Federal Court  Cour fédérale

Date: 20200420

Docket: T-2083-18

Citation: 2020 FC 533

Montreal, Quebec, April 20, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

MOHAMMED ALSALOUSSI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

UPON MOTION in writing dated March 30, 2020 made by the Respondent, the Attorney General of Canada [AGC], pursuant to Rules 359, 360(c), 369(1) and 397(1)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules], seeking an Order to reconsider my judgment rendered on March 13, 2020 [Judgment], granting the Applicant's Application for judicial review in part [Motion]. More specifically, the AGC is asking me to:

- Amend paragraph 2 of the Judgment to read as follows:

> "2. The November 28, 2018 decision of the Passport Division is set aside in part and the issue of the period of refusal of passport services is remitted to a different decision maker for reconsideration and redetermination, in accordance with these reasons;"

- Order that the 60-day delay granted to the Passport Entitlement and Investigations Division [Passport Division] to make a decision, as indicated at paragraph 3 of the Judgment, shall start from the date of the present Order;

AND UPON reading the materials filed by the AGC on March 30, 2020 in support of his Motion, the response filed on April 6, 2020 by the Applicant, Mr. Mohammed Alsaloussi, as well as the reply filed by the AGC on April 15, 2020;

AND UPON considering that Rule 397 provides a limited and exceptional basis for reconsidering an order that has already been granted, and for which the main elements are as follows:

1. When a judge has issued a final order or judgment, he/she is *functus officio*. It means that he/she has exhausted his/her jurisdiction over the subject matter of the litigation (*Halford v Seed Hawk Inc*, 2004 FC 455 at para 6, citing *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848). The doctrine of *functus officio* exists to ensure the finality of orders or judgments, and provides that the Court cannot reconsider or alter its decision once it has been rendered.

2. One of the strictly defined exceptions to the principle of *functus officio* is found in Rule 397, which authorizes the Court to reconsider one of its orders in limited circumstances. These include situations where "the order does not accord with any reasons given for it" (Rule 397(1)(a)) or where "a matter that should have been dealt

with has been overlooked or accidentally omitted" (Rule 397(1)(b)). In this case, Rule 397(1)(a) is the provision invoked by the AGC in support of his Motion.

3. Rule 397 does not allow the Court to entertain a motion which is in the nature of an appeal from its own decision. The proper way to challenge the merits of a decision is to file an appeal, when such appeal is available. Similarly, an argument that goes to the substantive validity of a decision rather than correcting a slip or oversight by the Court cannot be asserted in a motion for reconsideration under Rule 397 (*Yeager v Day*, 2013 FCA 258 at para 14).

4. The purpose of Rule 397(1) is not to reverse a decision that has already been issued (*Taker v Canada (Attorney General)*, 2012 FCA 83 at para 4), but to enable the Court to address inadvertent mistakes or omissions in a judgment, and to ensure that the judgment reflects the intention of the issuing judge and deals with all of the issues that should have been adjudicated (*Pharmascience Inc v Canada (Minister of Health*), 2003 FCA 333 at paras 12-15).

5. More specifically, the power to reconsider an order on the basis that it "does not accord with any reasons given for it", contemplated by Rule 397(1)(a), is limited. In such a case, the Court can only correct an order "if it does not reflect the manifest intention of the Court as expressed in the reasons provided by that Court" (*McCrea v Canada (Attorney General)*, 2016 FCA 285 [*McCrea*] at para 10).

6. The discordance addressed in Rule 397(1)(a) refers to situations where the reasons favor one party and yet, through a clear and obvious error or omission, the order does not (*Davey v Canada*, 2016 FC 492 at para 17);

AND UPON considering that, in support of his Motion, the AGC submits that:

1. Paragraph 2 of the Judgment, as currently drafted, does not accord with the reasons given for it.

2. The reasons are clear that Mr. Alsaloussi's Application is granted in part and that the Passport Decision is only set aside in part.

3. With the proposed amendment to the Judgment, Mr. Alsaloussi will suffer no prejudice and the Judgment will lose none of its force;

AND UPON observing the following:

1. It is not disputed, and very clear from the reasons, that Mr. Alsaloussi's Application was only granted in part. In my reasons, I reviewed the two main dimensions of the decision issued on November 28, 2018 [Decision] by the Passport Division, which revoked Mr. Alsaloussi's Canadian passport and imposed on him a three-year suspension of passport services. I found that the Passport Division's conclusion that Mr. Alsaloussi had obtained a passport by means of false or misleading information in his passport application of April 2018 was reasonable, but that the conclusion on the issue of the three-year period of refusal of passport services imposed by the Passport Division was not.

2. In my view, the reasons leave no doubt that what was remitted to the Passport Division for redetermination by a new decision maker was solely the issue of the period of refusal of passport services. No other parts of the Decision were remitted for

redetermination. To borrow the words of the Federal Court of Appeal in *McCrea*, "this was the manifest intention of the Court as expressed in the reasons".

3. The conclusions of the Judgment expressly state, at paragraph 1, that the Application "is granted in part" and, at paragraph 2, that the Decision of the Passport Division "is set aside and the matter is remitted to a different decision maker for reconsideration and redetermination of the issue of the period of refusal of passport services, in accordance with these reasons".

