

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 1, 2011
MOHAMED ALI SAMANTAR,	.	10:40 a.m.
	.	
Defendant.	.	
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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	NATASHA ELISA FAIN, ESQ. Center for Justice and Accountability 870 Market Street, Suite 680 San Francisco, CA 94102
FOR THE DEFENDANT:	JOSEPH PETER DRENNAN, ESQ. 218 North Lee Street, Third Floor Alexandria, VA 22314
ALSO PRESENT:	AZIZ DERIA
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

(Pages 1 - 15)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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

2 THE CLERK: Civil Action 04-1360, Bashe Abdi Yousuf, et  
3 al. v. Mohamed Ali Samantar. Would counsel please note their  
4 appearances for the record.

5 THE COURT: All right, counsel, please identify  
6 yourselves.

7 MR. DRENNAN: Yes, Your Honor. Good morning. Joseph  
8 Peter Drennan on behalf of defendant Mohamed Ali Samantar.

9 THE COURT: All right.

10 MS. FAIN: Good morning, Your Honor. Natasha Fain from  
11 the Center for Justice and Accountability, on behalf of the  
12 plaintiffs. Plaintiff Aziz Deria is here with us today.

13 THE COURT: All right. We have before us the  
14 defendant's motion to dismiss and the defendant's motion for  
15 reconsideration. I want to address the last motion first.

16 Mr. Drennan, again, as you know, courts seldom reverse  
17 themselves. I'm not -- I've certainly reversed myself in the  
18 past, but it's not a common practice, and I have considered with  
19 care your motion for reconsideration, but I'm satisfied that it  
20 ought not to be granted. The Executive Branch has spoken on this  
21 issue and that they are entitled to a great deal of deference.  
22 They don't control but they are entitled to deference in this  
23 case.

24 The rationale for finding -- for the government's  
25 position on sovereign immunity, I think, is sound. As you know,

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1 they looked upon among other things the status of the government  
2 of Somalia at this point, and unless anything's changed in the  
3 last couple of weeks, I don't think there's any new situation

4 going on there.

5 Has the government changed in any respect in the last  
6 two or three weeks?

7 MS. FAIN: No, Your Honor.

8 THE COURT: No. And the residency of the defendant has  
9 also been taken properly into consideration. In the past, at  
10 least the Second Circuit has found that the lack of a recognized  
11 government is a factor in the sovereignty determination, and I'm  
12 going to go with that, so we're not going to hear any argument on  
13 that. All right?

14 MR. DRENNAN: We, we understand the Court's ruling, but  
15 we would respectfully note our exception.

16 THE COURT: All right, that's fine.

17 So then we move on to the other issues that have been  
18 raised. The statute of limitations issue is a very interesting  
19 one, but, Mr. Drennan -- I think I'll keep you on your feet since  
20 it's your motion. You do have circuit law -- there are certainly  
21 certain circuits that have clearly found that equitable tolling is  
22 available under these statutes, correct?

23 MR. DRENNAN: Yes, Your Honor, but there, there's some  
24 disagreement about that, and, and there's the --

25 THE COURT: Yes, but here's the point: The Fourth

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1 Circuit is silent.

2 MR. DRENNAN: Correct.

3 THE COURT: All right. Some circuits have found that,  
4 in fact, equitable tolling is appropriate, and this is before the  
5 Court on a motion to dismiss, not a motion for summary judgment,  
6 correct?

7 MR. DRENNAN: That is correct.  
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8 THE COURT: All right. Equitable tolling to a certain  
9 degree is somewhat fact specific; would you not agree?

10 MR. DRENNAN: I would, I would -- if equitable tolling  
11 were to be deemed to apply, I would agree that it is inexorably  
12 fact specific.

13 THE COURT: And therefore, the matter can be  
14 reconsidered when the full record of this case is developed,  
15 because again, previously we granted an early motion to dismiss,  
16 and discovery, as I recall, had not been going on in this case or  
17 at least had not gone on too extensively. There was another case  
18 also pending at that time, and there was huge discovery problems,  
19 or were there discovery problems in this case as well?

20 MR. DRENNAN: Well, Your Honor, in this case, I'm  
21 relatively new to this case, and I do not believe that any  
22 discovery has taken place in this case. Your Honor is obviously  
23 adverting to the other case involving Colonel Ali in which I've  
24 been involved since the outset.

