ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., Petitioners v. MARIE LUCIE JEAN, ET AL.

CASE NO: 89-601

PLACE: Washington, D.C.

DATE: April 23, 1990

PAGES: 1 thru 39

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., Petitioners

v. : No. 89-601

MARIE LUCIE JEAN, ET AL.

Washington, D.C.

Monday, April 23, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

IRA J. KURZBAN, ESQ., Miami, Florida; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 89-601, the Commissioner of the -- Immigration and Naturalization Service v. Marie Lucie Jean.

Mr. Larkin.

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE PETITIONERS

MR. LARKIN: Thank you, Mr. Chief Justice, and may it please the Court:

The Equal Access to Justice Act generally requires the United States to pay reasonable attorneys fees to a prevailing party in a non-tort civil action if the position of the United States is not substantially justified. The question in this case is whether the substantial justification component of that statute applies at the fee stage of litigation, the so-called fees for fees question.

For three reasons we believe that it does. First, the fee stage of the case is part of the overall civil action. Indeed, if the fee stage of a case were not part of the civil action, then a prevailing party could not recover attorneys fees for that phase of a lawsuit at all.

Second, Congress limited the liability of the United States for attorneys fees to those instances where the position of the United States was not substantially justified. Nothing in the text of the statute renders the United States automatically liable for attorneys fees at any stage of the lawsuit, at the merits or at the fee stage.

And third, the best reading of the text of the act, and the one that best serves its purposes, is that the substantial justification requirement applies at the fee stage of a lawsuit.

The fee stage and the merit stage are conceptually distinct, the legal issues involved are quite different, and the United States can and often does take different positions in fact and law at each stage of a lawsuit.

QUESTION: Well, what is there in the statute which justifies our making the distinction between the merits stage and the fee stage? You have mentioned fee stage very adroitly now six times, I've noticed. Aren't we going to hear that there is no basis for that dichotomy?

MR. LARKIN: No, Your Honor, it is that point where the parties really disagree, and it is that point that I was about to address right now. Let me do so.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And let's start with the text of the statute. And when you look at the statute we think you first have to look at the forest and not just the trees. The reason is the very existence of an attorneys fees statute is significant. It modifies the American rule; it's a partial waiver of sovereign immunity. What a fee statute does is create a new cause of action for a plaintiff and impose a new form of financial liability on the United States.

In fact, the version of Section 2412 of the Judicial Code that existed before the EAJA was adopted expressly exempted attorneys fees from the costs that could be awarded against the United States in a lawsuit. The statute itself, therefore, creates an entirely new claim that is separate from the dispute on the merits. Now that is not, we think, a novel proposition. This Court's cases, beginning with its 1982 decision in White v. New Hampshire Department of Employment Security, have recognized that the fee stage of a lawsuit involves different issues, and is --

QUESTION: Mr. Larkin, can I interrupt with something that ran through my mind? Supposing you have a case in which there is quite a difference between the liability issues and the remedy issues, and you have two separate stages, liability and remedy. And it is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

determined that your position on liability was not substantially justified, but there were substantial merit to your objections to the remedy. Would you -- would you just get fees for the liability part of the lawsuit?

MR. LARKIN: Well, that is one way to break the statute down. It would be to decide that the merits and -- excuse me, the liability and relief stages are discrete. And if the United States was not substantially justified at one stage but was at the other, then a party would get attorneys fees only for that stage where the United States was not substantially justified.

There is an even simpler way to break down the statute if you wanted to. What you could -- if you look to the statute it requires a party to file a fee request within 30 days of the entry of a final non-appealable judgment. You could draw the first line right there.

QUESTION: I know you could draw the line either of the ways. What is your position on the question of differentiating between merits and remedy?

MR. LARKIN: Well, in most cases there are not going to be a difference.

QUESTION: If cases are --

MR. LARKIN: The one -- there is -- there will be a category of cases where there is a difference, and that is this category. If a lawsuit ends in a settlement

-- and the statute uses that term to describe when a lawsuit ends, so it contemplates that a lawsuit can end in a settlement. The settlement may be a consent decree. The consent decree may contemplate that there is future litigation down the road over questions such as whether the United States lived up to its obligations under the decree, whether the decree should be modified or whether the decree should be entirely vacated.

In that sort of circumstance you have a relief part of the action, if you will, that extends well into the future. Generally we think you can collapse the two, because in the vast majority of cases what a person is going to be claiming is, for example, an entitlement to benefits that were wrongfully withheld. When the United States pays over those benefits, that's the end of the case as far as what that party was trying to get.

