Federal Court  Cour fédérale

Date: 20171211

Docket: IMM-2977-17

Citation: 2017 FC 1131

Ottawa, Ontario, December 11, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE CANADIAN COUNCIL FOR REFUGEES
AMNESTY INTERNATIONAL
THE CANADIAN COUNCIL OF CHURCHES
ABC
DE [BY HER LITIGATION GUARDIAN ABC]
AND FG [BY HER LITIGATION GUARDIAN ABC]

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Introduction

[1] The Respondents bring this motion for a final determination of whether the Canadian Council for Refugees [CCR], Amnesty International [Amnesty], and the Canadian Council of Churches [CCC — together, the Organizations], meet the test for public interest standing. Having considered the parties' submissions and reviewed the law, I have decided that (i) the question of public interest standing should be finally decided now, at this early stage of the proceeding, and (ii) the Organizations meet the test for public interest standing.

II. Background

[2] This application for leave and judicial review [Application] was brought by the Organizations, and an El Salvadorian mother and her two children [Family] whose names are protected by a confidentiality order.

[3] The Application seeks leave to judicially review the July 5, 2017 decision of a Canadian Border Services Agency officer who found that the Family was ineligible to be referred to the Refugee Protection Division under section 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. The Application challenges the constitutionality of these provisions and the ongoing designation of the United States as a "Safe Third Country" [STC] under IRPA and the Regulations.

[4] By order dated July 6, 2017, Justice McDonald stayed the return of the Family to the United States, pending the determination of this Application. However, leave has not yet been decided, as the Respondents brought this motion prior to the perfection of the Application.

[5] Two other applications for judicial review have been brought against the Respondents that also challenge the constitutionality of STC provisions in respect of the United States. The first, IMM-775-17, for which leave was granted on July 25, 2017, involves four individual applicants, Mohammad Majd Maher Homsi and her three children [*Homsi*]. Leave was granted in the second application, IMM-2229-17, brought by Nedira Jemal Mustefa, on December 11, 2017 [*Mustefa*]. A decision on a request to consolidate those two proceedings and the instant Application has been deferred until after this leave has been determined.

[6] *Mustefa*, *Homsi*, and this Application are not the first time that STC constitutionality within IRPA and the Regulations has been challenged: the Organizations themselves did so successfully over ten years ago in *Canadian Council for Refugees v Canada*, 2007 FC 1262 [*CCR* (FC)], in which Justice Phelan granted them public interest standing. However, *CCR* (FC) was overturned when the Federal Court of Appeal [FCA] found there was "no factual basis" underlying the constitutional challenge. The FCA decided that such a basis had to be advanced by a refugee in order to provide the "proper factual context" (*Canada v Canada (Council for refugees)*, 2008 FCA 229 at paras 101-103 [*CCR* (FCA)], leave to appeal ref'd 2009 CarswellNat 3778 (WL Can)].

[7] These two cases, decided nearly a decade ago, remain important because the same Organizations have once again asserted public interest standing in this Application, which raises substantially the same constitutional challenges. Thus, the reasoning of the FCA in *CCR* (FCA) has some bearing on the current issue of public interest standing, as will be further discussed below.

III. **Analysis**

A. *What is the nature of this motion?*

[8] The Respondents have, at this preliminary stage of the Application, moved for an order "striking" the Organizations as parties. The underlying argument is that the Organizations do not meet the test for public interest standing.

[9] It is to be remembered that this Application was brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act]. Section 18.4(1) of the Act directs that applications made under section 18.1 must be heard and determined without delay and in a summary way. Preliminary determinations of any kind are discouraged (*YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 at para 37 [*YZ*]).

[10] In other words, the type of relief sought by the Respondents is infrequently entertained by this Court. For that reason, I must be clear on what the nature of the Respondents' motion is, as that will affect which authorities govern, the applicable burden of proof, the legal standards to be met, and the finality of any determinations made. To that end, I will first provide the procedural

context of this motion and my analysis on the Court's jurisdiction to entertain it at this stage of the Application.

(1) Procedural context of this motion

[11] By notice of motion filed September 5, 2017, the Respondents moved under Rules 367 and 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], as well as section 18.1(1) of the Act, for an order "striking" the Organizations as parties because they "improperly purported to be Applicants". The Respondents argued that the Organizations did not meet the test for public interest standing, and asserted that it was improper for them to have asserted standing in the notice of application along with the Family, as opposed to first seeking a grant of standing from the Court.

