

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAY 9 1990

ROBERT L. HOECKER
Clerk

HASKELL LEVI CHAPOOSE, as Guardian Ad)
Litem for and on behalf of his minor)
children, to-wit: SHAUN THOMAS)
CHAPOOSE, JANAE LYN CHAPOOSE, DIXON)
LEVI CHAPOOSE, MICHELLE QUITTA)
CHAPOOSE, and CONNOR CHARLES CHAPOOSE;)
DORTHEA UNCA SAM GARCIA, as a Guardian)
Ad Litem for and on behalf of her minor)
children, to-wit: MAUREEN GARCIA,)
MURITA GARCIA, PHILLIPE THEODORE GARCIA,)
and LORA LYNN GARCIA, who are minors,)
and JOHNNIE CHRIS GARCIA, who is now an)
adult; MARIETTA CHAPOOSE REED, as)
mother of INA CHARLENE REED and LORI)
ANN REED who are now adults; and)
RAYMOND WISSIUP, as Guardian Ad Litem)
for and in behalf of his minor)
children, to-wit: RAYLENE JAMIE)
WISSIUP, RAYMOND WISSIUP II, and)
CYNIELLA MONDA RAE WISSIUP; et al.)
(class action),)

Plaintiffs-Appellees,)
Cross-Appellants,)

v.)

MANUEL LUJAN, Secretary of the)
Interior of the United States of)
America, PAT RAGSDALE, as Acting)
Assistant Secretary of the Interior,)
HAZEL ELBERT, as Deputy Assistant)
Secretary/Indian Affairs, and/or)
their successors in office,)

Defendants-Appellants,)
Cross-Appellees.)

Nos. 89-4037

&

89-4045

(D.C. No. 83-C-1145W)

(D. Utah)

ORDER AND JUDGMENT*

Before MCKAY, BARRETT, Circuit Judges, and KANE,* District Judge.

*Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

This appeal and cross-appeal concern an award of attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1986). This statute provides that "a court shall award to a prevailing party . . . fees and other expenses, . . . incurred by that party in any civil action, . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." Id. Once a court determines that these prerequisites have been met and that the EAJA claimant is thus entitled to an award for reasonable fees and expenses, it then determines the proper amount of that award based

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

on the amount and character of the work performed and expenses incurred.

In this appeal, the government defendants-appellants challenge only the latter determination, the amount of an EAJA award made to Haskell Levi Chapoose, as guardian ad litem for his minor children, and other Ute Indian children (the Children) who were the plaintiffs below. In particular, the government claims that the district court improperly awarded fees for work performed on claims on which the Children did not prevail and that it otherwise failed to account for various inadequacies and errors in the fees and expenses claimed by the Children. The Children cross-appeal, claiming entitlement under EAJA to fees and expenses incurred in first applying for and then defending their EAJA award. We affirm the district court's calculation of the Children's EAJA award as against the government's challenges, but reverse and remand this action to that court for determination of additional amounts due the Children for litigating the fee issue in this court and below.

Background

The events giving rise to these cross-appeals began in 1977 when the Tribal Business Committee of the Ute and Uintah Reservation, the governing body of the Ute Indian Tribe (Tribe), denied the Children enrollment in the Tribe because they did not possess 5/8ths Ute Indian blood. The Children challenged this determination in Ute Tribal Court and ultimately prevailed in their argument that their right to tribal membership was fully established under the Ute Tribal Constitution. The Children could

not enforce this right and enroll in the Tribe, however, until the Bureau of Indian Affairs approved the Children's enrollment requests. The Bureau of Indian Affairs (the Bureau) refused to do so on the ground that the 1954 Ute Partition and Termination Act, as amended in 1956, 25 U.S.C. § 677d (the Act), superseded Tribal requirements and established membership criteria for the Tribe that did not permit the Children's enrollment.

