

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.  
Cooley Godward Kronish LLP  
One Freedom Square  
11951 Freedom Drive  
Reston, VA 20190-56562

FOR THE DEFENDANT: FRED B. GOLDBERG, ESQ.  
Spirer & Goldberg, P.C.  
7101 Wisconsin Avenue, Suite 1201  
Bethesda, MD 20814

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Fifth Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

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## P R O C E E D I N G S

1  
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.

