Federal Court Cour fédérale

Date: 20190412

Dockets: T-1911-12
IMM-6259-12

Citation: 2019 FC 457

Ottawa, Ontario, April 12, 2019

PRESENT: The Honourable Mr. Justice Russell

Docket: T-1911-12

BETWEEN:

RUSTEM TURSUNBAYEV

Plaintiff

and

DANIEL BÉRUBÉ, STEVEN BEAN, RUSSELL GREGORY, SHARI FIDLIN, ANDREJ RUSTJA, MARK BOND, ROCH CÔTÉ, THE CANADA BORDER SERVICES AGENCY, AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF JUSTICE, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, THE MINISTER OF CITIZENSHIP AND IMMIGRATION, AND THE MINISTER OF FOREIGN AFFAIRS

Defendants

Docket: IMM-6259-12

AND BETWEEN:

RUSTEM TURSUNBAYEV

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

ORDER AND REASONS

I. THE MOTION

[1] This is a motion by the Plaintiff/Applicant [Plaintiff] pursuant to Rules 400-402 of the *Federal Courts Rules*, SOR/98-106 for an order:

1. That the Defendants pay the Plaintiff's costs of the motion to stay the admissibility proceedings against him (together with the costs of related motions) pending the disposition of the underlying action;

2. That the quantum of those costs is as set out in the Plaintiff's Bill of Costs, or alternatively in a lump sum;

3. That the Defendants also pay the costs of this motion; and

4. That the costs are payable forthwith.

II. BACKGROUND

[2] The general background to this dispute has been set out in my previous judgments made as case management judge. Essentially, the Plaintiff is alleging an abuse of process. The grounds of abuse include, *inter alia*: the improper use of deportation proceedings instead of extradition proceedings to effect the return of the Plaintiff to Kazakhstan; the Defendant/Respondents [Defendants]' failure to discharge their duty to ensure that the evidence they relied on from Kazakhstan was not obtained by torture; and the unlawful sharing of information with Kazakh authorities.

[3] The absence of the rule of law in Kazakhstan has not been seriously challenged by the Defendants. There is no serious dispute in the evidence that the human rights record of Kazakhstan is abysmal, that there is an absence of the rule of law, that torture is commonplace, corruption endemic and there is no independent judiciary.

[4] The immediate background to the present motion is substantially as set out by the Plaintiff in his written submissions.

[5] The Plaintiff initially brought four Applications for Leave and Judicial review in March 2012 that were adjourned, and he sought a stay of the admissibility proceedings until the four original Applications were disposed of. The Plaintiff's motion for disclosure and the Plaintiff's motion for a stay of the Admissibility Hearing were set to be heard on April 27, 2012 in Ottawa.

[6] Just prior to the hearing of the motions, the stay motion was adjourned at the request of the Minister of Public Safety and Emergency Preparedness in order to allow the Minister to obtain evidence in support of his position. As a result, the Court heard an interim motion in May 2012 and granted an interim stay until the hearing of the stay motion, and ordered that there would be no costs.

[7] In granting the Plaintiff's motion for an interim stay of the admissibility proceedings, the Court concluded that there was a serious issue in relation to the question of whether or not there was a disguised extradition. The Court found that there was irreparable harm in allowing an abuse of process to continue, and that the balance of convenience favoured the Plaintiff. In particular, the Court found:

(a) That there were serious grounds of concern that Officer Bean saw himself to be engaged in a removals process that was a substitute for an extradition hearing (para 7);

(b) That Kazakhstan had made a request for extradition and that Canada was responding by using the deportation process. The Court noted, "I do not see what other conclusions I can draw from the evidence adduced" (para 8); and

(c) That the issue of the Plaintiff's wealth was not before the Court and there was clear and convincing evidence of abuse of process through the use of the deportation proceeding to effect extradition and that the Court must act to prevent it from continuing. The Court noted that allowing an abuse of process to continue would constitute irreparable harm (para 9).

[8] The hearing of the stay was set for June 14, 2012. Prior to the hearing, the Defendants again requested that the motion be adjourned. On June 13, 2012, the Defendants wrote to the Court asking for an adjournment. The Plaintiff initially opposed, but did consent.

[9] After a case management conference on June 14, 2012, the Court adjourned *sine die* the hearing of the stay motion scheduled for June 14, 2012. It was agreed that the Plaintiff would prepare other motions he wished to file and the parties would move towards hearing the stay in the coming months.