Where you have a lawsuit that is going to extend into the future, for example in a prisoners lawsuit where he claims that the law library at a Federal prison was not adequate and a consent decree is entered, you are going to have then litigation extending into the future. And we think in that case you would have perhaps three lines, not -- not the two.

QUESTION: But I still don't think I have an answer to my rather simple question. Supposing you have a

claim for Social Security benefit or something like that, and there is a big fight about liability, and on that position the judge says your position was not substantially justified. But you also have a dispute over the amount of benefits, maybe you get credit for past months or you don't -- you often get that kind of a dispute. And on that issue the government's position was substantially justified. Does the plaintiff get fees for that part of the litigation?

MR. LARKIN: We -- we think that if we were substantially justified in that sort of circumstance on the remedial stage, you wouldn't get fees for that part. But if the Court found that that was too complicated and the Court wanted to collapse the two --

QUESTION: But your position is anything that is severable as to which you have a substantial -- substantially justified position, no fees as to that phase of the litigation.

MR. LARKIN: Yes. But if the Court found that -- like I say, if the Court found that that was too complicated, it could collapse the two into one, draw the first line once the final non-appealable judgment is entered, and consider everything up to that point.

QUESTION: What do you mean could? Could as a matter of law, or -- or -- I mean -- are you saying we

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

could adopt a different legal rule?

MR. LARKIN: Yes. Because --

QUESTION: Or are you saying that it's up to the discretion of the -- of the district court to decide whether it is going to do the one or the other?

MR. LARKIN: The former.

QUESTION: Okay.

MR. LARKIN: The legal rule would -- in that case would rest and give primary emphasis to that portion of the statute which says the fee request has to be made once the final non-appealable judgment is entered. That's an interpretation of the statute, and that is a legal rule. It wouldn't simply leave it up to the discretion of the district court.

QUESTION: I would think Hensley would -- the Hensley case would support some sort of distinction whether or not you make a formal break down between two sections of the case. Doesn't Hensley say that the fee award, even to a prevailing party, has to be tied to the parts of the case in which the prevailing party actually won?

MR. LARKIN: Yes, Your Honor, and Hensley, as we explained in our opening brief, would be authority for looking at the statute that way. The prevailing party inquiry that is made under Hensley is the one that is

normally made under most fee statutes.

This statute is unique. It also adds not only a prevailing party -- not just a prevailing party inquiry, but it has a substantial justification inquiry. And we think the statute can logically be read so that the two should be made virtually simultaneously. You can apply the two to the same stages of a lawsuit, and therefore you could decide whether someone prevailed at a particular phase, and even if they did, whether we were nonetheless taking a reasonable position at that stage, either the agency or the United States in court.

And specific provisions of the act we think also show that the attorneys fee stage is clearly a separate stage of the lawsuit. Before a court can award attorneys fees it has to make an inquiry into a variety of different issues that arise only at that stage. Those questions typically involve the inquiry whether or not a party was a prevailing party, whether that claimant is eligible for a fee award, whether the number of hours that were spent on the case were adequately documented and are otherwise reasonable and whether there is present in the case a special factor justifying an award of fees in excess of the fee cap, which, due to inflation, is now about $100 an hour.

Even if the only inquiry that the court makes at

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the fee stage is whether the position of the United States was substantially justified, that inquiry, too, is distinct from the one that is made at the merits. As the Court held in the Pierce v. Underwood case, the question at the merits is whether the government was correct, while the question under EAJA at the fee stage is whether the government's position, although incorrect, was nonetheless reasonable.

QUESTION: Mr. Larkin, what do you do about the perpetual motion objection that is made here by -- by the respondent?

MR. LARKIN: Your Honor --

QUESTION: That is to say it will never end. I mean, if you get the fees on this basis, then you are able to argue again that whatever fees are awarded below were on the basis of a reasonable opposition by the government. How does it ever end?

MR. LARKIN: Your Honor, my answer to that is a practical one. That in the vast majority of cases a court is going to be able to decide all of those inquiries at one time. It will be able to decide whether a plaintiff was a prevailing party, whether the United States was substantially justified, if not, whether the inquiry into the hours and fees should be done and whether the fees requested are reasonable, and whether the position the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

United States took at the fee stage was also reasonable. Now, that problem --

QUESTION: What court can decide that all at once? The district court?

