Federal Court  Cour fédérale

Date: 20180209

Docket: IMM-2645-17

Citation: 2018 FC 156

Ottawa, Ontario, February 9, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ROZAS DEL SOLAR, PAOLA
ZEVALLOS ZUNIGA, LUIS
ZEVALLOS ROZAS, SOFIA
ZEVALLOS ROZAS, MACARENA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

THE CANADIAN ASSOCIATION OF REFUGEE LAWERS, THE CANADIAN COUNCIL FOR REFUGEES, AND L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION

Interveners

ORDER AND REASONS

[1] Before this Court are two motions for leave to intervene under Rule 109 of the *Federal Courts Rules*, SOR/98-106. For the reasons that follow, I am allowing both motions, with terms.

I. Procedural Background

[2] The application underlying these motions is a judicial review [Application] of the May 17, 2017 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, in which a three-member panel considered whether the RAD owes deference to findings made by the Refugee Protection Division [RPD].

[3] The intervener motions now before this Court concern three organizations: the Canadian Association of Refugee Lawyers [CARL], the Canadian Council for Refugees [CCR], and l'Association québécoise des avocats et avocates en droit de l'immigration [AQAADI]. With the participation of the parties and of CARL, CCR, and AQAADI, I issued a case management Order on December 7, 2017, which set a timetable for the Application, including any motions for intervention. (Although CARL, CCR, and AQAADI are not parties to the Application, they were involved in its case management because they planned to seek leave to intervene.)

[4] CARL and CCR brought their motion jointly in writing within the timelines set by my Order, for which an oral hearing was then scheduled under Rule 369(4).

[5] AQAADI's motion was filed late. Nevertheless, it was heard with CARL/CCR's motion, with the consent of the parties, given AQAADI's submissions relating to its prior counsel. At the motion hearing, AQAADI provided assurances that, going forward, it would comply with the established timetable if granted leave to intervene.

II. Analysis

[6] In deciding these motions under Rule 109, I am governed by the test set out in *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1989] FCJ No 707 (Federal Court – Appeal Division) [*Rothmans*], and developed in *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 [*Pictou Landing*], *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 [*Sport Maska*], and *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120 [*Prophet River*].

[7] The *Rothmans* test has six factors. However, as in *Pictou Landing* and *Prophet River*, only two of them are relevant here: whether the position of the proposed interveners is adequately defended by one of the parties, and whether the interests of justice would be better served by intervention. These are the fourth and fifth *Rothmans* factors, respectively, and the Respondent opposes both interventions on the basis that they are not met.

[8] First, the Respondent argues that the positions of CARL/CCR and AQAADI [together, the Proposed Interveners] substantially overlap with those of the Applicants. The Respondent relies on *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151 [*Ishaq*], in which Justice Stratas dismissed a motion for leave to intervene on the basis that the moving parties had made

only “unspecific and unparticularized” submissions on how their participation would assist the Court (at para 40).

[9] Second, the Respondent argues that the interests of justice would not be served by intervention since, in its view, (i) the matters raised in the Application are not of a sufficiently public, important, or complex nature to warrant intervention, and (ii) the Proposed Interveners’ positions will be before this Court in any event without their participation, since their submissions to the RAD will form part of the Certified Tribunal Record.

[10] On the latter point, CARL/CCR argues that its participation as an “interested person” before the RAD should weigh in favour of it being granted intervener status. It relies on *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 119 [*Globalive Wireless*], in which Justice Stratas held that, “absent fundamental error in the decision in the Federal Court to grant the moving parties leave to intervene, some material change in the issues on appeal, or important new facts bearing on the issue”, the Federal Court of Appeal had no reason to exercise its discretion differently from the Federal Court (at para 5). Justice Stratas’ reasoning was followed in *Canada (Attorney General) v Canadian Wheat Board*, 2012 FCA 114 (at para 9) [*Canadian Wheat Board*]. CARL/CCR submits that the same principles of deference and comity should apply to the circumstances of these motions.