The Children challenged this result by filing suit against the Bureau and other government officials in the United States District Court for the District of Utah. In their October 11, 1983 complaint, the Children sought injunctive and monetary relief on the basis of the following six causes of action: Count I: injunctive relief preventing the Bureau from denying enrollment to the Children; Count II: damages for denial of the Children's liberty and property rights; Count III: damages for violation of the Children's civil rights; Count IV: damages for denial of equal protection; Count V: punitive damages for the government's "wanton and willful" misconduct and Count VI: attorneys' fees pursuant to "42 U.S.C. § 1983 of the Civil Rights Act, and/or any and all other applicable statutes and judicial precedents."

The government moved to dismiss the Children's complaint, and on September 18, 1984, the district court granted this motion with respect to the Children's civil rights claims, Counts II-V of their complaint, leaving only the enrollment and attorneys' fees claims before the court. In a Memorandum Decision and Order entered April 10, 1985, the court ruled in favor of the Children on Count I of their complaint, the enrollment issue, holding that

Congress intended the Tribe to retain control over its membership and that the Bureau's denial of Tribal membership to the Children on this basis was therefore plainly erroneous.¹ Chapoose v. Clark, 607 F. Supp. 1027, 1037 (D. Utah 1985). The court denied the Children's subsequent motion for attorneys' fees on the ground that they had failed to raise any legal basis for such an award other than section 1983, which was not applicable in this case after dismissal of the Children's civil rights claims. Order at 2 (June 21, 1985).

The Children appealed the court's dismissal of their civil rights claims and claim for attorneys' fees to this court. We affirmed dismissal of their civil rights claims, but remanded the attorneys' fees question to the district court for determination of whether the Children were entitled to an award under EAJA. Chapoose v. Hodel, 831 F.2d 931, 936-37 (10th Cir. 1987).

On remand, the district court determined that the Children were the prevailing party on their claim that the Bureau improperly interpreted the Act when it refused to allow the Children to enroll in the Tribe. Memorandum Decision and Order at 2 (Jan. 26, 1988)(January Order). It also found that the government's interpretation of the Act was not reasonable and hence was not substantially justified. Id. at 4; see Hadden v. Bowen, 851 F.2d 1266, 1267 (10th Cir. 1988)(standard for determining substantial justification is whether government's

¹ In response to the district court's decision, the Bureau withdrew its objection to the Children's enrollment requests and the Children were enrolled in the Tribe.

position was reasonable in both law and fact). Accordingly, the court held that the Children were entitled to attorneys' fees under EAJA for fees incurred in challenging the Bureau's actions under the Act. January Order at 4-5. The district court disallowed recovery of any fees incurred in litigating the Children's civil rights claims, however, on the ground that the Children had not prevailed on these claims. Id. at 3.

The court next referred the fees issue to a magistrate with directions to prepare a report and recommendation determining the hours reasonably worked by the Children's attorneys on the issues on which they prevailed. Id. at 7. In so doing, the court directed the magistrate not to consider expenses incurred in the partially successful appeal to this court because such expenses could only be awarded "if the Tenth Circuit feels the government's position on appeal was substantially unjustified." Id.

After reviewing voluminous records, affidavits and memoranda submitted by the parties, and holding as many as three hearings on issues raised by these documents, the magistrate issued a Report and Recommendation that the Children be awarded fees for a total of 1780.79 hours worked by the three attorneys on the case and an additional 135.2 hours worked by a law clerk. Report and Recommendation (Oct. 25, 1988). These total reimbursable hours included time spent directly on the enrollment issue, on mixed issues or claims, on the fees issue on remand to the district court and on administrative proceedings that occurred after the Bureau had denied the Children's enrollment applications. Id. These totals did not include hours worked on issues on which the

Children clearly did not prevail and also reflected a 20% reduction from the total hours submitted by the Children's attorneys. The magistrate found that this reduction was warranted because "not all hours were recorded, duplicative efforts were not always weeded out, and the description of the work performed [was] not always accurate." Id. at 5. The magistrate also recommended that the Children be awarded \$6885.18 in miscellaneous expenses. Id. at 8.