25 THE COURT: Right. In that case, there were significant

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1 discovery problems, but there's been no discovery done in this  
2 case, and so the issue as to whether or not there would be facts  
3 that would support equitable tolling or not we don't know yet. So  
4 I'm going to deny the motion to dismiss on statute of limitations  
5 grounds without prejudice, and the issue can be raised once there  
6 is a fuller development of the evidentiary record.

7 MR. DRENNAN: Your Honor, I understand the Court's  
8 position with regard to equitable tolling, but I would, I would  
9 query the Court regarding the determination of the applicable  
10 limitations period, because the, the action brought by the

11 plaintiffs is essentially brought under the Alien Tort Statute as  
12 well as what I call for shorthand reference the Torture Statute.

13 THE COURT: Right.

14 MR. DRENNAN: The Torture Statute was not enacted until,  
15 if I'm not mistaken, 1992, and that was after any alleged relevant  
16 conduct took place. At the time of the enactment of the, the  
17 Torture Statute, the applicable limitations period for claims  
18 brought under the, the Alien Tort Claims Act was the most  
19 analogous state limitations period, and as pointed out in our  
20 briefing papers, that would be two years.

21 It was not until the Torture Statute was enacted that a  
22 ten-year period was prescribed for that statute, and then there's  
23 been some, some stare decisis ensuing from that that allows  
24 borrowing to the Alien Tort Claims Act claim that would give under  
25 contemporary jurisprudence a ten-year limitations period for the

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1 alien claim.

2 The question here presented is what limitations period  
3 applies to the claims brought under the second amended complaint  
4 as it's before the Court, and respectfully, we are of the view  
5 that that would be a two-year limitations period and that  
6 accordingly, there could be no gainsaying that this action is, is  
7 untimely.

8 THE COURT: All right, let me have the plaintiff  
9 respond.

10 MS. FAIN: Your Honor, that's just not supported by the  
11 decisions. Courts applying equitable tolling under the Torture  
12 Victim Protection Act and the ATS have consistently tolled for the  
13 full ten-year period. After the defendant entered the United  
14 States, there's just -- there's no authority to support

15 defendant's proposition that those ten years should not be applied  
16 in this case.

17 THE COURT: It is an interesting issue as to whether or  
18 not the ten years is going to apply. Again, I'm going to punt on  
19 that issue right now and let this case go forward and be fully  
20 developed. This is an affirmative defense that has been properly  
21 raised by the defendant and can be raised again after we see the  
22 full record, but I'm not going to grant the motion to dismiss on  
23 these grounds at this point.

24 MR. DRENNAN: I understand, Your Honor, and again, not  
25 to, not to belabor the point, but, you know, we did make the

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1 argument that, that my client was living openly in Italy from 1991  
2 through '97, before he came to the United States, and that --

3 THE COURT: We'll see how openly he truly was living.  
4 Again, that's a factual issue, all right? And again, equitable  
5 tolling requires the Court to use, you know, its sound discretion  
6 in determining what would be basically fair or unfair to the  
7 plaintiffs.

8 If it was absolutely clearly obvious that he was there,  
9 if there's evidence that some of the plaintiffs knew or should  
10 have known that he was there, that may be another issue, but I  
11 don't have that before me right now in the context of a motion to  
12 dismiss, and so I'm denying the motion, all right?

13 MR. DRENNAN: I understand. Your Honor -- and again, I  
14 do understand the Court's ruling, but because of the, the  
15 importance of that issue, what we respectfully believe are very  
16 stale claims, if the Court -- and we'll move on to address the  
17 other issues raised in our motion to dismiss, but if the Court

18 were to be inclined to permit some discovery, shouldn't that  
19 discovery be essentially delimited to addressing the, the issues  
20 raised very, I think, importantly --

21 THE COURT: We're not going to do bifurcated discovery  
22 in this case. This case has already been around all the way up  
23 the line one time. We're going to get the case fully litigated.  
24 When I say fully litigated, I mean discovered, and discovery could  
25 be the killer in this case. It was last time in a companion case.

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1 It was just an unmanageable situation.

2 And it is the plaintiffs who chose to bring the case,  
3 and discovery has to be able to be achieved, and so down the road  
4 again, Mr. Drennan, the Court will review the record when it's  
5 been fully developed, if it can be fully developed, all right?  
6 And if it can't be, then the ramifications of that are what they  
7 are, but at this point, I'm not going to bifurcate discovery. The  
8 case is going to go forward, all right?

