# Rafeedie v. INS

United States District Court for the District of Columbia
August 22, 1996, Decided ; August 22, 1996, Filed
Civil Action No. 88-0366 (JHG)

**Reporter:** 1996 U.S. Dist. LEXIS 22505
FOUAD YACOUB RAFEEDIE, Plaintiff, v. IMMIGRATION AND NATURALIZATION SERVICE, et al., Defendants.

**Disposition:** [*1] Plaintiff's Motion for Attorneys' Fees and Costs granted in substantial part; and Plaintiff awarded $ 258,385.99 in attorneys' fees and costs.

**Counsel:** For FOUAD YACOUB RAFEEDIE, plaintiff: Michael Maggio, MAGGIO & KATTAR, David Cole, CENTER FOR CONSTITUTIONAL RIGHTS, Kerry William Kircher, U.S. HOUSE OF REPRESENTATIVES, Washington, DC.

For IMMIGRATION & NATURALIZATION SERVICE, EDWIN A. MEESE, III, ALAN C. NELSON, ROBERT L. BROWN, defendants: Allen W. Hausman, U.S. DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, DC.

For IMMIGRATION & NATURALIZATION SERVICE, EDWIN A. MEESE, III, ALAN C. NELSON, JAMES BUCK, ROBERT L. BROWN, defendants: James A. Hunolt, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For IMMIGRATION & NATURALIZATION SERVICE, defendant: Michael P. Lindemann, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For IMMIGRATION & NATURALIZATION SERVICE, EDWIN A. MEESE, III, ALAN C. NELSON, JAMES BUCK, ROBERT L. BROWN, defendants: William P. Joyce, Springfield, VA.

AMERICAN CIVIL LIBERTIES UNION, amicus: Arthur Barry Spitzer, AMERICAN CIVIL LIBERTIES UNION, Washington, DC.

**Judges:** JOYCE HENS GREEN, United States District Judge.

**Opinion by:** JOYCE HENS GREEN

**Opinion**

[*2] ***MEMORANDUM OPINION AND ORDER***

Presently pending is plaintiff Fouad Yacoub Rafeedie's Motion for Attorneys' Fees and Costs and the government's opposition thereto. Rafeedie's motion is granted in substantial part, for the reasons set forth below.

**I. *BACKGROUND***

The background of this case has been set forth in detail in the prior opinions of this Court and the Court of Appeals, and will not be repeated here except in summary fashion. Rafeedie, a permanent resident alien, brought this action in 1988 to challenge the government's initiation of summary exclusion proceedings against him pursuant to § 235 of the Immigration and Nationality Act, 8 U.S.C. § 1225(c). The summary exclusion proceedings differ markedly from ordinary exclusion proceedings under § 236 of the Act, 8 U.S.C. § 1226, in that summary proceedings offer no hearing, no opportunity to present witnesses, and virtually no opportunity to challenge the government's case prior to the rendering of a decision by the INS Regional Commissioner. The alien's participation is limited to submitting a "written statement and accompanying information," which the alien [*3] must do without knowing the evidence against him. 8 U.S.C. § 1225(c).

Contending that these summary proceedings violated his *Fifth Amendment* due process rights, and that the bases upon which the INS initiated the proceedings violated his *First Amendment* rights, Rafeedie brought suit and moved for a preliminary injunction barring the INS from proceeding. The government moved to dismiss Rafeedie's claims on a number of grounds, and Rafeedie moved for partial summary judgment.

After considering and rejecting the government's justiciability arguments, which centered around Rafeedie's failure to exhaust the administrative process prior to bringing suit, the Court granted a preliminary injunction, which enjoined the defendants from continuing the summary exclusion proceedings and barred them from conducting any exclusion proceeding on the basis of charges brought under *8 U.S.C. § 1182(a)(27)* or 28(F). [1] The Court denied the government's motion to dismiss as well as Rafeedie's motion for partial summary judgment.

