Federal Court of Appeal  Cour d'appel fédérale

Date: 20180328

Docket: A-394-15

Citation: 2018 FCA 65

Present: WEBB J.A.

BETWEEN:

ALEXANDER VAVILOV

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 28, 2018.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] By the Order (the FCA Order) dated January 19, 2018 (2018 FCA 19), the motion that had been brought by the Minister of Citizenship and Immigration (Minister) for an order staying the Judgment of this Court dated June 21, 2017 (2017 FCA 132) pending the disposition of the Minister's application for leave to appeal to the Supreme Court of Canada and, if leave is granted, the determination of the appeal, was dismissed. The Minister has now filed a motion

requesting that I reconsider the FCA Order under Rule 397(1)(*b*) of the *Federal Courts Rules*, SOR/98-106 or that I set it aside under Rule 399(2)(*a*).

[2] For both Rules the matter that I allegedly "overlooked or accidentally omitted" or that subsequently arose was the decision of the Federal Court on January 19, 2018 (the same date that the FCA Order and the related Reasons were signed) that dismissed the Minister's motion for an adjournment of the hearing of the judicial review application of Timothy Vavilov, Alexander Vavilov's brother.

I. Rule 397

[3] Rule 397 provides a limited basis for reconsidering an order that has been granted:

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.

[4] In order for paragraph (*b*) to be applicable, there must have been some matter that was overlooked or accidentally omitted. To be overlooked or accidentally omitted, it must have been a matter of which the Court was aware or ought to have been aware. However, in this case, the matter to which the Minister referred was an order of a different court – the Federal Court. That Order of the Federal Court was issued on the same day that the FCA Order and Reasons were signed. The Federal Court and this Court are two separate courts. There is no process by which a judge of this Court is immediately apprised, as soon as a judge of the Federal Court signs an order, that such order has been signed. In any event, it appears, from the copy of the Federal Court Order that was submitted by the Minister in relation to this motion, that the Order of the Federal Court was sent by fax at 4:17 pm on January 19, 2018 to counsel for Minister. The FCA Order and Reasons were signed before that time.

[5] The motion for reconsideration under Rule 397 is without any merit.

II. Rule 399(2)

[6] Rule 399(2) provides that an order can be set aside based on a subsequent event:

(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.

[7] In arguing that the dismissal of the Minister's motion for an adjournment in Timothy Vavilov's application for judicial review should result in the FCA Order being set aside, the Minister submits in paragraph 2 of his memorandum that because Timothy Vavilov's case will be proceeding:

- [it] will lead to procedural complexities (notably whether to consider Timothy Vavilov's *Charter* argument)
- the waste of resources in potentially unnecessary proceedings (if the Supreme Court ultimately dismisses the Minister's case)
- the uncertain preservation of appeal rights (it being no foregone conclusion the Federal Court will certify a question this Court has already answered) and
- the risk of inconsistent outcomes (should Timothy Vavilov's judicial review be granted and no question be certified, but the Minister eventually be successful in the present matter before the Supreme Court).

[8] All of these arguments are submissions that would be more appropriate in relation to the adjournment motion for Timothy Vavilov's application than in this motion to reconsider the FCA Order. It would appear that these submissions were made by the Minister before the Federal Court in relation to that adjournment motion. These arguments were not sufficient to obtain an adjournment of Timothy Vavilov's judicial review application and are less relevant in this motion to set aside the FCA Order.

[9] The issue related to Timothy Vavilov's application for judicial review was addressed in paragraphs 12 and 13 of the Reasons dated January 19, 2018. This was part of the analysis of whether there would be any irreparable harm to the Minister if the stay was not granted. Since the conclusion in paragraph 11 of these Reasons was that "there may be some harm to the Minister in having to revoke a certificate of citizenship and a passport if the Minister is successful in having the decision of this Court overturned", the analysis proceeded to the balance of convenience, even though the arguments related to Timothy Vavilov's application were speculative at that time.

[10] In order to succeed in this motion, the Minister will need to establish that the denial of the adjournment request in Timothy Vavilov's case would result in the balance of inconvenience analysis, as set out by the Supreme Court of Canada in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311, would now result in greater harm to the Minister than to Alexander Vavilov.

[11] The harm to Alexander Vavilov discussed in the balance of inconvenience analysis in the Reasons dated January 19, 2018 is not affected by the denial of the adjournment in Timothy Vavilov's application.

[12] The additional harm identified by the Minister, as set out in paragraph 7 above, relate to the additional litigation related to Timothy Vavilov. This is simply a consequence of having the two matters proceed separately. The floodgates of individuals who have been or may be granted citizenship that should not be granted, if the Minister is successful in being granted leave to

appeal and also ultimately in the appeal to the Supreme Court, are not open. The number of individuals who may be in the same situation as Alexander Vavilov simply increases from 1 to 2.

[13] In my view, the denial of the adjournment request in Timothy Vavilov's application does not warrant a reconsideration of the FCA Order denying the Minister's motion for a stay in Alexander Vavilov's case.

[14] As a result, the motion of the Minister is dismissed, with costs.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-394-15
STYLE OF CAUSE:	ALEXANDER VAVILOV v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	MARCH 28, 2018

WRITTEN REPRESENTATIONS BY:

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