MR. LARKIN: The district court.

QUESTION: The district court.

MR. LARKIN: In a lawsuit that begins in the district court, the district court can make that inquiry. It can make each of those, and it can then lay those out, whatever determinations it makes --

QUESTION: Fine.

MR. LARKIN: -- for the court of appeals.

QUESTION: Right.

MR. LARKIN: The court of appeals will then be able to look at all of those at one time. And that, I think, in the vast majority of cases is what is going to happen. Even in the circuits that object --

QUESTION: Well -- well -- but, excuse me. But the court of appeals looks at all of that, but there is also the question of the fees for the appeal. Right?

MR. LARKIN: If -- if the court of appeals goes through all of those inquiries and rules against us on every one --

QUESTION: Right.

MR. LARKIN: -- what is left at that point is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the question of whether or not they spent a reasonable number of hours on the appeal. And that, we think, is going to be a very small matter. Because if you assume that the parties are acting in good faith, the only inquiry at that point a court has to make is whether or not they spent a reasonable number of hours.

QUESTION: Oh, there -- there is no inquiry as to whether your appeal was reasonable?

MR. LARKIN: Well, if the court of appeals concluded --

QUESTION: I mean, they could find against you even though you were reasonable.

MR. LARKIN: Well, that's right. I'm saying if the court of appeals concluded, in a case where we took an appeal --

QUESTION: Right.

MR. LARKIN: -- that our position --

QUESTION: Was wrong.

MR. LARKIN: -- was wrong, and we were unreasonable in taking the appeal, then the other side would be entitled to fees in the court of appeals, and the question would just be a reasonable number of hours.

QUESTION: Okay. And the court of appeal has -- has an obligation to decide both of those issues?

MR. LARKIN: If the -- if the court of appeals

rules against us and says they are eligible for fees, the court of appeals can then ask the parties to submit the number of hours they reasonably spent on the appeal.

QUESTION: Suppose the court of appeals doesn't say anything? It just -- just says you are wrong, finds against you on the appeal.

MR. LARKIN: Well, then the other party is certainly going to file a request. And so --

QUESTION: Before the district court.

MR. LARKIN: No, or before the court of appeals. We think before the court of appeals would be the more natural way to do it. Because, for example in the Seventh Circuit case that rejected the automatic rule, that was a case where the decision was from the NLRB to the court of appeals.

Now, there was no district court in that context. The request went back to the court of appeals. And the court of appeals had to make this sort of inquiry. Now, the court of appeals there rejected the automatic rule and found that we were substantially justified in taking the position that we did.

QUESTION: Is there any question involved here of fees on appeal?

MR. LARKIN: Well, the narrow question that the court of appeals addressed in this case really just dealt

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

with the fees in the district court, because there haven't been any calculation yet or anything made to fees on appeal.

QUESTION: So we are talking about fees for fee litigation in the district court for work done in the district court.

MR. LARKIN: Correct. That was the holding under the facts of this case.

QUESTION: May I ask --

QUESTION: And you conceded, I take it, or you concede in your brief that the initial work that the prevailing party does to calculate its fees and to make its motion to the district court is compensable.

MR. LARKIN: Correct. We thought that that was a reasonable approach to the statute --

QUESTION: Well, if -- if -- if you say that there are these discrete stages, how does your concession square with your argument that there are discrete stages?

MR. LARKIN: Well, that -- that serves as the bridge from the merits to the fee stage. If we are not substantially justified in the merits, then they are entitled to an award of attorneys fees for the merits.

QUESTION: And they are entitled to all of the time they expend reasonably in compiling their hours and making their fee request.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: I didn't know you conceded that. Do you?

MR. LARKIN: Well, what we said was --

QUESTION: Isn't that a fee on a fee that you don't want to pay?

MR. LARKIN: No, no. It is not a fee for the litigation at the fee stage. It is just a reasonable amount of hours that someone spends putting the fee request together.

QUESTION: Well, why isn't it a fee on a fee?

MR. LARKIN: Well, if they are entitled to fees on the merits, we thought that that was best seen as part of the merits. Now maybe we were wrong. I mean, we conceded it, but it is not a question of fact, it is a question of law. And if you think we were wrong, I don't think --

QUESTION: Well then, what is, what is wrong with -- what are you complaining about now?

(Laughter.)

MR. LARKIN: What we're complaining about is this. When the United States receives a fee request you have to take a position on that request. And any further litigation, we think, from that point on, if we are reasonable in the positions we take, should not be paid entirely by the government for both sides.

