning of that provision. Accordingly, there is no accused in such a proceeding, and the burden of proof is on the AGC. In this context, Mr. Al Telbani cannot refer to this case law to claim the payment of his legal fees, at least in respect of the present matter.

[38] For all of these reasons, Mr. Al Telbani's motion for advance costs is dismissed, without costs.

<u>**ORDER**</u>

**THE COURT ORDERS that** the respondent's motion for advance costs is dismissed, without costs.

"Yves de Montigny"
Judge

Certified true translation
Johanna Kratz