[10] The Plaintiff then brought a series of motions:

(a) Sealing motions in which no costs were sought and none were ordered;

(b) Motion for Further Disclosure, Motion to Strike, and Conversion to an Action;

(c) Motion to Stay, Adjourn or Consolidate Original Applications;

(d) Motion to Stay the Admissibility Hearing Pending the Disposition of the Action; and

(e) A further sealing motion.

[11] Following the conversion of IMM-6259-12/T-l911-12 into an action, the Plaintiff advised the Defendants of his position that the interim stay of the admissibility proceedings should remain in effect until the resolution of the action. The Defendants did not agree and indicated they would not consent to a stay in relation to the action. The Plaintiff advised the Court of this on September 11, 2013.

[12] In light of the Defendants' position regarding the interim stay and regarding the Plaintiff's request to adjourn the original four Applications pending the disposition of the action,

the Plaintiff filed a motion to stay the admissibility proceedings pending disposition of the action. The Plaintiff's materials were filed on October 25, 2013.

[13] The Defendants' materials were filed on February 17, 2014, including the Affidavit of Professor Olcott sworn February 14, 2014.

[14] On February 28, 2014, the Plaintiff notified the Court and the Defendants that he intended to challenge Professor Olcott's expertise and independence. On May 7, 2014, the Plaintiff served a Notice of Motion to strike the affidavit and included as one of the grounds that Professor Olcott was not sufficiently independent from the government of Kazakhstan. The materials were accepted for filing May 13, 2014.

[15] The Plaintiff moved to cross-examine Professor Olcott prior to the motion to strike with leave to file further affidavits. He also moved to submit a confidential affidavit. While the Court did not permit the Plaintiff's request to cross-examine prior to the motion to strike, the evidence presented was relevant to the eventual cross-examination of the witness.

[16] The Defendants tendered a supplementary affidavit from Professor Olcott sworn October 6, 2015, principally responding to the Plaintiff's materials filed May 30, 2014.

[17] On February 9, 2016, the Plaintiff submitted material responding to the October 6, 2015 affidavit of Professor Olcott, including a confidential affidavit of Scott Horton and a confidential affiant.

[18] The Defendants' witness, Professor Olcott, appeared for cross-examination in June 2016. The cross-examination was contentious as between the parties and resulted in significant lost time during the scheduled cross-examination. The parties had to appear before the Court at the outset of the cross-examination when the Defendants' counsel accused the Plaintiff's counsel of intimidating the witness. The Court disagreed and directed the cross-examination to continue as scheduled.

[19] The cross-examination was cut short when the witness was confronted with evidence that seriously undermined her credibility and independence. The parties appeared before the Court on a motion regarding this conduct and other refusals. The Court found that the Defendants' witness and counsel engaged in obstructive conduct at a key strategic moment. The Plaintiff was successful on the motion, except for a limited number of refusals.

[20] The Court ordered the Defendants pay the Plaintiff's costs of the Refusals Motion and the Plaintiff's costs thrown away, to be determined at a later date.

[21] After the Court's determinations on the Refusals Motion, the Defendants filed a Notice of Appeal. However, the Defendants later discontinued the Appeal. The Defendants subsequently agreed to continue the stay until the trial. Now that both the Appeal has been abandoned and the Motion has been consented to, it seems that the cross-examination of Professor Olcott will not resume. This is not disputed by the Defendants.

[22] After initially advising the Plaintiff that they would not consent to leaving the interim stay in place until the conclusion of the action, and that the Plaintiff would have to bring a motion to convert the interim stay to a stay pending trial, and after the Plaintiff brought that motion in October 2013, the Defendants informed the Plaintiff that they would consent to an extension of the stay until trial (on March 14, 2017).

III. ANALYSIS

A. *Introduction*

[23] The Plaintiff is seeking costs, payable forthwith and in any event of the cause, for substantial expenditures he was forced to incur in bringing a stay motion in October 2013 that the Defendants at first resisted but then belatedly abandoned for no reason that has been explained.

[24] After Applications IMM-6259-12 and T-1911-12 were converted into an action in 2013, the Plaintiff sought the Defendants' consent to continue an interim stay (that I imposed in my Order of May 4, 2012) pending the resolution of the action. The Defendants refused to consent, so that Plaintiff was obliged to bring the stay motion in 2013 that, over the course of a number of years, required both sides to assemble a significant body of evidence and thus incur substantial costs.

