Federal Court  Cour fédérale

Date: 20111213

Docket: IMM-3076-11

Citation: 2011 FC 1468

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ZE WEN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER FOR COSTS

[1] The general rule that costs usually follow the event does not apply in immigration matters. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* provides for no costs "unless the Court, for special reasons, so orders." The Minister submits that there are special reasons to award costs against Mr. Li. I agree and grant costs in the amount of $1,500, all inclusive.

[2] Mr. Li was concerned, and probably rightly so, with the lack of progress in his application to sponsor his Chinese mother. There were two avenues of redress open to him. One was by way of

judicial review, and the other was extra-judicial in nature. He chose both. He achieved success early on through the extra-judicial avenue, but continued this judicial review, which had then become moot, without informing the Minister's counsel and the Court of the other steps he had taken, with success, to expedite his mother's application.

CHRONOLOGY OF EVENTS

[3] In 2006, Mr. Li applied to sponsor his mother. The Minister approved the application in October 2008. In the normal course this would have generated two letters. The first was to inform him that the application had been approved and that a sponsorship kit would be sent within the next few weeks. The second was the sponsorship kit itself. Mr. Li would have had his mother fill out the form. Mr. Li's position is that he received neither the approval letter nor the sponsorship kit.

[4] In December 2009, the Hong Kong Visa Office closed its file because it had not received an application for permanent residence within a year of approving the sponsorship application.

[5] In December 2010, with the help of his Member of Parliament and lawyer, Mr. Li asked that the matter be re-opened. The answer was that the visa office had closed its file. Mr. Li appealed to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada which dismissed the appeal on the grounds that it lacked jurisdiction. It was of the view that there was no decision of a visa officer to appeal. It is that decision, dated 28 April 2011, which was the subject of this application for leave and judicial review, notice of which was filed in court 9 May 2011.

[6] This was followed by Mr. Li's application record which was filed on 6 June 2011.

[7] On 11 June 2011, however, he was informed by the Hong Kong Visa Office that it would accept his mother's application for permanent residence notwithstanding that it had not been submitted within the one-year limit. The file would be re-opened as soon as the application was received. The application was submitted 11 July 2011 and is being processed.

[8] Mr. Li did not immediately inform the Minister's counsel who had appeared on the application for leave and judicial review of this development. Consequently, the Minister's memorandum of argument on the leave application was filed 4 July 2011. It was admitted that the IAD had erred in conflating the sponsorship application and the application for permanent residence into a single application. However, nothing, it was alleged, turned on that point. Mr. Li could not appeal with respect to the application for permanent residence as no such application had been received by the visa office, and he could not appeal the sponsorship application as it had been granted.

[9] On 9 September 2011, Mr. Justice Kelen, obviously not made aware that the visa office had agreed to re-open its file, granted leave.

[10] The Minister's position is not only that the application for judicial review had become moot, but that Mr. Li had obtained more than he could possibly have obtained in a successful judicial review. I agree. All this Court could have done was grant the judicial review and refer the matter back to the IAD for re-determination. It might have again held that it was without jurisdiction on the

grounds that no application for permanent residence had been filed with the visa office and, therefore, there was still nothing to appeal. However, even if it determined that there had been a constructive refusal, all it could have done was refer the matter back to the visa office with a request that the matter be expedited.

[11] The more recent history is set out in the affidavit of Caroline Christiaens, who originally had carriage of this matter for the Minister. It would appear from a letter she sent 11 October 2011 to Mr. Li's counsel, Lawrence Wong, that it was only through telephone conversations with him on 4 and 5 October 2011 that she learned that the Hong Kong Visa Office had agreed to re-open its file.

[12] On 18 October 2011, she wrote to say that the application for judicial review had become unnecessary since at least 12 June 2011, and that since then the Minister had spent further time preparing a memorandum of argument and various affidavits. Mr. Wong was invited to discontinue the judicial review application. However, if he pursued the Minister intended to seek costs for all unnecessary steps as the judicial review application should have been discontinued.

[13] Nevertheless, Mr. Wong stated he intended to cross-examine affiants on their affidavits, and various dates were offered.

[14] Mr. Li's counsel, wrongly I think, was of the view that the judicial review could somehow force the Hong Kong Visa Office to expedite matters. By letter dated 21 October 2011, he was informed by the Minister's counsel that the Hong Kong Visa Office did not have a backlog and that the permanent residence visa application was in active process.

[15] According to a letter dated 31 October 2011, from Ms. Christiaens to Mr. Wong, in a voicemail he had said that he would not be cross-examining the affiants, and that he would consent to the judicial review being allowed. He would not withdraw the judicial review application because of the IAD's error. Again, Minister's counsel raised the mootness issue and that if the judicial review application were continued the Minister would seek costs.

[16] Next we have a letter dated 9 November 2011, from Ms. Christiaens to Mr. Wong, referring to a voicemail message in which he had said he would withdraw the judicial review if the Minister could give something official in writing saying the file was being processed and the timeframe for getting to it. In the alternative, he suggested that the IAD appeal be allowed, and left in abeyance. Ms. Christiaens reminded him that she had already given him something official in her own letter dated 21 October 2011 and that the judicial review application was not a challenge to the visa officer's decision as such. Finally, the respondent would have to file a further memorandum arguing that the matter had become moot and seeking costs.

[17] Then, on 21 November 2011, Ms. Christiaens passed on a letter from the Hong Kong Visa Office, which had been sent to Mr. Li's mother, which called for proof of completion of the immigration medical examination. It was only at this point that counsel seemed to accept that there was nothing to be gained in pursuing the matter. On 28 November 2011, he wrote to the Registry with a draft notice of discontinuance. He further stated that on 25 November 2011 he offered to discontinue the proceeding but that the respondent was seeking costs, so that Mr. Li would also be seeking costs against the respondent. On the motion, Mr. Li sought costs of $1,200.

SPECIAL REASONS TO AWARD COSTS

[18] Special reasons to award costs include a finding that a party has unnecessarily or unreasonably prolonged proceedings (*Huot v Canada (Minister of Citizenship and Immigration)*, 2009 FC 917, 83 Imm LR (3d) 144; *Manivannan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, 338 FTR 203). In this case, the Court lost valuable time, and someone else's judicial review was delayed because of the unreasonable position taken by counsel for the applicant.

[19] As the exercise we went through at the hearing demonstrates, the Minister could easily tax more than $1,500.

[20] This award takes no account of the following outrageous remark in the affidavit of Mr. Li's solicitor, Lawrence Wong, an officer of this Court, about Caroline Christiaens, another officer of the Court, a remark which might surface elsewhere:

> Based on my previous experience, I have very good reason not to take this Minister counsel's words at face value and therefore I could not rely on the Minister counsel's letter advising that there was no backlog in Honk Kong. I requested to see something official and I could not recommend to the Applicant to discontinue until we see some official or concrete evidence of the case moving forward.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The motion for costs is granted.

2. The applicant is ordered to pay the Minister of Citizenship and Immigration costs in the amount of $1,500, all inclusive.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3076-11
STYLE OF CAUSE:	LI v MCI
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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