

Date: 20060704

Docket: T-170-06

Citation: 2006 FC 849

Montréal, Quebec, July 4, 2006

Present: Richard Morneau, Prothonotary

BETWEEN:

IBRAHIM NJONKOU

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the applicant under sections 369 and 316 of the *Federal Courts Rules* for an order authorizing witnesses to testify at the hearing on the merits of his application for judicial review.

[2] Section 316 reads:

316. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation

316. Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à

to an issue of fact raised in an application.

témoigner à l'audience quant à une question de fait soulevée dans une demande.

(Emphasis added)

[3] In *Cyanamid Canada Inc. v. The Minister of National Health and Welfare* (1992), 52 F.T.R. 22 (F.C.T.D.), the Associate Chief Justice of this Court, as he then was, made the following comments with respect to the exceptional nature of “special reason” in subsection 319(4) of the former rules of the Court. The wording of subsection 319(4) was very similar to the current section 316.

It is clear that motions are to be conducted on the basis of documentary evidence and that it is exceptional to depart from this practice. Rule 319 of the *Federal Court Rules* provides that allegations of fact upon which a motion is based shall be by way of affidavit although, by leave of the Court and for special reason, a witness may be called to testify in open Court in relation to an issue of fact raised by an application. In *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al. No. 4* (1987), 11 F.T.R. 132, Glaxo's application under rule 319(4) for leave to call a witness to give viva voce evidence in relation to certain issues of fact raised in the application was dismissed. Rouleau, J., commented (at p. 133):

Under Rule 319 all the facts on which a motion is based must be supported by affidavit evidence. It is only ‘by leave of the court’ and ‘for special reason’ that a witness can be called to testify in relation to an issue. There were no cases presented to me by counsel for the plaintiff nor am I aware of any case law which identifies the test as to what constitutes ‘special reason’. In my opinion, this is a question to be decided on the facts of a particular case with the onus being on the applicant to prove the existence of ‘special reason’ to the satisfaction of the court. What is clear from the jurisprudence is that leave will be granted by the court only in exceptional circumstances.

[4] I am not persuaded that there are special circumstances in this case that would allow the parties to avoid the general procedure of hearing an application for judicial review on the basis of affidavits.

[5] It is also interesting to refer to the following comments by the Federal Court of Appeal when it dealt with a similar request as in this case, i.e. that an application be treated and proceeded with as an action under subsection 18.4(2) of the *Federal Courts Act* (see *Macinnis v. Canada (Attorney General)*, [1994] 2 F.C. 464 (F.C.A.), page 473).

[6] As Mr. Justice Décary stated in *Macinnis, supra*, at page 472 regarding subsection 18.4(2) of the *Federal Courts Act*, I believe that in the circumstances:

. . . the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[7] In this case, I am of the view that affidavit evidence will be adequate for all parties, and that “special circumstances” under section 316 have not been established.

[8] Therefore, the applicant’s motion is dismissed, without costs.

ORDER

The applicant's motion is dismissed, without costs.

“Richard Morneau”

Prothonotary

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-170-06

STYLE OF CAUSE: IBRAHIM NJONKOU
and
CANADA REVENUE AGENCY

**MOTION IN WRITING REVIEWED IN MONTRÉAL WITHOUT APPEARANCE BY
THE PARTIES**

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: July 4, 2006

WRITTEN SUBMISSIONS BY:

Ibrahim Njonkou FOR THE APPLICANT

Dominique Guimond FOR THE RESPONDENT

SOLICITORS OF RECORD:

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