9 MR. DRENNAN: I understand, but, Your Honor, may -- I  
10 understand the Court has, has essentially ruled thus far on our  
11 motion with regard to the reconsideration.

12 THE COURT: Yes. I've denied your motion to reconsider.

13 MR. DRENNAN: Yes.

14 THE COURT: I've found that equitable tolling does apply  
15 to these statutes but that the evidence developed during the  
16 record -- during, during discovery may result in a finding that  
17 the case is time-barred, all right? I can't make that decision at  
18 this point. The facts are not before the Court.

19 MR. DRENNAN: All right.

20 THE COURT: And then the next round of arguments, which  
21 we have not addressed, is the failure to state a claim.

22 MR. DRENNAN: Correct. And that's what I was just about  
23 to do.

24 THE COURT: All right.

25 MR. DRENNAN: Your Honor, in, in essence, the claims are

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1 that my client as the, the head of state --

2 THE COURT: The Minister of Defense.

3 MR. DRENNAN: Ministry of Defense or subsequently as  
4 prime minister, somehow bears responsibility for alleged  
5 atrocities that took place in certain regions of Somalia during  
6 the 1980s, and if I could summarize those alleged atrocities, they  
7 essentially boil down to extrajudicial killings and torture and, I  
8 believe, unlawful detention, and --

9 THE COURT: Well, I mean, to be specific, I think we've  
10 counted seven claims under the ATS: acts of torture;  
11 extrajudicial killing; attempted extrajudicial killing; crimes  
12 against humanity; war crimes; cruel, inhuman, and degrading  
13 treatment or punishment; and arbitrary detention.

14 MR. DRENNAN: Yeah, that's correct. And, Your Honor,  
15 with regard to each, each of those, the Sosa case, the 2004 Sosa  
16 case --

17 THE COURT: They have to -- those causes of action have  
18 to, have to have attained the status of binding customary  
19 international law to be cognizable.

20 MR. DRENNAN: Correct. And our, and our -- that is  
21 indeed correct, and our position is that they, they had not, and  
22 that was the reason that the Torture Statute was enacted. When  
23 the Congress enacted the Torture Statute, it specifically stated  
24 in the committee report that it was creating a new cause of

25 action, and if these were recognized norms of being actionable,

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1 then the Torture Statute wouldn't have been necessary, and it's  
2 our position that the animating purpose of the Torture Statute was  
3 to address a situation in which there was no universal consensus  
4 that extrajudicial killing in a foreign land by a foreign  
5 government or an official of a foreign government to his own  
6 people was actionable.

7 And, in fact, the only -- in our estimation, retroactive  
8 application of an action for extrajudicial killing is the, the  
9 Flatow amendment to the -- or the state terror exemption to the  
10 Foreign Sovereign Immunities Act that allows, for instance, suits  
11 against Iran for the Beirut Barracks Bombing in 1983, let's say,  
12 but other than that, there was no positive law, no positive law in  
13 the United States during the 1980s, when these acts -- and we're  
14 not conceding that any of them were committed, by the way -- but  
15 during the time in which the alleged conduct -- or activities took  
16 place, there was no consensus in the United States that any of  
17 those discrete claims were actionable.

18 They only would have become actionable upon the  
19 enactment of the Torture Statute in 1992, which raises another  
20 issue with regard to retroactive application, and we respectfully  
21 submit that, that there is, is no compelling legal authority that  
22 makes the proscribed conduct under the Torture Statute retroactive  
23 to actions that antedated the, the Torture Statute. If there had  
24 been, there certainly would have been an explicit proviso in the  
25 statute, just as there was in the Foreign Sovereign Immunities

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1 Act, but there was not.

2 THE COURT: All right.

3 MR. DRENNAN: So our position is that none of these  
4 counts alleging liability under any of the discrete causes of  
5 action made represent proper statements of a cause of action,  
6 because at the time they took place, there was no universal  
7 consensus that they were actionable. That only came upon the  
8 enactment of the Torture Statute in 1992.

9 THE COURT: Let me hear from plaintiff on that.

10 MR. DRENNAN: All right.

11 MS. FAIN: Your Honor, defendant's statement of the law  
12 can't be further from the truth. That is absolutely not the case.  
13 Every court that has considered this issue has squarely held that  
14 the TVPA can be applied to violations committed before it was  
15 enacted in March of 1992. That's because the TVPA does not impair  
16 rights, increase liability, or impose new duties. Rather, it  
17 recodifies a claim previously maintained by aliens under the Alien  
18 Tort Statute and by U.S. citizens under 28 U.S.C., section 1331  
19 rising under jurisdictions or in state courts.