Now, oftentimes if the request is reasonable the government wouldn't oppose it, and there wouldn't be any fee litigation. But it is our position that if there is litigation over the amount of fees someone claims, that that is litigation at a divisible, discrete and separate portion of the lawsuit, and the substantial justification requirement --

QUESTION: Yes, but --

MR. LARKIN: -- has to apply, because it's the only requirement that there is in the statute, and because the Congress required -- limited the waiver of its sovereign immunity to situations where we were not substantially justified.

QUESTION: But, Mr. Larkin --

MR. LARKIN: We don't think there should be an exception, in other words, just for fee litigation.

QUESTION: Well, what if you -- what if you challenged the number of hours or the rate that is to be applied, and the district court thinks your position is substantially justified, but just plain wrong? Now, I would -- under your concession I would think they would be entitled to fees for that time and effort spent against your position.

MR. LARKIN: No, no. What the concession, let me explain, and perhaps maybe we made it too readily, was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that a reasonable number of hours spent preparing the fee request would be compensable because it is part of their case on the merits. It is really a bridge between the merits and the fees --

QUESTION: But you don't think they would be entitled to fees for defending that submission?

MR. LARKIN: If we are substantially justified, they are not entitled to fees for defending that submission. That is our position.

QUESTION: What if they -- but if you weren't substantially justified?

MR. LARKIN: Then they are.

QUESTION: Just like any other --

MR. LARKIN: That's right. The reason is Congress chose that approach because --

QUESTION: Well, what about you challenge, you say that you challenge the fee because you think on the merits you were substantially justified, and the court says well, you were, but you are wrong.

MR. LARKIN: Then they --

QUESTION: You say no fee?

MR. LARKIN: Then they don't get a fee at all. If we were substantially justified on the merits, then --

QUESTION: No, no. I see. No fee at all then, on the merits.

MR. LARKIN: That's right. That's right.

QUESTION: I am still puzzled about this bright line, because it seems to me that there are fee requests and fee requests. Some are rather conclusory and some are very detailed. And if you got a fee request that was very, very detailed, took many, many hours to get it together, you would say that was compensable. But if they send in one that just kind of in general described what the various associates had done, and without -- and you thought you had to take their depositions or do discovery to find out exactly what was covered, is that compensable or not, responding to your very reasonable inquiries about we want a little more detail here?

MR. LARKIN: No, if -- if -- that would not be. Particularly if you have an outstanding rule of law that says you have to itemize and adequately document your request for fees. Suppose the rule in the circuit is --

QUESTION: So what you do, then, you spend lots and lots of time itemizing and documenting so you are sure nobody is going to raise any questions about the form of your submission, because you know you will get paid for that.

MR. LARKIN: Well, if -- and if that is what happens, then that should simplify the litigation over this matter. If the rule in the circuit is you have to

with specificity itemize and document your requests, then a party who follows that rule will simplify matters for the district court. If the rule in the court is you can't just submit a request that the lawyers in my firm spent 100 hours on this case --

QUESTION: Without the -- I see.

MR. LARKIN: -- then, if they -- if they do that, then we are reasonable, because they are not following the law in that circuit.

QUESTION: May I ask a question? How does this normally work in the district court? Does the district judge combine all the issues in one hearing, or will they sometimes decide I'd better determine -- make the substantial justification determination first before I spend a lot of time worrying about hours and rates, or do they do it all at once?

MR. LARKIN: I'm not sure whether there is any uniform rule on that. It may turn on whether or not the case involved primarily a legal issue --

QUESTION: Because it would seem to me that if you have made that determination, then you know you are going to get fees and you would pay them. But if you haven't made that determination, there may be a lot of waste time. Well, anyway, I just --

MR. LARKIN: It's possible. And if a court

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

thinks that there's going to be time wasted, then it -- a district court, which is certainly interested in processing its cases efficiently, will be able to do so in that type of manner. If the substantial justification question is a question of law that can be examined by looking at a statute or some other cases, the district court might believe that is the way -- the best way to start out. Once I have made that inquiry, that may end it. The court may also say but to be safe I may also want to look at some of the other objections in order to avoid having to do this again.

QUESTION: Well, now the time that is compensable for preparing the fee request, suppose some of that time is devoted to research to develop the argument that there was no substantial justification? That's part of your presentation. You have got so many hours, and the reason it wasn't -- I mean, your fee application ought to cover that too. Is that time compensable?