[25] The stay was of great significance to the Plaintiff and, in my view, appropriately sought because, without it, the Plaintiff could have faced admissibility proceedings and the risk of possible removal from Canada before the underlying action could have been heard and decided.

[26] The Defendants have provided no adequate explanation for belatedly granting their consent after years of litigating the stay, or why, given my findings in the interim stay of May 4, 2012, it was necessary to force the Plaintiff to seek a further stay once this matter was converted to an action.

B. *Are Costs Warranted?*

[27] In my view, it is appropriate for the Court to consider and award costs for the truncated stay motion at this point in the proceedings.

[28] We know that, in the proper case, the Court can exercise its general discretion under Rule 401 to award costs on a motion in any event of the cause rather than leaving it to the trial judge (see, for example, *Laboratoires Servier v Apotex Inc*, 2007 FC 344 [*Laboratoires Servier*]), and that under Rule 401:

401 (1) The Court may award costs of a motion in an amount fixed by the Court.	401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu’elle fixe.
(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.	(2) Si la Cour est convaincue qu’une requête n’aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[29] It is my view that the truncated motion involved an interlocutory stay, so that the issue was discrete and will not be an issue at trial. See *AIC Ltd v Infinity Investment Counsel Ltd*, 1998 FCJ No 904 at paras 5, 6, 11 and *Laboratoires Servier*, above, at paras 6-7.

[30] I also think that, as case management judge involved in this complex litigation since its inception in 2012, I am in the best position to determine the costs of the truncated stay motion.

[31] In my view, costs are warranted for the Defendants' effective abandonment of the stay motion. The Defendants have offered no exculpatory reasons as to why it was reasonable to resist agreeing to a stay, given my reasons at the interim stay stage, or why the Defendants abandoned that resistance after several years of complex and expensive litigation. Tactical considerations are, of course, no business of the Court. In addition, in granting the interim stay, I made it clear that my conclusions on serious issue and irreparable harm were dependant upon the evidence adduced at the time and that I appreciated that the evidentiary record would evolve and throw further light on the need for a stay:

> 7. I do not as yet have a full evidentiary record before me on the abuse of process issue. The record will be supplemented in this regard before the full stay motion is heard on June 14, 2012. I may at that time form a very different view of what the evidence tells us about abuse of process. However, based upon what has been placed before me to date and in the absence of an explanation from Officer Bean on some of the things he has said in the documentation, I think it is fair to say that there are serious grounds of concern that Officer Bean, in the course of compiling his section 44 reports, saw himself to be engaged in a removals process that was an alternative to, or a substitute for, extradition to a country that has a very poor human rights record and where one of the Applicant's witnesses has testified that the Applicant will face torture. This evidence is supported by evidence from Amnesty International. Kazakhstan made an extradition request to Canada for the Applicant on 4 January 2012. Officer Bérubé of Interpol

> Ottawa, who forwarded the Red Notice to CBSA, advised (apparently incorrectly) that Interpol Ottawa was unable to pursue legal action "in the absence of a bilateral treaty" and Officer Bean has said in an e-mail to Officer Bérubé that Officer Bean "can arrest the subject and send him back to Kazakhstan…." There is also evidence before me that an RCMP liaison officer has met with Kazakhstan officials and has advised of the following:
>
> > KNB would like the subject to be arrested in Canada and deported to Kazakhstan. KNB is available to provide any type of document required by CBSA to complete its deportation process. [emphasis added]

[32] I can appreciate that the Defendants might reasonably consider that new evidence could emerge as the litigation progressed that might cause the Court to revise its findings on serious issue and irreparable harm. However, given that abuse of process on the part of Officer Bean in particular was the basis for the stay, such further evidence must have been readily available if it existed. And if the Defendants were searching for other evidence that would convince me to refuse an interlocutory stay then their failure to find or acquire any such new evidence was a risk they took that should not be absorbed by the Plaintiff when that quest was abruptly terminated without explanation.

C. *What Costs Is the Plaintiff Claiming?*

[33] The Plaintiff has put forward a draft bill of costs that includes costs claimed for the abandoned stay motion itself, as well as for costs incurred in a series of motions that preceded the abandonment of the stay motion by the Defendants and that the Plaintiff believes should now be assessed and granted because they are costs of related matters that were undertaken in anticipation of the stay motion.

[34] In written submissions, the Plaintiff says that his “position is, and was, that success on the stay motion would determine entitlement to costs” in the prior motions.

