Federal Court of Appeal | Cour d'appel fédérale

Date: 20160923

Docket: A-205-15

Citation: 2016 FCA 237

CORAM: **NADON J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

OBAIDULLAH SIDDIQUI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 23, 2016.

REASONS FOR ORDER BY: NADON J.A.
CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR ORDER

NADON J.A.

[1] Before us is a motion brought by the appellant for an order, pursuant to Rule 399 of the *Federal Courts Rules*, SOR/98-106, setting aside this Court's judgment of April 29, 2016 (2016 FCA 134) which dismissed his appeal of a decision of the Federal Court (2015 FC 329) which had previously dismissed his application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada.

[2] The appellant also seeks an order reconvening the hearing of the appeal before a new panel or, in the alternative, an order pursuant to Rule 397 setting aside that part of our judgment which granted costs to the respondent.

[3] For the reasons that follow, I conclude that the motion should only be allowed in respect of the granting of costs to the respondent.

[4] I begin by reproducing Rules 397 and 399 upon which the appellant relies in making this motion.

Motion to reconsider	Réexamen
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;
(*b*) a matter that should have been dealt with has been overlooked or accidentally omitted.	*b*) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

Mistakes	Erreurs
(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.	(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.
…	[…]
Setting aside or variance	Annulation sur preuve prima facie
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.

[emphasis added]

[5] We heard this appeal in Vancouver on April 19, 2016 and, at the end of the hearing, we reserved our judgment.

[6] On April 28, 2016, counsel for the appellant wrote to the Court requesting the opportunity of making representations with respect to this Court's decision in *MCI v. Bermudez*, 2016 FCA 131, 483 N.R. 115 (*Bermudez*) rendered on April 27, 2016.

[7] On April 29, 2016, we signed a judgment and reasons for judgment which dismissed the appellant's appeal with costs. Accordingly, on that day, the judgment and the reasons were sent to the registry of the Court for filing and communication to the parties. I should point out that when we signed the judgment and reasons, counsel for the appellant's letter of April 28, 2016 had not yet been brought to our attention by the Registry. I should also point out that at that time we were not aware of the Court's decision in *Bermudez*.

[8] On May 2, 2016, after the letter of April 28, 2016 had been brought to our attention, Rennie J.A. issued a direction to the parties pursuant to which they were asked to provide submissions regarding *Bermudez* within certain delays namely May 4, 2016 for the appellant and

May 6, 2016 for the respondent. Prior to the making of his direction, Rennie J.A. had been advised by the Registry that the judgment had not yet issued.

[9] Following the issuance of his May 2, 2016 direction, Rennie J.A. was informed by the Registry that contrary to the information that he had previously received, the judgment had been transmitted to the parties on April 29, 2016 and that the reasons had been transmitted in part. As a result, Rennie J.A. issued a further direction on May 9, 2016 advising the parties that because judgment had been issued on Friday, April 29, 2016, the Court would not entertain further submissions from the parties.

[10] First, the appellant says that the discovery of *Bermudez*, which this Court rendered on April 27, 2016 and which he brought to the Court's attention on April 28, 2016, constitutes "a matter that arose or was discovered subsequent to the making of the order" (Rule 399(2)(*a*)). Hence, the appellant argues that it is open to this Court to set aside or vary the judgment of April 29, 2016.

[11] Second, the appellant says, in the alternative, that pursuant to Rule 397(2), this Court should reconsider the order of costs made against him.

[12] I will deal first with the appellant's submission that pursuant to Rule 399(2)(*a*), we should set aside or vary our judgment of April 29, 2016. Rule 399(2)(*a*) is an exception to the principle that decisions rendered by a Court are final. In *Collins v. Canada*, 2011 FCA 171, 421

N.R. 201, Mainville J.A., writing for the Court, made this point as follows at paragraph 12 of his reasons. He made it clear that Rule 399(2)(*a*) could not be used

> …as a vehicle for revisiting judgments every time a litigant is unsatisfied with a judgment. The general principle is that judicial decisions are final, and consequently the setting aside of such a decision under paragraph 399(2)(*a*) of the Rules must be based on exceptionally serious and compelling grounds. This is necessary to ensure certainty in the judicial process as well as to preserve the integrity of that process.

