RECORD NO. 12-2178

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, *et alii,*

Plaintiffs-Appellees,

versus

MOHAMED ALI SAMANTAR,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Party-in-Interest.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Judge Leonie M. Brinkema

REPLY BRIEF

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April 8, 2013

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A. SOME INITIAL CONSIDERATIONS

1. Samantar has Petitioned for a Writ of Certiorari to the United States Supreme Court

Since your Appellant, Mohamed Ali Samantar ("Samantar") filed his Opening Brief, and, indeed, since the filing by your Appellees of their Response Brief, on 12 February 2013, Samantar did, on 4 March 2013, file with the Supreme Court of the United States a Petition for a Writ of *Certiorari* in respect of the subject 2 November 2012 decision of this Honorable Court, in which this Honorable Court affirmed the District Court's 15 February 2011 Order, striking Samantar's defense of common law immunity from suit, which decision is reported at *Yousuf v. Samanta*r, 699 F. 763 (4th Cir. 2012) and a copy of such Petition, was docketed in the Supreme Court *qua* Record No. 12-1078, *Mohamed Ali Samantar v. Bashe Abdi Yousuf, et alii*, 2013 WL 836952 (March 4, 2013). Subsequent to the filing of the said Petition, two *amici curiae* briefs have been filed with the Supreme Court in support of the said Petition, *viz*., the Brief of *Amici Curiae* the Kingdom of Saudi Arabia and the Democratic Socialist Republic of Sri Lanka, filed on 1 April 2013, 2013 WL 1309077 (April 1, 2013), and the Brief of *Amici Curiae* Former Attorneys General of the United States Edwin Meese III, Richard Lewis Thornburg, and William Pelham Barr, filed with the Supreme Court on 3 April 2013[1].

1 At this writing, a Westlaw citation to the said *Amici Curiae* Brief is not yet available.

2. The United States has Recognized the Government of Somalia which has Requested Immunity for Samantar.

In addition, shortly before the filing of the Petition, the United States did, on 17 January 2013, recognize formally the Government of Somalia. *See:* U.S. Hillary Rodham Clinton, Secretary of State, Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting, Jan. 17, 2013, http://www.state.gov/secretary/rm/2013/01/202998.htm ("I am delighted to announce that for the first time since 1991, the United States is recognizing the Government of Somalia. . . . I believe that our job now is to listen to the Government and people of Somalia, who are now in a position to tell us, as well as other partners around the world, what their plans are, how they hope to achieve them."); U.S. Department of State, Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC, Jan. 17, 2013, http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm . ("President Hassan Sheikh's visit and the U.S. decision to recognize his government are evidence of the great strides toward stability Somalia has made over the past year. These steps also demonstrate the strong relationship between the Government of Somalia, its people, and the United States of America.").

In addition, contrary to one of the two grounds in articulated by the United States in its Statement of Interest, filed on 14 February 2011, in the case *sub judice*, for recommending against immunity for Samantar —that Somalia has no recognized government to assert or waive Petitioner's immunity, (J.A. at 95) —the newly

recognized Prime Minister of Somalia has formally requested that the State Department recognize Petitioner's immunity from suit in this case. Indeed, in a letter to Secretary of State Kerry dated 26 February 2013, the Prime Minister of Somalia requested that Secretary Kerry "use [his] good offices to obtain immunity for" Petitioner, whose alleged "acts in question were all undertaken in his official capacity with the Government of Somalia . . . .", and the Prime Minister further "reject[ed] the notion that [Petitioner's alleged] action[s] were contrary to the law of Somalia or the law of nations . . . ." [2] (Pet. App. 70a).

B. SAMANTAR'S APPEAL WAS (AND IS) NOT "FRIVOLOUS"

In the subject antecedent appeal to this Honorable Court, *viz., Yousuf v. Samantar*, 699 F. 3d 763 (4th Cir. 2012), this Honorable Court held that the denial of immunity was immediately appealable under the collateral-order exception to the final judgment rule, (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006)), and your Appellees concede this point in their Brief in the instant appeal (Br. at 25, fn. 2), yet persist, incongruously, in characterizing Samantar's subject appeal of the denial of his common law immunity from suit as "frivolous", seizing upon the District Court's putative certification of the appeal as "frivolous" as an exercise in *ipse dixit* reasoning.

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2 An unexpurgated copy of the said diplomatic letter, dated 26 February 2013, from the Honorable Abdi Farah Shirdon, the Prime Minister of the Federal Republic of Somalia, to Secretary of State John Forbes Kerry, is included with the aforesaid Petition for Certiorari, Pet. App. at 70A – 75a.