[11] Therefore, the question that arises in these motions is whether the holdings in *Canadian Wheat Board* and *Globalive Wireless* apply to the facts before me, namely, when non-parties

participate before a tribunal (here, as "interested persons" before the RAD) and then seek leave to intervene on a subsequent judicial review.

[12] Under Rule 46(2) of the *Refugee Appeal Division Rules*, SOR/2012-257 the Proposed Interveners were required to explain to the RAD how their submissions would be relevant and helpful and different from those of the Applicants. Thus, the RAD's task shared some similarities with this Court's analysis under Rule 109 of the *Federal Courts Rules*. But I am not applying the same test on these motions as the RAD did when it granted "interested person" status to CARL/CCR and AQAADI. The reasoning in *Canadian Wheat Board* and *Globalive Wireless* is distinguishable, because both the Federal Court of Appeal and the Federal Court apply the *Rothmans* test when considering whether to grant leave to intervene.

[13] I find that the fact that the Proposed Interveners were granted "interested person" status by the RAD does not engage principles of comity and deference for the purposes of the intervener motions before this Court. However, as I will now explain, the Proposed Interveners' participation before the RAD reinforces my conclusion that leave to intervene should be granted, for different reasons than those underlying *Canadian Wheat Board* and *Globalive Wireless*.

[14] Justice Stratas held in *Prophet River* that "whether the [proposed intervener] has been involved in earlier proceedings in the matter" is a relevant factor in considering whether the interests of justice are better served by the proposed interventions (at para 6). Further, in my view, *Suncor Energy Inc v Mining Assn of Canada*, 2016 ABCA 265, which considered *Canadian Wheat Board* and *Globalive Wireless*, is of some assistance. In that case, the Alberta

Court of Appeal held that, when a Court considers whether to grant leave to intervene to a party that participated in an intervener capacity in a Court below, it should consider: "whether the particular perspective of the [proposed intervener] can continue to inform the discussion as now framed on appeal" (at para 20).

[15] I find that it is significant that the positions of the Proposed Interveners were addressed by the RAD in its decision. Given that those positions factored into the decision to be reviewed by this Court, but differ from the positions of the Applicants taken on this Application, it would be difficult for this Court to assess the RAD's decision in its entirety without the Proposed Interveners' continued participation.

[16] Further, the issues before this Court are not the same as those before the RAD: the Application is a judicial review and not an appeal from the RPD. I stress that, if they participate in this Application, the Proposed Interveners must situate their arguments made before the RAD in the context of whether and why this Court should interfere with the RAD's decision. They must not simply repeat what was argued before the RAD.

[17] In these motions, the Proposed Interveners have satisfied me that they will advance different and valuable perspectives, particularly in respect of whether the RAD owes any deference to any of the RPD's findings. It is clear to me from the Proposed Interveners' submissions that they will invoke different bodies of jurisprudence than the parties, and that they will assist this Court in considering the larger implications associated with its potential rulings (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 at para 49 [*Tsleil-Waututh*

Nation]). I note also that there is no need at this stage for the Proposed Interveners to set out their intended submissions with granular particularity (*Lukács v Canada (Transportation Agency)*, 2014 FCA 292 at paras 27-29).

[18] In *Sport Maska*, the Federal Court of Appeal confirmed that the criteria for allowing or not allowing an intervention must remain flexible, and that the overriding concern is whether the interests of justice require that intervention be granted or refused (*Sport Maska* at para 42). The "interests of justice" encompass many considerations, including whether the matter has assumed a public, important, and complex dimension, such that the Court must be exposed to perspectives beyond those of the parties (*Prophet River* at para 6).

[19] The Application clearly has important, public, and complex dimensions. The decision under review is the first three-member RAD decision to come before this Court, and indeed, appears to be the first three-member RAD decision ever (all other decisions having been rendered by a single-member panel). I accept that the Proposed Interveners' participation before the RAD speaks to the importance and complexity of the issues decided by the RAD, and, by extension, those to be considered by this Court on judicial review.

[20] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] states at section 171(c) that "a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court" [emphasis added].