[35] I have no reason to doubt that this was the Plaintiff’s “position” on prior motions, but it was not communicated to the Defendants or the Court at the time of those motions, so that the Defendants had no opportunity to respond to that “position” at the time of the motions, and the Court had no opportunity to address the “position” and rule upon it in each of the relevant orders. In effect, both the Defendants and the Court are now being asked to deal with this “position” long after the motions were decided and orders were issued.

[36] In oral submissions, the Plaintiff has suggested that the Court should take a holistic approach to this issue. He says that the evidence that both sides were developing after the interim stay was aimed at the anticipated interlocutory stay that the Defendants abandoned, so that it is now appropriate to “step back and take a holistic approach” to relevant costs because the work on each separate motion carries into the main stay motion and needs to be considered as a whole. This sounds to me like a reasonable argument that the Plaintiff could have made at the time that each of the prior motions was argued and decided, but he did not do this and the Court’s orders either deny costs or make no order as to costs. So I think the reality is that, when those orders were made, the Court did not order or address costs because they were not requested, raised or discussed. In order to avoid the problems associated with *functus*, the Court should have been advised by the Plaintiff that he would be seeking costs in relation to each motion, but that he would like the Court to wait until the stay motion was completed – or abandoned – so that costs could be assessed “holistically” and prior motions treated as a conduit or feed into the stay

motion. And to be blunt about it, when I made those prior orders it was my intention that no party would have costs for each separate motion, and it never crossed my mind that the Plaintiff would later ask me to consider a “holistic” approach at some time in the future when the stay was decided or abandoned.

[37] It is possible the Defendants might have agreed with this “holistic” approach if it had been raised, but it isn’t clear that they would. And after such a significant lapse of time since the motions were decided, it would be unfair to expect the Defendants to raise and substantiate any objections they might have had now. Given some of the arguments raised by the Defendants in this motion, it seems unlikely, for instance, that they would agree that all of the evidence that was being gathered on both sides was chiefly focussed upon the stay or even that the motions were nothing more than a feed into the stay motion. I appreciate the Plaintiff’s argument that much of his expert evidence will have to be updated before the trial. But at the time of the motions, it wasn’t clear how long it would take to get to trial and how that evidence might have to be replaced or supplemented. In any event, the gathering of expert evidence for a trial of this nature will benefit from and take its cues from what has already been assembled, particularly where the expert for trial is also the expert in prior steps that lead to trial.

[38] I do not think that my discretion under Rule 400 allows me to disregard other relevant principles of law. In the present case, my discretion and power over “the amount and allocation of costs and the determination of by whom they are to be paid” does not, in my view, allow me to disregard the principle of *functus* and/or the jurisprudence related to what the Court should do if costs are not raised in a particular motion.

[39] As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:

> [5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.
>
> [6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.

[40] When it comes to Rule 401, the case law is to the effect that, notwithstanding the broad discretion I have, I cannot award costs where they were not requested. This general principle was confirmed by the Federal Court of Appeal in *Exeter v Canada (Attorney General)*, 2013 FCA 134:

> [12] The general principle is that a court may not award costs when costs were not requested: see, for example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[41] The Plaintiff argues that, in the present case, there are no fairness issues because the Defendants can now respond. It seems to me, however, that the Defendants' ability to respond to the Plaintiff's assertions on costs years after the motions in question were decided is, at the very least, unfairly compromised, and the Court's ability to recall all of the costs issues that may have been at play at the material time is, to be frank, decidedly vague.

[42] But, over and above all of this, I think it would be entirely inappropriate (and contrary to the *functus* principle) to go back and now consider costs in motions where I issued final orders in which costs were not awarded (intentionally) because I had not been asked by the Plaintiff to consider costs and so assumed he was not seeking them. It would have been no hardship at all for the Plaintiff to have raised with the Court and the Defendants that, although he was not asking for costs at the time of each motion, he would be asking the Court to consider them in a "holistic" way when the stay process was concluded. The Defendants could have presented their views on this wait-and-see approach and the Court could have made an appropriate decision on point. Although the Plaintiff has provided no explanation for not taking this approach, it seems obvious that it could have had one singular disadvantage for him: he would have incurred a reciprocal obligation to pay the Defendants' costs for all prior motions in the event that the stay was refused.

[43] For these reasons, I have to refuse the Plaintiff's request to consider and award costs for items A-D and F of his draft bill of costs.

[44] As regards the aborted stay motion itself, I have already indicated that I believe costs are appropriate. The difficulty here, however, is quantification.

