Court File No.: A-276-09

FEDERAL COURT OF APPEAL

B E T W E E N:

JEREMY DEAN HINZMAN
NGA THI NGUYEN and
LIAM LIEM NGUYEN HINZMAN

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

WRITTEN SUBMISSIONS OF PROPOSED INTERVENERS

(Proposed Intervenors: Canadian Friends Service Committee (CFSC), and Mennonite Central Committee Canada (MCC Canada))

PART ONE - THE FACTS

1. The Canadian Friends Service Committee (CFSC) and the Mennonite Central Committee Canada (MCC Canada) are seeking to intervene in the Hinzman appeal, and are requesting leave to intervene pursuant to Federal Court Rule 109. They claim an interest in the outcome of the within appeal and believe that they can provide this Court with useful and different submissions for consideration.

2. The appeal is from the decision of Justice Russell, *Hinzman v. Canada (MCI) 2009 FC 415*, in which he dismissed the Appellants' judicial review of the decision of an officer to refuse their application for permanent residence on humanitarian and compassionate grounds.

3. Justice Russell subsequently certified a question for this Court to consider: "Can punishment under a law of general application for desertion, when the desertion was

motivated by a sincere and deeply held moral, political and/or religious objection to a particular war, amount to unusual, undeserved or disproportionate hardship in the context of an application for permanent residence on humanitarian and compassionate grounds?"

4. The relevant background facts, including the decision of the officer and the decision of Justice Russell, are contained in the Appeal Book. The proposed interveners have received and reviewed copies of the Appeal Book.

5. At the conclusion of his decision, Justice Russell also noted the following:

> "If Court room attendance at the hearing is anything to go by, this application has attracted significant public interest and debate. In completing my review of the Officer's decision I have simply applied the relevant jurisprudence and the principles of judicial review as I understand them. The result will obviously displease not only the Applicants but also the larger community of supporters behind them. My conclusions are in no way intended as a comment upon, or sympathy for, either side in the public debate. They are simply the conclusions I feel compelled to reach in applying Canadian law to the facts and arguments before me."
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> *Hinzman v. Canada (MCI) 2009 FC 415, para 97*

6. In the Statutory Declarations submitted in conjunction with his application, the proposed interveners have outlined their particular interests and involvements in the underlying issues in this appeal, namely the circumstances in which mistreatment and punishment for deeply held moral and religious objections to war might be considered hardship for the purpose of a humanitarian and compassionate application in Canada. Both proposed interveners are religious organizations – rooted in the Quaker and Mennonite faith communities – for whom conscientious objection to war has been a fundamental tenet of faith and a basis for much of their work.

7. Jeremy Hinzman and his family are "actively engaged" in the Quaker community in Canada, and regularly attend and are involved with the Toronto Monthly Meeting of

the Religious Society of Friends (Quakers). Support letters from the community, attesting to their commitment to the Quaker community and to pacifism, had been provided with the H&C application (Appeal Record, pages 180, 370). In his affidavit (dated July 3, 2008) in support of his H&C application, Jeremy stated: "I remain opposed to the occupation of Iraq, and to war in general. I now consider myself to be a pacifist, and against all participation in war".

Appeal Book, Affidavit, page 145, para. 18

8. Both the Appellants and Respondent in this matter have submitted their Factums. The proposed interveners have had the opportunity to review both Factums. To date, a Requisition for Hearing has not yet been submitted. No date has yet been set. The proposed interveners are submitting this application in a timely manner.

PART TWO – THE ISSUE

9. The only issue which arises in respect of this motion is whether this Court ought to permit the Canadian Friends Service Committee and the Mennonite Central Committee Canada to intervene in the Hinzman appeal.

PART THREE – STATEMENT OF ARGUMENT

10. Pursuant to Federal Court Rule 109, this Court may grant leave to CFSC and MCC Canada to intervene in this appeal. In *Benoit v. Canada, 2001 FCA 71*, Justice Sexton summarized the principles that may be considered on a motion for intervention (as also set out in *CUPE v. Canadian Airlines*):
    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 of the Court?
    d. Is the position of the proposed intervener adequately defended by one of the parties to the case?
    e. Are the interests 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?

