11-19-2008

Written Representations of the Applicant

Court File Number: T-727-08

FEDERAL COURT

B E T W E E N:

ABOUSFIAN ABDELRAZIK

Applicant
(Responding Party to this motion)

-and-

MINISTER OF FOREIGN AFFAIRS
and THE ATTORNEY GENERAL OF CANADA

Respondents
(Moving Parties to this motion)

WRITTEN REPRESENTATIONS OF THE APPLICANT
(RESPONDING PARTY TO THIS MOTION)
(for motion to seek leave to file additional affidavit evidence)

PART I - FACTS

Overview and Nature of the Motion

1. The Respondents seek leave of the Court by way of the instant motion to introduce new affidavit evidence in response to answers elicited through Respondents' counsel's cross-examination of the Applicant. The allegations to which the Respondents now seek to respond by tendering new affidavits were available to the Respondents prior to the cross examination of the Applicant; however, the Respondents take the position that they were "ambushed" by new allegations. In essence, the Respondents seek to repair answers, which Respondents' counsel wishes she did not obtain through cross-examination. Such an approach is not consistent with the interests of justice and will delay the proceedings. In any event, the new evidence in question relates to matters that are not necessary to the disposition of the underlying application.

2. In all of the circumstances, the Applicant submits that the Respondents' motion is inconsistent with the Rules, constitutes an abuse of process and should be dismissed with costs payable forthwith.

Facts

3. The Applicant filed the Notice of Application giving rise to the underlying application on May 7, 2008. He subsequently amended the style of cause of his Application on October 6, 2008.

4. The Applicant served his affidavit in support of the instant application on June 30, 2008.

5. A second affidavit, sworn by Ms. Jo Wood, was filed in support of the application on July 29, 2008. This affidavit was effectively a refiling, with the Respondents' consent, of an affidavit previously filed on June 23, 2008 by Audrey Brousseau. Both affidavits were filed in Court on July 29, 2008 in conformity with Chief Justice Lutfy's Order dated July 28th, 2008.

6. The Respondents filed their responding affidavits in this matter on September 12, 2008, approximately three months after being served with the Applicant's affidavit.

7. The Applicant cross-examined the affiant for the Respondents, Sean Robertson, on October 7, 2008. During this cross examination, Mr. Robertson admitted that he had knowledge that the Applicant had, in March 2008, informed Canadian government officials, including Parliamentary Secretary, Deepak Obhrai, and his Executive Assistant, Aaron (Erin) Gardiner, that he was tortured while in detention at the hands of Sudanese officials. Mr. Robertson also affirmed that the Applicant showed these officials his torture wounds and that this information was recorded in a summary report by the Department of Foreign Affairs staff.

Transcript of Cross Examination of Sean Robertson, Applicant's Motion Record, Tab 3, Questions 535, 539-542, at pages 142-144

8. During cross-examination, counsel for the Applicant asked Mr. Robertson whether "...he was aware that persons in detention may be reticent to disclose torture for fear of retribution" by the torturers. Mr. Robertson answered affirmatively that he was aware of this phenomenon.

Transcript of Cross-Examination of Sean Robertson, Applicant's Motion Record, Tab 3, Questions 222-225, at pages 62-63

9. The Applicant was cross-examined by counsel for the Respondents via teleconference on October 15, 2008. During this cross-examination, the Applicant indicated that he expressed concerns to Canadian officials that he had been tortured, but that in certain instances, in particular, when his Sudanese gaolers or Sudanese officials were close at hand, he did not disclose the fact of his torture.

Transcript of Cross-Examination of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, Questions 333-337, at pages 65-66 and Questions 540-569, at pages 113-122

10. The Applicant indicated that when he was in a semi private context speaking to Canadian officials, he did not make mention of torture. Similarly, when he met with a Sudanese doctor at a state run facility, he was particularly careful not to make mention of torture to the treating physician. On the latter occasion, he was acutely aware of the presence of Sudanese officials in the vicinity and feared that a remark in such circumstances would be cause for reprisal and perhaps reimprisonment.

Transcript of Cross-Examination of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, Questions 634-636, at pages 134-137

11. The Applicant has been seeking to return to Canada since 2004. To avoid being rearrested and tortured again, he is currently living in a "temporary safe haven" at the Canadian embassy in Sudan where he agonizes every day about his separation from his family in Canada. He lives in a makeshift room on a cot and has no private area for his exclusive use, but must move to various locations within the embassy throughout the course of each day.