4. True, paragraph 2 of the Judgment does not say "set aside in part". However, in my respectful view, when the text of paragraph 2 is read in its entirety and in its grammatical and ordinary sense, it clearly expresses that what is set aside and what needs to be reconsidered and re-determined by the Passport Division is solely "the issue of the period of refusal of passport services". Not any other issues addressed in the Decision. At no point was the wording meant to set aside the portion of the Decision dealing with the issue of false and misleading information. The only way a "plain reading of paragraph 2" (to use the words of the AGC) could give a reader the impression that the whole Decision is set aside is if such a reader ignores and turns a blind eye to the second portion of the sentence I wrote.

5. I pause to note that the Passport Division well understood this limited scope of the Judgment from the very beginning, when it initiated the redetermination process. On March 25, 2020, the Passport Division requested Mr. Alsaloussi to make submissions regarding "the suspension of passport services" and expressly referred to the Decision

being reviewed "in part for reconsideration and redetermination of the period of refusal of passport services".

6. That being said, and without espousing or acquiescing to the truncated reading of paragraph 2 proposed by the AGC, I am prepared to acknowledge that the Judgment would have been even clearer if the words "in part" used in paragraph 1 had also been expressly repeated after "set aside" in paragraph 2, rather than simply implied. This, I concede, would have even more accurately reflected the fact that portions of the reasons favored the AGC as only one part of the Decision (namely, the three-year period of refusal of passport services) was found unreasonable.

7. Precision, clarity and certainty are essential attributes of any orders or judgments issued by the courts. Judges should always aim for the highest degree of clarity and certainty in their decisions. Moreover, the interests of justice and the rule of law value precision and clarity. Without them, confusion and uncertainty can hold sway (*Ayangma v Canada (Attorney General)*, 2012 FCA 213 at para 66). Clarity means that someone unfamiliar with a case must be able to ascertain what is required to meet the terms of an order (*Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52 at para 97).

8. Therefore, if it serves to provide additional clarity and to erase any confusion that might percolate with respect to the limited nature of the relief ordered in the Judgment, I am amenable to add the words "in part" in the first portion of paragraph 2, while observing that the rest of the sentence nonetheless clearly states that only the issue of the period of refusal of passport services is remitted for reconsideration redetermination by a different decision maker.

9. I share Mr. Alsaloussi's view that clarity of what exactly is being set aside and remitted for reconsideration in the Judgment may not be necessary here. But the test under Rule 397(1)(a) is not one of necessity. It is one of discordance. In other words, the presence of some asymmetry between the language of the reasons and the terms of an order can be sufficient to convince the Court to reconsider such terms. Here, adding the words "in part" will correct any perceived asymmetry between the reasons and the Judgment, and will thus make the paragraph 2 of the Judgment crystal-clear. In that sense, it fits within the realm of Rule 397(1)(a).

10. I am of course mindful of the fact that Rule 397(1)(a) cannot become a vehicle to modify, change or alter the terms of a judgment. The AGC expressly recognized this in his submissions. Here, I am satisfied that adding the words "in part" after "set aside" in paragraph 2 of the Judgment would not alter the terms or the essence of the Judgment in any manner whatsoever. It would instead just serve to clarify that the Judgment precisely reflects the manifest intention of the Court as expressed in the reasons provided by the Court and entirely conforms with the reasons given for it.

AND UPON finding that, on the basis of the foregoing, the AGC's Motion seeking a reconsideration of my Judgment can be granted in part;

AND UPON finding that the AGC's request to extend the timeline provided for at paragraph 3 of the Judgment should however be dismissed for the following reasons:

1. The AGC has not provided any reasons nor any justification for his requested extension of the 60-day delay within which the Passport Division is to make its decision on redetermination.

2. I fail to see any grounds upon which a request for a reconsideration of this 60-day timeline set out in the Judgment could fit within the limited scope of Rule 397(1)(a). In fact, it could not as it would alter the terms of the Judgment.

3. Furthermore, I observe that the AGC waited until March 26, 2020 to serve his Motion, and until March 30, 2020 to file it with the Court. This is two weeks after the rendering of the Judgment dated March 13, 2020. The AGC then filed his reply submissions on April 15, 2020, nine days after Mr. Alsaloussi's response. At both stages, and though this lateness may perhaps be explained by the unusual and challenging COVID-19 emergency, the AGC took more time than provided in the Rules to file his materials, on a Motion that he himself qualified as being simple and concise.

4. The absence of any justification or reason for the AGC's requested extension is all the more puzzling in light of the fact that the Passport Division had diligently complied with the Judgment prior to the filing of the AGC's Motion, and that it had already started the redetermination process on the basis of its understanding that the redetermination was limited to the issue of the period of refusal of passport services. Therefore, the clarification sought by the AGC in his Motion was not requiring the Passport Division to modify its conduct or to change its course of action and, in such context, I am unable to see on what basis the AGC could justify his request for extending the 60-day timeline provided for in paragraph 3 of the Judgment.