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[1] These provisions, which have since been amended, provided for the exclusion of aliens whom the Attorney General had reason to believe would engage in activities prejudicial to the public interest or dangerous to the welfare, safety, or security of

[*4] The Court of Appeals agreed that the Court had jurisdiction to consider Rafeedie's challenges to the summary exclusion proceeding, albeit for a different reason than that asserted by this Court. The Court of Appeals affirmed the Court's issuance of a preliminary injunction as to summary exclusion proceedings under § 235, but not as to ordinary exclusion proceedings under § 236. The Court of Appeals determined that the Court was without jurisdiction to hear Rafeedie's claims concerning ordinary exclusion proceedings because it was necessary for Rafeedie to first exhaust the administrative process. Finally, finding that Rafeedie had a protected liberty interest, the Court of Appeals remanded for entry of partial summary judgment for Rafeedie on his due process claims and for a determination of whether Rafeedie received the process to which he was due.

On remand, this Court entered partial summary judgment for Rafeedie on his due process claim, holding that § 235 as applied to Rafeedie violated the Due Process clause. The Court declined to strike down the statute as unconstitutional, due to the potential of the Attorney General utilizing additional procedural safeguards that would [*5] satisfy due process. The Court further found that *8 U.S.C. § 1182(a)(27)* and *(a)(28)(F)* violated the *First Amendment*. Judgment was accordingly entered in part for Rafeedie and in part for the government.

The government's subsequent appeal and Rafeedie's cross-appeal were withdrawn following a settlement, under which the government agreed to admit Rafeedie as a permanent resident alien and drop its exclusion proceedings against him. Mem. in Support of Pl. Motion, at 13. Thus, because of this litigation and the very favorable settlement of it, Rafeedie was permitted to remain in the United States.

## II. *ANALYSIS*

The Equal Access to Justice Act ("EAJA"), *28 U.S.C. § 2412(d)*, provides for an award of attorneys' fees and expenses to prevailing parties in litigation against the United States, unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The EAJA caps fees at $ 75 per hour, with exceptions in certain circumstances.

There is no doubt that Rafeedie prevailed in this action, and the government does not challenge this aspect of Rafeedie's [*6] fee request. The government strongly asserts, however, that fees should not be awarded in this case because the government's position was substantially justified and because special circumstances make a fee award unjust.

To show that its position was substantially justified, the government need not show that its position was "'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988). In other words, the government's position must have a "reasonable basis both in law and fact." *Id.* In this regard, a position can be justified even if it is not correct. *Id.* at n. 2. The government carries the burden of proving that its position was substantially justified. *Wilkett v. ICC*, 269 U.S. App. D.C. 249, 844 F.2d 867, 871 (D.C. Cir. 1988).

The Court is to make a single finding regarding whether the government's position was substantially justified -- separate determinations are not made for each stage of the litigation. *INS v. Jean*, 496 U.S. 154, 160, 110 L. Ed. 2d 134, 110 S. Ct. 2316 (1990). [*7] Thus, "while the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. As our Court of Appeals has explained, "once a court determines that the government's position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute." *Anthony v. Sullivan*, 299 U.S. App. D.C. 198, 982 F.2d 586, 589 (D.C. Cir. 1993).

Our Circuit has also made clear that a partial fee award is sometimes appropriate where some, but not all, of the government's positions are substantially justified. *See, e.g., McDonald v. Washington*, 304 U.S. App. D.C. 395, 15 F.3d 1126, 1130 (D.C. Cir. 1994) (discussing appropriateness of partial fee awards where claims are easily severable and government's position was justified on some claims); *Alphin v. Nat'l Transp. Safety Bd.*, 268 U.S. App. D.C. 138, 839 F.2d 817, 822 (D.C. Cir. 1988) (remanding for determination of whether partial fee award is appropriate); *Cinciarelli v. Reagan*, 234 U.S. App. D.C. 315, 729 F.2d 801, 806-07 (D.C. Cir. 1984) [*8] (partial fee award appropriate because one of government's two defenses was substantially justified); *see also Europlast, Ltd. v. NLRB*, 33 F.3d 16 (7th Cir. 1994) (citing with approval D.C. Circuit cases regarding partial fee awards).

