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HLF DECISION: TERRORIST FINANCING VICTORY OR TROUBLING PRECEDENT FOR CHARITIES?

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A. INTRODUCTION

The U.S. Court of Appeals for the Fifth Circuit recently issued its long-awaited decision in the Holy Land Foundation for Relief and Development ("HLF") appeal[1] of the 2008 conviction of the organization and its principals in relation to charges of providing material aid and support to a terrorist organization (Hamas) and related charges. The convicted principals of HLF were sentenced to prison terms of between 15 and 65 years, and the organization, which was not represented at trial, had its frozen assets forfeited and was subject to a monetary judgement in the amount of $12.4 million. The December 2011 Court of Appeal decision upheld the jury verdict. This *Anti-terrorism & Charity Law Alert* summarizes the HLF appeal and the disconcerting public policy issues that could arise in relying on the HLF decision for the purposes of demonstrating a Canadian charity's non-compliance with anti-terrorism policies in Canada.

B. BACKGROUND TO THE HLF TRIAL

HLF, a Texas-based 501(c)3 organization established in 1988, was one of the largest Muslim charities in the U.S., whose object was to provide humanitarian assistance in Palestine. There is a lengthy history to the HLF case, as it dates back to FISA (*Foreign Intelligence Surveillance Act 1978*) warrants obtained against HLF in the early 1990s, which permitted the government to conduct clandestine wiretaps and physical searches

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[1] *United States of America v. Mohammad El-Mezain et al.*, No. 09-10560 (5th Circ. Dec. 7, 2011), available online at http://www.ca5.uscourts.gov/opinions/pub/09/09-10560-CR0.wpd.pdf.

against senior HLF officials. In December 2001, the U.S. Treasury Department, through the Office of Foreign Assets Control ("OFAC"), designated the HLF as a terrorist organization, seized its assets, and put the charity out of business. HLF unsuccessfully challenged the designation in federal court in the District of Columbia.

On July 26, 2004, a federal grand jury in the United States District Court for the Northern District of Texas indicted HLF and three of its former officers, a former employee, and a performer at fundraising events on charges of providing material aid and support to a foreign terrorist organization (Hamas), engaging in prohibited financial transactions with a Specially Designated Terrorist (Hamas), money laundering, filing false tax returns, and multiple conspiracy charges. The charges stemmed from HLF's donations of millions of dollars to local *zakat* (or "charity") committees that the government alleged were not legitimate charities and were only fronts for Hamas. The government's theory was that by providing charitable support to Palestinians in the West Bank and distributing humanitarian aid through those committees, HLF helped Hamas win the "hearts and minds" of the Palestinian people. The *zakat* committees were not and have not been put on the U.S. Designated Terrorist list and there was no allegation that HLF gave money directly to Hamas.

During the first trial, the U.S. government filed a pleading entitled "Trial Brief" outlining the scope of the alleged conspiracy and identifying the different types of evidence it would seek to admit at trial, as well as the evidentiary bases for the admission of that evidence. The government attached a list containing the names of 246 individuals and organizations the government identified as "unindicted co-conspirators". The government included this list so it could rely on any statements made by any of the individuals or groups as co-conspirator statements, pursuant to U.S. law.

The key factual issues at trial were (1) whether Hamas in fact controlled the *zakat* committees; and, if so (2) whether the defendants knew of the Hamas control and acted wilfully. The first trial produced a hung jury on most counts, acquittals as to one defendant, and no convictions. At a second trial before a different judge, the jury returned guilty verdicts on all counts. HLF was found guilty of giving more than $12 million to support Hamas and the five appellants face prison terms ranging from 15 to 65 years.

HLF did not have legal representation at either trial because its original counsel, who represented both HLF and the individual co-defendants, had to withdraw from representing HLF for potential conflict of interest

between the two. Because HLF is listed on the designated terrorist list, all transactions with it (including legal representation) are illegal since the Office of Foreign Assets and Control ("OFAC), a U.S. Department of the Treasury, would not authorize the release of HLF's blocked funds. This meant that counsel for HLF would only be authorized to represent HLF on a *pro bono* basis.

C. THE APPEAL

The convictions of HLF and its co-defendants were appealed to the Fifth Circuit Court of Appeals. The appeal contended that a number of reversible errors occurred during the second trial. These errors included: (1) violating the defendants' due process rights by presenting two witnesses, including a key expert witness, without requiring disclosure of the witnesses' names to the defense or allowing the witness to be seen; (2) admitting prejudicial hearsay, including testimony by a co-operating witness that was based entirely on newspapers, leaflets, the internet and talk amongst his friends, that Hamas controlled HLF and the *zakat* committees; (3) admitting documents seized by the Israeli military from the Palestinian Authority headquarters, which – based on unnamed "Western Sources," "Israeli sources," and "western security organizations" – state, among other things, that HLF is among Hamas' worldwide funding sources; (4) admitting documents, many of them by unknown authors, written before it was unlawful to support Hamas; and (5) failing to exclude inflammatory evidence, including graphic evidence of violence committed by Hamas, amongst other errors.

