

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BASHE ABDI YOUSUF, et al., . Civil Action No. 1:04cv1360
Plaintiffs, .
vs. . Alexandria, Virginia
April 27, 2007
MOHAMED ALI SAMANTAR, . 10:40 a.m.
Defendant. .
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT R. VIETH, ESQ.
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P R O C E E D I N G S

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2 THE CLERK: Civil Action 04cv1360, Bashe Abdi Yousuf, et
3 al. v. Mohamed Ali Samantar. Would counsel please note their
4 appearances for the record.

5 MR. GOLDBERG: Good morning, Your Honor. Fred Goldberg
6 for the defendant.

7 THE COURT: Mr. Goldberg.

8 MR. VIETH: Good morning, Your Honor. Robert Vieth for
9 the plaintiffs.

10 THE COURT: All right, this matter comes before the
11 Court on the defendant's motion to dismiss, and we've had a chance
12 to review this motion with great care. It's actually a motion to
13 dismiss the second amended complaint.

14 There are a significant number of complex legal
15 arguments that are raised in the defendant's motion. I know that
16 plaintiff has requested perhaps some additional time to address
17 the statute of limitations argument and whether or not the
18 plaintiffs could have brought similar claims in the Italian court
19 system within the time period that was within the statute, but I
20 don't think the statute of limitations issue is really the
21 dispositive issue in this case.

22 It strikes this Court that under the Foreign Sovereign
23 Immunities Act, the record that's established at this point before
24 this Court is more than sufficient to support the defendant's
25 motion that this case must be dismissed.

1 As I've expressed to you many times before, Mr. Vieth,
2 I've been concerned about this particular case, first of all,
3 because of allegations that were raised either in this motion to
4 dismiss or in the previous one that there were significant
5 political motivations for the particular litigation at this time
6 and that this is such a very sensitive time in that part of the
7 world, with Somalia being in such chaos and efforts being made
8 through a transitional federal government to try to get a unified
9 governmental system there so that what is going on now can be
10 quelled.

11 You know that we had terrible problems in the past
12 figuring out how in the world there could be a reasonable
13 discovery in this case given the chaos in that part of the world,
14 and I understand you had pending before Judge Poretz a motion for
15 a protective order addressing some of these issues, and that is,
16 trying to figure out what you were going to do about arranging for
17 depositions, because there's no way in which depositions could be
18 taken in Somalia, Ethiopia presents similar types of problems, and
19 the American judicial process can't just go into any country
20 without the permission of the sovereign. We would have needed to
21 go through letters rogatory and other diplomatic channels.

22 There are problems in bringing foreigners into the
23 United States. Some of the witnesses might very well not be able
24 to come here and might not want to come here.

25 So there are various logistical problems that this case

1 presents that most civil cases in our courts do not present, but
2 the overwhelmingly compelling argument, it seems to me, that I
3 don't think the plaintiff can get around are the concerns under
4 the Foreign Sovereign Immunities Act about the immunity that would
5 apply to someone in this defendant's position.

6 We have in the record a letter dated February 17, 2007,
7 from Salim Alio Ibro, who is identified as the Acting Prime
8 Minister for the Transitional Federal Government of the Somali
9 Republic. This is a letter written to Secretary of State Rice
10 specifically addressing this case and indicating that, "We wish to
11 indicate that the actions attributed to Mr. Samantar in the
12 lawsuit in connection with the quelling of the insurgencies from
13 1981 to 1989 would have been taken by Mr. Samantar in his official
14 capacities and to reaffirm Mr. Samantar's entitlement to sovereign
15 immunity from prosecution for those actions."

16 And then the next paragraph, which again troubles this
17 Court or concerns us even more, "We also wish to reemphasize the
18 potential danger to the reconciliation process in Somalia of a
19 lawsuit that would hold a flame to past events and revive old
20 hostilities."

21 Faced with what I think is the overwhelming case law
22 certainly in the Fourth Circuit, the Fourth Circuit recognizes
23 that the Foreign Sovereign Immunities Act can apply to individual
24 members of the government and provide them with immunity, the D.C.
25 Court, Judge Friedman's decision recently involving the government

1 of Israel is right on point with the facts, I think, and the
2 allegations of this case, also holding that immunity would apply,
3 those cases convince me that the statute does apply and immunity
4 would apply here, but even if it didn't, I think the compelling
5 special political circumstances that are raised in this letter
6 from the transitional government coupled with the horrendously
7 difficult hurdles to having any kind of reasonable federal civil
8 discovery in this case make this an untenable lawsuit.