Affidavit of Abousfian Abdelrazik, Respondents' Motion Record, Volume 1, Tab 2, at paras 5-7, 33 and 55-59

12. The Applicant suffers from several physical ailments including: heart problems, asthma problems, visual degeneration, gastrointestinal problems and suffers mentally from depression. He looks forward to his repatriation to Canada when he can become reunited with his family and obtain adequate medical attention, and can live in his own home without fear of persecution.

Affidavit of Abousfian Abdelrazik, Respondents' Motion Record, Tab 2, at paras. 4-7, 16, 45-46 and 59

Amended Notice of Application, Applicant's Motion Record, Tab 5

PART II - ISSUES

13. The Issue in this motion is the following:

(a) Whether the Court should grant the Respondents leave to file additional affidavit evidence pursuant to Rules 84 and 312?

PART III - ARGUMENTS

14. The Applicant pleads that the applicable test for the Court to decide whether additional evidence should be admissible is the following:

a) The evidence to be adduced will serve the interests of justice;
b) The evidence will assist the Court;
c) The evidence will not cause substantial or serious prejudice to the other side;
d) The evidence must not have been available prior to the cross-examination of the opponent's affidavits.

***Atlantic Engraving Ltd. v. Lapointe Rosenstein*, [2002] F.C.J. No. 1782, at paras. 8-9, Respondent's Motion Record, Volume 2, Tab 1**

***Pfizer Canada Inc. v. Canada (Minister of Health)*, [2006] F.C.J. No. 1234, at paras. 18-21, Applicant's Motion Record, Tab A**

15. The Applicant submits that the three affidavits tendered by the Respondents do not meet any of the established criteria as condition precedent for their introduction as evidence in the underlying application. Most significantly, the Respondents' argument hinges on a clever articulation of the necessity of filing new evidence as a remedy for being "ambushed" by new allegations. In fact, no new allegations were raised by the Applicant and it was open to the Respondents earlier to have led the kind of affidavit evidence, which they now seek leave to file had they thought it was integral to their defense.

A) The evidence to be adduced will not serve the interests of justice

16. It is noteworthy that the Respondents cite *Walsh v. R* as authority for the principle that the Respondent needs to know the case to meet. The principle of a case to meet applies in criminal proceedings such as *Walsh,* which relate to criminal prosecution and interests of an accused, wherein the Crown is

subject to broad and well-established dictates of disclosure. The nature and content of disclosure as part of a case, however, will vary as per the forum of litigation and the interests at stake. The case at bar is a civil proceeding, wherein the Notice of Application adequately informed the Respondents of the nature of the case. Significantly, in this instance, the Applicant is the party that is seeking access to information relating to his right of repatriation to Canada, which is in the possession of the Respondents.

***Walsh v. R.* 2008 TCC 282, at para. 8, Respondent's Motion Record, Volume 2, Tab 1**

17. In the instant case, the Respondents have always known the case that they have to meet – essentially to demonstrate that the Applicant has not been deprived of his section 6 *Charter* right to enter Canada. That the Applicant has asserted that he was tortured in detention was known to the Respondents and was set out in his affidavit. However, the issue of torture does not impact upon the case to meet for the Respondents. The additional evidence is not relevant as it neither prove nor disprove the assertion of torture. This being said, the issue of torture in this case is significant *per se* as it raises the case to a level of public and national importance, but does not determine the question of how the Applicant's section 6 right will be defined.

18. The Respondents also mischaracterize the evidence of the Applicant as "new allegations." The allegations are definitely not new, but even if hypothetically they were, which is strictly denied by the Applicant, they entered the record when the Applicant answered questions put to him by Respondents' counsel. It is not in the interests of justice for counsel to attempt to revisit evidence elicited through cross-examination that she is dissatisfied with. As Justice Lemieux stated in *Salton Appliances*:

> "A further affidavit is not designed to repair answers, which cross-examining counsel wishes he did not get."

***Salton Applicances (1985) Corp. v. Salton Inc.* (2000) 4 C.P.R. (4th) 491, at para. 18, Respondent's Motion Record, Volume 2, Tab 5**

19. That the Applicant answered a line of questioning put to him by Respondents' counsel in a manner that was surprising to counsel does not constitute unfairness. Indeed, fairness dictates that the opposing party be allowed to test the evidence before it, which is the function of cross-examination. As a general rule, counsel is not entitled to respond to evidence that emerges from cross-examination because this would make the process of litigation interminable and is antithetical to the nature of a summary proceeding such as an application.