Because HLF was unrepresented at trial, the trial judge appointed counsel to represent it on appeal. U.S. prosecutors objected to the appointment of an Austin law professor to represent HLF, arguing that the professor had no standing to represent HLF because she had not obtained approval from former HLF organizers who are in prison following their convictions in 2008. The prosecutor suggested that HLF was represented through the trial by the arguments of the other defendants' lawyers, and that the lack of a dedicated attorney was a "harmless error". The Court of Appeal sided with the prosecution, dismissing HLF's appeal on December 7, 2011, upholding the 2008 convictions and sentences, for lack of jurisdiction, concluding that the trial judge was unauthorized to appoint counsel, thus making the appeal invalid. The court ruled also against the individual co-defendants finding that although the District Court had erred in admitting some of the new re-trial evidence, the court found that those errors were harmless because substantial other evidence supported the facts in issue.

D. REHEARING DENIED

On February 18, 2012, the Fifth Circuit Court of Appeals denied a request for a rehearing.[2] HLF and its leaders had filed petitions for re-hearing of their appeals, arguing that the court should grant a re-hearing because the case involved three legal questions of "exceptional importance"[3]:

1. Did the appeal judges apply the wrong "harmless error standard" to errors involving the admission of evidence and thus violate the appellants' Sixth Amendment right to have their guilt determined by a jury rather than by appellate judges, where it viewed the evidence in the light most favourable to the government; it ignored evidence presented by the defence, instead of considering the record as a whole; found the errors *per se* harmless because they affected issues on which the prosecution presented "sufficient" or "substantial" other evidence; and gave no weight to the government's use of the improperly admitted evidence. The defendants also argued that the Court overlooked that the four errors marked the principal differences between appellants' first trial, which did not produce a single guilty verdict on any count, and the second trial, which produced guilty verdicts on all counts.

2. Did the government's anonymous expert witness, whose name was withheld even from defence counsel, violate the appellants' Fifth Amendment right to due process and Sixth Amendment right of confrontation, particularly where the government had noticed another, named expert to cover the same subject matter, but elected to call the anonymous expert instead?

3. Should the Court abandon the "lawful joint venture" variant of the co-conspirator exception to the hearsay rule, which permits introduction of out-of-court statements based on the declarant being an agent of the defendant, because it is contrary to the language and legislative history of the rule, contravenes the directive of the Supreme Court and the Advisory Committee Notes to construe the rule narrowly, and undermines the reliability of the fact-finding process?

It is not currently known if any further action will be taken on this case.

[2] Centre for Constitutional Rights, http://www.ccrjustice.org/newsroom/press-releases/daughters-of-holy-land-five-respond-court-decision.
[3] Appellants' Joint Petition for Rehearing En Banc (Court File No. 09-10560, Filed 01/04/2012) at page i.

E. SOME TROUBLING ASPECTS OF THE TRIAL AND APPEAL

There are a number of troubling aspects of both the trial and the appeal, not only for U.S. organizations, but also for Canadian charities, as the Canada Revenue Agency ("CRA") has already demonstrated its inclination to use the HLF trial evidence and conclusions in its own audit process.

1. Unindicted Co-conspirators

The U.S. government provided no explanation or any evidence whatsoever for its inclusion of the 246 unindicted co-conspirators. After two different organizations complained about being included in the list of unindicted co-conspirators, the Fifth Circuit Court of Appeal ruled that the government should have originally filed the unindicted co-conspirators' names under seal and ordered the list sealed. The court found that no legitimate interest existed to justify publicly naming the two organizations as unindicted co-conspirators and that the government had less injurious means to accomplish its purpose.

Although the list has since been ordered sealed, the order has come too late to have any practical effect, since the list has already been reproduced on the internet, and as a consequence these 246 individuals and organizations have been unfairly described as unindicted co-conspirators on thousands of web pages, in books and in articles.

By naming these individuals and organizations as unindicted co-conspirators and failing to advance any evidence supporting this serious allegation, they have been denied the ability to face their accuser, defend their name and have a court determine the validity of the allegation based on well-established tests.