Therefore, if upheld, the RAD's decision will have significant precedential value on all subsequent decisions by the RAD and the RPD.

[21] For the reasons set out above, I conclude that the perspectives of the Proposed Interveners differ from those of the Applicants, that those perspectives will continue to inform the discussion on this Application, and thus that the interests of justice require that this Court be exposed to those perspectives.

[22] Having considered the *Rothmans* factors as developed by the Federal Court of Appeal, I am satisfied that leave to intervene should be granted to CARL/CCR and AQAADI.

[23] I further find that this is an appropriate case in which to grant leave with terms, having regard to Rules 53(1), 109, and 3 of the *Federal Courts Rules* (see *Pictou Landing* at para 32), and will therefore turn to the parameters of CARL/CCR's and AQAADI's participation.

III. Terms of Intervention

[24] CARL/CCR seeks leave to intervene jointly on the following issues: (i) whether the RAD erred in interpreting the scope of its appellate jurisdiction including what deference, if any, the RAD owes to credibility findings made by the RPD, and (ii) the standard of review to be applied by the Court in deciding that issue. CARL/CCR does not seek to file affidavit evidence in respect of these issues, but seeks leave to file a 30 page memorandum and make 30 minutes of oral submissions at the hearing of this Application.

[25] I will grant CARL/CCR joint intervention status in respect of the issues proposed, with a 15 page memorandum and 30 minutes of oral submissions, and no right of written or oral reply. CARL/CCR's written and oral arguments will be restricted to those matters on which it has different and valuable insights, and shall not duplicate the arguments of the parties or, to the extent possible, those of AQAADI.

[26] AQAADI seeks leave to intervene independently of CARL/CCR. It wishes to address the standard of review that the RAD must apply when considering the RPD's credibility determinations, and to make arguments concerning "credibility" generally, including the definition of this concept and its treatment in international law and in Canadian criminal and refugee law. AQAADI also wishes to address the origins of paying deference to findings of credibility, and the distinguishing features of refugee proceedings. It also seeks to preserve an ability to raise further issues. AQAADI wishes to file evidence pertaining to "the definition, concept and study of issues of credibility and deference in the courts or elsewhere", to file a 30 page memorandum, and to make submissions not exceeding 40 minutes at the hearing of this Application.

[27] As an intervener, the scope of AQAADI's participation in the Application must be defined by this Court and is constrained by the legal and evidentiary principles governing judicial reviews. AQAADI cannot introduce evidence beyond the Certified Tribunal Record (*Tsleil-Waututh Nation* at paras 48 – 49). The evidentiary record is closed, subject to narrow exceptions, none of which apply to the broad categories of evidence that AQAADI seeks to submit (*Ishaq* at para 15). Similarly, as an intervener, AQAADI cannot make new arguments that

are foreclosed by the evidentiary record (*Ishaq* at para 17), or advance issues that were not raised before the RAD (*Rouleau v Canada (Attorney General)*, 2017 FC 534 at para 38). AQAADI must take the evidentiary record as it is (*Ishaq* at para 12).

[28] Accordingly, AQAADI is restricted to the evidentiary materials referenced before the RAD. I will not grant AQAADI leave to file any affidavit evidence, as it requested. I also remind AQAADI that its arguments must be appropriate for judicial review, and not simply a repetition of the position argued before the RAD.

[29] AQAADI may file a 15 page memorandum and make up to 30 minutes of oral submissions at the hearing of the Application on the same intervention issues as CARL/CCR, with respect to which it may only advance its unique perspective, and not duplicate the arguments of the parties or, to the extent possible, those of CARL/CCR.

[30] Both CARL/CCR and AQAADI have requested the ability to submit questions for certification under paragraph 74(d) of IRPA. I will grant this relief, as neither the Applicants nor the Respondent oppose it.

[31] However, I will defer the issue of CARL/CCR and AQAADI's appeal rights, beyond their ability to submit questions for certification, to the hearing of the Application (see *Sandy Pond Alliance to Protect Canadian Waters Inc v Canada*, 2011 FC 158 at paras 43-45). The Applicants and the Respondent oppose this relief, and, in my view, it is indeed premature to decide the issue of appeal rights at this stage, given the context of this particular proceeding.

