Federal Court  Cour fédérale

Date: 20231027

Docket: IMM-8969-22

Citation: 2023 FC 1432

Ottawa, Ontario, October 27, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

FREDERIC JOSEPH HEMOND

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

ORDER AND REASONS

I. OVERVIEW

[1] The Canadian Association of Refugee Lawyers (CARL) seeks leave to intervene in this application for judicial review.

[2] The central issue raised in the underlying application is whether the determination by a member of the Immigration Division (ID) of the Immigration and Refugee Board of Canada that the applicant was a compellable witness at a detention review hearing is unreasonable. There is no dispute that the application for judicial review is moot: the applicant was released after a subsequent detention review and he has since left Canada. However, citing the well-known test in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, counsel for the applicant submits that the Court should exercise its discretion to hear and decide the application on its merits. The applicant supports CARL's intervention. For its part, the respondent maintains that the underlying application should be dismissed as moot and, for this and other reasons, opposes CARL's intervention.

[3] This motion was originally brought in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 (*FCR*). I directed that there be an oral hearing of the motion. At the conclusion of that hearing, I granted the motion for reasons to follow. These are those reasons.

II. THE TEST FOR LEAVE TO INTERVENE

[4] Rule 109(1)(b) of the *FCR* provides that, on a motion for leave to intervene, the notice of motion shall "describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist in the determination of a factual or legal issue related to the proceeding."

[5] The Federal Court of Appeal has developed a substantial body of jurisprudence applying Rule 109(1)(b) in motions for leave to intervene in appeals. That jurisprudence focuses on three factors when determining whether an intervention is warranted: (1) the usefulness of the intervention in relation to the issues to be decided by the Court; (2) the moving party's interest in the case; and (3) whether it is in the interests of justice to permit the intervention. See, among other cases, *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 at para 6; *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2022 FCA 67 at para 10; *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 19; and *Canada (Attorney General) v Pekuakamiulnuatsh First Nation*, 2023 FCA 193 at para 6.

[6] While the present motion is in relation to an application for judicial review rather than an appeal, the parties agree that the elements of usefulness, genuine interest, and consistency with the interests of justice identified in Federal Court of Appeal jurisprudence constitute the applicable test.

III. THE TEST APPLIED

[7] The respondent accepts, as do I, that CARL has a genuine interest in the legal issue raised in the underlying judicial review application. However, the respondent opposes the intervention on the basis that it will not be useful and that it is not in the interests of justice.

[8] As I will explain, I am satisfied that CARL's proposed intervention will be useful and that it is in the interests of justice to permit the intervention.

A. *Will the intervention be useful?*

[9] The requirement that a proposed intervention be useful flows directly from Rule 109(2)(b) of the *FCR*. As we have seen, it requires the proposed intervener to set out how their participation "will assist the determination of a factual or legal issue related to the proceeding."

[10] Usefulness is a function of the issues the parties have raised and the submissions, insights and perspectives that the proposed intervener will bring to the proceeding (*Le-Vel Brands,* at para 19). If the proposed intervener's submissions, insights and perspectives relate to issues other than the ones the parties have raised – if, in other words, the proposed intervener is raising new issues – the intervention will not assist in the determination of issues "related to the proceeding." Even if the submissions, insights and perspectives of the proposed intervener relate to an issue that must be determined, they will not be useful if they simply reiterate those of a party. That being said, if a proposed intervener's submissions are too different from those of the

parties, they risk running afoul of the prohibition on raising new issues. A flexible, realistic assessment of usefulness is therefore required.

[11] CARL proposes to address the implications of *Jaballah (Re)*, [2011] 3 FC 155, for the issue of whether a detainee is a compellable witness at a detention review conducted under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). This is the central issue raised in the underlying judicial review application. While CARL properly does not propose to take a position on the disposition of the application for judicial review, it is no secret that its legal arguments support the position of the applicant.