Rules 83 and 312 of the *Federal Courts Rules*

20. Moreover, well before the cross-examination, Respondents' counsel was aware that the Applicant did disclose the fact of his torture to senior government officials. The fact was not new to the Respondents and it has been admitted by the Respondents' witness, Sean Robertson.

Transcript of Cross Examination of Sean Robertson, Applicant's Motion Record, Tab 3, Questions 530-533, at pages 141-142

Affidavit of Sean Robertson, Applicant's Motion Record, Tab 1, at para. 35

21. The Respondents' best argument to justify the admission of their new affidavits is that the Applicant's answers in cross-examination raised "serious issues". However, serious issues being raised on cross-examination is not the relevant test. The Respondents were aware of the assertion made by the Applicant that he was tortured and that he had communicated that fact to senior Canadian government officials. As such, the Respondents had the opportunity to deal with such assertions at the time of filing their own evidence and prior to cross-examining the Applicant. In this regard, the "new allegations" with which

the Respondents claim to have been "ambushed" during the cross-examination of the Applicant, and the evidence which they now seek to tender in response, was available to them prior to cross-examining the Applicant and, on this basis alone, the Respondents' motion must fail.

***Atlantic Engraving Ltd. v. Lapointe Rosenstein*, Supra, Respondent's Motion Record, Volume 2, Tab 1**

***Bourque, Pierre & Fils. Ltée v. Canada*, [1998] F.C.J. No. 908, Respondent's Motion Record, Volume 2, Tab 2**

***Salton Applicances (1985) Corp. v. Salton Inc.* (2000) 4 C.P.R. (4th) 491, Respondent's Motion Record, Volume 2, Tab 5**

22. The rule against case-splitting also requires that the parties put their best foot forward. In this sense, the issue of disclosure of torture to Canadian officials by the Applicant could have been anticipated by the Respondents and was indeed a live issue given that the Respondents themselves knew that such disclosure had been made by the Applicant on at least one occasion prior to the filing of the underlying application. It would be against the interests of justice to allow the Respondents to split their case in this manner.

B) The evidence will not assist the Court

23. More evidence on the record does not necessarily translate into better evidence or evidence that will assist the court in determining the matters in issue before the parties. In the instant case, the Respondents' new affidavits have been drafted in response to an imagined "two theory" approach by the Applicant to his case.

24. The Respondents assert that it will be important for the Court to sort out the factual issue of whether or not the Applicant told Canadian officials

about his torture between 2004 and 2008. But the Respondents' witness himself admits that in March 2008, the Applicant told Canadian officials that he was tortured in 2008.

Transcript of Cross Examination of Sean Robertson, Applicant's Motion Record, Tab 3, Questions 530-533, at pages 141-142

Affidavit of Sean Robertson, Applicant's Motion Record, Tab 1, at para. 35

Transcript of Cross-Examination of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, Questions 549-550, at pages 115-116

25. Ultimately, the Respondents seek to somehow prove that the Applicant's evidence is inherently unreliable on the question of his torture in detention. It is submitted, respectfully, that the veracity of allegations of the Applicant on torture do not assist the Court in terms of resolving the legal issues on section 6 of the *Charter* that are disputed in the instant application. Rather, the proposed affidavits are an attempt to provide an indemnity against liability for certain individual agents of the Respondents.

26. Given that this application is not about liability, the filing of new affidavits appears to be geared towards another litigation, which is not before this court. The attempt to lead evidence that is not germane to a litigation, but may have other ulterior purposes constitutes an abuse of process. This Court has denied filing of supplementary affidavits when such filing in all of the circumstances would constitute an abuse of process.

***Bourque, Pierre & Fils. Ltée v. Canada*, [1998] F.C.J. No. 908, at para. 12, Respondent's Motion Record, Volume 2, Tab 2**

27. The Respondents' conduct in attempting to adduce further affidavits solely to attack the circumstantial basis for the assertion that the Applicant was in fact tortured is surprising and runs counter to the public interest, which the Attorney General must uphold - even in civil proceedings. The Respondents will

not in this Application prove one way or the other whether the Applicant was really tortured. However, in pursuing a line of protecting the liability of Crown agents at the expense of expeditious treatment of the merits of a case as serious as the present one, the Respondents are committing an abuse of process.

C) The evidence will cause substantial or serious prejudice to the Applicant

28. The evidence which the Respondents seek to file by the instant motion is not highly prejudicial in itself, but will require cross-examination of the Respondents' affiants. Once evidence is entered on the record, the Applicant is entitled to cross-examine and make arguments based on the answers provided through cross-examination.

