Federal Court of Appeal  Cour d'appel fédérale

Date: 20150622

Docket: A-124-15

Citation: 2015 FCA 151

Present: **STRATAS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ZUNERA ISHAQ

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 22, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Before me are six motions for intervention brought by the Canadian Civil Liberties Association, the National Council of Canadian Muslims, the South Asian Legal Clinic of Ontario / South Asian Bar Association of Toronto, the Ontario Human Rights Commission, the Barbra Schlifer Commemorative Clinic, and the Women's Legal Education and Action Fund Inc. (collectively, the "applicants"). Each seeks to make submissions on certain Charter issues that may arise in this appeal.

[2] The Charter claimant and the respondent to this appeal is Ms. Ishaq. She is a permanent resident who has been granted Canadian citizenship. However, she cannot be considered to be a citizen until she takes the oath of citizenship. She says that a government policy requires her to remove her *niqab*, a veil that covers most of her face, during the oath of citizenship. This, Ms. Ishaq says, is against her religious beliefs that obligate her to wear a *niqab*. She says that she will unveil herself to a stranger only if it is absolutely necessary to prove her identity or for purposes of security, and even then only privately in front of other women. In the Federal Court, she challenged the government policy on a number of grounds, including freedom of religion and equality rights under the Charter.

[3] The Federal Court (*per* Justice Boswell) ruled in her favour, but on issues other than the Charter issues: *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FC 156, 381 D.L.R. (4th) 541. The Federal Court interpreted the policy and applicable legislation and held that to "the extent that the [p]olicy interferes with a citizenship judge's duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath, [the policy] is unlawful" (at paragraph 68). The Minister of Citizenship and Immigration has appealed to this Court.

[4] Although the Federal Court did not deal with the Charter issues, they are still live in this appeal. It is possible that this Court will have to deal with them.

[5] For the purposes of assessing the six motions for intervention, the test in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365 shall be applied.

This test replaces the former test in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.).

[6] The test in *Pictou*, above at paragraph 11 is as follows:

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?

[7] In the six motions for intervention before this Court, all of the factors, save one, are present to a greater or lesser degree. The one problematic factor—perhaps the most important factor given its prominence in Rule 109(2)—is whether the proposed intervener will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter.

[8] Our Court has never written about this factor in much detail. Many applications for intervention fail because this factor has not been met. Yet, good interventions can really assist this Court. So a few words of guidance about this factor are now apposite.

[9] This factor really matters. Time and time again, applicants fail to address whether they will advance different and valuable insights and perspectives that will actually further the Court's

determination of the matter. Instead, often they stress their lofty aims, good policy work and previous valuable interventions. Others raise issues that they find interesting but have nothing at all to do with the case. Some promise in one paragraph that they will take the evidentiary record as they find it but then in the next paragraph offer arguments dependent on facts absent from the evidentiary record. Still others assure us that if admitted to the proceedings they will have something important to say, but they don't tell us what they will say. Sometimes we get words that sound nice but don't really mean much at all. And sometimes we are confused for legislators or constitutional framers who can enshrine grand policies into law.

[10] Applicants that are successful investigate the evidentiary record and the specific issues in the case, enabling them to offer much detail and particularity on how they will assist the Court. They know that success depends upon the extent to which they can hone into the true nature of the case, locating the particular itch in the case that needs to be scratched, and telling us specifically how they will go about scratching it.

[11] In many cases, we need only decide whether there is reviewable error in the decision before us. This often entails nothing more than examining through the lens of the appellate standard of review the settled law and the settled facts. In cases of that sort, the need for an intervener is low.

[12] However, some cases are different—they have an itch that needs to be scratched—and so intervention is a real possibility:

- Sometimes the law is unsettled and the need for help is real. For example, with two conflicting lines of authority, the Court may have to decide which line best reflects the policies expressed in the area of law.

- In rare cases, we will consider departing from earlier authority for principled, legal reasons, and outside insights and perspectives on that may be useful: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149.