### A. *Justiciability*

This case involved two major issues: (1) resolution of whether the Court had jurisdiction to hear Rafeedie's claims in light of Rafeedie's failure to first exhaust the administrative process, and (2) resolution of the underlying merits of Rafeedie's Due Process and *First Amendment* claims. Paraphrasing then-Judge Ruth Bader

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the United States. and aliens affiliated with organizations that advocate or teach violence against governments. Rafeedie's *First Amendment* challenge concerned these provisions.

Ginsburg's concurring opinion, Rafeedie characterizes the government's justiciability arguments as involving the question of "when and where," but not "whether" his complaint would be heard. Reply at 9; *Rafeedie v. INS*, 279 U.S. App. D.C. 183, 880 F.2d 506, 525 (D.C. Cir. 1989). According to Rafeedie, because a court would have eventually heard the constitutional claims central to his case, on which he prevailed, he should recover fees in full.

However, in order to reach Rafeedie's claims on the merits, the Court first was required to satisfy itself that it had jurisdiction [*9] over the case. It is readily apparent from a review of this Court's and the Court of Appeals' opinions that the government's motion to dismiss based on Rafeedie's failure to exhaust the administrative process posed legitimate and difficult questions. *See Rafeedie v. INS*, 688 F. Supp. 729, 736-741 (D.D.C. 1988); 279 U.S. App. D.C. 183, 880 F.2d 506, 510-519. The Court will not recount here the various hurdles to justiciability raised by the government, or the Court's resolution of those claims, because those matters are set forth in considerable detail in the published opinions. In the end, however, both courts ruled in Rafeedie's favor and determined that the Court had jurisdiction to hear the merits of Rafeedie's claim.

Although ultimately unsuccessful, the Court cannot say that the government's justiciability defense was unreasonable. "An arguable claim that a particular controversy is . . . nonjusticiable, can and should be pressed independently of the legal merits of the defendant's position, at least when the courts' Article III jurisdiction is at issue." *Nichols v. Pierce*, 239 U.S. App. D.C. 146, 740 F.2d 1249, 1260 (D.C. Cir. 1984).

What is more, plaintiff's [*10] counsel themselves recognized the complex and uncertain nature of the exhaustion issue, providing further evidence that the government's position in this regard was "substantially justified." Plaintiff's fee request recognizes that "in general, immigration decisions are not subject to federal court review until the immigration procedures are exhausted, and do not raise constitutional issues. This case required the development of an exception to that general rule." Motion at 34. And, as Lucas Guttentag, an immigration lawyer not directly involved in this case, stated in his affidavit in support of plaintiff's fee application:

> While the government's actions in this case were quite plainly unconstitutional, the jurisdictional justiciability questions were quite complicated. I attended the oral argument in this case in the D.C. Circuit. It was one of the longest appellate arguments I have ever attended and the majority of time was devoted to the justiciability issues that divided the members of the court and that resulted in three lengthy separate opinions.Aff. at P 8. Thus, plaintiff's own fee request belies his claim that the government's position on the justiciability [*11] issues lacked a reasonable basis.

Accordingly, because the justiciability issues posed a separate issue from the underlying merits of this action, and because the government's position with regard to justiciability was substantially justified, a partial reduction in plaintiff's fee award is appropriate. From a review of plaintiff's fee submission and the record in this case, the Court has determined that a 40 percent reduction in fees and expenses is warranted to account for efforts spent defending the government's justiciability claims.