5. I cannot help but note that adding this unnecessary and unfounded request for an extension of the 60-day timeline is what appears to have sparked things off and ignited

the strong and understandable reaction from Mr. Alsaloussi to the AGC's Motion. While clarifying the limited scope of what is being set aside does not harm Mr. Alsaloussi or cripple the Judgment, extending the delay for a new decision of the Passport Division would do the opposite. It would only further amplify the prejudice suffered by Mr. Alsaloussi as a result of the suspension of his passport services by prolonging it, and it would amputate the benefits of the Judgment for him. In other words, I am left with the distinct impression that the unjustified request for an extension of the 60-day timeline regrettably corroded the AGC's Motion and hampered what should normally have been a smooth clarification process of the Judgment.

6. I pause to underline that my foregoing comments should not be read as suggesting or implying any bad faith nor any improper purpose on the part of the AGC. I do not consider that the AGC's Motion is hiding any oblique attempt to unduly delay matters. I am satisfied that the main purpose of the Motion truly was the AGC's perceived need for additional clarity on paragraph 2 of the Judgment. The diligent conduct of the Passport Division since the Judgment was rendered and the steps it has quickly taken to put the redetermination process into motion eloquently reflect the fact that neither the AGC nor the Passport Division is trying to postpone the execution of the Judgment here. Unfortunately, adding the unnecessary request to further amend the Judgment by extending the timeline granted to the Passport Division to render a new decision muddied the waters.

7. I must however add that the AGC's unbridled insistence, in his April 15, 2020 reply, on obtaining an extension of the 60-day timeline is somewhat troublesome in light of the recent developments caused by the COVID-19 situation.

8. On April 4, 2020, the Court issued its *Updated Practice Direction and Order (COVID 19),* clarifying that all timelines set out in any "orders and directions" of the Court made prior to March 16, 2020 do not run during the "Suspension Period", defined as the period running from March 16, 2020 through to May 15, 2020. The Rules expressly state, at Rule 2, that an "order" includes a judgment. Given the wording and the spirit of the Court's suspension caused by the COVID-19 situation, the suspension applies equally to judgments when the timelines are not made on a peremptory basis. The intent is that a party will pick up from where things stood before the Suspension Period as if the intervening period never existed. The Passport Division will therefore have, at the end of the Suspension Period, the period which remained after March 16, 2020 to comply with paragraph 3 of the Judgment.

9. In this highly exceptional and unprecedented context, the befitting course of action on reply would have been for the AGC to graciously retreat from his request of a timeline extension and to limit his Motion to the clarification issue.

10. I make one last comment. I understand from the AGC's submissions that, despite the Suspension Period and the multiple constraints occasioned to all by the current COVID-19 situation, the Passport Division nonetheless continues to act diligently to comply with the Court's Judgment and to render its new decision on redetermination. I can only commend such conduct and the Passport Division certainly deserves to be

praised for that. In these challenging times, the interests of justice and our judicial system need all adjudicators across the country, be they courts, administrative tribunals or other decision makers, to embrace a similar approach so that justice can continue to be administered effectively, yet safely.

AND UPON concluding that, in the circumstances, neither party deserves to be granted costs on this Motion, let alone on a forthwith basis, for the following reasons:

1. Considering that there was apparently no dispute that what had been in fact remitted to the Passport Division for reconsideration and redetermination was strictly the portion of the Decision dealing with the issue of the period of refusal of passport services, the main aspect of the AGC's Motion with respect to the clarification of paragraph 2 of the Judgment should not have been opposed by Mr. Alsaloussi. In my view, this part of the Motion could have been easily settled between counsel with a minimum level of cooperation, and should have been brought to the Court on consent.

2. Conversely, the AGC should not have sought an extension of the 60-day timeline provided for at paragraph 3 of the Judgment considering that, by his own admission, the requested clarifying amendment did not alter the terms of the Judgment, and considering the fact that the Passport Division was already acting in conformity with the understanding of the Judgment that the AGC was asking the Court to clarify. For the AGC to ask for an extension of the 60-day timeline to redetermine the Decision in a situation where the passage of time could only serve to cause additional prejudice to Mr. Alsaloussi was simply unjustified.

3. As was the case in the Judgment, given the divided success on this Motion, I see no ground to support an award of costs to any party.

ORDER in T-2083-18:

THIS COURT ORDERS that:

1. The motion to reconsider the Judgment issued on March 13, 2020 is granted in part and paragraph 2 of the Judgment is hereby amended as follows:

   "The November 28, 2018 decision of the Passport Division is set aside in part and the matter is remitted to a different decision maker for reconsideration and redetermination of the issue of the period of refusal of passport services, in accordance with these reasons."

2. No other provision of the Judgment is modified.

3. No costs are awarded.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2083-18
STYLE OF CAUSE:	MOHAMMED ALSALOUSSI v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT MONTREAL, QUEBEC PURSUANT TO RULE 369 OF THE **FEDERAL COURTS RULES**

ORDER AND REASONS:	GASCON J.
DATED:	APRIL 20, 2020

APPEARANCES:

Neil Gary Oberman	FOR THE APPLICANT
Lisa Maziade	FOR THE RESPONDENT

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