11-27-2008

Order on the Applicant's Motion by Prothonotary Tabib dated 27 November 2008

Federal Court | Cour fédérale

CANADA

Date: 20081127

Docket: T-727-08

Ottawa, Ontario, Thursday, this 27th day of November 2008

PRESENT: MADAME PROTHONOTARY TABIB

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

- and –

MINISTER OF FOREIGN AFFAIRS and THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON the Applicant's motion for:

(a) An order compelling Sean Robertson, a deponent in support of the Respondents, to re-attend cross-examination on his affidavit and answer a number of questions put to him by the Applicant.

(b) An order admitting as part of the record for the application a document tendered to counsel for the Respondents and referenced in cross-examination, namely the

Globe and Mail article by Paul Koring entitled "Ottawa withholding travel papers for Canadian" dated September 11, 2008 and the "Etihad Itinerary".

(c) An order compelling the production of documents listed at item 10 of the Amended Direction to Attend addressed to Sean Robertson.

(d) A declaration that documents relating to the ongoing efforts from the Respondents to repatriate the Applicant Mr. Abdelrazik to Canada by any safe means at their disposal are relevant to the underlying application.

(e) An order for all costs of this motion, forthwith and in any event of the cause, on a substantial indemnity scale.

UPON considering the motion records of the parties and hearing the representations of counsel.

UPON being advised by counsel for the Applicant that its request for the declaration contemplated in paragraph (d) above was withdrawn.

Objections related to reasons for refusal of the Applicant's passport applications

The fact that the Applicant made two applications for renewal of his passport, and the status of these applications are relevant to these proceedings. The Respondent may be correct that this application is not concerned with a judicial review of any decision to refuse the applications, and that the correctness or validity of the reasons given for the refusal, if any,

would be irrelevant. However the questions at issue do not go so far. The questions at issue merely go to test the witness' knowledge as to the reasons stated, if any, for the refusal of the applications. Whilst it is also true that the witness has already answered several questions going to that issue, each time professing lack of knowledge of that issue, still, some leeway must be given to counsel on cross-examination, the questions are not identical to questions previously asked, and stop short of being improper or abusive. Questions 167 and 170 are to be answered.

Questions going to the "Etihad Itinerary" and the Globe and Mail article

I am satisfied that the Etihad Itinerary is a relevant document, in the sense that it may constitute evidence of the availability of safe air travel for the Applicant to return from Sudan to Canada, and that this fact may be relevant to the issues in this application. As such, questions asked of the witness for the purpose of authenticating the document as an Etihad Itinerary and allowing its introduction into evidence are relevant and should have been answered. On the other hand, to the extent the Etihad Itinerary also formed part of settlement communications between the parties, any knowledge of the Etihad Itinerary or action taken by the witness with respect to the Etihad Itinerary arising out of the settlement communications would clearly be privileged, and properly objected to. It has not been established on the record before me that the witness cannot have obtained knowledge of the Etihad Itinerary or verified its authenticity independently of the settlement discussions; it has therefore not been established that an answer to the questions at issue would necessarily breach the settlement discussion privilege. Accordingly, the witness will have to provide an answer to questions 582, 584 and 586, to the

extent he has knowledge other than that obtained or derived as the result of the settlement discussions.

I am not satisfied that the Globe and Mail article attempted to be introduced through question 583 is relevant to any of the issues raised in this application. Counsel for the Respondent was correct in objecting to its production at cross-examination.

Finally, question 585, as phrased, goes directly to communications between solicitor and client and in addition, goes to communications with respect to the content of a settlement offer. The objection based on privilege is well-founded.

Admissibility of the Etihad Itinerary and the Globe and Mail article

The Court cannot issue an order admitting the "Etihad Itinerary" as part of the record for the application since it has not yet been properly tendered and identified through any affidavit or cross-examination. The Court has ruled that the Itinerary may be relevant but cannot rule it to be admissible at this point. With respect to the Globe and Mail article, as mentioned above, it has not been established to be relevant to any issue in this application. In addition, the Court agrees with the submissions of the Respondent to the effect that this article clearly is hearsay evidence, and that its reliability has not been established.

Production of the documents listed at item 10 of the amended direction to attend

As phrased, this request for production specifically targets all documents regarding a settlement offer and therefore goes to privileged information. In addition, it would also target communications between solicitor and client relating to that offer, which are covered by direct solicitor and client privilege. The request is inappropriate.