20 The Eleventh Circuit rejected a similar challenge to  
21 this in the Cabello case: ". . . this Court could have exercised  
22 extraterritorial jurisdiction to reach wrongful death actions  
23 involving defendants and locations outside the forum jurisdiction"  
24 before the enactment of the TVPA.

25 Further, these violations defendant mentioned,

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1 especially extrajudicial killing, have long been a part of United  
2 States and international law, long before the alleged actions in  
3 this case, and as we submitted in our papers, this was not only a

4 violation of U.S. law and international law; it was a violation of  
5 Somalia law.

6 He can't tell me that when he lined up one of our  
7 plaintiffs along the other Isaaq army officers and shot and shot  
8 and shot and shot, he thought that that was not going to be  
9 something that was actionable, that he thought that that was  
10 lawful.

11 THE COURT: All right. And are you alleging that the  
12 defendant himself actually pulled the trigger? You're not, just  
13 to be accurate about this.

14 MS. FAIN: Thank you, Your Honor, for clarifying. No,  
15 as you're, as you're making clear, defendant in his role as  
16 general who is on the ground and overseeing the forces  
17 systematically attacking unarmed civilians was not himself pulling  
18 the trigger. In fact, he was devising the plans and overseeing  
19 the death of countless victims.

20 THE COURT: All right.

21 MR. DRENNAN: Your Honor, this case has been extensively  
22 briefed, but very briefly by rejoinder to what's just been said,  
23 this allusion that, well, somehow my client violated Somali law,  
24 we would invite the Court's attention to the cases cited in our  
25 moving papers involving civil litigation arising over China's

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1 repression of the Falun Gong movement in which the plaintiffs in  
2 that case made essentially the same argument: Chinese officials  
3 are violating Chinese law in repressing the Falun Gong, a  
4 religious dissenting movement.

5 The court in that case, to be sure, it was a Northern  
6 District of California case, but that, that court said  
7 notwithstanding that, it's quite clear that the officials that

8 were carrying out these alleged actions or atrocities were  
9 carrying out or furthering Chinese government policy, and nowhere  
10 in any of the plaintiffs' moving papers do they somehow state that  
11 my client, General Samantar, or Mohamed Ali Samantar, was somehow  
12 running some kind of rogue operation that was contrary to the  
13 intent, purpose, and policy of the Somali government, and  
14 therefore, that argument is unavailing.

15 THE COURT: well, again, I think that's again too  
16 wrapped up in fact. I am not an expert on Somali history or  
17 Somali law. I have at this point I don't feel a sufficient record  
18 as to what was or was not within the context of Somali law at that  
19 time. There's even a question in my mind as to the relationship  
20 of the United States government to that government at that time,  
21 all right?

22 Those are fact issues that may ultimately resolve the  
23 case at summary judgment but not at this early stage. So the  
24 motion is going to be denied, again without prejudice to the same  
25 issues being raised in a context where there's more meat on the

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1 bones, so to speak.

2 MR. DRENNAN: I understand. And again, we will  
3 respectfully note our objection. Thank you, Your Honor.

4 THE COURT: I mean, there's also an issue about, you  
5 know, vicarious --

6 MR. DRENNAN: Exception.

7 THE COURT: -- vicarious litigation.

8 I mean, you know, again, the United States under section  
9 1983, for example, we have a body of case law in this country that  
10 the head of an agency -- of a government agency is not normally

11 personally liable for the actions of the underlings. That's a  
12 factual issue. A similar kind of analysis would have to be done  
13 here as well.

14 And on the political question doctrine, again, I'm not  
15 going to grant a motion to dismiss at this point. All of these  
16 issues, while they are legally intensive issues, also have to be  
17 resolved in my view in the context of a better factual record than  
18 what we have at this point.

19 So the bottom line is the motion to dismiss is denied  
20 without prejudice, and if we haven't already issued a scheduling  
21 order -- have we issued one yet?

22 MR. DRENNAN: No.

23 THE COURT: One will be issued this week, and you're off  
24 and running in that respect. Thank you.

25 MR. DRENNAN: Thank you.

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1 MS. FAIN: Thank you, Your Honor.

2 (Which were all the proceedings  
3 had at this time.)

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CERTIFICATE OF THE REPORTER

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

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/s/  
Anneliese J. Thomson

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