Both parties filed objections to the magistrate's report. The district court, after conducting its own de novo review of the record, approved and adopted the magistrate's report and recommendations. Order Accepting Report and Recommendation and Order Awarding Attorney's Fees (Dec. 13, 1988)(December Order). In so doing, the court found that the magistrate's 20% reduction of hours adequately addressed the government's concern that the Children not be awarded fees for time spent on their civil rights claims. Id. at 3-4. The court further found that the Children were not entitled to an award for attorney time that "was not documented" at the time of the magistrate's final hearing on August 31, 1988. Id. at 5. In summary, the court concluded, "considering all of the circumstances of this case, the court is of the opinion that the fees and expenses recommended by the magistrate are just and fair." Id. at 4.

Based on the hourly totals recommended in the magistrate's report and a rate of \$75 per hour for worked performed by attorneys and half that amount for work done by the law clerk, the

district court awarded the Children \$128,489.25 in fees and \$6885.18 in expenses.² The government timely appealed and the Children cross-appealed.

Discussion

A. Government Challenges to the Amount of the Award

The government's initial challenge to the amount of the award is that it improperly includes fees for work performed on claims unrelated to the enrollment and attorneys' fees issues on which the Children ultimately prevailed. In particular, the government asserts that the Children's award should be reduced by at least two-thirds because they only prevailed on two of the six claims made in their complaint and because the civil rights and constitutional claims on which they were unsuccessful were more complex than the issue on which the Children ultimately prevailed. We review the district court's calculation of the award and its response to these concerns for abuse of discretion. Jean v. Nelson, 863 F.2d 759, 769 (11th Cir. 1988), cert. granted, 110 S. Ct. 862 (1990); see Hadden, 851 F.2d at 1268.

We hold that the district court did not abuse its discretion in refusing to limit the EAJA award as suggested by the government. As we noted in the first appeal arising out of this

² The Children originally requested somewhere between \$300,000 and \$750,000 in fees and expenses based on reimbursement for all of the hours submitted at hourly rates of \$85 to \$90 per hour as multiplied by 1.5. This district court refused to approve an hourly rate in excess of the \$75 per hour cap set by Congress, see 28 U.S.C. § 2412(d)(2)(A), or a multiplier in the absence of any exceptional circumstances. See Memorandum and Order at 5-6 (Jan. 26, 1988).

case, the substance or thrust of the Children's complaint was "to establish their right to tribal membership." Chapoose, 831 F.2d at 936. The Children achieved this goal by prevailing on the enrollment issue and hence substantially prevailed in this action. See id.; Devine v. Sutermeister, 733 F.2d 892, 898 (Fed. Cir. 1984). It was reasonable, therefore, for the district court to determine that the Children's attorneys spent the bulk of their time working on issues that were necessary to this result. This is particularly so given that the four civil rights claims on which the government prevailed were dismissed relatively early in the underlying action.

In addition, the district court properly recognized that the Children had not prevailed on all of their claims and adjusted their fee award accordingly to eliminate work performed directly on the four unsuccessful civil rights claims. It then further reduced the award by 20%, partly in response to the government's concern that the Children had understated the amount of time that was properly attributable to these unsuccessful claims. This is an appropriate method of accounting for an EAJA applicant's partial success in an action. See Jean, 863 F.2d at 771 ("[Because] there is no precise rule or formula for making these determinations[,] [t]he district court may attempt to identify specific hours that should be eliminated or it may simply reduce the award to account for the [claimant's] limited success."); see also Hensley v. Eckerhart, 461 U.S. 424, 434-37 (1983) (EAJA award may properly be reduced even where the plaintiff's claims are interrelated). Accordingly, we hold that the district court did

not abuse its discretion in determining that the reductions described above adequately limited the Children's recovery to those claims on which they prevailed.

The government also challenges the amount of the Children's EAJA award as determined by the district court on the grounds that it does not include sufficient reductions to compensate for the Children's inadequate documentation of their fees and expenses, improperly reimburses the Children for duplicative efforts by their attorneys, permits recovery for excessive work on particular issues and tasks, arbitrarily assigns an excessive hourly rate to work performed by a law clerk and improperly compensates the Children for time spent in administrative proceedings in which the government was not a party and in lobbying efforts in Congress. To the extent that any of these complaints are justified, we believe that they were adequately addressed by the district court's decision to reduce the Children's overall award by 20%. We hold, therefore, that the district court did not abuse its discretion in awarding the Children \$128,489.25 for attorneys' fees and \$6885.18 for expenses.

B. The Children's Claim to "Fees for Fees"

In their cross-appeal, the Children assert that EAJA entitles them to an additional award for fees and expenses incurred in preparing and litigating their fee application in the district court and in this and the prior appeal to this court. The district court apparently recognized their right to recover such "fees for fees" for work performed in its court, but limited this recovery to work performed, documented and filed before the

magistrate's August 31, 1988 hearing on the amount of the Children's award. See Order Accepting Report and Recommendation and Order Awarding Attorney's Fees at 5 (Dec. 13, 1988). We review this limitation of the fee award for abuse of discretion. See Hadden, 851 F.2d at 1268. We consider both claims for appellate fees de novo.³

The government argues that EAJA does not permit the Children to recover fees arising out of the two appellate proceedings because the government's position in both appeals was and is substantially justified. In the district court, the government also opposed an award of "fees for fees" on this ground.⁴ The Children argue, however, that a per se rule applies in shifting fees incurred in successfully litigating the amount of or entitlement to an EAJA award, see Powell v. Commissioner, 891 F.2d 1167, 1171 (5th Cir. 1990); McDonald v. Secretary of Health & Human Servs., 884 F.2d 1468, 1480 (1st Cir. 1989); Jean, 863 F.2d at 780; Trichilo v. Secretary of Health & Human Servs.,

³ Although the district court also considered the Children's claim for fees and costs incurred in the first appeal to this court, it declined to decide this claim on the ground that we must first determine whether the Children were a "prevailing party" in this first appeal. See January Order at 7 n.3. Accordingly, we decide this issue de novo. The Children's claim for fees incurred in this appeal is, of course, raised for the first time here and is also considered de novo.

⁴ On appeal, the government has not raised this substantial justification defense in opposing the Children's claim for additional fees incurred in the district court fee litigation as opposed to the appellate fee litigation. In order to decide the Children's cross-appeal for these additional district court fees, however, we must address this issue.

832 F.2d 743, 745 (2d Cir. 1987), and that they are thus entitled to "fees for fees" for every level of the fee litigation at which they prevailed.

As a general rule, time reasonably spent by attorneys on successful fee applications is reimbursable under fee-shifting statutes. See, e.g., Love v. Mayor, City of Cheyenne, 620 F.2d 235, 237 (10th Cir. 1980)(§ 1988); Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984)(citing cases); Prandini v. National Tea Co., 585 F.2d 47, 53-54 (3d Cir. 1978)(citing cases). Because EAJA adds the element of "substantial justification" to its fee-shifting scheme, however, we hold that EAJA does not permit application of this general per se fee-shifting rule. See 28 U.S.C. § 2412(d)(1)(A); Cornella v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984)(EAJA fees for fees application denied because government's position in resisting fee award was reasonable and therefore substantially justified); Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984)(same); Continental Web Press, Inc. v. N.L.R.B., 767 F.2d 321, 324 (7th Cir. 1985)(same). Instead, an EAJA fee litigant may only recover attorneys' fees for successful fee litigation if the government's position in that litigation was substantially unjustified. See id. This standard is met, and "fees for fees" will be awarded, if the government fails to prove that its position in the fee litigation had a reasonable basis in law and in fact. See Hadden v. Bowen, 851 F.2d 1266, 1267 (10th Cir. 1988).

