Cour fédérale Federal Court

Date: 20151019

Docket: T-1637-14

Citation: 2015 FC 982

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 19, 2015

Present: The Honourable Mr. Justice Annis

BETWEEN:

MALIKA HADDAD

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED ORDER WITH REASONS

I. Introduction

[1] The applicant, Malika Haddad, has filed two motions: (1) a motion to set aside the order of Justice Locke, dated March 25, 2015, dismissing the appeal for delay pursuant to paragraph 399(2)(*a*) and section 359 of the *Federal Courts Rules*, and (2) a motion to disavow the applicant's former counsel, David Chalk, pursuant to section 4 of the *Federal Courts Rules* and

article 243 of the Quebec *Code of Civil Procedure*. The Court will need only to make a determination on the first motion to dispose of this matter.

[2] The applicant submits that the Honourable Justice Locke's decision, dated March 25, 2015, must be set aside in light of new facts she discovered subsequent to the issuing of the decision, in accordance with subsection 399(2) of the *Federal Courts Rules*.

[3] In this case, the new facts in this matter are in regard to the multiple failings of her counsel. First there was his failure to file the applicant's record with the Court, this in spite of the fact that she had signed an affidavit in support of that record two months earlier, namely, on December 3, 2014. She further states that he acted unilaterally and without her knowledge, thereby placing himself in a conflict of interest situation by attempting to remedy the situation. She asserts that he acted deliberately in order to defend his own interests ahead of hers.

[4] The Minister［the respondent］contends that federal case law has consistently refused to recognize the misconduct of counsel as sufficient grounds on which to set aside a decision under section 399(2), and I accept this general principle. Nonetheless, the applicant's particular case, in my view, falls within the exceptions recognized by the case law that warrant that a decision be set aside where the misconduct of counsel constitutes a breach of procedural fairness.

[5] For the following reasons, the motion to set aside the order of Justice Locke is allowed.

II. Facts and proceedings

[6] The applicant's citizenship application was rejected on May 12, 2014. She was notified of this on June 19, 2014.

[7] On July 18, 2014, an appeal of the citizenship judge's decision was filed with the Federal Court Registry.

[8] The applicant swore an affidavit in support of that application on December 3, 2014, in order for it to be added to her record. Her counsel made no effort to file the applicant's record with the Federal Court Registry.

[9] On February 11, 2015, a notice of status review was served on counsel, in which he was asked to explain the reasons why the Court should not dismiss the appeal for delay.

[10] On February 26, 2015, counsel filed a reply record that included the applicant's written submissions, the affidavit of the applicant sworn December 3, 2014, as well as his own affidavit wherein he explained that there had been a misunderstanding with the applicant as to the measure she sought. According to the counsel's affidavit, he was under the impression that the applicant wished to use the complaint mechanism regarding the conduct of citizenship judges, namely the *Protocol Addressing Conduct Issues*. However, nothing in the affidavit explains why he failed to act before this Court after having obtained the applicant's affidavit in December 2014 and his representations are rather nebulous in that regard.

[11] On March 25, 2015, Justice Locke dismissed the appeal on the ground that he could not accept the applicant's explanations, given that:

a. the only evidence of this supposed misunderstanding consists of the counsel's affidavit, which is contrary to section 82 of the *Federal Courts Rules*,

b. no evidence was adduced as to the applicant's intention of continuing the appeal,

c. no justification was given for the delay between the applicant's affidavit (on December 3, 2014) and the date on which the notice of status review was issued (on February 11, 2015).

[12] The applicant was notified of Justice Locke's decision on April 16, 2015, by her counsel. She retained a different counsel and filed her motion to set aside Justice Locke's decision on May 5, 2015.

III. Issues

[13] Two issues arise from this motion:

a. May the misconduct of counsel constitute a matter that arose or was discovered subsequent to the making of the order and thus warrant that the order be set aside or varied?

b. Should counsel's affidavit be disavowed?

IV. Relevant statutory provision

399 (2) On motion, the Court may set aside or vary an order	399 (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;

V. Discussion

[14] I am of the view that the misconduct of the applicant's counsel is the sole cause of the unfortunate situation she had to endure and the dismissal of her appeal on procedural grounds, including those that were identified by Justice Locke.

[15] Counsel is responsible for the failure to file the applicant's record. He also misled Justice Locke when he submitted his own affidavit when he was blatantly in a conflict of interest; furthermore, he raised no grounds that would be likely to convince the judge.

[16] Nevertheless, the relevant case law indicates that, generally speaking, negligence on the part of counsel is not sufficient for the purposes of subsection 399(2).

[17] Indeed, this is an exceptional remedy, given that the fundamental principle of the finality of judgments must be upheld, as was explained by Justice Stone in *Saywack v Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 189 (FCA), at paragraph 14:

> 14 The Rule must be seen as exceptional. It purports to permit relief in an action or proceeding subsequent to its disposition by

> solemn pronouncement of the Court even though that relief would be [page198] at variance or even wholly contrary to that pronouncement. Yet, if it covers an application the Court may grant relief. Obviously, a case would have to be a clear one before the Court will be induced to act under the Rule. Otherwise, the finality of judgments would be imperilled and that would be bad.
>
> [Emphasis added.]