[13] The question is then whether the discovery of *Bermudez* by counsel for the appellant and his communication of that decision to this panel constitutes a matter that arose or was discovered subsequent to the making of the April 29, 2016 judgment, thus opening the door to the setting aside or variance of the judgment. In my view, it does not. Again, I wish to make it clear that this panel only became aware of *Bermudez* when it received counsel for the appellant's letter of April 28, 2016, i.e. after the judgment of April 29, 2016 was signed and sent to the Registry.

[14] In making his submissions that the discovery of *Bermudez* constitutes "a matter" within the meaning of Rule 399(2)(*a*), counsel relies on the decision of Mr. Justice Blais (as he then was) in *Velupillai v. Canada (MCI)*, 2001 88 F.T.R. 314, 2000 CanLII 15997 (*Velupillai*). In particular, he refers to paragraphs 9 to 11 and 13 of Mr. Justice Blais' decision where he says:

> [9] When I signed the decision on June 15, 2000, I was not yet aware of the decision rendered in *Haghighi* by the Federal Court of Appeal, three days before.
>
> [10] Given the number of decisions rendered by the Trial Division and by the Appeal Division, it takes a few days before being aware of these judgments and unfortunately, I read that decision after my decision of June 15, 2000 was rendered.
>
> [11] I am convinced that the applicant is right when he argues that the Federal Court of Appeal's decision in *Haghighi* could have had an impact on my decision on the leave application.

> [13] I should also mention that this is an unusual situation and I have no hesitation to decide that Rule 399(2)(b) applies in the circumstances and the Court of Appeal's decision in *Haghighi* is a matter that was discovered subsequent to the making of the order.

[15] With respect, it is my view that Mr. Justice Blais was wrong in concluding as he did in *Velupillai.* In *Ayangma v. Canada*, [2004] 313 N.R. 312, 2003 F.C.A. 382 (*Ayangma*), there was a motion before our Court brought by the applicant for an order setting aside a previous order of the Court made on March 20, 2003 which had dismissed his appeal. The basis of the applicant's motion was that he had discovered jurisprudence which, in his view, was determinative of his appeal.

[16] After setting out Rule 399(2) and enunciating the criteria which had to be satisfied before the Court would intervene, Pelletier J.A., writing for the Court, made the following remarks at paragraph 4 of his reasons:

> We are not persuaded that the "matter" referred to in Rule 399 ("faits nouveaux" in the French version of the text) refers to jurisprudence. In *Metro Can Construction Ltd. v. Canada*, [2001] F.C.J. No. 1075 (F.C.A.), this Court decided that subsequent jurisprudence of our Court or of a higher Court does not constitute a "matter" that arose subsequently to the making of the order, within the meaning of Rule 399(2). Notwithstanding the decision of the Federal Court - Trial Division (as it then was) in *Jhajj v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 369, it follows from this that jurisprudence existing at the time of the order cannot be a matter that arose subsequent to the decision. To hold otherwise would deprive all judgments of finality and would invite litigants to research their case after judgment was rendered.
>
> [emphasis added]

[17] In my view, *Ayangma* stands for the proposition that jurisprudence, whether existing prior to or after the decision at issue, does not constitute a "matter" within the meaning of Rule 399(2)(*a*).

[18] As a result, I am of the view that the appellant cannot succeed on his request that the judgment of April 29, 2016 be set aside or that the hearing of the appeal be reconvened before a new panel.

[19] I now turn to the appellant's alternative argument that the judgment be varied pursuant to Rule 397. In making his submission that the order of costs made against him be set aside, the appellant relies on Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 which provides as follows:

22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	**22** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[20] In my view, the appellant is correct in making his submission on costs. We made no finding that there were special reasons to grant costs against the appellant. We simply overlooked Rule 22 and consequently, it is open to us pursuant to Rule 397(2) to reconsider that part of our judgment. Hence, the judgment of April 29, 2016 shall be varied in regard to the issue of costs.

[21] For these reasons, the appellant's motion will be allowed in part. Consequently, the judgment of April 29, 2016 shall be varied to read as follows: "The appeal is dismissed and the certified question is answered in the affirmative".

"M. Nadon"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-205-15
STYLE OF CAUSE:	OBAIDULLAH SIDDIQUI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	NADON J.A.
DATED:	SEPTEMBER 23, 2016

WRITTEN REPRESENTATIONS BY:

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Brett J. Nash	FOR THE RESPONDENT

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