Applying this rule to the fee litigation in this case, we agree with the district court that the government was not

substantially justified in opposing the Children's fee application in that court and that the Children are therefore entitled to recover all fees and expenses reasonably incurred in the fee litigation in the district court. To the extent that these fees and expenses were included in the district court's fee award, we affirm that award. To the extent that these fees and costs were not considered because of an arbitrary cutoff date for submitting appropriate documentation,⁵ however, we reverse and remand this matter to the district court so that it may determine the amount of any additional award due to the Children for this litigation.⁶

After a careful review of the government's position in each of the two appeals to this court on the fee issue, we also hold

⁵ The government argues that the district court acted properly and within its discretion in establishing a cutoff date for the Children to submit documentation in support of its fees claims. While we agree with this general statement and its application to documentation concerning litigation of the Children's substantive claims and preparation of the fee application itself, we cannot agree that it can reasonably be applied to bar the Children's claim to all other fees incurred in litigating the fee issue in district court. This work could not be documented and claimed until it was performed and it could not be fully performed until the magistrate and district court had completed their consideration of the fees issue as it was remanded by this court. Accordingly, it was an abuse of discretion for the district court to arbitrarily limit the Children's recovery of fees for litigating the fees issue to work documented and filed with the court months before the fee issue was finally decided.

⁶ On remand, the district court should also take into consideration the 73 hours of work attorney Machelie Fitzgerald performed on the fee issue before the August 31, 1988 hearing and cutoff date. The district court apparently denied any recovery for this time on the ground that it was not filed with the court before the August 31 deadline. The record shows, however, that documentation for this time was filed several weeks before the hearing, see Doc. 60 (Affidavit of Machelie Fitzgerald and attached time records (Aug. 9, 1988)), and thus should have been considered in calculating the amount of the Children's award.

that the government was not substantially justified in its fee position in these instances. Accordingly, on remand the district court shall determine and award the Children whatever reasonable attorneys' fees and costs they have incurred in connection with this appeal and their litigation of the fee issue in the prior appeal.

The government also challenges an award of fees to the Children for the prior appeal on the ground that the Children did not prevail on any issue in that appeal. Rather, the government contends, the Children were unsuccessful in their bid to reverse the district court's dismissal of their civil rights claim and gained only a remand, not an award or declaration of entitlement, on the fee issue. While we agree that the Children are not entitled to recover fees relating to their unsuccessful appeal of the district court's dismissal of their civil rights claims, they were still a prevailing party in the prior appeal if they "'succeed[ed] on any significant issue in the litigation which achieves some of the benefits which the parties sought in bringing suit.'" Chapoose, 831 F.2d at 936 (quoting Lummi Indian Tribe v. Oltman, 720 F.2d 1124, 1125 (9th Cir. 1983)). In this case, one of the significant issues that ultimately resulted in a benefit to the Children was their claim for attorneys' fees. The Children's status as a "prevailing party" on the first appeal of this issue was, moreover, established upon the district court's holding on remand that they were entitled to a fee award. Cf. Sullivan v. Hudson, 109 S. Ct. 2248, 2254-55 (1989) ("where a court's remand to the agency . . . does not necessarily dictate the receipt of

benefits, the claimant will not normally attain 'prevailing party' status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceeding is known."). Accordingly, the Children are entitled to recover reasonable attorneys' fees and costs specifically relating to their appeal of the district court's initial denial of fees. Cf. Cinciarelli, 729 F.2d at 809 (partial fees awarded for work specifically relating to one of two government defenses in an action). As stated above, this issue is remanded to the district court for determination of the proper award.

The judgment of the United States District Court for the District of Utah is AFFIRMED in part and REVERSED and REMANDED in part for additional proceedings in accordance with this decision.

ENTERED FOR THE COURT
PER CURIAM