29. The Respondents suggest that because their affidavits are being tendered for a limited purpose, cross-examination should be limited and brief. However, the Respondents have provided no evidence as to the availability of their affiants, two of whom are currently posted outside of Canada in Ghana and Bosnia respectively. Further, the Applicant is impecunious and his situation is extremely fragile. Allowing additional evidence would be highly prejudicial to him: it would cause additional delay (during which he lives precariously in the Embassy) and greatly increased expense in disbursements to cross-examine three new witnesses (two of whom live overseas).

Amended Notice of Application, Applicant's Motion Record, Tab 5

Affidavit of Abousfian Abdelrazik, Respondents' Motion Record, Volume 1, Tab 2, at paras 46, 49

30. The proposal of the Respondents will delay proceedings in this file by virtue of the creation of additional procedural steps, an expanded record and accommodation of various schedules of absentee witnesses.

31. Each day that this application is not heard, the prospect of resolving the Applicant's right of repatriation is deferred. Currently the Applicant lives in a state of physical and mental distress. He suffers from multiple physical ailments and lives in makeshift conditions from day to day. He lives in "temporary safe haven" in the Embassy, but the Respondents have said he can be ejected onto the streets of Khartoum at any time and for any reason. If that happened, he could be rearrested and tortured again.

Affidavit of Abousfian Abdelrazik, Respondents' Motion Record, Volume 1, Tab 2, at paras 56

32. Delaying the hearing of this application by permitting any unnecessary step, therefore, would mean to continue and prolong the irreparable damage that the Applicant has thus far suffered. The Applicant lives a precarious existence and seeks the intervention of this Court to address his right of return under the Charter in a timely manner.

Affidavit of Abousfian Abdelrazik, Respondents' Motion Record, Volume 1, Tab 2, at paras 46, 49

D) The evidence was available prior to the cross-examination of the Applicant

33. Further, an integral part of the analysis is a consideration of whether the evidence being sought to be adduced was available to the moving party prior to the cross-examination of the other party's affiants.

34. The Respondents knew about the Applicant's torture allegations prior to the commencement of the Application. During his cross-examination, Mr. Robertson, one of the Respondents affiants, confirms that he has seen reports by Canadian government officials reporting their meeting with the Applicant and the fact that he informed them about his torture and showed them his wounds. More significantly, the Applicant specifically states in his affidavit that he was

tortured by Sudanese authorities. If the Respondents' counsel believed it was important to establish that the Applicant did not inform certain Canadian officials of these torture allegations, it was fully within their power to speak to the proposed affiants and put forward this evidence in the normal course. For whatever reason, the Respondents did not exercise due diligence or otherwise chose not to introduce these affidavits at the appropriate stage.

Transcript of Cross Examination of Sean Robertson, Applicant's Motion Record, Tab 3, Questions 535, 539-542, at pages 142-144

Transcript of Cross-Examination of Abousfian Abdelrazik, Applicant's Motion Record, Tab 2, Questions 549-550, at pages 115-116

35. Accordingly, the evidence was available to the Respondents prior to the Applicant's cross-examination. The Respondents could have addressed this issue in their first set of affidavits and is now seeking reparation for their failure to do so.

36. For these reasons, the Respondents' motion to adduce new affidavit evidence should be dismissed with substantial indemnity costs payable forthwith.

PART IV - ORDER REQUESTED

34. The Applicant requests the following relief:

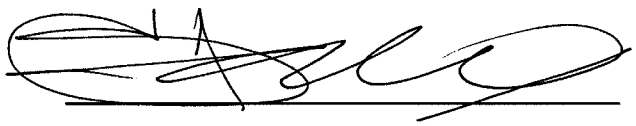
a) That the additional affidavit evidence of Messrs. David Hutchings, Michael Pawsey and Alan Bones be ruled as inadmissible in this proceeding;

(b) Alternatively, should the Respondents be granted leave to file the above-captioned affidavits, the Applicant requests to be allowed to cross-examine the Respondents' affiants;

(c) Costs payable forthwith on a substantial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 19th day of November 2008.



HAMEED FARROKHZAD ST-PIERRE
Barristers & Solicitors
43 Florence Street
Ottawa, ON K2P 0W6

Per: Yavar Hameed
Tel. (613) 232-2688 ext 228
Fax. (613) 232-2680

Solicitors for the Applicant
(Responding Party to this Motion)