Federal Court of Appeal | Cour d'appel fédérale

Date: 20200818

Docket: A-392-19

Citation: 2020 FCA 133

Present: **LOCKE J.A.**

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

EDGAR ALBERTO LOPEZ GAYTAN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 18, 2020.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] These reasons concern a motion by the Canadian Association of Refugee Lawyers (CARL) for leave to intervene in the present appeal.

[2] The present appeal seeks to reverse a decision of the Federal Court (2019 FC 1152) which dismissed an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. The IAD decision found that

the appellant had failed to establish that the respondent was inadmissible under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The IAD accepted a defence of duress. The appellant was entitled to commence the present appeal because the Federal Court certified a question under paragraph 74(*d*) of IRPA. The certified question is as follows:

> In determining whether an individual is inadmissible under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board entitled to consider the defence of duress?

[3] In addition to the certified question, the appellant puts in issue the reasonableness of the IAD's conclusion on the facts.

[4] CARL seeks to intervene in order to provide submissions to the Court on the broader implications of the position taken by the appellant, particularly in regard to grounds of inadmissibility beyond paragraph 37(1)(*a*), grounds for exclusion, and defences beyond duress. CARL argues that, as a well-established organization devoted to advocating on legal issues related to refugees, asylum seekers and the rights of immigrants, it is uniquely qualified to make these submissions.

[5] The appellant opposes CARL's motion. The respondent does not.

[6] The appellant and CARL agree substantially on the test applicable to a motion to intervene. They agree on the criteria set out in *Rothmans, Benson & Hedges Inc. v. Canada*

(Attorney General), [1989] F.C.J. No. 446, at para. 12, [1990] 1 F.C. 74, aff'd [1989] F.C.J. No. 707, [1990] 1 F.C. 90:

a) Is the proposed intervener directly affected by the outcome?

b) Does there exist a justiciable issue and a veritable public interest?

c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

e) Are the interest of justice better served by the intervention of the proposed third party?

f) Can the Court hear and decide the cause on its merits without the proposed intervener?

[7] The appellant and CARL also agree that these criteria are not exhaustive, and that the Court's focus should be in the fourth and fifth criteria. Both sides cite the following passage from *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 at para. 6, in this regard:

> • *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.
>
> • *Are the interests of justice better served by the intervention of the proposed third party*? In my view, this factor includes all of the factors discussed in *Pictou Landing First Nation* plus any others that might arise on the facts of particular cases:
>
> - whether the intervention is compliant with the objectives set out in Rule 3 and the mandatory requirements in Rule 109 (provisions binding on us);

> - whether the moving party has a genuine interest in the matter 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;
>
> - 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;
>
> - whether the moving party has been involved in earlier proceedings in the matter;
>
> - whether terms should be attached to the intervention that would advance the objectives set out in Rule 3 and afford procedural justice to existing parties to the proceeding.

[8] The appellant argues that CARL's proposed intervention would not be valuable to the Court in this appeal because it would add to or alter the issues on appeal (which is not permitted) and much of CARL's submissions would simply duplicate those of the respondent. The appellant also argues that, if CARL's intervention is to be allowed, the Court should limit CARL to addressing the proper interpretation of paragraph 37(1)(*a*) of IRPA and the applicability of the defence of duress thereto. Finally, the appellant argues that CARL should not be allowed to address the second broad issue in this appeal – the question of whether, assuming that the defence of duress can be relevant to inadmissibility under paragraph 37(1)(*a*), the IAD's assessment of the defence was reasonable. The appellant argues that there is no dispute on the legal test for the defence of duress, and that CARL's intervention on this issue would add to or alter the issues before the Court.

[9] I do not agree with the appellant's argument that CARL's intervention would add to or alter the issues. I accept CARL's submission that its proposal to address the broader implications

of the appellant's position in this appeal will be of assistance to the Court on the issue of the relevance of the duress defence to inadmissibility under paragraph 37(1)(*a*) of the IRPA. I also accept CARL's submissions that its knowledge and experience put it in a position to offer such assistance, and that its intervention will not simply duplicate the respondent's arguments. CARL can offer the Court a different perspective on the implications of various provisions of the IRPA to the issues in this appeal, and this will likely give the Court a more complete picture. I am of the same view concerning the second broad issue of the reasonableness of the IAD's assessment of the applicability of the defence of duress in this case.

[10] Moreover, I am confident that CARL understands its obligation to take the issues and the evidence as it finds them, and not to add to or alter them.

[11] In my view, the interests of justice are better served by CARL's intervention. I am satisfied that the submissions CARL seeks to make will be of assistance to the Court. Moreover, CARL has demonstrated that it has a genuine interest in this matter, and will dedicate its substantial knowledge, skills and resources to this appeal.

[12] CARL also seeks the right to make oral submissions at the hearing of the appeal. I will defer this request for consideration by the panel hearing the appeal. I expect that the panel will be better placed to decide this aspect of CARL's motion after (i) having reviewed CARL's memorandum of fact and law, and (ii) the duration of the appeal hearing as a whole has been determined.

[13] The appellant requests that he and the respondent be allowed to submit memoranda in reply to CARL's memorandum of fact and law. In the absence of any objection, this request will be granted.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-392-19
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. EDGAR ALBERTO LOPEZ GAYTAN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATE:	AUGUST 18, 2020

WRITTEN REPRESENTATIONS BY:

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