[12] The respondent submits that CARL has failed to identify with sufficient particularity how its submissions will differ from the applicant's. CARL helpfully provided a detailed outline of its proposed submissions in its motion record. Having compared this outline with the applicant's further memorandum of argument, I am satisfied that the two are sufficiently distinct that CARL's participation will be of assistance in the determination of the central legal issue raised in this case. Moreover, the proposed submissions demonstrate that, having the genuine interest in the legal issue raised in the underlying application that it does, CARL is prepared to dedicate the necessary knowledge, skills and resources to the matter before the Court. This enhances the usefulness of its contribution in relation to the central issue in the judicial review application. As well, CARL's significant history of interventions before the Supreme Court of Canada, the Federal Court of Appeal, and this Court gives me confidence that it understands the proper role of an intervener. This, too, gives me confidence that its contribution will be useful. Finally, it

bears noting that counsel for CARL brings singularly valuable insights to the present case as she was also counsel in *Jaballah*.

[13] For these reasons, I am satisfied that the usefulness requirement is met.

B. *Is it in the interests of justice that the intervention be permitted?*

[14] In *Le-Vel Brands,* Stratas JA states that a flexible approach is called for when determining whether it is in the interests of justice that an intervention be permitted (at para 19). He goes on to state that, among the factors that should be considered is whether the intervention is consistent with the imperative in Rule 3 of the *FCR* that the proceeding (in the present case, an application for judicial review) be conducted "so as to secure the just, most expeditious and least expensive outcome." This imperative can be frustrated if, for example, the intervention will unduly interrupt the orderly progression or schedule of the proceeding (*ibid.*).

[15] The respondent raises two concerns in this regard: first, that granting the intervention would unduly interfere with the orderly progression of the underlying application; and second, since the underlying application should be dismissed as moot, the intervention would serve no useful purpose.

[16] Looking first at the potential impact of the intervention on the orderly progression of the underlying application, leave to proceed with the judicial review was granted on August 1, 2023. The Order granting leave set the schedule for the filing of any additional materials by the parties. It also set the matter down to be heard on October 18, 2023.

[17] The motion for leave to intervene was not filed until October 10, 2023. The nearly last-minute arrival of this motion certainly disrupted the orderly progression of the application for judicial review. On the original schedule, it left little time for the respondent to respond to or for the Court to deal with the motion. Likewise, if the intervention were to be permitted, on the original schedule, there would be little time for the intervener to file its memorandum of argument, for the respondent to prepare and file responding submissions, or for the Court to incorporate these additional submissions into its preparation for the hearing.

[18] These considerations could well have weighed heavily against granting the intervention. Indeed, in another case, they could be determinative. However, in the particular circumstances of this case, while the intervention motion did disrupt the orderly progression of the underlying application for judicial review, I am satisfied that, in the end, no one was prejudiced by this.

[19] In view of the mootness of the underlying application, and being satisfied that doing so would not prejudice the respondent, I acceded to the suggestion from counsel for the applicant that the hearing of the judicial review application be adjourned. This then afforded time for the proper consideration of the intervention motion. Furthermore, the court time set aside for the judicial review application was not lost. It was used instead for the hearing of the intervention motion (as noted above, I was of the view that a hearing was required). It was also used for an informal case management conference during which a schedule for the filing of the intervener's and respondent's memoranda of fact and law was agreed upon. In short, it was possible to manage the risks the intervention motion posed for the orderly progression of the underlying application in a way that was consistent with the interests of justice.

[20] Before leaving this point, I would observe that these risks would have been avoided or, at least, mitigated if the intervention motion had been filed earlier than it was. This is not meant as a criticism of CARL or its counsel. Given the need to demonstrate usefulness (as discussed above), it is understandable why CARL and its counsel would want to see the applicant's further memorandum of argument (which was filed on September 25, 2023) before filing the motion for leave to intervene. I also acknowledge that CARL alerted the Court on August 28, 2023, that it was intending to bring a motion to intervene (although, as Associate Judge Horne pointed out in an Oral Direction of the same date, there was little the Court could do with that information).

[21] Under paragraph 74(d) of the *IRPA*, the Court is required to dispose of applications for judicial review "without delay and in a summary way." As a result, once leave is granted, generally speaking, the matter will proceed on a relatively expeditious timetable, including a hearing that is no later than 90 days after leave is granted (as required by paragraph 74(b) of the *IRPA*). Given these exigencies, the sooner a motion to intervene is brought after leave has been granted, the better. If this means having to proceed without the benefit of the parties' further memoranda of argument, one can expect that the Court will take this fact into account when applying the usefulness element of the test. Alternatively, having the matter continue as a specially managed proceeding pursuant to Rule 384 of the *FCR* may also be an option in appropriate cases. Once again, the sooner this mechanism is engaged, the better.