**B. *Underlying Merits***

The same cannot be said for the government's position with respect to the underlying actions at issue in this case. To be sure, the statute and regulations at issue expressly permit the INS to pursue summary exclusion proceedings against certain individuals, and in this regard, the INS's initial application of these provisions to Rafeedie could conceivably be considered "justified." [2]*See*880 F.2d at 515. The government's defense of its actions in litigation, however, unquestionably was not "substantially justified" in light of Supreme Court precedent holding that summary exclusion proceedings [*12] against resident aliens violated due process, *see, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590, 97 L. Ed. 576, 73 S. Ct. 472 (1953), and in light of the utter absence of procedural due process protections afforded Rafeedie in this case.

As previously stated, to avoid a fee award the government must demonstrate that its position had a reasonable basis in both law and fact, *i.e.*, that a reasonable person would be satisfied that the government's position was justified in the main. Here, all judges who have considered this case have found the government's actions with respect to Rafeedie to be, at a minimum, "profoundly troubling." *Rafeedie*, 880 F.2d at 531 (Silberman, J., dissenting). The government invoked summary exclusion provisions against a resident alien [*13] for the first time in 40 years, contending that national security demanded such action, even though "the INS has always interpreted § 235(c) *not* to apply to permanent resident aliens." *Id.* at 523. "Indeed,

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[2] The Court notes that plaintiff is not seeking fees for activities at the administrative level. His petition seeks fees for legal services beginning in January 1988, shortly before the complaint in this case was filed.

in the proceeding by which the INS excluded [Sulieman Ahmad] Shihadeh (allegedly one of Rafeedie's companions on his trip . . . ), the Government's attorney stated that 'in this particular case the alien is a lawful permanent resident, [and] he is entitled to a hearing.'" *Id.* (internal citations omitted). Thus, despite the existence of statutory provisions authorizing the INS' actions, Supreme Court precedent and the agency's own views plainly indicated that summary exclusion proceedings against permanent resident aliens were inappropriate. *Id.* at 519-523. Further undermining the government's initial justification for its actions, *i.e.*, national security concerns, is the fact that at the time, Rafeedie had been "paroled," *i.e.*, not detained, for more than 18 months prior to the government's decision to initiate these proceedings.

Nor could a reasonable person find the summary exclusion process as applied to Rafeedie to be constitutionally sufficient. [*14] [3] Resident aliens possess a liberty interest in remaining in this country, such that they are entitled to the protections of the Due Process clause. 880 F.2d at 520-21. The summary exclusion process, as set forth in the statute and regulations, and as applied in Rafeedie's case, deprives aliens of a hearing and an opportunity to confront the government's evidence against them. Aliens may submit written information on their own behalf, but are not privy to the information which prompted the government to seek exclusion. Moreover, they are not entitled to an appeal from the INS Regional Director's decision. As the Court noted in its May 1992 opinion, "it is clear that . . . the summary exclusion provisions, as they have already been applied to Rafeedie, violate the due process clause." 795 F. Supp. 13, 18. The constitutionality of the statute as a whole was spared only by the possibility, admittedly one that "may beg reality," *id.* at 20, of the government adopting greater procedural protections such that due process would be satisfied. Without such additional protections, however, it is evident that the statute would not pass constitutional [*15] muster.

Thus, on the central issue in Rafeedie's case, the Court finds that the government's position was not reasonable in law or fact, and consequently, its position was not substantially justified. [4]

[*16] The government urges the Court to find that special circumstances make an award of fees in this case unjust. EAJA's "'safety valve' was designed to 'insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts' and to permit courts to rely on 'equitable considerations' in denying a fee award." *Wilkett v. ICC*, 269 U.S. App. D.C. 249, 844 F.2d 867, 873 (D.C. Cir. 1988). The government argues that four "special circumstances" warrant denying an award in this case: (1) the governing law was unclear, (2) the government was defending an act of Congress, (3) intervening law "implies" that the Court should not have heard the case, and (4) immigration matters are traditionally within the province of the legislature and executive branches. The government's arguments are not persuasive. Most are refuted in the Court's earlier discussion, which will not be repeated here. The government's position in defending the INS' use of the summary exclusion proceedings was not substantially justified, and no special circumstances exist in this case to excuse the government [*17] from compensating Rafeedie for his legal fees and expenses incurred in challenging the government's unreasonable and unconstitutional actions.