Benoit v. Canada, 2001 FCA 71, para. 15

11. The Court further noted that not all factors need to be satisfied before leave is granted. One criteria for allowing intervention is if the intervener has submissions which will be useful and different from those of the other parties.
Benoit v. Canada, 2001 FCA 71, para. 17

12. The proposed interveners concur with the submissions of the Appellant that the Officer either "ignored evidence or failed to have regard to the totality of the evidence" of Jeremy Hinzman's "sincere and deeply held objections to service with the US military in Iraq". The Appellants in their Memorandum submit that "it is not simply a single piece of evidence that was overlooked, but an entire and central humanitarian and compassionate factor".
Appellant's Memoradum, para. 60 and 68

13. At the same time, the proposed interveners also concur with the submissions of the Respondent that "punishment for desertion could amount to unusual, undeserved and disproportionate hardship under s. 25(1) of the Act".
Respondent's Memorandum, para. 33

14. The Respondent proceeds to argue that the Officer duly considered all the "relevant factors" related to Jeremy Hinzman's case, including the requisite attention to his beliefs, and submits that this assessment cannot be reweighed and in any event "there is no internationally recognized right to selective conscientious objection".
Respondent's Memorandum, para. 33, para. 53 forwards

15. CFSC and MCC Canada wish to jointly offer submissions specifically related to conscientious objection to military service, and how Jeremy Hinzman's *current* beliefs are rooted in both the *Charter* and in international law.

16. While the Officer who decided their H&C case alludes to various steps in the development of Jeremy Hinzman's beliefs related to conscientious objection to war,

we submit that she fails to duly consider his *current* beliefs.
Respondent's Memorandum, para. 38-43

17. Amongst other things, for example, the Officer had noted that Jeremy Hinzman had made an application for conscientious objector status in the US Army, but that the investigating officer had concluded that "his beliefs were not congruent with the definition of conscientious objector status outlined in the regulation". (Appeal Book, page 54). Furthermore, she notes that the Refugee Protection Division in Canada – back in 2006 – had concluded that he was not a conscientious objector because he was not opposed to war in any form, or to the bearing of arms in all circumstances.. (Appeal Book, page 55).

18. However, in his supporting affidavit for the H&C application, Jeremy Hinzman had stated that: "I remain opposed to the occupation of Iraq, and to war in general. I now consider myself to be a pacifist, and against all participation in war". (emphasis added)
Appeal Book, Affidavit, page 145, para. 18

19. Defining what it means to be a conscientious objector is a question of law.
Lebedev v. MCI, 2007 FC 728, para. 35

20. In Jeremy Hinzman's first case before this Court, which dealt with his refugee claim, Justice Mactavish examined whether there was an internationally recognized right to conscientious objection, and rejected the argument that he could legitimately object to war in Iraq alone and be considered a conscientious objector.
Hinzman, 2006 FC 420, para 205, 206

21. However, Justice Mactavish does note that "there is no question that freedom of thought, conscience and religion are fundamental rights well recognized in international law", with particular reference to Professor Hathaway. (at para. 206 and 210). This is affirmed by Rachel Brett, in her paper "International Standards on Conscientious Objection to Military Service", who notes that the UN Human Rights Committee has recognized the right of conscientious objection to military service as part of the right to freedom of thought, conscience and religion.
Brett, "International Standards on Conscientious Objection to Military Service",

Quaker United Nations Office, November 2008

22. In the recent case of *Lebedev*, Justice de Montigny further analyzes the Canadian jurisprudence related to conscientious objection. He notes for example that the Federal Court of Appeal's decision in *Ates* (which simply answers a certified question related to a Turkish claim for conscientious objection, without any significant analysis) "does not seem to sit well" with the Court's previous decisions, in particular *Zolfagharkhani*, which in turn had re-examined its decision in *Musial*.
    Lebedev, 2007 FC 728, para 38, 39

23. Justice de Montigny suggests that the phrase "partial conscientious objection" – in reference to those who object to a particular war or military activity – "implies a non-existent link between two different exceptions from Hathaway and the UNHCR Handbook". Rather, he suggests that: "…conscientious objection applies to those who are totally opposed to war because of their politics, ethics or religion. Selective objection really refers to cases in which an applicant opposes a war he feels violates international standards of law and human rights". However, both raise subjective issues, and decision-makers must evaluate the applicant's "personal beliefs and conduct to see if his claim is genuine".
    Lebedev, para 44, 45

24. Justice de Montigny also finds that these "genuine convictions" may be grounded in religious beliefs, philosophical tenets or ethical considerations". Moral principles may also be "sufficiently compelling to ground and organize their lives".
    Lebedev, para 46

25. Finally, Justice de Montigny notes that "the issue of conscientious objection still raises a host of outstanding questions, begging for resolution". (para. 50).

