Federal Court Cour fédérale

Date: 20120912

Docket: IMM-7805-11

Citation: 2012 FC1076

Ottawa, Ontario, September 12, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JOZSEF MOLNAR, JOZSEFNE MOLNAR
(A.K.A. JOSEFNE MARIA MOLNAR),
KATALIN MOLNAR, GEZA MOLNAR,
JOSZEF MOLNAR
(A.K.A. JOZSEF MOLNAR),
RAMONA MOLNAR, ILONA BERKI

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Robert Israel Blanshay brings a motion, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, seeking leave to intervene in this application for judicial review, as provided for in Rule 109. For the reasons that follow, the motion is granted, on terms.

Preliminary Issue

[2] Mr. Blanshay has sworn an affidavit in support of his motion. The materials filed in support of the motion reflect that they have been filed by Mr. Blanshay of the firm of Blanshay and Lewis as solicitors for the proposed intervener.

[3] The Applicants submit that the motion does not comply with Rule 82 because the proposed intervener is both affiant and counsel on the motion. Rule 82 provides as follows: "Except with leave of the Court, a solicitor shall not depose to an affidavit and present argument to the Court based on that affidavit."

[4] Given the unique circumstances underlying this motion, the Court grants Mr. Blanshay leave to file his own affidavit and act as counsel solely for the purposes of this Rule 369 motion. The Court considers that the following support the granting of such leave.

[5] First, Mr. Blanshay, in his Notice of Motion, specifically advises that if his motion is granted, then he shall retain independent counsel.

[6] Second, he would have been permitted to file his own affidavit and file representations on his own behalf as a proposed party acting in person, regardless of the fact that he also happens to be a barrister and solicitor.

[7] Third, this is a motion made in writing and not one heard in open Court and there was no request made by either the Applicants or the Respondent to cross-examine Mr. Blanshay on his

affidavit. As a consequence, any feared conflict, of the sort described in *Pluri Vox Media Corp v Canada (Minister of National Revenue)*, 2012 FCA 18 [*Pluri Vox Media Corp*], has not arisen to date.

[8] Fourth, as is noted by Mr. Blanshay in his Reply, the matter at hand does not deal, other than indirectly, with the "main issues" in the application and the Court accepts his statement that those main issues "have intentionally not been placed within the proposed intervener's affidavit."

[9] Fifth, the Court agrees with the submission of Mr. Blanshay that in "sane modern procedure" one ought generally to turn a blind eye to procedural irregularities unless there is some evidence of prejudice to the party attacking the affidavit. There is no suggestion here of any prejudice suffered.

[10] Lastly, the Court has had regard to the decision of the Court of Appeal in *Pluri Vox Media Corp* wherein Justice Stratas noted that the Court must, on an application for leave under Rule 82, be alert to the concern of an unacceptable conflict that may arise when a lawyer acts on a motion both as a witness on controversial matters of fact and as an advocate as well as be alert to whether the evidence can be supplied by a person other than the lawyer. Here, any conflict will arise only if Mr. Blanshay is granted intervener status and he has undertaken to obtain independent counsel if his motion is granted. Further, and critically, only Mr. Blanshay has first hand knowledge of the relevant matters attested to in his affidavit.

[11] For all of these reasons, Mr. Blanshay is granted leave under Rule 82 to both depose his own affidavit and act as counsel for himself on this motion.

Background

[12] The main application is to review and set aside the decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD) denying the Applicants refugee protection. The records on the application and the motion reveal that there are outstanding complaints filed with the LSUC regarding the conduct of Mr. Blanshay and Martin Francis Selliah Nagendra (aka Sam Nagendra), an immigration consultant. Accordingly, in light of these outstanding matters, it is appropriate that the facts be limited to those truly necessary for the purposes of this motion.

[13] Mr. Blanshay practices immigration and refugee law in the City of Toronto. He is certified by the Law Society of Upper Canada (LSUC) as a Specialist in Immigration and Refugee Law. He formerly represented the Applicants in their claim for refugee protection before the RPD. The RPD dismissed their claim for protection and the Applicants have been granted leave from this Court to judicially review that decision.

[14] Mr. Blanshay was retained after the Applicants' claim for protection had been prepared by Mr. Nagendra. Mr. Blanshay describes Mr. Nagendra as a "former, trusted colleague and friend" who occupied an office in Mr. Blanshay's law firm. There was apparently a falling out between them in November 2010 and Mr. Blanshay "decided to terminate all association with Mr. Nagendra, cease all client referrals from him, and evict him from my firm premises."