[22] I turn now to the issue of mootness and its bearing on the interests of justice.

[23] As I have already noted, there is no issue that the underlying application for judicial review is moot. The parties disagree, however, on whether the Court should nevertheless hear and decide the application on its merits. This is something only the judge who ultimately hears the application can determine. Even if, as appears likely, this turns out to be me, it would be premature to decide this issue now. Nevertheless, the possibility that the matter may not be heard and decided on its merits is a relevant consideration when determining whether it is in the interests of justice to permit the intervention.

[24] If it were plain and obvious that the matter should not be heard and decided on its merits, the intervention would serve no useful purpose; it would simply create pointless work for the intervener, for the parties, and for the Court. On the other hand, if there is an arguable case for why the Court should exercise its discretion to hear and decide the underlying application despite its mootness, this would add further support to the proposition that permitting the intervention is in the interests of justice. Among the *Borowski* factors is whether the underlying application for judicial review raises "an important question which might independently evade review" (at 360). If this is answered in the affirmative, then, other things being equal, this would also support granting the intervention. This is because, as Stratas JA explains in *Le-Vel Brands*, among the factors to consider in assessing what is in the interests of justice is whether "the matter [has] 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" (at para 19).

[25] With the benefit of the submissions of the parties on the mootness issue in their respective further memoranda of argument as well as at the hearing of this motion, I am satisfied

that there is an arguable case for hearing and deciding the underlying application for judicial review on its merits despite its mootness. Since this remains a live issue between the parties, it is not appropriate to say more than this at this stage apart from reiterating that, as I have just explained, this factor also supports a finding that permitting the intervention would be in the interests of justice.

[26] No one disputes that the central issue raised in the judicial review application is important. CARL's participation will expose the Court to a perspective beyond that offered by the parties. In addition to assisting the Court in determining the central legal issue in the underlying application, CARL's participation will enhance the legitimacy and accountability of the proceeding in which this important legal issue may well be determined. This, too, supports the conclusion that it is in the interests of justice to permit the intervention.

[27] Finally, for the sake of completeness, I would note that neither of the remaining interests of justice factors identified in *Le-Vel Brands* (at para 19) weighs against granting the motion. One (whether the first-instance court admitted the moving party as an intervener) obviously does not arise. And, since CARL is the only proposed intervener, there is no risk of an "inequality of arms" or an imbalance on one side of this case to the disadvantage of the other.

[28] For these reasons, I am satisfied that it is in the interests of justice to permit the intervention.

IV. THE TERMS OF THE PROPOSED INTERVENTION

[29] There was no dispute over the terms of the proposed intervention should the motion be granted. As well, as discussed above, the schedule for the filing of further materials was agreed upon at the informal case management conference held on October 18, 2023.

V. CONCLUSION

[30] For these reasons, the motion for leave to intervene by the Canadian Association of Refugee Lawyers is granted on the terms set out below.

ORDER IN IMM-8969-22

THIS COURT ORDERS that

1. The motion for leave to intervene by the Canadian Association of Refugee Lawyers ("the intervener") is granted.
2. The style of cause shall be amended accordingly.
3. The intervener shall be served with any documents filed by a party, either in hard copy or electronically at the discretion of the party.
4. The intervener is not permitted to supplement the record with additional evidence.
5. The intervener is permitted to file a memorandum of argument not exceeding 10 pages in length on or before October 27, 2023.
6. The respondent is permitted to file a memorandum of argument not exceeding 10 pages in length responding to the intervener's submissions on or before November 10, 2023.
7. The intervener is permitted to make oral submissions not exceeding 15 minutes at the hearing of the application for judicial review.
8. The intervener shall not seek costs, nor will any costs order be made against it.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8969-22
STYLE OF CAUSE:	FREDERIC JOSEPH HEMOND v MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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