Federal Court of Appeal | Cour d'appel fédérale

Date: 20160204

Docket: A-355-15

Citation: 2016 FCA 36

Present: STRATAS J.A.

BETWEEN:

MIODRAG ZARIC
(a.k.a. MIDRAG ZARICA)

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 4, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Mr. Arnaud Duhamel moves for an order granting him leave to intervene in this appeal. The appeal is from the judgment of the Federal Court (*per* Fothergill J.). The Federal Court allowed the Minister's application for judicial review and quashed a decision of the Refugee Protection Division: 2015 FC 837.

A. The parties' submissions on the motion for leave to intervene

[2] Mr. Duhamel submits that his participation as an intervener will assist this Court's determination of a number of issues in the appeal. These include the standard of review and how review should be conducted, why the decision of the Refugee Protection Division was reasonable, mootness, and the consequences of the Federal Court's judgment. He adds that he intends to "refocus the debate on an issue that did not receive a lot of attention by the parties and lower courts."

[3] Helpfully, Mr. Duhamel has submitted a draft intervener's memorandum of fact and law. This assists the Court in seeing in a concrete way what he intends to argue in the appeal.

[4] The Minister opposes. He notes that Mr. Duhamel will not advance different and valuable insights and perspectives that will actually further the Court's determination of the matter. Rather, for the most part, the Minister says that Mr. Duhamel, who has not shown he has an interest or expertise in refugee law, administrative law or the law of mootness, will make legal submissions that are already in play in this appeal. In effect, he proposes to act as co-counsel for the appellant. The Minister also notes Mr. Duhamel's delay in bringing this motion.

B. The test for intervention

[5] The Minister submits that in deciding this motion, the Court should apply the test set out in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365. Mr.

Duhamel relies upon earlier authority that relies upon the test in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.). *Pictou Landing* suggested that the test for intervention in *Rothmans, Benson & Hedges* was in need of revision. In recasting the test and setting out the relevant considerations in *Pictou Landing*, this Court noted (at paragraph 12) that they "faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts."

[6] Another reason why *Pictou Landing* revised the test for intervention was the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. In that decision, the Supreme Court instructed courts and the litigation community to place more emphasis on speed, efficiency and simplicity in developing and applying procedural rules. *Pictou Landing* implements this in intervention motions by requiring this Court to consider the objectives in Rule 3, objectives that mirror those emphasized in *Hryniak*.

[7] *Pictou Landing*, although a decision of a single motions judge, has been uniformly relied upon by counsel appearing before this Court and has been applied consistently by other judges on this Court without any modification. For those reasons and the reasons set out in *Pictou Landing*, I consider that it correctly expresses the test that I am to apply in this motion.

[8] *Pictou Landing* sets out the following factors to be considered (at paragraph 11):

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and

well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[9] The Minister has made submissions concerning how these factors apply in this case. While this may not have been intended by the Minister, his submissions may be taken to suggest that a failure on the part of Mr. Duhamel to establish any one of these factors is fatal to his motion to intervene. In my view, that is not how the factors should be considered.

[10] Rule 109(2) consists of legislative words that must be followed unless in "special circumstances" it should be dispensed with under Rule 55. Rule 109(2) requires, among other things, that a moving party seeking intervener status must "describe how the proposed intervener

wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding." Absent special circumstances, if a moving party does not comply with Rule 109(2), the intervention motion should be dismissed.

[11] The remaining *Pictou Landing* factors serve to inform the Court's broad discretion under Rule 109(1) as to whether it should "grant leave to any person to intervene in a proceeding." Some of those factors are quite broad. For example, the fifth factor, consistency with Rule 3, is directed at the fair and orderly conduct of the proceeding before the Court, a concept that can embrace many practical considerations. And the "interests of justice" factor similarly has the potential to import a broad array of considerations.

[12] For example, in *Gitxaala Nation v. Canada*, 2015 FCA 73 at paragraphs 21-24, under the rubric of fairness (or what is "just" within the meaning of Rule 3), this Court paid attention to the principle of "equality of arms." It noted that the appearance of fairness can be harmed by allowing too many interveners on one side of the case. A court that allows several interveners supporting one side of the case—especially those that have partisan leanings and advocate political positions—with none or very few on the other side, gives the appearance of a court-sanctioned gang-up against one side, an appearance that can be enhanced by the ultimate result and reasoning in the case. This is especially harmful in public law cases that should be decided on the basis of doctrine, not subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at paragraphs 25-26.

[13] Overall, the factors should be assessed globally. In many cases, some factors will lean in favour of granting the motion, while others will lean in the opposite direction. The Court's task is to exercise its discretion one way or the other based on the principles illustrated by the factors and the decided cases on them.