[15] The motion record reveals a substantial and material disagreement between Mr. Blanshay and the Applicants as to the facts surrounding the professional services rendered to them by Mr. Nagendra, the quality of those services, the circumstances relating to the change in the Applicants' representation from Mr. Nagendra to Mr. Blanshay, the services rendered by Mr. Blanshay, and the quality of those services. Mr. Blanshay seeks to put before the Court in this application for judicial review, his version of these facts.

[16] The Memorandum of Argument filed by the Applicants in their judicial review application sets out four alleged issues. The first is stated as follows: "Should the decision be set aside because the Applicant [*sic*] was incompetently represented and as such the decision breached the principles of natural justice?" Mr. Blanshay is the counsel who is alleged to have been incompetent. The detail of the alleged incompetence, which is based upon affidavits sworn by some of the Applicants, is set out in paragraphs 61 through 67 of their memorandum. The allegations are significant and numerous.

[17] Mr. Blanshay in his affidavit filed on this motion vigorously disputes many, if not all of the facts as set out by in the Applicants' application record upon which they submit he was incompetent. Specifically, he attests that his "involvement, representation and services have been significantly misrepresented in order to skew the evidence in [the Applicants'] favour." He argues that "This Honourable Court, and all parties, ought to receive 'the full picture' of the Applicants', immigration history and my involvement, representation and services to them."

[18] The Applicants in their memorandum "accept that it is in the interests of justice that the Court has before it an affidavit from the Proposed Intervener." However, they submit that the proper way to get that affidavit before the Court is for the Respondent to file it and have cross-examinations on any additional affidavits. The Respondent, for its part, has filed a letter stating that "The Respondent consents to the motion of Robert Israel Blanshay, Barrister and Solicitor, dated August 21, 2012, to intervene in the above-referenced judicial review application, including his motion to file affidavits, cross-examine, be served with materials, and for any necessary adjournment of the judicial review hearing."

Analysis

[19] The Applicants submit that Mr. Blanshay has failed to meet the criteria for intervener status as set out in *Canadian Union of Public Employees v Canadian Airlines International Ltd.*, [2000] FCJ No 220 (FCA), para 8, namely:

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

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

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

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

5) Are the interests of justice better served by the intervention of the proposed third party?

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

[20] The factors above are not cumulative; a proposed intervener need not meet every one: *Boutique Jacob Inc v Paintainer Ltd*, 2006 FCA 426, at para 21. However, in this case and based on the specific facts in the record, I am of the view that all have been met.

[21] The Applicants accept that the first two criteria are met.

[22] The Applicants submit that the third criterion is not met because:

> The appropriate vehicle to adduce evidence with respect to incompetent counsel is through evidence filed by the Respondent. In fact, the Respondent has already been provided with the opportunity to file further affidavits and chose not to do so.
> …
> However, although the time for filing has passed, it is submitted that it is now in the interests of justice that the Court grant an extension of time to allow the Respondent to file further affidavits and the Applicants consent to such an order being issued. Thus there is no need to allow the Proposed Intervener to be granted intervener status.

[23] I agree that in the normal course it is for the two parties to applications for judicial review to file the evidence that is necessary for justice to be done. In this case, all parties agree that the evidence that Mr. Blanshay wishes to tender is necessary. It would not be in the interest of justice that it not be before the Court for its consideration. However, the Respondent has had an opportunity to file materials and chose not to include the evidence that Mr. Blanshay proposes to file; nor has it offered to do so in response to this motion should the Court grant it leave to do so. It is not for the Court to second-guess the Respondent's strategy. It is not for the Court to order a party to file affidavits from third parties that it chooses not to file. It is for the Court to ensure

that justice is done and seen to be done. In my view, there is no reasonable or efficient method to get this evidence before the Court other than to grant Mr. Blanshay intervener status.

[24] The Applicants submit that the position of Mr. Blanshay is adequately defended by the Respondent and that he does not require intervener status. I am unable to agree. I accept the submission of Mr. Blanshay that counsel for the Respondent does not and cannot act as the advocate for Mr. Blanshay in the sense that he will be provided with a "full and meaningful way of defending himself against the Applicants' [alleged] false allegations." The situation where counsel is alleged to have been incompetent is unique in that the allegations are a direct attack on a barrister and solicitor whose good name, reputation, and practice may suffer if the allegations are not fully defended in the public process of a court proceeding. Accordingly, I find that the fourth criterion has been satisfied.