**C. *Other Considerations***

**1. *Cost of Living Increase in Rate***

Rafeedie urges the Court to increase the $ 75 statutory maximum to account for the increase in the cost of living since the EAJA was enacted. Such an increase is authorized by the statute and is plainly warranted. *Wilkett*, 844 F.2d at 874. The government does not challenge a COLA *per se*, but contends that the COLA should be based on the year in which the legal services were rendered. The Court disagrees. Utilizing the COLA for January 1994, the year in which legal services were last rendered to Rafeedie, is appropriate. The long pendency of this litigation warrants utilization of the January 1994 to compensate Rafeedie's attorneys for the delay involved in obtaining fees for this case, which commenced more than eight years ago. *See Wilkett*, 844 F.2d at 875 and n. 4; *Hirschey v. FERC*, 250 U.S. App. D.C. 1, 777 F.2d 1, 5 (D.C. Cir. 1985). Accordingly, a rate of $ 123 per hour, reflecting a COLA from 1981 - [*18] 1994, will be utilized.

**2. *Unreimbursable Costs***

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[3] The government ordinarily is justified in defending the constitutionality of a statute, except in exceptional cases. *Grace v. Burger*, 246 U.S. App. D.C. 167, 763 F.2d 457, 458 and n.5 (D.C. Cir.), *cert. denied*, *474 U.S. 1026, 88 L. Ed. 2d 565, 106 S. Ct. 583 (1985)*. As noted above, this case involved both the constitutionality of § 235 as a whole and as applied to Rafeedie. With respect to the "as applied" challenge, the most important of Rafeedie's claims, this case clearly falls within the exception to the ordinary rule.

[4] In light of this determination on Rafeedie's central claim, it is unnecessary to dwell on Rafeedie's *First Amendment* claims, which although important, are secondary to his due process claim.

While forthright about the fact that case law in this Circuit makes certain costs unrecoverable under EAJA, Rafeedie seeks reimbursement for a variety of costs, including postage, long distance telephone charges, computer research and transportation expenses. Precedent in this Circuit compels the Court to reject plaintiff's request for all costs other than computer research, duplication expenses, and filing fees. *See Hirschey*, 777 F.2d at 6; *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 249 U.S. App. D.C. 400, 776 F.2d 1066, 1069 (D.C. Cir. 1985).

Rafeedie's motion and reply brief detail the following compensable expenses: (1) $ 3539.25 in photocopying; (2) $ 5290.47 in computerized legal research [5]; (3) $ 120 in filing fees; and (4) $ 495 for paralegal expenses, for total compensable expenses of $ 9,444.72. [6] [*19]

**3.** ***Increase for Special Expertise***

The EAJA permits the Court to increase compensation over the statutory rate where a "special factor, such as the limited availability of qualified attorneys for the proceedings involved, justify a higher fee." *28 U.S.C. § 2412(d)(2)(A)(ii)*. This provision authorizes an increase where the "attorneys have some distinctive knowledge or specialized skill needful for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce v. Underwood*, 487 U.S. 552, 572, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988).

Rafeedie argues that four of his attorneys should be compensated at an hourly rate of $ 250 to reflect their special expertise in immigration matters, which Rafeedie contends was critical to his case. Plainly, Rafeedie enjoyed the benefit of excellent counsel, whose special expertise in [*20] immigration and constitutional matters is widely recognized. [7] Moreover, aspects of this case certainly involved a complicated intersection of constitutional, immigration, and jurisdictional issues. Having counsel with expertise in these areas was undoubtably vital to Rafeedie's ultimate success. An increase over the statutory rate to reflect the specialized knowledge of immigration and constitutional law possessed by Rafeedie's uniquely qualified counsel is appropriate. Accordingly, the Court will increase the hourly rate for David Cole, Marc Van Der Hout, Michael Maggio, and James Fennerty to $ 200 per hour to reflect their special expertise and its importance to Rafeedie's ultimate success.