[45] The Defendants attempt to equate the result in the stay motion with settlement and ask the Court to adopt the reasoning in *Waterloo North Condominium Corp No 161 v Redmond*, 2017 ONSC 1304. In my view, the result has much more in common with abandonment situations when the retreating party concludes it really has no case and so capitulates and withdraws before the matter comes before the Court. It is noteworthy that, in this present costs motion, the Defendants have made no attempt to explain why they withheld consent as long as they did (given the reasons for the original interim stay) and why they changed their minds and capitulated after compelling the Plaintiff to incur years of costs pursuing the stay. As I said previously, tactics are not my business, but without some reasonable explanation, I am left to conclude the Defendants would only have withdrawn if they decided they had no case to argue. However, given the original interim stay decision, the Defendants have not explained why they ever thought they had a case to argue that would justify putting the Plaintiff to the trouble of mounting another stay motion at enormous expense. The collapse and discrediting of Professor Olcott's evidence would appear to be the only apparent reason for such a sudden change and, as I have already pointed out, there is no indication of what Professor Olcott could have said about the abuse of process findings that grounded my interim stay order, or why the Defendants could not have provided evidence from those persons involved in the abuse of process that grounded serious issue and irreparable harm, so that the matter could have been decided quickly and in a cost-effective way.

[46] I think the Plaintiff was successful in his motion for a stay because of the Defendants' consent, but I don't think the consent was anything like a reasonable compromise between the parties so that they should be left to absorb their own costs. This was a capitulation by the Defendants on this issue following a long, hard-fought battle in which the Defendants have offered no reasonable justification for their resistance.

[47] The only real objection raised by the Defendants is that "virtually all aspects of the Plaintiff's stay motion involve what will be at issue at trial" and that I am not in the best position to determine the quantum of these costs.

[48] Because of my close involvement as case management judge with this dispute since its inception, I think I have to decide the costs for the stay motion because it does involve a discrete issue – even if some of the evidence gathered may not be entirely discrete to the motion and may come into play later in discoveries and at trial – and it will not be possible for the trial judge to acquaint herself or himself with the intricacies of what have, to date, been quite complex and hard-fought proceedings.

[49] Given the international dimensions of this case, the difficulties and expense of finding qualified experts on Kazakhstan (which the Defendants know all too well), and the need for international travel, the disbursements claimed for this motion in the amount of $160,368.14 look entirely reasonable to me. The Defendants regard them as excessive but have produced no comparative figures.

[50] I am also of the view that the Plaintiff has established a need for costs to be calculated under column V of the Tariff.

[51] The Defendants have provided little to justify the need to resist the stay motion in light of my earlier findings on serious issue and irreparable harm. In addition, the Defendants have provided no explanation for their decision – after years of litigation – to abandon their resistance to the stay motion, or why there was a need to resist for so long. This means that the necessity for the costs and other expenditures incurred by the Plaintiff is left unexplained. Consent after years of expensive and hard-fought resistance is not the same thing as consent at an earlier stage or a mutually acceptable compromise.

[52] The reality is that, eventually: the Plaintiff was wholly successful in the stay motion; there is little to justify the Defendants' resistance, in the absence of an explanation, as reasonable; the issues at stake in the motion were complex and of the highest importance to the Plaintiff; the amount of work was substantial over a period of years; and the conduct of the Defendants significantly lengthened the proceedings. These are the factors I rely upon under Rule 400(3) to award the Plaintiff costs for the stay motion under Column V of the Tariff.

ORDER IN T-1911-12 & IMM-6259-12

THIS COURT ORDERS that

1. The Plaintiff's request for costs for motions other than his stay motion of October 2013 are denied;
2. The Defendants shall pay the Plaintiff's costs of the motion to stay the admissibility proceedings against him pending the disposition of the underlying action in the amount of $203,082.40 as set out in Section E of the draft Bill of Costs submitted with his motion;
3. The Defendants shall also pay to the Plaintiff the costs of this motion;
4. The costs herein awarded shall be payable forthwith and in any event of the cause.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1911-12
STYLE OF CAUSE:	RUSTEM TURSUNBAYEV v DANIEL BÉRUBÉ ET AL
AND DOCKET:	IMM-6259-12
STYLE OF CAUSE:	RUSTEM TURSUNBAYEV v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 22, 2019
ORDER AND REASONS:	RUSSELL J.
DATED:	APRIL 12, 2019

APPEARANCES:

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