To further expand on my determination that the communication of August 26, 2008, and all communications relating thereto, to wit, Exhibits A to H of the confidential affidavit of C. Deborah Hagarty are subject to settlement privilege, I note the following:

The parties are ad idem that the following conditions need to be fulfilled in order for settlement privilege to be established:

(a) A litigious dispute must be in existence or within contemplation;

(b) The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event negotiations failed; and

(c) The purpose of the communication must be to attempt to effect a settlement.

It is clear that the first condition is fulfilled and the Applicant does not contest this. Notwithstanding the Applicant's argument, it is plain and obvious to me that the purpose of the communication of August 26, 2008 was to attempt to effect a settlement. The communication set out various conditions in consideration of which the current application could be terminated. Contrary to the Applicant's argument, those conditions did not address every aspect of the prayer

for relief in the application and fulfillment of those conditions would therefore not have had the effect of making the application entirely moot. The communication contemplated significant compromise. The communication further included elements which are not raised in this application. By its content, the communication is clearly an offer of settlement. By its terms, and the terms in which it is referred to in later communications, it is also expressly identified and treated as a settlement offer. Condition (c) is therefore also fulfilled.

Counsel for the Applicant also disputes that condition (b) is fulfilled in that the communication does not convey, expressly or impliedly, the intention that it would not be disclosed to the Court in the event negotiations failed. It is true that the communication of August 26 is not termed "without prejudice" and contains no express language of such an intention. Still, it is clearly a settlement offer and such communications are, at law and in practice, and most notably in the practice of this Court, held to be inadmissible in litigation unless they are successful and lead to an enforceable settlement. Moreover, it has long been held improper to bring such communications to the attention of the Court prior to the determination of the litigation on its merits. Considering these factors, it seems to me that the intention that the communication will not be disclosed to the Court if negotiations fail (save and except in the circumstances clearly permitted by Rule 422) is implicit whenever a settlement offer is made in relation to litigation before this Court, unless the contrary is expressly stated.

Further, I do not accept the Applicant's submission that its attempt to disclose the communication of August 26, 2008 to the Court on September 2, 2008 demonstrates or expresses an intention that the communication be disclosed. The intention not to disclose must be assessed as at the date of the first communication. Subsequent expression of an intent at odds with the

intention implied in the original communication cannot be relied upon, lest it open the door to parties unilaterally waiving a common privilege, duly created, merely by changing their minds. Finally since the settlement privilege is one held jointly by the parties, due regard should also be given to the legitimate expectation or privilege and reliance thereon created in favour of the opposing party by the original communication. I am satisfied that at all times, the Respondents expected the privilege to operate, intended to benefit from it and relied upon it, and that their expectations were reasonable in the circumstances.

Even if I am wrong that settlement privilege arises and attaches with respect to the communications at issue, I am satisfied that the communications at issue address a clear settlement offer, and that as such, and in the particular circumstances of this case, they are irrelevant to the issues herein. The lack of relevance is underscored by the fact that elements going beyond the issues strictly raised in this application are included in the communications and presented in such a manner that they cannot be severed from those elements which might otherwise have had some tenuous relevance. That interconnection would taint any attempt at using a part of the communications for the purposes of this application.

While the Respondents seek no costs on this motion, the Applicant seeks costs on a full indemnity basis, payable forthwith and in any event of the cause. Clearly, the Applicant's request is not based on his success on this motion or on the conduct of the Respondents, but on his personal circumstances and financial needs. An award of costs should not be used as an indirect means of subsidizing a party, however dismal that party's financial circumstances. The Applicant's success on this motion is not only extremely limited, but such success as it has had is on the less important aspects of the motion. It is unlikely that the few questions to which

answers have been compelled will yield much relevant or important information. I can see no basis upon which costs, even minimal ones, could reasonably be awarded in favour of the Applicant payable forthwith. Accordingly, costs of this motion will be in the cause.

IT IS ORDERED THAT:

1. Sean Robertson shall provide answers to questions 167, 170, 582, 584 and 586 of the transcript of his cross-examination on affidavit. The answers shall be provided in writing in the form of an affidavit.

2. To the extent follow-up questions to any of these answers may reasonably be required, such re-attendance may be in person, subject to other agreement between the parties.

3. The Applicant's motion is otherwise dismissed, costs in the cause.

4. The affidavit of C. Deborah Hagarty, together with all exhibits thereto, shall be treated as confidential in accordance with Rules 151 and 152.

"Mireille Tabib"
Prothonotary

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____ day of NOV 27 2008 A.D. 20____
Dated this ____ day of NOV 27 2008 20____
Hélène Clément

HÉLÈNE CLÉMENT
ADJOINTE AU GREFFE
REGISTRY ASSISTANT