Such effort also gives short shrift to the District Court's retreat from such characterization while the subject underlying appeal of Samantar's common law immunity claim was under active consideration by this Honorable Court, as if the District Court's earlier, inconsistent pronouncements ought to be, as it were, resurrected a lá the forensic examination of a palimpsest parchment. However, in the course of the effort to enshrine the District Court's initial, threadbare "frivolous" finding, your Appellees concede, ironically, that the Samantar's subject common law immunity from suit appeal represents the first time that this Honorable Court recognized that a former government official's denial of common law immunity from suit is immediately appealable under the collateral order doctrine, *id.*, yet appear blithely to ignore altogether the fact that the *ratio decidendi* of this Honorable Court's affirmance of the District Court's striking of Samantar's common law immunity from suit claim, *viz.*, the panel's pronouncement of a *jus cogens* exception to the common law immunity of former government officials, such as Samantar, has been criticized as legally erroneous by, *inter alios*, Former Attorneys General of the United States Edwin Meese III, Richard Lewis Thornburg, and William Pelham Barr, in their above-referenced *amici curiae* Brief filed with the Supreme Court on 3 April 2013.Perhaps implicitly conceding that Samantar's appeal from the subject District Court Order striking his defense of common law immunity from suit was not frivolous after all, your Appellees take refuge in asserting that this Honorable Court is ". . . never required to make an independent

determination of frivolousness [of an immediate appeal of an order striking a claim of common law immunity from suit]" (Br. at 28). Essentially, your Appellees tacitly encourage this Honorable Court, as it were, to turn a proverbial blind eye to the District Court's retreat, on-the-record, from a pronouncement of frivolousness of the appeal, seeking, instead, to hearken to the District Court's evolving eschewal of its initial characterization of Samantar's appeal of the subject Order striking his common law immunity from suit defense into a sort of oblique handicapping of Samantar's prospects of success on appeal as it such a shift supports their view, which it palpably does not. (*Id.*)

To be sure, Appellees claim to find verisimilitude in the case of *McMath v. City of Gary, Indiana*, 976 F. 2d 1026 (7th Cir. 1992), (Br. at *passim*), although, in doing so, they fail to take due cognizance of the fact that, *inter alia,* the said case involved a interlocutory appeal of a denial of a motion to dismiss based upon qualified immunity, as opposed to the defense raised by Samantar of common law *immunity from suit*, and do not, indeed cannot, cite any spot on precedent supportive of the notion that Samantar's subject appeal was in any way "frivolous." Moreover, as Samantar has already observed in Opening Brief, (Br. at 21, 22), at no point has this Honorable Court ever characterized as frivolous Samantar's appeal from the 15 February 2011 Order striking his claim of common law immunity from suit. *Au contraire*, this Honorable Court's subject 2 November 2012 decision ,which, ultimately, rejected Samantar's

claim of common law immunity from suit, in no way found, or even suggested, that his legal arguments were in any way, shape or form, frivolous.

In what appears to be a desperate effort to salvage the District Court's improvident, and subsequently recanted, characterization of Samantar's appeal of the Order denying Samantar's claim of common law immunity from suit as "frivolous", your Appellees cite to the subject 2 November 2012 panel decision as constituting some sort of *fait accompli* on the question of the District Court's having purported to have retained jurisdiction and entered judgment against Samantar, when, all the while, Samantar's immunity from suit claim was under active consideration by this Honorable Court, as if a District Court's determination of whether, *vel non*, an appeal is "frivolous" is to be assayed on logical fallacy of *post hoc ergo propter hoc* rationalization. Appellees further raise the specious point that Samantar cannot cite to any adverse collateral consequences arising out of an arguably incorrect maintainment of "jurisdiction" because this Honorable Court, per the subject 2 November 2012 decision of this Honorable Court, citing *United States v. Hardy*, 545 F. 3d 280, 285 (4th Cir. 2008), in divining that "there is no wrong to remedy' now". (Br. at 18). However, in making such an argument, Appellees appear to be heedless of Samantar's ongoing pursuit of a writ of *certiorari* from the Supreme Court, in his continuing effort to assert his common law immunity from suit.

To state the obvious, the word "frivolous" is hardly an obscure term. In fact, it has a plain meaning both in the law and among lay people, that apparently been forgotten by your Appellees in their mistaken effort to rationalize the District Court's having been invited into error by your Appellees in characterizing Samantar's appeal of the subject Order striking his defense of common law immunity from suit as "frivolous". The clarity afforded by the binary condition of a matter either being seen as frivolous or non-frivolous has, in the context of your Appellees' stated position on the instant appeal been trivialized, and analogous to the old saw about one being "a little pregnant".