MR. LARKIN: That would be, under the way we've looked at the statute.

QUESTION: So a lot of their research and work on the substantial justification issue would be compensable under your bright line.

MR. LARKIN: They only have 30 days to do it, so it is not as if someone can prepare, you know, the same

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

way that you can for litigation on the merits. And perhaps if they spend that time at the outset that may reduce the need for litigation further down the road.

But if they decide to present a novel claim, and we had some in this case. The award in this case of attorneys fees was $1.2 million. It is one of the largest attorney fee awards that was ever handed down under EAJA. And the district court gave Respondents a 15 percent enhancement above their hourly rates, which in some cases were already above the cap set by the statute, because of factors such as the emotional hardship suffered by Respondents' counsel. Not by Respondents, but by Respondents' counsel.

Now, we thought we had a reasonable objection to an enhancement on a basis like that. And it was our -- and matter of fact, not only did we think we were reasonable, the court of appeals agreed with us.

So it is our view that the Congress did not intend to chill the government from taking those sorts of positions. I mean, the reason that it adopted the statute the way it did was to serve two masters. It wanted on the one hand private parties to be able to vindicate their rights in court, and on the other hand to ensure that it wouldn't chill legitimate exercise of government enforcement responsibility.

Well, one of the responsibilities the government has is a fiduciary duty to the agency involved, from whose budgetary appropriations EAJA awards are made --

QUESTION: Mr. Larkin, you are going to do it issue by issue? I mean, that sounds like a pretty reasonable objection that you described, especially since you won on it, but maybe you took some other unreasonable -- while you were at it, maybe you objected unreasonably to some other of the elements of the fee award. Now, would the time spend defending the unreasonable objections be compensable? In other words, are you going to divide up the whole fee appeal into its various issues?

MR. LARKIN: You could. There are two ways of doing it. That would be one way, which is consistent with what the Chief Justice mentioned is the prevailing party approach under Hensley. I mean, if they don't prevail on an issue, they shouldn't be entitled to fees for litigating that issue at all. And you could, therefore, break it up that way.

Another way to do it is -- would rely on the sort of substantial justification in the main approach that Your Honor wrote about in the Underwood case. What you would do is look to the issues where we lost overall and see whether we nonetheless overall had a reasonable position.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Now that -- how you conduct that inquiry is not before the Court in this case, and the lower courts really haven't spent a great deal of time discussing it. All you have to decide here is that we are allowed to make an argument that we were substantially justified, that we were reasonable at the fee stage. How you want to break it down doesn't have to be decided here, but there are, as I said, those two approaches.

QUESTION: Well, I suppose it could be that the time in litigating the government's objection to fees on the ground that your position was reasonably justified, it could be that the time litigating that might exceed, in terms of attorneys fees, might exceed any recovery that --

MR. LARKIN: Well, it would be an unusual case for that to happen. Perhaps in a case like this --

QUESTION: Well, it may be, but I suppose if, if the -- suppose there weren't any recovery. Suppose it was an injunction you were after.

MR. LARKIN: Well, it -- there wouldn't be any dollar award in that case to a party.

QUESTION: Exactly.

MR. LARKIN: But --

QUESTION: But there would be an attorneys fee.

MR. LARKIN: There would be an attorneys fee.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: If you were not substantially justified.

MR. LARKIN: Correct. If we were not substantially justified at the merits, then we have to pay their attorneys fees for the merits.

QUESTION: And if they are not entitled to fees for proving that you were not substantially justified, why, every dollar they pay their attorney for that litigation comes out of their own pocket.

MR. LARKIN: Well, they are entitled to --

QUESTION: And I would think -- don't you think that Congress had some idea of making a recovery -- rendering the plaintiff cost free for attorneys fees if he prevails and the government's position was untenable?

MR. LARKIN: Well, if our position at the fee stage is, as you put it, untenable --

QUESTION: No, on the merits. On the merits.

MR. LARKIN: Oh, well, if our position on the merits was untenable, then they will get an award of fees for the time they spent to vindicate their rights at the merit stage.

QUESTION: But not at the time -- not if you oppose their submission and say that you were substantially justified, and then thereafter you litigate like mad. And every -- and you say no money for that. No

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

fee for that.

MR. LARKIN: Correct. At the fee stage.

QUESTION: And so every dollar they pay their attorney to oppose your submission is out of their pocket.