- Sometimes we need assistance on whether there should be "responsible, incremental change[s] to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning": *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720 at paragraph 117.

- In other cases, we may have multiple options in applying the law to the facts—options with different implications on which interveners, taking the evidentiary record as it is, may have useful insights and perspectives. Sometimes cases raising the Charter fit here. But if the Charter issues are rather well-settled, the number of options can be narrow.

This is not an exhaustive list.

[13] In each case, the applicant for intervention must identify the issue(s) upon which the case will turn—the controlling idea(s) of the case—and describe with particularity how its unique

expertise or perspective will assist. The controlling idea(s) can only be identified through effort and attention to detail.

[14] Sometimes applicants offer to help on the controlling idea(s) but the submissions they intend to make are foreclosed by the absence of evidence in the record.

[15] The first-instance decision-maker, be it a trial court or an administrative decision-maker, is normally the only forum for fact-finding. New evidence is not admissible on appeal unless the test for fresh evidence is satisfied (see, *e.g.*, *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212) or unless we can take judicial notice of the evidence (see, *e.g.*, *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458). Very specific exceptions exist in applications for judicial review: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 41-46. Whether an appeal or an application for judicial review, the exceptions are narrow.

[16] Often, as here, applicants seeking intervener status in appellate courts have played no role before the first instance decision-maker. By the time they apply for intervener status in the appellate court, the facts have been found and the evidentiary record is closed. This is a shame, as they could have played an important role in the fact-finding process there.

[17] On appeal, interveners cannot make new legal arguments that are foreclosed by the evidentiary record:

> Notices of application and notices of appeal serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(*b*) a proposed intervener must show its potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.

(*Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at paragraph 19.)

[18] Nor can interveners simply import into the appeal the evidence they need to make their arguments. After all, the parties themselves cannot make new legal arguments that are foreclosed by the factual record, nor can they simply import into the appeal the evidence they need: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at paragraphs 32-33; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 at paragraphs 36-37. Judges sitting on appeal are subject to the same rule: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

[19] Although this is clear and elementary law, many in the intervener community seem oblivious to it. For example, in this case a number of the applicants seem to think they will be able to assert new factual matters in the area of social science in support of their submissions in the appeal. Some suggest that the Supreme Court has allowed them in the past to refer to social science insights not explored below. That may be so, but the Supreme Court has deluged us with binding decisions directly or indirectly forbidding that practice—*Palmer*, *Find*, *Spence*, *Sylvan*

Lake, *Quan*, *Kahkewistahaw*, all above, more Supreme Court cases below, and many other Supreme Court cases I need not cite.

[20] Take, for example, what the Supreme Court has said about judicial notice. Judicial notice allows for the admission of facts "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": *Find*, above at paragraph 48. An interest group devoted to a cause in a particular area might consider certain social science facts to be obvious or indisputable articles of faith. But to the Courts—neutral decision-makers divorced from all causes—such social science facts are controversial and must be proven.

[21] Almost always, social science facts do not fall within the categories of permissible judicial notice. Matters of social science are within the purview of experts. Those matters must be adduced through the experts, and they must be available for cross-examination. Cross-examination is essential to the testing and reliability of the evidence. It cannot be taken on faith. This exercise is to be conducted in trial courts, not appellate courts: see most recently *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paragraphs 53-55.

[22] In appellate courts, interveners sometimes try to file in their books of authorities reports that assert social science positions not advanced in the first-instance court. Then they cite the reports as proof of certain social science matters. This is nothing more than improperly "bootlegging evidence in the guise of authorities": *Canada v. Taylor*, [1987] 3 F.C. 593 at page 608, 37 D.L.R. (4th) 577, cited approvingly in *Public School Boards Ass'n v. Alberta (Attorney*

General), [1999] 3 S.C.R. 845 at page 847; and see *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at paragraph 14. Others try to sneak it into their memoranda. This does not make the report admissible.