[12] Although the Organizations maintained, in response, that they met the test for public interest standing, they objected to the Respondents' motion on the basis that it was premature and brought in writing. On the point of the Respondents' allegations of impropriety, the Organizations relied upon this Court's decision in *YZ*, submitting that public interest parties need not prove standing on a preliminary basis.

[13] Following a case management conference with the parties, I ordered that the motion be heard orally and invited further submissions on this Court's jurisdiction to "strike" the Organizations for lack of standing at this juncture, including whether Rule 221 and its attendant jurisprudence had any relevance.

[14] Rule 221, entitled “Motion to strike”, permits the Court to strike out a pleading or dismiss an action where, for instance, it discloses no reasonable cause of action. The test on such a motion is whether it is “plain and obvious” that the action cannot succeed (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 17 and 22). Although Rule 221 does not apply directly to applications, this Court may, by analogy to Rule 221 and through its plenary jurisdiction to control its own process, strike out or dismiss an application where it is “so clearly improper as to be bereft of any possibility of success” (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (FCA) at 600 [*David Bull*]; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at paras 47-48; *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 72 [*Windsor*]). The language of “plain and obvious” therefore remains useful on motions to strike applications (*Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 16 [*Apotex*]; *Windsor* at paras 24 and 72).

[15] In their further written submissions, the Respondents argued that theirs was not a motion to strike under the aegis of Rule 221, but rather a motion to remove the Organizations as parties, pursuant to Rule 369 and section 18.1(1) of the Act. The Respondents also invoked the Court’s inherent jurisdiction to control its process, as well as Rule 104(1)(a), whereby the Court may remove an improper or unnecessary party from a proceeding (*Sakibayeva v Canada (Citizenship and Immigration)*, 2007 FC 1045 (at para 5) [*Sakibayeva*]).

[16] The Organizations, on the other hand, submitted that neither Rule 104(1)(a) nor *Sakibayeva* were of assistance. Instead, they characterized the Respondents’ request as a “motion to strike” governed by the jurisprudence of the FCA in *JP Morgan* and *Apotex*, which follow

David Bull. Generally, as I will explain further below, the *David Bull* line of cases set a high bar for any preliminary determination in an application, including on the basis of lack of standing.

[17] I note that, in their initial written submissions, the Respondents relied upon *David Bull* and referred this Court to several other cases — including *Klippenstein v Canada*, 2014 FCA 216 — which determined strike motions brought under Rule 221. However, in their further written submissions and at the hearing, the Respondents endeavored to distance this motion from the *David Bull* cases and situate it under Rule 104(1)(a) instead, although they did not provide this Court with any authority that squarely addressed a preliminary determination of public interest standing under Rule 104(1)(a), despite being asked whether one existed during the hearing.

[18] In the end result, I am not persuaded that Rule 104(1)(a) permits this Court to simply disregard the *David Bull* cases addressing preliminary determinations of standing in applications for judicial review, to which I will now turn.

(2) Determinations of standing in applications

[19] A party may assert public interest standing by naming itself as an applicant in a notice of application. The Respondents have submitted, however, that this Court should discourage public interest organizations from doing so, arguing that public interest standing is "wholly improper" without a motion.

[20] This Court disposed of similar arguments in *YZ*, where the application was brought by an individual directly affected by the decision, along with the Canadian Association of Refugee

Lawyers [CARL], which asserted public interest standing in the notice of application. Justice Boswell held at paragraph 37 of *YZ* that no rule requires a party to prove public interest standing by preliminary motion, and that such a rule would be contrary to the guidance of the Supreme Court of Canada in *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 (SCC), which states that standing cannot always be properly determined on a preliminary basis.

[21] Thus, a party may assert standing when an application is commenced, and need not seek it by preliminary motion. In such cases, a party's standing to bring the application will typically be dealt with at the hearing on the merits. That occurred, for instance, in both *CCR* (FC) and *YZ*, and it is consistent with the policy mandated in section 18.4(1) of the Act, that applications be heard in a summary manner. Nevertheless, where public interest standing is asserted in the notice of application, it is also possible for the Court to address the issue of standing on a preliminary motion, either by (a) a "motion to strike", or (b) a "preliminary determination of a question of law" (*Apotex* at paras 11 and 24).