[32] Finally, the timelines set out in my Order of December 7, 2017 will continue to be maintained for the remainder of the Application.

ORDER in IMM-2645-17

THIS COURT ORDERS that:

1. CARL and CCR are granted joint leave to intervene in the Application and will be treated as one entity for the purposes of the Application;

2. AQAADI is granted leave to intervene in the Application;

3. The style of cause is amended accordingly and with immediate effect;

4. The intervention issues for both CARL/CCR and AQAADI are: (i) whether the RAD erred in interpreting the scope of its appellate jurisdiction including what deference, if any, the RAD owes to credibility findings made by the RPD, and (ii) the standard of review to be applied by the Court in deciding that issue;

5. Any documents to be served on any party must also be served on CARL/CCR and AQAADI;

6. CARL/CCR and AQAADI may participate in any future case conferences held;

7. Neither CARL/CCR nor AQAADI may add to the evidentiary record in the Application, nor refer to materials not relied on before the RAD, nor conduct cross-examinations in respect of any affidavits filed;

8. CARL/CCR may (i) file a memorandum of argument in compliance with Rules 65-68 and 70, limited to 15 pages in length, on or before April 20, 2018, and (ii)

make oral submissions at the hearing of the Application not exceeding 30 minutes in length;

9. AQAADI may (i) file a memorandum of argument in compliance with Rules 65-68 and 70, limited to 15 pages in length, on or before April 20, 2018, and (ii) make oral submissions at the hearing of the Application not exceeding 30 minutes in length;

10. The page limits set out in this Order are exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover;

11. The written and oral arguments of CARL/CCR and AQAADI must (i) only advance their unique perspectives on the intervention issues, and (ii) not duplicate the arguments of the parties or, to the extent possible, one another;

12. Neither CARL/CCR nor AQAADI may make a written or oral reply;

13. Questions for certification proposed by any party or intervener, if any, must be submitted no later than at the close of the hearing of the Application;

14. CARL/CCR and AQAADI may submit question(s) for certification under paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 within the scope of the intervention permitted by this Order;

15. The issue of CARL/CCR and AQAADI's appeal rights, if any, is deferred to the hearing of this Application;

16. Neither CARL/CCR nor AQAADI may seek costs or have costs awarded against them;

17. No costs were sought in respect of the motions, and none are awarded; and

18. The timelines set out in my Order of December 7, 2017 will continue to be maintained for the remainder of the Application.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2645-17
STYLE OF CAUSE:	ROZAS DEL SOLAR, PAOLA ZEVALLOS ZUNIGA, LUIS ZEVALLOS ROZAS, SOFIA ZEVALLOS ROZAS, MACARENA v MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE CANADIAN ASSOCIATION OF REFUGEE LAWERS, THE CANADIAN COUNCIL FOR REFUGEES, AND L'ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION
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DATE OF HEARING:	FEBRUARY 5, 2018
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DATED:	FEBRUARY 9, 2018

APPEARANCES:

Amedeo Clivio Cheryl Robinson	FOR THE APPLICANTS
James Todd	FOR THE RESPONDENT
Anthony Navaneelan	FOR THE INTERVENER CARL
Caitlin Maxwell	FOR THE INTERVENER CCR
Guillaume Cliche-Rivard	FOR THE INTERVENER AQAADI
Stéphanie Valois	FOR THE INTERVENER AQAADI

SOLICITORS OF RECORD:

Amedeo Clivio Clivio Law Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
Anthony Navaneelan Refugee Law Office Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER CARL
Prasanna Balasundaram Downtown Legal Services Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER CCR
Me Stéphanie Valois Montréal (Québec)	FOR THE INTERVENER AQAADI
Me Guillaume Cliche-Rivard Doyon, Nguyen, Tutunijian et Cliche-Rivard Montréal (Québec)	FOR THE INTERVENER AQAADI