MR. LARKIN: For the fee litigation, yes. But we are not saying that if we --

QUESTION: No, no. For the --

MR. LARKIN: For the merits? No, Your Honor.

QUESTION: Every dollar that they pay their attorney reduces in effect their recovery on the merits.

MR. LARKIN: That -- that's correct. But that is, we think, the con --

QUESTION: Don't you think Congress had some idea that it ought to be cost free to them?

MR. LARKIN: No, Your Honor. This statute is unique. In the other statutes, like 1988, like Title VII, in the other attorneys fees statutes, you don't have a substantial justification requirement. Here you do. That makes this statute different, and we think that is why, in this type of context, you should have that type of rule.

QUESTION: Mr. Larkin, when you are -- what you are proposing is that the standard where -- where you have lost on the merits, but you assert that attorneys fees should not have been awarded because although you lost, you were substantially justified. What you are proposing

is that the standard that be applied is whether you were substantially justified in saying that you were substantially justified. Isn't that right?

MR. LARKIN: And that can --

QUESTION: You think the judicial mind can entertain this concept?

(Laughter.)

MR. LARKIN: Yes. It's like saying -- it is the same as the inquiry now a court has to do, in a way, as to whether we were substantially justified, where we lost under the APA, and the APA standard is whether we were arbitrary and capricious.

But let me give you an example. Suppose the court of appeals rules against us on the substantial justification issue by a two to one vote. It seems to me that our position that we were reasonable is evidenced by the fact that one of the judges in the court of appeals voted for us. But this whole type of inquiry that you mention is not, I think, going to happen that often. What is going to happen more often --

QUESTION: Well, but if that is true, Counsel, the district judge was also reasonable in making the original fee award, so far as appeals are concerned.

MR. LARKIN: I am not saying you can just tally up the numbers on each side, but what I am trying to do is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

give you an example of how that can occur. But I think it is more important to keep in mind cases where someone asks for award in excess of the statutory cap. The problem you mentioned won't happen there.

If I could reserve the balance of my time.

QUESTION: Very well, Mr. Larkin.

Mr. Kurzban.

ORAL ARGUMENT OF IRA J. KURZBAN

ON BEHALF OF THE RESPONDENTS

MR. KURZBAN: Mr. Chief Justice, and may it please the Court:

I would like to begin by taking up Justice White's point on the fees accrued in litigating the fees, because that goes to the heart of what this statute is about.

Congress clearly intended to make fee litigants whole, to the extent that they could under this statute, by awarding them their fees not only for the underlying merits, but for the fees in litigating the fees. Not to do so would undermine the purpose of the act, because it would establish an economic deterrent that this Court noted in Sullivan v. Hudson should not exist.

In this case, and our case here I think amply demonstrates the problem, we need to look no further than the statute itself. The statute talks about substantial

justification and the position of the United States in terms of the government's underlying conduct, as well as their litigation position. The government studiously avoids the 1985 amendments to this act, because those amendments make it crystal clear that the government's position is not tenable here.

In our case, in 1981 the government engaged in activity by incarcerating 2,000 people, and then not publishing a regulation that their own counsel advised them to do a the agency level, clearly were not substantially justified. We then have spent, since 1982, seven years, almost eight years now, litigating solely the fee issue. Congress could not have intended, and clearly said so in the 1985 amendment, to allow us fees for the underlying litigation, but then allow the government to --

QUESTION: Well, Mr. Kurzban, wasn't our decision in Commissioner against Jean several years ago, wasn't that part of this case?

MR. KURZBAN: Yes, Your Honor.

QUESTION: Well, that wasn't fee litigation, was it?

MR. KURZBAN: No, Your Honor, it was not.

QUESTION: So the merits have also been litigated during this period of time.

MR. KURZBAN: That's correct, but the government's position has not been advanced one iota since that litigation. Because the reality is that the Haitians were released, and the government came to this Court, and in Your Honor's opinion you noted specifically that the government conceded in this Court, and the dissent noted that for the first time the government conceded that --

QUESTION: Just a minute, Mr. Kurzban. The reason I asked you the question was because I got the impression from what you've said that all the litigation in this case since 1981 had been over fees. And I thought that was a mistaken impression.

MR. KURZBAN: Oh, I am sorry, Your Honor. But the fee litigation did begin in 1982, and we did file our first fee petition in 1982. It is true that there was other litigation as well, but they -- they went forward simultaneously. And it is also true, and the point that I wanted to make is that that other litigation would not have been necessary if the government had made the concession that they made in this Court, which is that their regulations and statutes were neutral and non-discriminatory.