2. Failure to have Counsel

The Sixth Amendment confers the right to counsel and the right to confront evidence, a right that can only be asserted through counsel, since HLF is a charity and not a living person. The Court held that no corporate representative made a knowing, intelligent waiver of counsel on behalf of HLF, and as such the trial for HLF continued despite it having no counsel. The Court of Appeal noted that the appointment of counsel by the lower court was invalid. The Court of Appeal concluded that since the decision to appeal rests exclusively with the defendant, the defendant's counsel may not prosecute an

appeal without authorization from the defendant. Because HLF did not appoint counsel, but rather counsel was appointed for them, the Court of Appeal found that HLF was not able to consent to an appeal. This absence of authorization from HLF meant that the court of appeal had to dismiss HLF's appeal for lack of jurisdiction, upholding the trial court's convictions of HLF. The Court of Appeal apparently ignored the "catch-22" HLF was placed in when previous rulings held that the principals of HLF under indictment were not competent to effect waivers of conflict, and the OFAC designation of HLF as a terrorist organization effectively prevented the organization from operating and appointing individuals capable of giving instruction to legal counsel.

3. Reliance on Questionable Evidence

One of the many troubling aspects of the HLF trial is the U.S. government's heavy reliance on hearsay evidence, foreign intelligence, including military and police reports, translated interrogation transcripts and financial analyses, the disclosure of which is controlled by a foreign government.[4] The use of foreign intelligence certainly raises issues concerning methods of intelligence gathering, sources of intelligence and the reliability of the intelligence, including the translations.

The defendants were also denied access to all of the evidence against them. The defendants were only allowed to review unclassified recordings and transcripts of wiretapped communications that the government decided to turn over. Defence counsel, who had the proper security clearances, were also permitted to review the unclassified materials, but this proved fruitless as the legal counsel could not read or understand Arabic, and could not discuss the material with their clients.[5] The defendants were also denied access to the original FISA warrant applications or the orders issued by the Foreign Intelligence Surveillance Court ("FISC").

The Court also accepted evidence from two witnesses testifying under pseudonyms, preventing the defendants from effectively researching the backgrounds of the witnesses in order to cross-examine them.

[4] Greg Krikorian, "Questions Arise Over Case Against Islamic Charity; Federal prosecutors rely heavily on Israeli intelligence, court records indicate" in *Los Angeles Times* (June 18, 2006) Part A, p. 10.
[5] *United States of America v. Mohammad El-Mezain et al.*, No. 09-10560 (5th Circ. Dec. 7, 2011), at 65-66.

4. The Knowledge Requirement

The trial court's instructions to the jury did not require them to find that HLF and/or its leaders knew about Hamas' control of the *zakat* committees and intended that the donations they were raising were to support Hamas through the *zakat* committees. Since the *zakat* committees were not on the designated terrorist list and that there is no requirement to show knowledge of the designated terrorist connection, this renders charities vulnerable to criminal prosecution for unwittingly providing support to organizations that on their face are not identified by any government as having links to terrorism. This ambiguous result also raises significant questions about how much charities can rely on designated terrorist lists. Additionally, it raises concerns about the risks that are associated with funding local charities in international programs, since partnering with local groups is often considered a "best practice" for charities operating internationally.

5. Introducing Evidence with Tenuous Connections to the Charges

HLF prosecutors introduced evidence about Hamas violence, including testimony about Hamas suicide bombings, including an explanation of how suicide bombers choose their targets, carry out their plans, and prepare bombs to make them more lethal; testimony regarding Hamas's killing of collaborators with Israel; videotapes of demonstrators destroying American flags; videotapes of Palestinian children playing the role of terrorists in school ceremonies; and violent images of the aftermath of Hamas suicide bombings. This "evidence" was introduced, notwithstanding the fact that the defendants were not charged with planning or carrying out terrorist activities or directly supporting such activities. The Court of Appeal, however, concluded that evidence of Hamas violence served the probative purpose of providing context and explanation in the case, and to rebut defense theories that the defendants intended to support only charitable endeavors. The Court of Appeal noted with approval the U.S. Supreme Court decision in the *Holder v. Humanitarian Law Project* case, which recognized in part that money is fungible and that material support of a terrorist group's lawful activities facilitates the group's ability to attract funds, financing and goods that will further its terrorist acts.[6] Such recognition leaves charities in the untenable position of being exposed to charges of facilitating terrorism when their only intent is to provide humanitarian relief.

[6] 130 S. Ct. 2705 (2010).

F. CONCLUDING COMMENTS

Given the troubling aspects of the HLF decision, this is not a case that should be used as a precedent for Canadian charities, particularly given that the decision is based on standards that do not meet Canadian concepts of fundamental justice. This case is an example of how the threat of terrorism has caused governments to sometimes unnecessarily curtail individual civil liberties in the pursuit of collective security. The need to fight terrorism must be balanced by the need to preserve the rule of law in a free and democratic society and rights and freedoms should not be intruded on more than justifiably required. Cases such as this could deter legitimate and well-meaning charities from pursuing activities abroad, especially in conflict zones.

With the events of September 11, 2001 still fresh in the minds of most, it is acknowledged that counter-terrorism measures are a necessary element of governance for charities carrying on operations internationally. However, from a policy perspective, it is important to question whether the pervasive view that the charitable sector represents the "weak link" in the fight against terrorism is a relevant ongoing concern.