C. THE DISTRICT COURT WAS DIVESTED OF JURISDICTION UPON SAMANTAR'S APPEAL FROM THE ORDER DENYING HIS COMMON LAW IMMUNITY FROM SUIT

As the foregoing analysis makes pellucidly clear, Samantar's appeal was not frivolous. And, as this Honorable Court has already held in its subject 2 November 2012 decision, affirming the District Court's Order striking Samantar's common law immunity from suit defense, such order was immediately appealable. Thus, because there is no alternative legal basis for defeating divestiture of jurisdiction from the District Court whilst Samantar pursued his appeal of such Order to this Honorable Court, divesture occurred and the District Court was bereft of jurisdiction whilst this Honorable Court exercised jurisdiction over the subject antecedent appeal. Thus, the putative 28 August 2012 default judgment order is null and void as is

Samantar's purported default in the District Court during the pendency of his common law immunity from suit appeal to this Honorable Court.

Your Appellees' response to this reasoning is to trivialize the whole concept of divestiture by misapplying the holding of *Levin v. Alms & Assoc*., 634 F. 3d 260 (4th Cir. 2011) , which dealt with divestiture in the context of an arbitrability case, which can be fairly said to differ critically from common law immunity from suit in that, whereas interlocutory appeals arising out of arbitrability disputes concern the forum in which a dispute ***is to be heard,*** *viz.*, a court of law versus an arbitral proceeding, the subject antecedent appeal involved a non-frivolous, and Samantar respectfully urges, meritorious, claim of ***immunity from suit*** at common law. Appellees essentially minimize the prejudice to Samantar of having to prosecute his subject antecedent appeal, which, tellingly, he continues to do by petitioning the Supreme Court for a writ of *certiorari* (*e.g.,* Br. at 32).

The learned treatise Wright & Miller's Federal Practice and Procedure addresses distinctly the issue of divestiture of jurisdiction upon an appeal from an order, where, under the collateral order doctrine, as is the case in the case *sub judice*, further district court proceedings after the filing of the appeal would violate the very right being asserted in the appeal taken under the collateral order doctrine:

"[I]f further district court proceedings would violate the very right being asserted in the appeal taken under the collateral order doctrine—as is the case with claims of qualified immunity or double jeopardy—then the pendency of the appeal does oust the district court of authority to proceed, at least if the appeal is not patently frivolous."

> Charles Wright & Arthur Miller, 16A, Federal Practice and Procedure Jurisdiction, § 3949.1 (4th ed.) (internal citations omitted)

There can be no gainsaying that the District Court's continuation of proceedings during the pendency of the subject appeal eroded that which Samantar sought to assert on the subject antecedent appeal, *viz*., his immunity from suit at applicable common law, and it is abundantly clear that Samantar's subject appeal was not "patently frivolous", nor, for that matter, was it, or is it, remotely susceptible of being characterized as "frivolous." Thus, the noting by Samantar of his timely appeal to this Honorable Court on 29 April 2011 divested the District Court of jurisdiction over the matter.

CONCLUSION

For the reasons stated in the instant Reply Brief, as well as those set forth in Samantar's Opening Brief, Samantar ever prays that the subject "Orders" of the District Court entered on 28 August 2012, be vacated by this Honorable Court and that the instant cause be remanded to the District Court for further proceedings consistent with such directive; Samantar further prays for such other and further relief as may be just and proper under the existent circumstances.

Dated: 8 April 2013, at Alexandria, Virginia, U.S.A.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In re: Fourth Circuit Record No. 12-2178;

BASHE ABDI YOUSUF, et alii, versus MOHAMED ALI SAMANTAR.

The Reply Brief of the Appellant has been prepared using:

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Exclusive of the Table of Contents, the Table of Authorities, and the Filing, Mailing & Compliance Certificates, the word count for the instant Brief is: 2,232 . I fully understand that a material misrepresentation could result in this Honorable Court's striking of the Brief and the imposition of sanctions. If this Honorable Court were so to request, the undersigned would gladly furnish this Honorable Court with an electronic version of the instant Brief and/or a word count printout of same.

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FILING CERTIFICATE AND CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this 8th day of the month of April, 2013, I caused to be filed, electronically, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, utilizing the CM/ECF System, the Reply Brief of the Appellant, and that I will cause to be dispatched forthwith by carriage of First Class Mail, through the United States Postal Service, enshrouded in suitable wrappers, the required numbers of copies of the said Reply Brief unto the following, *viz*.:

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