(a) *Motion to strike for lack of standing*

[22] The moving party bears the onus on a motion to strike for lack of standing (*League for Human Rights of B'nai Brith Canada v Canada*, 2008 FC 146 at para 13, rev'd on other grounds in 2008 FC 732 [*B'Nai Brith* (FC)]). The test to be used on such a motion is whether it is "plain and obvious" that the application for judicial review is "bereft of success" because the impugned party has no standing (*Apotex* at para 11, cited recently in *Arctos Holdings Inc v Canada (Attorney General)*, 2017 FC 553 at para 46 [*Arctos*]). If the answer to this question is "yes",

then the motion succeeds and the application is dismissed or the party without standing is struck out. Such a finding may only be made in exceptional cases (*Arctos* at para 45).

[23] If, on the other hand, it is not plain and obvious that the party has no standing, then the motion to strike fails. In that case, the matter of standing is not actually decided, but rather is left to the judge hearing the application (*Arctos* at para 75; *Apotex* at para 24).

(b) *Determination of standing on a preliminary motion*

[24] The jurisprudence also instructs that the Court may exercise its discretion to fully and finally determine the question of standing on a preliminary motion, i.e. before the hearing of the application. In such cases, the Court must be satisfied that determination at the preliminary stage is appropriate; if it is not, the issue should be heard with the merits of the application (*Apotex* at para 13). The discretion to make a determination of standing at an early stage of the proceeding must be explicitly exercised, but should only be exercised sparingly (*Apotex* at paras13-14). Ultimately, the overriding consideration is, again, that judicial review applications should proceed summarily and not be encumbered by interlocutory motions (*JP Morgan* at paras 47-48).

[25] The Respondents' motion materials ask for the Organizations to be "struck" as parties and, in part, rely upon some of the *David Bull* and Rule 221 cases. However, it became clear to me at the hearing of this motion that the Respondents are actually asking this Court to exercise its discretion to finally determine the question of public interest standing at this preliminary stage of the Application.

[26] The Respondents' desire to determine the matter of standing early in this proceeding is understandable. They cited jurisprudence suggesting that late-stage challenges to standing reflect a lack of diligence on the part of the moving party, and that it is difficult to "unscramble the egg" prior to a hearing when a matter has proceeded with the participation of all parties asserting standing (Order of Prothonotary Milczynski dated January 15, 2015 in IMM-3700-13 and IMM-5940-14 at 4, at page 24 of the Respondents' Motion Record; see also *Odynsky v League for Human Rights of B'Nai Brith Canada*, 2009 FCA 82 at paras 8-10).

[27] I agree with the Respondents that the issue of the Organizations' standing can and should be finally determined now, rather than at some future point, or indeed at the hearing itself, if leave is granted.

[28] Having reviewed the substantial evidentiary record and considered the extensive written and oral submissions of the parties, I do not foresee any relevant grounds with respect to the test for public interest standing, that would be better canvassed at the hearing (see *Sierra Club of Canada v Canada (Minister of Finance)*, [1992] 2 FC 211 at para 25, excerpted in *Apotex* at para 13). In other words, this Court now has all the information it requires to finally determine whether the Organizations should be granted public interest standing (see *Canwest Mediaworks Inc v Canada (Attorney General)*, 2008 FCA 207 at para 10).

[29] Furthermore, in the particular circumstances of this Application, a final determination of public interest standing at this early juncture will ensure that the Application proceeds without

delay as required by section 18.4(1) of the Act. It will also help to promote the objective of Rule 3, by securing the most expeditious and least expensive way forward.

[30] Therefore, what remains to be considered is whether the "public interest standing" test is met by the Organizations, to whom the onus now shifts.

B. *Should the Organizations be granted public interest standing?*

[31] The heart of the matter before this Court is whether the Organizations should be granted public interest standing. If the answer is "yes", then they are accordingly proper parties to the Application moving forward and I must deny the relief sought by the Respondents.

[32] Section 18.1(1) of the Act provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which relief is sought", which includes parties with public interest standing (*YZ* at para 36).

[33] The Respondents, however, urged this Court to keep in mind the policy rationales for limiting standing to those who are directly affected by a proceeding. They submitted that such a limitation sharpens the debate before the Court, because having a personal stake ensures that arguments are presented thoroughly and diligently. They further observed that the addition of unnecessary parties adds cost and inconvenience with no corresponding benefit, and does not uphold the principle of conserving judicial resources. Against this policy backdrop, the Respondents submitted that the Organizations do not meet the test for public interest standing.

[34] The SCC has developed a three-part test for determining public interest standing, refined in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 37 [*Downtown Eastside*]. To meet this test, the Organizations must demonstrate that (1) there is a serious justiciable issue raised, (2) they have a real stake or a genuine interest in that issue, and (3) the proposed application is a reasonable and effective way to bring that issue before the Court.

[35] Public interest standing must be addressed in a flexible, liberal, and generous manner, and in light of the purposes of setting limits on standing, as confirmed in *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paragraph 43 [*Manitoba Metis*]. This approach has been the interpretative standard since at least *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 (SCC) (at 253) [*Canadian Council of Churches*], and was broadened in *Downtown Eastside* and *Manitoba Metis*.

[36] With these principles in mind, and for the reasons that follow, I agree with the Organizations that (1) there is a serious justiciable issue, (2) they have a genuine interest in that issue, and (3) their participation as parties will contribute significantly to reasonable and effective litigation.

[37] The Respondents neither conceded, nor vigorously disputed, that the Organizations met the first two parts of the public interest standing test. As I explain below, the crux of this decision therefore comes down to whether the Application, with the participation of the Organizations, is

a reasonable and effective way to bring the challenge of Canada's STC provisions in respect of the United States before the Court. Thus I will address the first two parts of the test only briefly, before moving on to the third, key issue.

(1) Does the Application raise a serious justiciable issue?

[38] To answer the first part of the test for public interest standing, I must be satisfied that the Application raises a "serious justiciable issue", without getting into a "detailed screening" of the merits (*Downtown Eastside* at para 56). The issue raised must be assessed pragmatically to ensure that it is "substantial", "important", and "far from frivolous" (*Downtown Eastside* at paras 54-56).

[39] In their written representations, the Organizations summarize the issues raised in the Application as follows:

> (a) Whether section 159.3 of the *Regulations* is *ultra vires* or otherwise unlawful because the designation of the United States of America is not and/or was not at the time of the decision in conformity with sections 102(1)(a), 102(2) and 102(3) of IRPA;
>
> (b) Whether section 159.3 of the *Regulations* is inconsistent with Canada's international obligations under the *Convention relating to the Status of Refugees* and the *Convention Against Torture*;
>
> (c) Whether section 159.3 of the *Regulations* is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter of Rights and Freedoms*; and
>
> (d) Whether section 101(1)(e) of IRPA is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter of Rights and Freedoms*.

[40] First, these are substantial and important constitutional issues, which were considered at length in *CCR* (FC) and *CCR* (FCA). They are far from frivolous.

[41] Second, when ordering a stay of the Family's deportation, Justice McDonald found that the Family established a "serious issue", as required by *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA). It should also be noted that leave has been granted in *Homsi* and *Mustefa*, which as explained above, raise similar constitutional issues. To obtain leave in the context of an application for judicial review, an applicant must establish a "fairly arguable case", which has been held to require a higher threshold than the "serious issue" that must be established for a stay of deportation (*Brown v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1250 at para 5).

[42] Although these prior and related findings turn on different legal standards and are thus not determinative of the question before the Court now, they are, in my view, further evidence that a serious issue exists in this Application for the purposes of public interest standing. I therefore have no difficulty concluding that the Organizations meet the first part of the public interest standing test.

(2) Do the Organizations have a real stake or genuine interest in that issue?

[43] The second part of the test for public interest standing is that the Organizations must have a real stake or genuine interest in the Application. This part of the test "reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody" (*Downtown Eastside* at para 43).

[44] Again, I have no difficulty concluding that the Organizations meet this second part of the test. Each of the Organizations has constituents or stakeholders who are impacted by the subject matter challenged in the Application. Indeed, the Organizations have been extensively involved with cases turning on the STC provisions of IRPA and its Regulations for nearly three decades, including, as set out above, bringing the prior constitutional challenge before this Court in 2007.

[45] Interestingly, *Canadian Council of Churches*, the SCC case which articulated the test for public interest standing in the early 1990s, was brought by one of the three Organizations seeking public interest standing in this Application. Back then, CCC challenged certain refugee procedures, including the precursor to the STC provisions now at issue. Although the SCC denied public interest standing to CCC on the third part of the public interest standing test, it concluded that there was "no doubt" that CCC had a genuine interest in the issue, holding that CCC enjoyed "the highest possible reputation" and had "demonstrated a real and continuing interest in the problems of the refugees and immigrants" (at page 254).

[46] All three Organizations have long and consistently advocated for the rights of refugees, and have been widely recognized for their work in this area. They are also dedicated to human rights and social justice issues, and have collectively participated and intervened in numerous leading cases.

[47] Given their histories and mandates, I find that the Organizations have a real stake and genuine interest in the issues raised in the Application. This interest is amply proven in the affidavit evidence submitted by each of the Organizations in response to this motion, which

establishes in detail their significant and continued involvement in this area of refugee law, including since the time of their participation in *CCR* (FC) and *CCR* (FCA). The Organizations have undertaken a tremendous amount of work assisting individuals, making representations to government, reporting to the press, and gathering evidence.

[48] Indeed, the Respondents on this motion conceded that the Organizations' interest in the Application "cannot be disputed". However, relying on *CCR* (FCA), the Respondents argued that the nature of the Organizations' interest is different from that of the Family. They submitted that the Organizations' interest does not ground public interest standing, but is more appropriately suited to participating in the litigation as intervenors or by "assisting those directly affected".

[49] I will address the Respondents' suggestion that the Organizations ought to seek leave to intervene, or otherwise simply "assist" the Family, at the third stage of the test (below). At this point, suffice it to say that I have not been persuaded by the Respondents' attempts to minimize the nature of the Organizations' interest in relation to that of the Family. Rather, I find that the Organizations will bring a helpful, broad public interest perspective to the determination of these issues. Each has a genuine and long-demonstrated interest in the issues raised. They are far from "mere busybodies". Thus, the Organizations meet the second part of the test for public interest standing.

(3) Is the participation of the Organizations a reasonable and effective way to litigate?

[50] This motion turns on the third part of the test for public interest standing, namely, whether the litigation — with the Organizations participating as public interest parties — is a

"reasonable and effective way" to litigate the serious justiciable issues raised in the Application. Although the Organizations bear the onus of meeting this third part of the test, I will begin with the submissions of the Respondents, which go to the heart of the issue.

[51] The Respondents argued that the Organizations do not meet the third part of the test because there are already several directly affected litigants before this Court, who the Respondents submitted will "thoroughly and diligently" argue the issues raised in this Application. Specifically, the Respondents noted that the Family members, as well as the applicants in *Homsi* and *Mustefa*, all have experienced counsel. As a result, they argued that the individuals are in the best position to litigate the issues raised. The Respondents submitted that the involvement of the Organizations would merely be duplicative, and create inefficiencies.

[52] The Respondents relied on *Canadian Council of Churches* for the proposition that "the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (at page 256). The Respondents argued that here, like in *Canadian Council of Churches*, there is no such "immunization", because the Family and the *Mustefa* and *Homsi* applicants are already challenging the legislation's STC provisions. Therefore, the rationale for granting public interest standing to the Organizations disappears. In this regard, the Respondents urged the Court to follow the reasoning in IMM-1604-16 (Order of Justice Heneghan dated January 4, 2017 at page 16 of the Respondents' Motion Record [*Kashtem*]). In *Kashtem*, Justice Heneghan found that CARL did not have a sufficient interest in the proceeding to be granted public interest standing because the issues could be dealt with by the individual applicants (at pages 18-19 of the Respondents' Motion Record).

[53] I find *Kashtem* to be distinguishable on its facts, which will be explained after first discussing the two key SCC cases on public interest standing (*Downtown Eastside* and *Manitoba Metis*), the considerations they raise, and why those considerations steer this outcome away from *Kashtem*'s.

(1) Guidance from the SCC in *Downtown Eastside* and *Manitoba Metis*

[54] In contrast to the Respondents' submissions, *Manitoba Metis* found that the "presence of other claimants does not necessarily preclude public interest standing; the question is whether [the] litigation is a reasonable and effective means to bring a challenge to court" (at para 43).