9 That's giving you an uphill battle, Mr. Vieth, but is
10 there anything you wanted to put on the record that would, you
11 think, dissuade me from the direction in which I'm about to go?

12 MR. VIETH: Thank you for the opportunity to speak, Your
13 Honor. First, we, we do disagree with what appears to be Your
14 Honor's interpretation of the Foreign Sovereign Immunities Act.
15 The Fourth Circuit has held that it does apply to individuals, but
16 there is case after case after case holding individuals liable,
17 individuals who are acting under color of law, because that is
18 required really to get in the door on 90 percent of these claims.

19 We do think that the Torture Victim Protection Act would
20 have been a meaningless act by Congress if anyone under color of
21 law was -- who acted under color of law was automatically immune.

22 Now, we have -- we put this in our briefs, and I know
23 Your Honor has carefully read the briefs, so I don't want to stand
24 here and repeat myself, but I do think -- repeat what I said in
25 the briefs, but I do think that the legislative history together

1 with case after case after case holding individuals liable tend to
2 show that the Foreign Sovereign Immunities Act does not protect
3 defendants in the position of Mr. Samantar.

4 Your Honor, it's one thing to allow a state to have
5 immunity under the Foreign Sovereign Immunities Act. It's another
6 thing to grant immunity to an individual who committed torture or
7 human rights abuses on behalf of that state to be immune when he
8 moves to this country to live thereafter, and that's the crucial
9 distinction, Your Honor, as well as the distinction between acting
10 in official capacity and merely acting under color of law.

11 Your Honor, the -- we do dispute the force and perhaps
12 even the validity of the letter from the TFG that Your Honor has.
13 First, I don't believe the -- and TFG is the Transitional Federal
14 Government. I don't believe that government is recognized by the
15 United States. I think the State Department has had that letter
16 for some time and has not requested that this Court take any
17 action on it. So I don't believe that should, frankly, play much
18 of a role in Your Honor's consideration of the motion.

19 THE COURT: Well, it's interesting that in today's
20 Washington Post, in the first section, there's a large article
21 about Somalia and Ethiopia and the incredibly unstable situation
22 there, likening it to a potential new Iraq. It clearly states,
23 and I guess the Washington Post is not legal authority, but it
24 just heightens the fact that the political background against
25 which this lawsuit is to some degree positioned is incredibly

1 incendiary.

2 I mean, it's much more incendiary than, for example, the
3 political situation at issue in Judge Friedman's case, and that
4 just reinforces my view that this -- and although there may not be
5 a formal recognition of the transitional authority, everything
6 that you see at least in the public media indicates that the
7 United States has publicly indicated it backs that authority. I
8 don't think that that would be an incorrect statement of the
9 situation.

10 And why the State Department didn't have the courtesy of
11 responding to this Court, giving all of us some indication, is
12 beyond me. I actually had considered issuing something myself
13 directly to the department but decided after particularly looking
14 at the recent D.C. case and the briefs of the parties that I would
15 go forward with what I've got, but I was not pleased that they
16 didn't have the courtesy of responding, because I think they
17 should have weighed in at some point.

18 Yes, Mr. Vieth?

19 MR. VIETH: May I say just one more thing about the
20 discovery problems, Your Honor?

21 THE COURT: Yes.

22 MR. VIETH: We do think they are surmountable, by no
23 means insurmountable. Ms. Lee, whom Your Honor just admitted to
24 this Court, returned yesterday from Somalia. She was in Hargeisa.
25 This week, we ran a video test that worked.

1 We also -- and we were planning to bring that to the
2 Court's attention through a more formal motion -- we did file a
3 motion for a protective order. There's no notice of deposition
4 filed. We wanted to be up front about our diligence on these
5 issues with the Court.

6 But we also are seriously exploring the possibility of
7 doing depositions in Dubai, where I don't think we run into
8 serious logistical problems. I think it's feasible. It is one of
9 the countries to which people from Somalia may travel with
10 relative ease, and it's a modern city, with all of the technology
11 one could ask for.

12 So I know that's -- I just wanted to say that to the
13 extent that's playing a role in Your Honor's thinking, I
14 understand --

15 THE COURT: Did you have the permission of the Dubai
16 authorities to conduct pretrial discovery there?

17 MR. VIETH: We have been in touch with the United States
18 State Department and with the consulate in Dubai. I can't
19 recall -- and I personally was not making these phone calls -- I
20 don't recall if we actually spoke to the embassy, which is in Abu
21 Dhabi rather than Dubai, but I know our office talked directly to
22 the consulate in Dubai, and it -- the information we have received
23 is for voluntary depositions where no subpoena is required, it's
24 relatively easy.

25 We are -- this is actually a series of conversations,

1 and we're hoping to continue to engage with the right people
2 there, but the preliminary indication at least is it should not be
3 too difficult if we can get the people there, and we think we can
4 get them there.

5 THE COURT: All right.

6 MR. VIETH: Thank you, Your Honor. Although I, I do
7 understand what Your Honor has said, and I do think Judge
8 Friedman's case is wrongly decided, I will say that. I could try
9 to distinguish it, but it's, frankly, not very persuasive. I
10 think it's wrongly decided, and Your Honor --

11 THE COURT: And I know it's on appeal; I understand
12 that.

13 MR. VIETH: And it is on appeal. Thank you, Your Honor.

14 THE COURT: All right. Mr. Goldberg, was there anything
15 that you wanted to add to the record? What I will do because,
16 obviously, it's a very significant issue, I want to give you a
17 written opinion. I wanted you to know what the ruling is, and
18 that will be the ruling as of today, to be followed up with an
19 opinion, and so the time to appeal will be stayed until such time
20 as you get the more detailed reasoning from the Court.

21 MR. GOLDBERG: Yes, Your Honor, thank you. I'd like to
22 add two things. The first is that we would suggest that Hargeisa
23 is not an acceptable location from which to conduct discovery, as
24 it's in Somaliland, which is not recognized by the United States.

25 I don't see how we could have a judicial proceeding

1 emanating from a country we don't recognize. I don't know who
2 would administer an oath that would be sufficient. I don't know
3 that it would be recognized by this Court or even condoned by this
4 Court for a location from which to conduct discovery. That's one
5 issue.

6 The other is, Your Honor, yesterday evening, I received
7 a follow-up fax copy of a letter -- a new letter to Dr. Rice,
8 Secretary of State Rice, from the transitional government, this
9 time from the prime minister, Mr. Ghedi, President -- Prime
10 Minister Ghedi, which reiterates some of the information that was
11 in the last letter but includes a paragraph that says, "Even
12 though state collapse and anarchy took place in our country,
13 nevertheless, the diplomatic immunities of the then Somali
14 government officials have not been removed."

15 And that paragraph was not in the original letter. I'd
16 like to add that for the record. I sent a copy last night when I
17 received it to Mr. Vieth. It only came in at about 4:15, so I
18 couldn't get it to the Court.

19 THE COURT: All right, if you'd hand it over to the
20 court security officer? We'll make it a part of the file.

21 So as I said, Gentlemen, I'm granting the motion to
22 dismiss, dismissing the case at this time. I'm taking a little
23 time to get the opinion out, because I want it to be thorough.
24 Obviously, it will invite the Fourth Circuit to perhaps create new
25 law in this Circuit.

1 And I want to make sure it's understood clearly that the
2 allegations are obviously very serious. The kind of conduct that
3 is described in the complaint is conduct that civilized societies
4 ought not to tolerate, but that's not this Court's issue. I have
5 legal issues that I think bar this lawsuit.

6 I think Congress has spoken. If Congress wants to
7 clarify the law, it can do so. It knows how to do that.

8 But I think that the very careful reasoning of Judge
9 Friedman is very sound reasoning. I will most likely adopt a good
10 deal of it myself in writing this opinion. Thank you.

11 MR. GOLDBERG: Thank you, Your Honor.

12 MR. VIETH: Thank you, Your Honor.

13 (Which were all the proceedings
14 had at this time.)

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16 CERTIFICATE OF THE REPORTER

17 I certify that the foregoing is a correct transcript of the
18 record of proceedings in the above-entitled matter.

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 Anneliese J. Thomson

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