Federal Court  Cour fédérale

Date: 20100315

Docket: T-1592-08

Citation: 2010 FC 297

Montréal, Quebec, March 15, 2010

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

REDA AHMED GINENA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Upon considering a motion by the applicant under rule 316 of the *Federal Courts Rules* (the rules) for an order authorizing the applicant to testify at the hearing on the merits of his application for judicial review with respect, essentially, to the treatment received by him upon his periodic but multiple arrivals into Canada from abroad and especially at the Pierre-Elliot Trudeau airport after a first seizure of personal effects and cash that was executed back on June 5, 2004;

[2] Upon considering the motion records of the parties, and upon having listened to counsel;

[3] Considering that rule 316 reads:

316. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application. [Emphasis added.]	316. Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une demande.

[4] Considering that in *Cyanamid Canada Inc. v. The Minister of National Health and Welfare* (1992), 52 F.T.R. 22 (F.C.T.D.), the Associate Chief Justice of this Court, as he then was, made the following comments with respect to the exceptional nature of "special reason" in subsection 319(4) of the former rules of the Court. The wording of subsection 319(4) was very similar to the current rule 316.

> It is clear that motions are to be conducted on the basis of documentary evidence and that it is exceptional to depart from this practice. Rule 319 of the *Federal Court Rules* provides that allegations of fact upon which a motion is based shall be by way of affidavit although, by leave of the Court and for special reason, a witness may be called to testify in open Court in relation to an issue of fact raised by an application. In *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al. No. 4)* (1987), 11 F.T.R. 132, Glaxo's application under rule 319(4) for leave to call a witness to give viva voce evidence in relation to certain issues of fact raised in the application was dismissed. Rouleau, J., commented (at p. 133):
>
> > Under Rule 319 all the facts on which a motion is based must be supported by affidavit evidence. It is only 'by leave of the court' and 'for special reason' that a witness can be called to testify in relation to an issue. There were no cases presented to me by counsel for the plaintiff nor am I aware of any case

> law which identifies the test as to what constitutes 'special reason'. In my opinion, this is a question to be decided on the facts of a particular case with the onus being on the applicant to prove the existence of 'special reason' to the satisfaction of the court. What is clear from the jurisprudence is that leave will be granted by the court only in exceptional circumstances.
>
> [Emphasis added.]

[5] Considering that it is also interesting to refer to the following comments by the Federal Court of Appeal when it dealt with a request which presented similarities with the case at hand, i.e. that an application be treated and proceeded with as an action under subsection 18.4(2) of the *Federal Courts Act* (see *Macinnis v. Canada (Attorney General)*, [1994] 2 F.C. 464 (F.C.A.), page 473). In said case, Justice Décary stated at page 472 regarding subsection 18.4(2) of the *Federal Courts Act*, that in the circumstances:

> . . . the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[6] Considering here that the Court agrees with the defendant that the Court at the merits will be in a good position based on the affidavit evidence and the application records produced by each party pursuant to rule 306 and ss. to appreciate and assess properly the discrepancies that exist between the two parties – and any credibility issue that might be related thereto – as to whether or not the applicant was targeted systematically by the respondent's officials upon each entry into Canada and then sent automatically to secondary referral;

[7] Considering also that it was at the cross-examination of the affiant for the respondent that the applicant was required to probe and test the respondent's take versus the one sustained by the applicant and his close family in their affidavits;

[8] Considering the alleged prejudice, embarrassment and discomfort caused to the applicant by the repetitive examinations and searches carried by the respondent's officials, said aspects have already been stressed and explored by the applicant in his rule 306 affidavit and the ones of his wife and son;

[9] Considering, in addition, that the instant motion was moved somewhat late considering that parties have known since January 21, 2010 that the hearing on the merits of the application is scheduled to take place on March 24, 2010;

[10] Considering the above mentioned reasons, I am not persuaded that there are special circumstances in this case that should allow the applicant to avoid the general procedure of hearing an application for judicial review on the basis of affidavits;

CONSEQUENTLY, THIS COURT HEREBY ORDERS that the applicant's motion be dismissed, the whole with costs.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1592-08
STYLE OF CAUSE:	REDA AHMED GINENA and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 15, 2010
REASONS FOR ORDER:	MORNEAU P.
DATED:	March 15, 2010

APPEARANCES:

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