[55] Six months earlier, in *Downtown Eastside* (a case published before but heard after *Manitoba Metis*), the SCC provided significant guidance on the types of "interrelated matters" courts should consider when assessing the third part of the public interest standing test. These interrelated matters include (a) a party's capacity to bring forward a claim, including resources, expertise and factual setting, (b) whether the public interest transcends those most directly affected, including access to justice considerations, (c) any realistic alternative means which would favour a more efficient and effective use of judicial resources, and (d) the potential impact of the proceedings on the rights of others who are equally or more directly affected (*Downtown Eastside* at para 51).

[56] Having taken each of these four interrelated considerations into account (explained below), I find that they favour a grant of public interest standing to the Organizations.

(a) *Capacity of the Organizations*

[57] Given the historic involvement of the Organizations in refugee law matters generally, including in the policy-making, legislative, and judicial spheres, as well as the Organizations' involvement in the very matters at issue, they are uniquely situated to assist the Court in appreciating the broader effects of its potential findings. I am guided on this point by the holding in *Manitoba Metis* that even "if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand" (at para 43). It is clear that the Organizations have a useful and distinct perspective.

[58] It is also clear from the notice of application and prior decisions in *CCR* (FC) and *CCR* (FCA), that this Application raises complex and important issues, the determination of which will require a substantial evidentiary record. This Court would therefore benefit from the participation of the Organizations, who have all assisted the courts in immigration and refugee matters of national importance in the past.

[59] In addition, the Organizations have submitted evidence on this motion that they have the requisite resources and relationships with American organizations and attorneys to gather expert evidence regarding the American asylum system in its current reality. They submit that the Family members do not have this expertise or resources, which is confirmed by the Applicant ABC in her affidavit.

[60] On this first *Downtown Eastside* consideration, then, I am satisfied that the Organizations have the expertise, resources and ability to assist the Court in fairly determining the constitutional issues raised in the Application. The Organizations will assist not only the Family in its presentation of the constitutional challenge, but also the Court in determining the issues. At the same time, the Family will ensure that those constitutional issues are determined in a well-developed and concrete factual context, mitigating the concerns raised in *CCR* (FCA).

(b) *Access to justice*

[61] The Organizations are willing to bring forward evidence and commit resources that would otherwise be unavailable to the Family. Their participation will therefore further the aims of access to justice, which are inherent to the notion of public interest standing.

[62] This reality goes beyond the individual applicants who have brought this Application, and extends to those who are not in a position to launch their own challenges. Refugee claimants ordinarily cannot undertake major constitutional challenges alone: they are a vulnerable segment of the Canadian population, lacking both resources and immigration status, and require support in accessing justice.

[63] These considerations must be weighed, not only with respect to the individuals involved in this case, but also given the realities for others similarly situated, who might not be in a position to apply to the Court (*Downtown Eastside* at para 67). Indeed, it has taken nearly ten years since *CCR* (FCA) for any individual applicants to come forward. Although the Family will

provide the necessary factual context, they are at risk of being unable to see the litigation through to its conclusion, particularly if they are deported.

[64] The participation of the Organizations will ensure that the Application is carried through to its conclusion. On this point, I am cognizant that the missing factual context was an issue in *CCR* (FCA) a decade ago, but the concerns identified by the FCA then are mitigated in this Application. In addition, as mentioned above, the law on public interest standing has significantly developed since *CCR* (FCA) through *Downtown Eastside* and *Manitoba Metis*.

(c) *Efficient and effective use of judicial resources*

[65] The Organizations have undertaken to harmonize their input and not to prolong the length or scope of the litigation. This tempers the Respondents' concerns that the Organizations' involvement will become unwieldy and create inefficiencies in the process. The Organizations have demonstrated that they are cognizant of the need to conserve judicial resources through their written and oral submissions to the Court. For instance, should leave be granted in this Application, the Organizations have undertaken not to file separate written arguments from those submitted by the Family, and will not ask for additional time for oral submissions. Thus, I am satisfied that granting public interest standing to the Organizations will not impose any undue burden on court resources.

(d) *Potential impact of the proceedings on the rights of others*

[66] This final consideration from *Downtown Eastside* has been covered off in the above discussion. To summarize, I am satisfied that the inclusion of the Organizations as public interest parties will have a salutary effect on the rights of others, and that granting the Organizations public interest standing will not undermine the private interests of those who are unwilling or unable to pursue the constitutional challenges raised in the Application. To the contrary, their involvement will support those private interests.