[25] I am also of the view, in these circumstances, that the interest of justice is best served by permitting the proposed intervener to participate in the application fully in the issues that directly affect him. He should be permitted to file his own affidavit and that of the interpreter he employed when dealing with the Applicants. He must also be permitted the right to cross-examine the Applicants on their evidence as to their dealings and him, and he must also be permitted to make submissions at the hearing on the issues that directly affect him.

[26] Lastly, I am satisfied that as the record currently stands, it is not possible for the Court to hear and decide the case on its merits with any confidence that justice will be done. The proposed intervener is a necessary party to this litigation given the issue raised by the Applicants

as to his competence. The Applicants, Mr. Blanshay and his interpreter are the only parties with direct knowledge of their interactions, discussions, and instruction. That evidence is essential, in my view, given the allegation that the Applicants' evidence regarding Mr. Blanshay may have been tailored to provide support for their application.

[27] Accordingly the proposed intervener will be granted standing in this application, on the terms set out in the Order.

ORDER

THIS COURT ORDERS that:

1. The motion is granted, Robert Israel Blanshay (the Intervener) is granted intervener status upon the following basis:

   (i) The Intervener shall be represented by counsel who is not a partner or member of the law firm Blanshay and Lewis;

   (ii) The Intervener is permitted to bring evidence and make arguments on the issue of whether the Applicants were incompetently represented, resulting in a breach of natural justice that vitiates the determination of the Refugee Protection Division of the Immigration and Refugee Board (the Intervener's Issue);

   (iii) On or before September 26, 2012 the Applicants and the Respondent shall serve the Intervener with all materials each has filed in this application to date, and the Respondent shall serve the Intervener with a copy of the Certified Tribunal Record;

   (iv) The Intervener is granted leave to file an application record on or before October 3, 2012, including supporting affidavits from:

      a. Robert Israel Blanshay concerning all information, details and circumstances regarding his past representation of the Applicants, together with any other material relevant to the Intervener's Issue; and

      b. Brigitta Mahl, the Intervener's interpreter/translator with whom the Intervener worked with the Applicants, concerning all information, details

and circumstances regarding her interpretation and translation services for the Applicants;

(v) The Applicants and the Respondent are granted leave to serve and file on or before October 10, 2012 further affidavits, if any, in response to the affidavits filed by the Intervener;

(vi) The Intervener is granted leave to cross-examine on any affidavit already served and filed by the Applicants in support of this application and on any new affidavit filed by the Applicants or Respondent pursuant to paragraph 1(v), above;

(vii) The Applicants and Respondent are granted leave to cross-examine on any new affidavits served and filed by either of them pursuant to paragraph 1(v), above;

(viii) The Applicants and the Respondent are granted leave to cross-examine on any affidavits served and filed by the Intervener filed pursuant to paragraph 1(iv);

(ix) Cross-examinations, if any, on affidavits shall be completed on or before October 19, 2012;

(x) The Applicants' further memorandum of argument, if any, shall be served and filed on or before November 2, 2012;

(xi) The Respondent's and Intervener's further memoranda of argument, if any, shall be served and filed no later than November 16, 2012;

(xii) The transcript of the cross-examinations, if any, shall be filed on or before November 16, 2012;

2. The hearing of this application currently scheduled to be heard on Tuesday, September 25, 2012, at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, is hereby adjourned;

3. The style of cause is amended as follows:

JOZSEF MOLNAR, JOZSEFNE MOLNAR (A.K.A. JOSEFNE MARIA MOLNAR), KATALIN MOLNAR, GEZA MOLNAR, JOSZEF MOLNAR (A.K.A. JOZSEF MOLNAR), RAMONA MOLNAR, ILONA BERKI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

ROBERT ISRAEL BLANSHAY

Intervener

4. The hearing of this application for judicial review is hereby fixed for Tuesday, January 29, 2013, to commence at 11:00 a.m. at the Federal Court, 180 Queen Street West, in the City of Toronto, Province of Ontario, for a duration not exceeding two (2) hours.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7805-11
STYLE OF CAUSE:	JOZSEF MOLNAR ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

REASONS AND ORDER OF THE HONOURABLE MR. JUSTICE ZINN

DATED:	September 12, 2012

WRITTEN REPRESENTATIONS BY:

Lorne Waldman	FOR THE APPLICANTS
David Cranton	FOR THE RESPONDENT
Robert Israel Blanshay	INTERVENER

SOLICITORS OF RECORD:

WALDMAN AND ASSOCIATES Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT