Federal Court  Cour fédérale

Date: 20190405

Dockets: IMM-2977-17
IMM-2229-17
IMM-775-17

Citation: 2019 FC 418

Ottawa, Ontario, April 5, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

THE CANADIAN COUNCIL FOR REFUGEES,
AMNESTY INTERNATIONAL,
THE CANADIAN COUNCIL OF CHURCHES,
ABC, DE [BY HER LITIGATION GUARDIAN ABC],
FG [BY HER LITIGATION GUARDIAN ABC]

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP AND THE
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-2229-17

AND BETWEEN:

NEDIRA JEMAL MUSTEFA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket: IMM-775-17

AND BETWEEN:

MOHAMMAD MAJD MAHER HOMSI
HALA MAHER HOMSI
KARAM MAHER HOMSI
REDA YASSIN AL NAHASS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] These are the Order and Reasons for the Rule 369 Motions filed by three proposed interveners, namely: the Canadian Civil Liberties Association (CCLA), the West Coast Legal Education and Action Fund (West Coast LEAF); and the British Columbia Civil Liberties

Association (BCCLA). They each seek to intervene in the underlying Judicial Review Applications.

[2] For the reasons that follow, I am denying the Motions as I am satisfied that the perspectives and input that would be offered by the proposed interveners are already adequately represented by the three organizations that have been granted public interest standing, they being the Canadian Council for Refugees (CCR), Amnesty International (Amnesty) and the Canadian Council of Churches (CCC).

Background

[3] The background to the underlying Judicial Review Applications is summarized in the Order of Justice Diner of August 10, 2018 at paragraphs 4 and 5:

> The Applicants in this case challenge the constitutionality of the legislation implementing the *Safe Third Country Agreement* [STCA] in Canada. They allege that by returning ineligible refugee claimants to the United States [US] under the STCA, Canada exposes such claimants to a substantial risks [sic] in the form of detention, *refoulement*, and other violations of their rights under the 1951 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137. The Applicants argue that, as a result, the legislation implementing the STCA runs contrary to sections 7 and 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
>
> In *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2017 FC 1131, the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches were granted public interest standing in this application. The remaining individual Applicants are (a) a mother and her children from Central America, whose refugee claim relates to gang and gender-based persecution, and who were previously detained in the United States, (b) a Muslim family from Syria who left the United

> States following the issuance of the first Travel Ban by the United States government, and (c) a Muslim woman from Eritrea who was held in detention for an extended period after her attempt to enter Canada from the United States.

[4] On August 18, 2017, Prothonotary Milczynski ordered that the three judicial review applications be consolidated. These Applications challenge the Canada-United States Safe Third Country Agreement which is governed by paragraph 102(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]; and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] (together, the "STCA Regime").

[5] The Applicants claim that the operation of the STCA Regime violates the provisions of Charter of Rights and Freedoms [Charter].

[6] The Applications are scheduled to be heard in September 2019.

Intervener Submissions

[7] The Applicants consent to all three intervener Motions while the Respondents oppose the Motions. The submissions are summarized below.

CCLA Submissions

[8] The CCLA is a national organization dedicated to the furtherance of civil liberties in Canada. The CCLA has a history of intervention before courts, including the Supreme Court of

Canada. The CCLA has intervened in cases involving the *Charter*, including in the immigration context.

[9] In its Notice of Motion, the CCLA seeks intervener status to address the following:

> The impact of the outcome of this application for judicial review will extend beyond the interests of the immediate parties. This review raises novel legal issues concerning the engagement of section 7 of the *Charter* where removal to the United States mandated by the STCA increases the risks of *refoulement*, detention and family separation. This will be among the first cases to consider the application of the causal connection test following the Supreme Court of Canada's decision in *Bedford* and will have broader implications outside this case that are significant interest [*sic*] to the CCLA and the immigration context.
>
> …
>
> The case also raises significant issues related to the interplay between sections 1 and 7 of the *Charter*. Based on the evidence filed to date by the Ministers, it appears that there may be an attempt to justify the STCA regime under section 1 of the *Charter* on the basis of broader societal benefit. The application of section 1 in such a case is a significant legal issue that could have precedential value beyond the instant case, including in relation to government decision-making and the constitutionality of other *IRPA* provisions and administrative regimes outside immigration law.

[10] The CCLA argues that it will offer the Court a useful and unique perspective concerning the scope of Canada's legal commitments pursuant to section 7 of the *Charter*, and the need to take a principled, consistent approach when considering whether the ineligibility of a refugee claimant to make a claim as a result of the STCA Regime engages section 7 of the *Charter*.

[11] If granted leave, the CCLA notes that it will not seek costs. It also submits that its participation will not delay the matter and that it will not seek to add to the record or raise additional issues.

West Coast LEAF Submissions

[12] West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. The organization has a broad representative base and recognizes that intersecting and overlapping markers of disadvantage pose unique, complex challenges to achieving substantive equality in the law.

[13] West Coast LEAF seeks leave to intervene to provide the Court with submissions that would assist the Court in determining the section 15 *Charter* claims made in this case. It states as follows in support of its Motion:

> This case concerns the constitutionality of the STCA Regime under s. 7 and s. 15(1) of the *Charter*. West Coast LEAF's interest in the case relates to the equality interests of female and gender diverse refugee claimants seeking protection in Canada, including those among them who are seeking protection from gender-based persecution. The case will require interpretation and application of s. 15(1) of the *Charter*. In particular, it will require understanding the nexus between the claimed discrimination and the impugned legislative regime in the context of a claim based on indirect, adverse effects discrimination. West Coast LEAF has considerable experience and knowledge concerning the interpretation of s. 15 of the *Charter*, and in applying an intersectional, subjective equality analysis to the experiences of diverse women, including refugees, women without status and women subjected to gender-based harms.

[14] West Coast LEAF intends to focus its submissions on the following two elements of the Court's analysis of adverse effects discrimination under section 15: first, by arguing that courts must engage in a full contextual analysis to appreciate indirect, adverse effects discrimination, and that such an analysis must begin by considering the pre-existing disadvantage experienced by female survivors of violence; second, by setting out a number of considerations the Court should apply.

[15] If granted leave to intervene, West Coast LEAF asserts it will work in cooperation with the parties and any other interveners to ensure that it will offer a perspective that is non-duplicative, unique and useful to the Court's determination of the case.

BCCLA Submissions

[16] The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. The objectives of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

[17] If granted leave, the BCCLA seeks to make submissions to address the section 7 implications of the risk of harm to refugee claimants upon their return to and within the United States, regardless of whether they are ultimately *refouled*.

[18] The BCCLA states as follows:

> The BCCLA will submit that in this context, the principles of fundamental justice must be interpreted and applied, and any balancing undertaken, in a manner that is informed by and reflects

> (a) Canada's international legal obligations; and (b) other *Charter* rights. In both respects, the BCCLA's proposed submissions are different from those of the parties and useful to the Court in determining how section 7 ought to be interpreted and applied.

[19] Similar to the other proposed interveners, the BCCLA also maintains that it will not cause prejudice to the parties or cause delay in the proceedings.

Respondents' Opposing Submissions

[20] The Respondents argue that the Motions should be denied. They argue that the proposed interveners are not directly affected by the outcome and, therefore, their interests are merely jurisprudential.

[21] They also argue that the justiciable issues raised by the interveners are already being advanced by the six principal Applicants, including the three public interest standing parties. As such, allowing interveners would simply bolster the Applicants' case and cause duplicative arguments.

[22] The Respondents submit that there is no evidence that this Court cannot determine the sections 7, 15 and 1 *Charter* issues without hearing the perspective of the interveners.

[23] The Respondents also raise the issue of delay on the part of the interveners.

[24] Finally, the Respondents argue that the concerns identified by the BCCLA in relation to the detention and prosecution of refugee claimants returned to the United States under the STCA Regime do not arise on the facts of this case. Therefore, the Respondents argue that this proposed intervention would be dealing with a hypothetical concern.

Issue

[25] The only issue for determination is if intervener status should be granted to the CCLA, West Coast LEAF, and the BCCLA.

Analysis

[26] As provided in Rule 109 of the *Federal Courts Rules*, SOR 98/106, one of the considerations for the Court is how the participation of the proposed intervener will assist in the determination of factual or legal issues related to the proceeding.

[27] The test for intervention is outlined in *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 90 (FCA) [*Rothmans*], and further developed in the following subsequent Federal Court of Appeal cases: *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 [*Pictou Landing*]; *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120 [*Prophet River*]; and *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 [*Sport Maska*].

[28] The *Rothmans* test consists of six factors, namely:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?
6. Can the Court hear and decide the case on its merits without the proposed intervener?

[29] These factors are non-exhaustive and flexible, with discretion given to the Court to ascribe how much weight is apportioned to any individual factor in light of the facts, legal issues, and context of each case. In considering the fifth *Rothmans* factor regarding the interests of justice, for example, the Federal Court of Appeal considered additional factors as set out in paragraph 11 of *Pictou Landing*. Other factors from the more recent case of *Sport Maska* at paragraphs 29 and 42 include as follows:

- The intervener will advance different or valuable insights or perspectives to further the Court's determination of the issues;
- The appearance of fairness is harmed by the intervention;
- The matter has assumed such a public, important, and complex dimension that the Court needs to be exposed to perspectives beyond those of the immediate parties; and

- The intervention is consistent with the just, most expeditious, and least expensive determination of the proceeding.

[30] As noted in both *Sport Maska* (at para 40) and *Pictou Landing* (at para 9), it is undeniable that the Court in most cases is able to hear and decide a case without an intervener, and that the "more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter".

[31] In this case, where there are already three public interest standing parties, the determinative factor is if the interveners will bring "further, different and valuable insights or perspectives" that will be of assistance to the Court.

[32] I turn to a consideration of Justice Diner's decision granting public interest standing to the CCR, Amnesty, and the CCC in *Canadian Council for Refugees*, 2017 FC 1131 [*Canadian Council for Refugees*]. At paragraph 74 he finds:

> Having exercised my discretion to determine – with final effect – the question of public interest standing, I find that test has been met: the Application raises a serious justiciable issue in which the Organizations have a genuine interest. That issue will be reasonably and effectively litigated with the Organizations' participation as parties.

[33] Justice Diner applied the public interest standing test as outlined by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at paragraph 37. To meet this test, the three organizations had to demonstrate that (1) there is a serious justiciable issue raised, (2) they

have a real stake or a genuine interest in that issue, and (3) the proposed application was a reasonable and effective way to bring that issue before the Court.

[34] At paragraph 39 of *Canadian Council for Refugees*, the Court outlined issues to be addressed by the public interest standing parties as follows:

a) Whether section 159.3 of the *Regulations* is *ultra vires* or otherwise unlawful because the designation of the United States of America is not and/or was not at the time of the decision in conformity with sections 102(1)(a), 102(2) and 102(3) of the *IRPA*;

b) Whether section 159.3 of the *Regulations* is inconsistent with Canada's international obligations under the United Nations' *Convention Relating to the Status of Refugees* and the *Convention Against Torture*;

c) Whether section 159.3 of the *Regulations* is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter*; and

d) Whether paragraph 101(1)(e) of the *IRPA* is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter*.

[35] Justice Diner was satisfied that the CCR, Amnesty, and the CCC met the test for public interest standing and stated as follows at paragraph 68:

> First, the matter of intervener status is not before me. The Organizations are seeking public interest standing and that is the test I have applied. Second, given the extent of the Organizations' expertise and involvement in the issues, I do not agree with the Respondents' proposal that the Organizations should simply "assist" the Family. It is generally not appropriate for "ghost" parties to lurk in the background, providing extensive funding, evidence, advice, or information.

[36] I note that the first three criteria of the *Rothmans* test are similar to the test for public interest standing and, in considering the first branch of the test for public interest standing,

Justice Diner was satisfied that the issues the parties will be addressing are substantial, important, and far from frivolous (*Downtown Eastside* at paras 54-56).

[37] As outlined above, here the interveners propose to address the implications of the STCA Regime on sections 7 and 15 of the *Charter* and on Canada's international legal obligations. These are substantially the same justiciable issues being addressed by the public interest standing parties.

[38] As such, in these circumstances, I am not satisfied that the proposed interveners will advance insights and perspectives that are different from those that will be advanced by the public interest standing parties (see *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151 at para 7).

[39] Fairness to the Respondent is also a consideration and I note of the comments of the Federal Court of Appeal in *Gitxaala Nation v Canada*, 2015 FCA 73 at paragraph 23:

> These concerns are well-founded. An aspect of overall fairness in the litigation process is the "equality of arms": Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, U.K.: Lord Chancellor's Department, 1995). To the extent possible, no one side should be so numerous or dominant that its voices drown out the other side and prevent it from expressing itself adequately.

[40] Considering the three public standing parties will address the same issues sought to be addressed by the interveners, fairness is a factor weighing against the Motions.

[41] Finally, the issues raised by the BCCLA with respect to Canada's international obligations and other *Charter* issues that may be triggered, regardless of *refoulement*, may well be beyond the scope of this judicial review. As noted in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102, an intervener cannot transform the proceedings by raising issues beyond the application before the Court (at para 48).

[42] Considering Rule 109 and the intervener test, I am not satisfied that the proposed interveners will advance insights and perspectives that are wholly different from those advanced by the public interest standing parties. I acknowledge the credibility and expertise of the proposed interveners, I also recognize the experience and skill of legal counsel representing the Applicants, therefore, I am not persuaded that involvement of the interveners is necessary.

[43] Accordingly, I conclude that it is not in the interests of justice to allow the Motions to intervene by the CCLA, West Coast LEAF, and the BCCLA.

ORDER in IMM-2977-17, IMM-2229-17 and IMM-775-17

THIS COURT ORDERS that:

1. The Motions of the Canadian Civil Liberties Association (CCLA), the West Coast Legal Education and Action Fund (West Coast LEAF); and the British Columbia Civil Liberties Association (BCCLA) for leave to intervene in these Applications are denied; and

2. No costs are awarded.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2977-17, IMM-2229-17, IMM-775-17
STYLE OF CAUSE:	THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA YASSIN AL NAHASS AND NEDIRA JEMAL MUSTEFA v MIRC ET AL

MOTIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO,

PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCDONALD J.
DATED:	APRIL 5, 2019

WRITTEN REPRESENTATIONS BY:

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