[23] Sometimes courts adopt a more lax attitude to the admissibility of evidence concerning legislative facts, such as the reason why certain legislation was enacted: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at page 1099, 73 D.L.R. (4th) 686. But here we are not dealing with legislative facts. And even in the case of legislative facts, one cannot offer evidence against the opposing party's case without providing a proper opportunity for its truth to be tested: *Public School Boards Ass'n v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44 at paragraph 5, citing *Danson*.

[24] I acknowledge the desirability of courts deciding Charter issues on a factual record that is as complete as possible: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385. But the evidence in that record must be tested, assessed and weighed. In our system of justice, that happens at first instance, not on appeal.

[25] In this case, one applicant casts its eye to what it says the Supreme Court does in some Charter cases. It suggests that "[i]n public interest litigation" courts "will be making policy decisions on matters of fundamental importance to Canadian society" and so a liberal approach to intervention should be adopted. This smacks of the idea that judges deciding Charter issues make subjective decisions about what ought to be and so they should welcome policy briefs from a broad array of people.

[26] That idea is fundamentally misconceived. Unelected as we are, when we decide cases we do not rely upon our aspirations, ideological visions or freestanding opinions about what is just, appropriate and right. We do not decide cases on an *ad hoc* basis using tendentious reasoning based on our personal views. We, like judges on all courts, are subject to constitutional limits, legislation, and binding legal doctrine. Those who disregard this overlook our democratic and constitutional arrangements. The opening words of sections 91 and 92 of the *Constitution Act, 1867* enshrine a principle won four centuries ago at the cost of much bloodshed: legislators have the *exclusive* right to make laws. The only policies we can apply reside in the law or emerge from time-honoured, accepted pathways of legal reasoning. See, *e.g.*, *Delios*, above at paragraph 39; *Paradis Honey*, above at paragraph 117.

[27] As a result, as far as interventions are concerned, we usually refuse offers to acquaint us with political considerations and policies at large, including those that are nothing more than social science conclusions based on a body of evidence not before us. Similarly, offers to acquaint us with foreign or international law regardless of its relevance to the issues at hand are often refused: *Gitxaala Nation v. Canada*, 2015 FCA 73 at paragraphs 11-18. Such offers do not advance any of our tasks as a court of law.

[28] To summarize, an applicant for intervention trying to establish that it will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter ideally should:

1. identify one or more specific controlling idea(s) on which the case will turn;

2. offer, with specificity, the submission(s) it will make on the controlling idea(s), showing why it will advance the Court's appreciation of the controlling idea(s);

3. ensure that its submission(s) will not need to go beyond the evidentiary record; merely saying so is not good enough;

4. distinguish its submission(s) from those of others already before the Court, *e.g.*, on the ground that the submission(s) have not been made, or that its perspectives, experience or expertise—specifically identified—will cast a different light on the matter.

[29] None of the applicants deals with the first three things. Most touch on the fourth, but only by assertion, not demonstration. Accordingly, none has persuaded me that it will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter.

[30] On the nature of the case before us, all seem to accept that this Court will have to follow the law as set out by the Supreme Court of Canada in cases such as *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, 382 D.L.R. (4th) 195; *Mouvement Laïque Québécois v. Saguenay (City)*, 2015 SCC 16, 382 D.L.R.

(4th) 385; and others. No one has identified an inconsistency or ambiguity in the case law on which this Court will need assistance.

[31] One intervener suggests that this Court ought to tweak the test for an infringement of freedom of religion by giving greater emphasis to the subjective belief of the Charter claimant. That avenue is not open to us, bound as we are by the pronouncements of the Supreme Court to the contrary.

[32] It may be that in the course of applying the settled law to the settled facts, the Court will have multiple options with different implications and it may be that interveners, taking the evidentiary record as it is, have useful insights and perspectives. But the applications before me fail to identify with specificity any implications founded upon this evidentiary record that the court needs to consider, let alone advise with specificity how their insights and perspectives might assist. No one has concretely and specifically identified a task—one that is live on the law and the evidentiary record in this case—on which the Court will need assistance and on which the applicants can help.

[33] All of the applicants' submissions are too general and diffuse to be persuasive. The concern is that nothing much different from the submissions of the parties already before the Court will be said. For example, one proposed intervener offers platitudes such as "[t]he way courts approach these issues affects how they evaluate Charter claims which in turn affects the protection of equality rights more broadly" and assures us, without detail, that it would "bring different and valuable insights to assist the Court in its understanding and application of a

purposive and inclusive approach to Charter law." Another promises us a "contextual and substantive rights analysis" based on a "community perspective," without defining this any further.

[34] And when specific matters are identified, their value to this Court's determination has not been made evident. To take one example of many, some applicants wish to make submissions about section 27 of the Charter, the requirement that the Charter be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Others cite section 28, the fact that Charter rights "are guaranteed equally to male and female persons." These sections are already on the books and in our minds. What exactly will the applicants do beyond reading the sections to us? From the submissions received, we are left to wonder.

[35] Some would like to speak to issues of gender, religious faith or culture. More often than not, little specificity is offered.

[36] And to the extent specific issues are offered, the evidentiary record does not allow the issue to be raised. I have reviewed the evidence in the appeal book. Various applicants wish to raise the following factual matters: violence against women, the challenges facing Muslim women in Canada, states' historical control of women's attire, the experiences of Muslims in Canada, the historical relationship between women's attire and their trustworthiness and character, the history of disenfranchisement of women, the exacerbation of barriers already faced by women in immigration and citizenship processes, the poverty of women, stereotypes

concerning *niqab*-wearing women, and the challenges of women in accessing services or employment. I do not minimize the societal importance of these issues but they are not present in this evidentiary record. In the abstract, these may be important issues—some very important issues—but they are just not raised by this evidentiary record. The appeal book shows that the evidence is focused very much upon the respondent herself. There is no evidence of broad effects upon Muslim women generally or the larger Muslim community. The narrowness of the evidentiary record before us and the inability of that record to be expanded on appeal foreclose many of the broad and general submissions the applicants for intervention wish to make.

[37] The respondent's memorandum of fact and law filed in the Federal Court also appears in the appeal book. I have read the memorandum. That memorandum shows that pretty much all of the arguments offered by the applicants that are founded on evidence are already being made by the respondent. Some claim special expertise in running these arguments—mainly legal arguments—but given the presence of experienced and skilled counsel representing the respondent, I am not persuaded that intervention is justified on that basis.

[38] The respondent's equality rights claim is based on two enumerated grounds under section 15 of the Charter, religion and gender. Some of the applicants for intervention wish to raise other enumerated grounds, such as national origin and race. These are new grounds offered without a factual basis and thus cannot be pursued on appeal: *Kahkewistahaw First Nation*, above.

[39] Some applicants urged that they are valuable organizations that have intervened on many issues in many courts. I accept this, though intervention is not granted as a reward for previous good public service. I also accept that there are no Rule 3 concerns of the sort discussed in *Pictou*, above that would make intervention inappropriate. I can also accept—at least judging by media reports filed before me—that this matter has assumed a public, broad and complex dimension though, for reasons explained above, the matter is not as broad and complex as asserted. Finally, I do not doubt that many of the suggested topics for intervention are important and would be fodder for intervention in a case where they are live on the evidentiary record.

[40] However, for the foregoing reasons, on the basis of the rather unspecific and unparticularized submissions made to me and on the basis of the specific evidentiary record and the particular issues raised in this case, I am not persuaded that the applicants will assist in the determination of a factual or legal issue that is actually before us and, in any event, not in a manner different from the existing parties to the appeal.

[41] Therefore, I shall dismiss the six motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-124-15
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION v. ZUNERA ISHAQ

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JUNE 22, 2015

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