[67] I will briefly address the Respondents' submissions that the Organizations' interests are better suited to intervener status or "assisting" the Family behind-the-scenes, rather than as public interest parties.

[68] First, the matter of intervener status is not before me. The Organizations are seeking public interest standing and that is the test I have applied. Second, given the extent of the Organizations' expertise and involvement in the issues, I do not agree with the Respondents' proposal that the Organizations should simply "assist" the Family. It is generally not appropriate for "ghost" parties to lurk in the background, providing extensive funding, evidence, advice, or information.

[69] Finally, I turn to the relevant jurisprudence of this Court which post-dates both *Manitoba Metis* and *Downtown Eastside*.

(2) Guidance from this Court

[70] First, I refer to Justice Mactavish's comments in her comprehensive decision *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, which I find to be applicable on this motion. There, too, the Court granted public interest standing even where there were directly-affected applicants. Justice Mactavish affirmed the importance of access to justice for disadvantaged persons whose legal rights are affected, finding that:

> 347 The three applicant organizations seeking public interest standing in this case are credible organizations with demonstrated expertise in the issues raised by these applications. They are represented by experienced counsel, and have the capacity, resources, and ability to present these issues concretely in a well-developed factual setting: *Downtown Eastside*, above at para. 51. This suggests that this litigation constitutes an effective means of bringing the issues raised by the application to court in a context suitable for adversarial determination.

[71] Justice Mactavish went on to observe that the issues raised "impact on an admittedly economically disadvantaged and vulnerable group, and are clearly matters of significant public interest which transcend the interests of those most directly affected" (at para 350). Further, on the point of duplicative litigation, Justice Mactavish noted that it made the most sense, "from a resource allocation perspective" to litigate the issues "once, in a coherent, comprehensive manner, rather than have them litigated in a piecemeal fashion down the road" (at para 344).

[72] Second, I also rely upon the analysis in *YZ* as follows:

> 42 Granting public interest standing to CARL is also a reasonable and effective way by which the constitutional concerns about paragraph 110(2)(d.1) of the *IRPA* can be brought before the Court. CARL's resources and expertise are such that the constitutional issues have been presented in a concrete factual

> setting. Although the existence of other potential DCO claimants is a relevant consideration, CARL has joined its application with three private litigants and thus ensured that judicial resources will not be wasted (*Downtown* at paragraph 50). Also, the practical prospects of other claimants bringing the matter to Court at all or by equally reasonable and effective means needs to be considered in light of the fact that many potential claimants could be deported before they even try to challenge the legislation... Most refugee claimants arrive with little money and lack the financial means to litigate complex constitutional issues; whereas CARL has secured test case funding from Legal Aid Ontario… CARL will be in a good position to continue this litigation in the event that Y.Z., G.S., or C.S. should be unable or unwilling to do so.

[73] Lastly, *Kashtem* is distinguishable on the basis of the (i) unique connection that the Organizations have to the issues raised in this Application, and (ii) expertise, resources, and evidence that will be required to effectively litigate the constitutional challenges raised here, the tremendous scope of which is evident from *CCR* (FC) and *CCR* (FCA).

IV. **Conclusion**

[74] The issues raised in this judicial review are important nationally, and transcend the immediate interests of the individual parties. Having exercised my discretion to determine — with final effect — the question of public interest standing, I find that test has been met: the Application raises a serious justiciable issue in which the Organizations have a genuine interest. That issue will be reasonably and effectively litigated with the Organizations' participation as parties. Accordingly, the Organizations are granted public interest standing, and the Respondents' request to strike them as parties to this Application is denied.

ORDER in IMM-2977-17

THIS COURT ORDERS that

1. The Respondents' request for an order striking the Canadian Council for Refugees, Amnesty International, and Canadian Council of Churches as parties is denied.
2. The Canadian Council for Refugees, Amnesty International, and Canadian Council of Churches are granted public interest standing with immediate and final effect.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2977-17
STYLE OF CAUSE:	THE CANADIAN COUNCIL FOR REFUGEES ET AL v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
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ORDER AND REASONS:	DINER J.
DATED:	DECEMBER 11, 2017

APPEARANCES:

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