[14] This is not to say that over time, as cases are decided, certain factors might not take on considerable importance. Over time, the case law may well illustrate circumstances where intervention should definitely not be allowed. For example, intervention should be denied where the proposed intervener's participation runs counter to the operation of the court as a court of law, *i.e.*, a court governed by legal standards, doctrines and admissible evidence, as opposed to a court of politics governed by personal predilections. Some recent cases suggest that parties moving to intervene should be barred where they intend to:

- add social science evidence or other controversial evidence to the evidentiary record by smuggling studies, articles and other extraneous materials as submissions in their memoranda or as "authorities" in their books of authorities, or by making factual assertions in the hope that the court will improperly take judicial notice of them: *Ishaq*, above at paragraphs 18-24 and the authorities cited therein, including several from the Supreme Court of Canada;

- raise new issues in circumstances where the factual record is not adequate to support it or where the factual record might have been different had the issue been raised below: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at paragraph 19; *Ishaq*, above at paragraph 17; *Quan v. Cusson*,

2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678;

- refer to international law notions and standards in circumstances where international law does not truly arise in the application or appeal or where it is irrelevant to the domestic law that binds us: *Gitxaala Nation*, above at paragraphs 15-20.

C. Analysis

[15] Applying the test for intervention, as explained above, I must dismiss Mr. Duhamel's motion.

[16] Mr. Duhamel has failed to demonstrate how he will assist in the determination of a factual or legal issue related to the proceeding. The Minister suggests that Mr. Duhamel's participation is entirely duplicative of that of the appellant—essentially a co-counsel for the appellant—and adds nothing.

[17] In the circumstances of this case, I agree. Mr. Duhamel's proposed submissions substantially duplicate those already made in the appellant's memorandum of fact and law. They emphasize different things, but are not sufficiently distinct to be of assistance to the Court in determining the issues in this appeal.

[18] There may be a case where the Court will examine the factors and, with particular attention to the need for assistance in a complex case, can plausibly exercise its discretion to allow an intervener represented by experienced counsel into proceedings where there is some overlap between its submissions and the submissions of another party: see, *e.g.*, the observation at paragraph 37 in *Ishaq*, above. This is just an illustration of the point made above, that the factors should not be regarded as a mandatory checklist that must be completely satisfied before intervention is granted, but rather as matters to be assessed globally to inform the Court's broad discretion under Rule 109(1) as to whether it should "grant leave to any person to intervene in a proceeding."

[19] But that is not the case here. The appellant is represented by experienced counsel, the appellant's memorandum is comprehensive, and there is no need for additional assistance in the areas the appellant raises.

[20] Although in the circumstances of this case I do not consider it necessary in this case to review the other factors, I note that they uniformly lie against granting Mr. Duhamel's motion to intervene.

[21] Mr. Duhamel's affidavit is inadequate. It baldly states that everything in his written representations is true, offering no details or particulars. Of special note in this regard is that the written submissions, backed by the affidavit, do not tell us who Mr. Duhamel is or whether he has a special interest, expertise or useful perspective in refugee law, administrative law or the law of mootness.

[22] Whether or not intended, some of the Minister's submissions could be taken to suggest that, at a more general level, private individuals seeking to intervene, like Mr. Duhamel, face greater obstacles. In my view, it is worth noting that in an appropriate case, an individual with a special interest, expertise or useful perspective on a relevant issue could well be permitted to intervene, depending on the outcome of the global assessment of the relevant factors. Interventions are not vehicles reserved for the exclusive use of prominent advocacy groups.

[23] The Minister, citing this Court's advice in *Canadian Doctors for Refugee Care*, above, to the effect that those intending to intervene should move quickly, submits that Mr. Duhamel's delay in bringing this motion should count against him. I agree that in the circumstances of this case it should count against him, but it is just one of many factors. In this case, it is not necessary to say more about the factors, as they all lean against granting this motion to intervene.

[24] The Minister asks for costs in the amount of $100. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that "no costs shall be granted in respect of an application for leave, an application for judicial review or an appeal under these Rules" absent "special reasons." The Minister candidly appears to accept that this Rule applies to Mr. Duhamel's motion for leave to intervene in this appeal. But he nevertheless submits that special reasons exist justifying an award of costs.

[25] Given Rule 22 and in recognition of Mr. Duhamel's helpfulness in providing a draft intervener's memorandum, I shall exercise my discretion against making any order as to costs.

D. Disposition

[26] The motion shall be dismissed.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-355-15
STYLE OF CAUSE:	MIODRAG ZARIC (A.K.A. MIDRAG ZARICA v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 4, 2016

WRITTEN REPRESENTATIONS BY:

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