The government's argument also, in many respects, tortures and certainly strains the language of this act. To take Justice Kennedy's point, there is

nothing in this statute that indicates that fees should be separated into different aspects of the litigation. The statute talks of fees in the civil action.

To reach the government's position in this case, this Court would have to amend the statute not once, but twice. You would have to amend it to say that fees and substantial justification are determined at different stages of the litigation, which the statute does not say, and you would have to read out, as the government does in their brief, the question of substantial justification with respect to the government's underlying action.

QUESTION: Mr. Kurzban, under your view of the statute, do you nonetheless concede that under Hensley the district court has considerable discretion about allowing fees at all, for instance for losing claims, if several claims are made?

MR. KURZBAN: Absolutely, Your Honor.

QUESTION: And also, discretion to determine what is reasonable for attorneys fees, and perhaps to adjust within that category.

MR. KURZBAN: Absolutely. And that is why we think that the government's concerns here are purely hypothetical. The government's description of absolute fee shifting, the government's description that they would have to pay untold fees, is completely unreasonable and

unrealistic. What we are saying is substantial justification, consistent with the statute, like prevailing party in Hensley, is a threshold determination. Once that determination is made, just as in Hensley, then it's a matter of the district court's discretion as to what is a reasonable fee.

And on the facts in this case, for example, to the extent that the government won in the court of appeals and to the extent that we then submit other applications for fees for those, the court -- the district court judge can take that into consideration and make a determination that we are not entitled for X number of dollars for pursuing one issue that the government won on, but we are entitled to others.

What we are saying is not that the district court doesn't have broad discretion, because I think that was the point of the statute, but that the government shouldn't be allowed to come in and allege different issues, as they are suggesting here, at different phases, the substantial justification threshold. They have all the protection they need under a Hensley rationale with respect to what a reasonable fee is.

And the statute specifically contemplates that, because the statute says in the appropriate sections, in Section (1)(C) and in Section (2)(A), that plaintiffs are

entitled to a reasonable fee. In Section (1)(C), to the degree that the plaintiffs are unreasonable in prolonging the litigation, at whatever phase of that litigation they are involved in, they are entitled to no fee. So that the district court is intended to be that party to make these decisions. And I think it is clear --

QUESTION: Mr. Kurzban, how, what -- let's take the government's doomsday case, where -- where you come in with a fee request that is plainly in excess of the statutory limit, and there's no justification. And the government objects, but the district court nonetheless grants it. All right? And then that is reversed on appeal. What -- what fees would you be entitled to?

MR. KURZBAN: Under Hensley rationale, we might not be entitled to the fees for the appeal.

QUESTION: Well --

MR. KURZBAN: And we might not be entitled to the fees for pursuing that issue.

QUESTION: On appeal.

MR. KURZBAN: On appeal, and in -- and in the district court we might not be entitled to those.

QUESTION: But then -- but then you have already divided the litigation into two pieces, which you say is a no-no.

MR. KURZBAN: No, Your Honor. What we are

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

saying is that substantial justification is a threshold. We have met that, because you look at the agency's underlying action. Once that is met --

QUESTION: You get all your fees.

MR. KURZBAN: No. Then the determination is left to the district court as to what a reasonable fee is. Within the rubric of a reasonable fee, as this Court said in Hensley, they can take into consideration whether or not we prevailed, as you are suggesting, on an issue or not.

So the government's worst case scenario is met by the fact that the district court judge, or if he is reversed by the court of appeals, the court of appeals can say, under Hensley, we are entitled to no fees at all for pursuing that particular issue.

QUESTION: Well, if the government then says well, we oppose this fee request because we think the hours spent were excessive, or the rate requested is too high, and the district court agrees with them, you're not entitled to fees for defending your submission?

MR. KURZBAN: On those issues, under Hensley, under a reasonableness test, yes, we would not be entitled to it. And I think that is what really meets all the government's concerns here. And those concerns are also consistent with the legislative history of this act. And

I think the clearest example of that, Your Honors, is the case with respect to litigating the fees. The average case, the actual case that comes before the courts is where a fee is generated of only $4,500.

The government, I think, as Justice White was pointing out, the government can then litigate. And we assume the government in many instances may be reasonable. They may lose, but they are very good lawyers, they can fashion very reasonable arguments. And in the process of doing that they can run up enormous fees, far beyond the average fee in an Equal Access to Justice Act case. And that fee is $4,500; 90 percent of the fees in Equal Access to Justice Act cases are less than $3,000.

So if the government has an interesting issue, as they did, for example, in Sullivan v. Hudson, where the lawyer as a matter of record had to drop out of the case, because the government took that all the way to this Court, where the government has an interesting issue and they wish to pursue it all the way to the Supreme Court, the fee litigant is going to be discouraged from taking those kind of cases.

And the thought of Congress here is we want to encourage people to take cases. We want to make sure that they don't feel that there is a tremendous risk that down the road the government will litigate against them for --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

for years to come, as they have in this case, and -- and wind up with enormous fees that the party cannot pay.

QUESTION: Suppose we thought that there was something to the government's submission that fee litigation really is a separate lawsuit. And if you start out from that position, doesn't everything the government has submitted here follow?

MR. KURZBAN: No, because the statute says that it's fees in the civil action. And the government concedes --

QUESTION: Well, I know, but I am just assuming that -- I guess we disagree with you on that, that fee litigation is a waiver of sovereign immunity really, involves a waiver of sovereign immunity. You ought to construe it strictly. And suppose we say this is -- it's just like filing a separate lawsuit against the government. Suppose we agree with the government to that extent.

MR. KURZBAN: Okay. Well, I think first of all the government doesn't take that position. They say that --

QUESTION: I believe they just said it right here in Court.

MR. KURZBAN: Well, they take the position that the fees are fees in the civil action. So to the degree

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that they separate out, they are talking about only separating out the fees for litigating the fees. They are not talking about separating out the fees for the underlying merits of the case. So it's not clear that any of those analogies --

QUESTION: Well, I agree. I agree, but we are talking about whether there are fees on fees. And if this is a separate action for fees, then the question becomes whether you are entitled to fees during that litigation.

MR. KURZBAN: Well, assuming the hypothetical, and obviously we don't want to concede that, but assuming what Your Honor is saying is correct, I think the answer is that no, the substantial justification threshold would not apply, because it would defeat the very purpose of the act for the very reasons that you have suggested. Which is it would allow the government to litigate issues endlessly. It would give them a weapon that would serve as an economic deterrent for litigation.

I -- I'd like to address just one more point in closing, which is the Russell v. Heckler point, which the government suggests is a compromise position. We would submit to the Court that, as the government concedes that that position is not well grounded in the statute itself, this statute is absolutely clear, and technical defenses and Russell v. Heckler types of defenses are just

inapplicable. They are in effect an attempt to amend the statute. To amend the statute, number one, when it is not necessary, because Hensley and the reasonableness test address all those issues. But secondly, they are clearly an amendment of the statute because they allow the government to make certain litigation arguments separate from the agency's underlying conduct.

And the Court, in 1985 in -- I am sorry, the Congress in 1985 indisputably said that you cannot separate those; that you must look at the agency's underlying action; and that you can't let lawyers come into court, whether it is a technical defense, whether it's a Russell v. Heckler type of defense, whether it is any other kind of defense, and make the argument that because their litigation position is reasonable, that that is sufficient.

Thank you.

QUESTION: Thank you, Mr. Kurzban.

Mr. Larkin, you have three minutes remaining.

REBUTTAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE PETITIONERS

MR. LARKIN: And I will make only two points. First, the '85 amendment doesn't undermine in any way our interpretation of the statute. Congress addressed a problem in '85 dealing with the front end of litigation.

What we are dealing with here is a problem that arises at the back end. There is no logical reason to assume that Congress wanted the same answer to apply in both circumstances where there are different problems. And if anything, the 1985 amendment actually helps us in a way, because it indicates that there are two positions that have to be considered: the agency's and the lawyer's position that is taken in court.

The second point I would like to make is just that we think the statute has to be read so that the substantial justification provision and the civil action have to be read reasonably, because the statute uses them in the same sentence. If the fee stage is not part of the civil action, then they don't get fees for fees at all. If the fee stage is part of the civil action, then the substantial justification provision has to apply.

Unless the Court has any further questions, I have nothing further to add.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

The case is submitted.

(Whereupon, at 10:43 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 89-601

COMMISSIONOR, IMMIGRATION AND NATURALIZATION SERVICE ET AL. PETITIONERS, V. MARIE LUCIE JOAN ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lora M. May

(REPORTER)