[*21] **4.** ***Reasonableness of Hours Expended***

In its opposition to Rafeedie's fee request, the government did not "undertake an exhaustive, line-by-line analysis of the fees sought," but still contended that "plaintiff's request is excessive and insufficiently documented." Opp. at 39. The government stated that it would seek leave to submit a more detailed analysis should the Court determine that fees were appropriate.

The Court has scrutinized plaintiff's fee request, including the affidavits and time records submitted by his attorneys in connection with the request, and has determined that the hours expended are reasonable in view of the complex and protracted litigation involved. For substantially the reasons cited by plaintiff in his reply to the government's opposition, *see* Reply at 18-20, the Court finds that plaintiff's fee request is adequately documented and that the hours expended are reasonable. The government's objections in this regard are rejected. [8]

[*22] **III.** ***CONCLUSION***

For the foregoing reasons, it is

ORDERED that plaintiff's Motion for Attorneys' Fees and Costs is granted in substantial part; and it is

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[5] The Declaration of Stephen Glickman of Zuckerman, Spaeder, Goldstein, Taylor & Kolker states that his firm incurred $ 3,864.05 in expenses for postage, long distance telephone charges, court costs, computerized legal research, transportation and messenger charges, and secretarial overtime charges. However, the Declaration does not break down the $ 3,864.05 into these various categories, and the Court therefore cannot determine which, if any, of these expenses are reimbursable. Accordingly, no part of this $ 3,864.05 is awarded.

[6] This amount is reduced by 40 percent in the final award to account for costs expended in addressing the government's justifiability defense.

[7] Counsel's expertise is set forth in affidavits submitted with plaintiff's motion for fees. *See* Exh. 1 (Declaration of David Cole), Exh. 8 (Declaration of Marc Van Der Hout), Exh. 9 (Declaration of Michael Maggio), Exh. 10 (Declaration of James Russell Fennerty). *See also* the Declaration of Lucas Guttentag, Exh. 11, which opines that "this case required the specialized expertise of immigration attorneys." P 5.

[8] Nor will the Court permit the government to have yet another opportunity to scrutinize and comment on plaintiff's fee request. The government had such an opportunity in its opposition, and elected not to specifically analyze and challenge the hours sought. Further submissions by either side are not warranted.

FURTHER ORDERED that plaintiff shall be awarded $ 258,385.99 in attorneys' fees and costs in accordance with a separate Judgment issued this date. [9]

IT IS SO ORDERED.

August *22*, 1996

JOYCE HENS GREEN

United States District Judge

***JUDGMENT***

[*23] In accordance with the Memorandum Opinion and Order issued this date, judgment is hereby entered in favor of plaintiff Fouad Yacoub Rafeedie and against defendants Immigration and Naturalization Service, *et al.* in the amount of two hundred fifty-eight thousand three hundred eighty-five dollars and ninety-nine cents ($ 258,385.99).

IT IS SO ORDERED.

August *22*, 1996

JOYCE HENS GREEN

United States District Judge

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[9] This total was calculated as follows:

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|---|---|
| David Cole: 725.5 hours x $ 200/hour = | $ 145,100.00 |
| Marc Van Der Hout: 223.4 hours x $ 200/hour = | 44,680.00 |
| Michael Maggio: 47.2 hours x $ 200/hour = | 9,440.00 |
| James Fennerty: 63.35 hours x $ 200/hour = | 12,670.00 |
| Wilmer Cutler & Pickering: | 177,542.35 |
| (detailed in Declaration of Philip Anker) | |
| Zuckerman, Spaeder, Goldstein, Taylor & Kolker | 31,766.25 |
| (detailed in Declaration of Stephen Glickman) | |
| TOTAL FEES: | $ 421,198.60 |
| TOTAL COSTS: | 9,444.72 |
| | $ 430,643.32 |
| TOTAL FEES AND COSTS LESS 40% | $ 258,385.99 |