Federal Court  Cour fédérale

Date: 20110316

Docket: IMM-5979-09

Citation: 2011 FC 318

Ottawa, Ontario, March 16, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

VINOD KUMAR RAINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] By Notice of Motion dated January 21, 2011, the Minister of Citizenship and Immigration (the "Respondent") seeks reconsideration of the Order made by this Court on January 11, 2011. By that Order, the Court allowed the application for judicial review brought by Mr. Vinod Kumar Raina (the "Applicant") from the decision dated November 4, 2009, made by the Immigration and Refugee Board, Refugee Protection Division. The Respondent seeks reconsideration of that Order pursuant to Rules 35(2)(a), 397 and 399 of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[2] By submissions filed on January 26, 2011, the Applicant opposes the Respondent's motion and arguments. The Respondent filed his reply submissions on January 31, 2011.

[3] Rule 397(1) allows a party to seek reconsideration of an Order where a Court, not a party, has overlooked a matter. Rule 397(1)(a) provides as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(a) the order does not accord with any reasons given for it; or	a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

[4] The Respondent also relies on Rule 399, in asking for reconsideration of the Order that was issued on January 11, 2011. Rule 399 provides as follows:

399. (1) On motion, the Court may set aside or vary an order that was made	399. (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve prima facie démontrant pourquoi elle n'aurait pas dû être rendue :
(a) ex parte; or	a) toute ordonnance rendue sur requête ex parte;

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding, if the party against whom the order is made discloses a prima facie case why the order should not have been made.	b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
Setting aside or variance	Annulation
(2) On motion, the Court may set aside or vary an order	(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or	a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
(b) where the order was obtained by fraud.	b) l'ordonnance a été obtenue par fraude.
Effect of order	Effet de l'ordonnance
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[5] The thrust of the Respondent's submissions is that in allowing the application for judicial review the Court failed to deal with the issue of certification of a question, relative to matters arising under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), as governed by subsection 74(d) of that Act, as follows:

74. Judicial review is subject to the following provisions:	74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
…	
(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[6] The power to reconsider pursuant to Rule 397, is a narrow one. It is not an opportunity for the Court to entertain an appeal from its own order. In that regard, I refer to the decision in *Man v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 332.

[7] In *Tran v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1249 the Court determined that Rule 397 does not operate to allow the Minister to bring a motion for the purpose of adding a question for certification. At para. 8 of that decision, Justice Simpson held as follows:

> In my view, Rule 397(1) does not permit the Minister to move to add a question for certification to a judgment.

[8] I agree with the Court's conclusion in *Tran*. In *Varela v. Canada (Minister of Citizenship and Immigration)*, [2010] 1 F.C.R. 129, the Federal Court of Appeal said as follows, at para. 29:

> Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.

[9] In my opinion, the decision in *Varela* reinforces the rule that questions for certification should be proposed before the judge's reasons are rendered, meaning that Rule 397 does not allow a party to bring a motion for reconsideration for the purpose of proposing a certified question.

[10] Rule 399, likewise, has a narrow scope of application. I refer to the Federal Court of Appeal's decision in *TMR Energy Ltd. v. State Property Fund of Ukraine*, [2005] 3 F.C.R. 111 and *Roxford Enterprises v. Cuba*, [2003] 4 F.C. 1182. In *TMR Energy*, the Federal Court of Appeal, at para. 31, held as follows:

> Rule 399 allows the Court to set aside or vary an order that was made *ex parte* if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

[11] The Order that is the subject of the Minister's motion was not made *ex parte*. There is no allegation or issue of fraud relative to the Order of January 11, 2011.

[12] The only basis upon which the Respondent could succeed in his motion pursuant to Rule 399 is to show that, pursuant to Rule 399(2)(a), a "matter" arose or was discovered subsequent to the making of the decision.

[13] The meaning of a new "matter" for the purpose of Rule 399 was discussed by the Court in *AB Hassle v. Apotex Inc.* (2008), 65 C.P.R. (4th) 332, affirmed (2008), 73 C.P.R. (4th) 428, at para. 36 as follows:

> Where a matter of the type referred to in paragraph 399(2)(a) already was in existence but was only discovered after the judgment was issued, the Court has established a stringent three-fold test which a

> party must meet before consideration is to be given to setting aside a judgment. The Federal Court of Appeal set out such a test in *Ayangma v. R.*, 2003 FCA 382 (F.C.A.) at paragraph 3:
>
> > 3 The jurisprudence establishes three conditions which must be satisfied before the Court will intervene:
> >
> > 1 - the newly discovered information must be a "matter" with the meaning of the Rule;
> >
> > 2 - the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and
> >
> > 3 - the "matter" must be something which would have a determining influence on the decision in question.

[14] In *AB Hassle*, the Federal Court held that case law made after the Court's decision cannot be considered a new "matter" for the purpose of Rule 399(2)(a). Given the Court's conclusion in *AB Hassle*, and the Federal Court of Appeal's holding in *Varela*, it is my opinion that the Court's reasons in a particular case cannot be a new "matter" for the purpose of varying an order to allow the proposal of a certified question, pursuant to paragraph 399(2)(a) of the Rules.

[15] The Respondent's attempt to characterize the opportunity to prepare a question for certification as a new "matter" cannot succeed.

[16] At the end of the hearing of the within application for judicial review, counsel for both parties were given an opportunity to propose a question for certification. This fact is recorded both in the Minutes of the hearing and in the Index of Recorded Entries.

[17] This is a complete answer to the motion under both Rules 397 and 399. The Minister was given the opportunity to propose a question for certification, he chose not to do so.

[18] The motion is dismissed with costs to the Applicant. If the parties cannot agree on the costs, brief submissions can be made in accordance with a Direction to be issued.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the Applicant. If the parties cannot agree on costs, brief submissions can be made in accordance with a Direction to be issued.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5979-09
STYLE OF CAUSE:	VINOD KUMAR RAINA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Motion Dealt with in Writing Without Appearance of Parties
DATE OF HEARING:	Motion in Writing
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	March 16, 2011

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