26. We will submit that the analysis of conscientious objection should also – as appropriate – require an analysis of freedom of religion and conscience. In this case, Jeremy Hinzman's conscientious objection is rooted in his religious and moral beliefs, rooted in part in both his Buddhist and his Quaker religious affiliations. He is clearly sincere in his belief. Moreover, that belief can be tested: is it consistent with his other current (religious) practices? Does it have a nexus with religion which calls for a particular line of conduct? Or does it engender a "personal connection with the

divine or with the subject or object of an individual's spiritual faith"?
Syndicat Northcrest v. Anselem, 2004 SCC 47, para. 53-56

27. The certified question in this matter is rooted in Jeremy Hinzman's desertion from the US military, following his conscientious objection to a particular war, namely the war in Iraq. His decision was rooted in his sincerely held beliefs. Moreover, those beliefs have continued to develop further; as noted he is now a pacifist, and "against all participation in war". The relevant issue for this case is not only the impact of his beliefs at the time he chose to "desert", but the nature and substance of his current beliefs. As noted by the Supreme Court in *Anselem*: "it is inappropriate for courts rigorously to study and focus on past practices of claimants in order to determine whether their current beliefs are sincerely held". (para 53) The Officer deciding the H&C application was required to consider his current beliefs, and the consequences and punishment he would suffer as a result.

28. If an individual like Jeremy Hinzman can show that his or her religious freedom is triggered, the question then is whether there has been enough of an interference to constitute an infringement of freedom of religion. Section 2(a) of the Charter prohibits burdens that are "non-trivial". The burden "must be capable of interfering with religious belief" in a "manner which is more than trivial or insubstantial".
Syndicat Northcrest v. Anselem, 2004 SCC 47, para. 57-59

29. In analyzing conduct which may interfere with freedom of religion, the Supreme Court in *Anselem* states that: "as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial". (para. 60)

30. In the present case, Justice Russell finds that the PRRA Officer "appropriately addresses hardship for both judicial and non-judicial punishment". In particular, she had found that "the hardships attached to laws of general application in a democratic state cannot be considered as unusual and undeserved or disproportionate under Canadian law". (Decision, para. 81). Justice Russell further finds that: "I do not think that the Officer applied a wrong legal test and did not go beyond risk to consider hardship". (para. 88).

31. Given that Jeremy Hinzman's sincerely held belief in conscientious objection is

rooted in his freedom of religion (and conscience), a more rigorous test was required to assess the consequences of any law of general application for his desertion. He deserted because of his sincerely held religious belief. Moreover, while his initial conscientious objection was to a particular war, his current belief is "against all participation in war". (see para. 7 above)

32. Canadian Friends Service Committee and Mennonite Central Committee will submit that the analysis of "unusual or disproportionate hardship" in the circumstances of this particular case must be considered in light of the Supreme Court's test for religious freedom, namely whether the prospective interference is more than trivial or insubstantial.

33. Furthermore, the very nature of the "principled objection" – when based on a fundamental right – requires more than a mere balancing with other relevant factors considered in an H&C application. It must inform the decision.
Okoloubu v MCI, [2008] FCJ No 1495

34. They will further submit that in the particular circumstances of this case, that the likelihood of imprisonment for conscientious beliefs amounts to arbitrary detention resulting from the exercise of rights and freedoms guaranteed not only by the Charter, but by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
Brett, "International Standards on Conscientious Objection to Military Service", Quaker United Nations Office, November 2008

35. CFSC and MCC Canada raise a justiciable issue of public interest. Justice Russell makes reference to the "public interest and debate" in the present case. And Justice de Montigny in the *Lebedev* case, noted above, states that "the issue of conscientious objection still raises a host of outstanding questions, begging for resolution".

36. It is further submitted that the proposed interveners have something useful and distinct to add, given their long history in dealing with the underlying issues in this matter.

PART FOUR – THE ORDER SOUGHT

37. The Applicants (proposed interveners) respectfully request that the following order be made:

    a) That they – either or both of them – be granted leave to intervene in respect of the within appeal;

    b) That they jointly be permitted to file a factum of 20 pages and to make oral submissions limited to 15 minutes.

ALL OF WHICH is submitted at Toronto, this 15th day of December, 2009.

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Timothy Wichert
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Solicitors for the Applicants