[18] Justice Lemieux, in *Entreprises A.B. Rimouski Inc. v Canada*, 2005 FC 115, 276 FTR 6, at paragraph 16, identified the four tests that must be met in order to have a decision set aside or varied pursuant to subsection 399(2). I will therefore discuss these tests, which are reproduced below, in order.

A. The motion must be brought within a reasonable time after the alleged matter or fraud became known.

[19] In this case, the applicant acted with the requisite diligence. Indeed, after having learned of the decision of Justice Locke dismissing the application for judicial review for delay, she immediately transferred the case to a new counsel and filed the present motion to set aside.

B. The moving party must establish that the alleged matter or fraud is new, i.e., that it was established or discovered after the order was made.

C. The party arguing the matter or fraud must show that the alleged matter or fraud could not have been discovered sooner with reasonably due diligence.

[20] In my opinion, counsel's misconduct meets the definition of the word "matter" ("fait" in French) as it was previously interpreted by the Federal Court of Appeal in *Saywack*, above. In fact, Justice Stone, writing for the Court, gave a broad interpretation of the word in his

discussion of the former section 1733. Paragraphs 20 and 21 of that decision are reproduced in part below:

> 20 … I am satisfied that our Rule 1733 does not limit "matter" subsequently discovered to fresh evidence subsequently discovered. It authorizes the Court to look at any relevant new "matter". No doubt the most common matter will be evidence subsequently discovered and, indeed, many of the decided cases are of that type. It is significant that the word "matter" is used in this Rule rather than the word "evidence". This is to be contrasted with Rule [page203] 1102(1),[5] for example, which authorizes this Court to "receive evidence or further evidence upon any question of fact". …
>
> 21 I am of the view that the Board's reasons fall within the word "matter". It is a word of broad import. In *The Shorter Oxford English Dictionary* (3rd ed.) it is defined, inter alia, as: "Ground, reason or cause for doing or being something". …

[21] On these points, I find that the new matter in the record was clearly discovered after Justice Locke had issued his decision and that the applicant could not have discovered it earlier, even with reasonably due diligence.

[22] Indeed, at no time was the applicant notified that her former counsel had failed to act with diligence with respect to her application for judicial review, which gave rise to the notice of status review; nor was she informed of the unauthorized attempts made by him to correct that lack of diligence. This state of affairs prevailed until the order dismissing her application was made against her and she was informed of this by her former counsel.

D. It must be established that the alleged matter or fraud is of a nature that would have affected the original decision.

[23] On this point, I find that had the evidence that the applicant had a continuing intention to pursue the application, and that any delays that occurred were entirely the fault of her counsel, been raised at the time of the notice of status review, it is reasonable to believe that this evidence would have influenced the decision of Justice Locke, and that the application for judicial review would have proceeded despite the repeated delays.

(i) Two stages of delay in pursuing the appeal

[24] A review of the evidence and allegations that were before Justice Locke makes it clear that there were two grounds for dismissing the judicial review application for delay. First, in this case, there was an alleged misunderstanding as to the applicant's instructions, which was supposed to explain the repeated delays leading up to December 2014. Second, we can see that there was a failure to file the applicant's record with the Registry between the applicant's signature of the affidavit on December 3, 2014, and the receipt of the notice of status review, on February 11, 2015.

(ii) Misconduct of counsel

[25] Whatever "misunderstanding" may have occurred in this case, it was clearly the responsibility of the applicant's former counsel to take the necessary actions in order to further the applicant's case after the signature of the affidavit of the applicant in December 2014 and before the Court was obliged to issue a notice of status review. Having caused the notice to be issued, he ensured that the status review was doomed to fail.

[26] After the notice of status review was issued, here is what the applicant's counsel ought to have done:

- Given his misconduct, the former counsel had an obligation to inform his client, the applicant, of his own negligence and to signal the error to the Barreau du Québec.

- He also had an obligation to inform his client of the conflict of interest and of her right to retain the services of another counsel, if she so chose. Furthermore, with respect to the justification for the delays at the time the notice of status review was issued, the new counsel would have been able to raise the mistakes of his predecessor.

- In any event, there was no possible justification for the applicant's former counsel to attempt to repair his own negligence and lack of diligence without clear and written instructions from his client.

- Had the applicant's former counsel taken the appropriate measures, the applicant's affidavit containing all of the requisite information would have been filed, and Justice Locke would therefore have been able to properly assess the applicant's submissions and find that her problems resulted solely from her counsel's misconduct.

(iii) Effects of counsel's misconduct on Justice Locke's decision

[27] Indeed, instead of advising his client as he should have done, the former counsel acted on his own in filing his own affidavit in a proceeding in which he was already involved as counsel. Thus, there was an obvious breach of the Barreau du Québec's code of conduct and of section 82 of the *Federal Courts Rules*. Moreover, the first ground cited by Justice Locke in his dismissal of

the application for judicial review for delay explicitly refers to the failure to comply with this provision.

[28] Even taking into account the so-called "misunderstanding" claimed by the former counsel, (contradicted in no uncertain terms by the applicant and refuted by the filing of her notice of appeal and affidavit), this kind of situation is normally attributable to a professional providing a service to his or her client. Indeed, it is up to counsel, in such cases, to produce concrete evidence of the instructions given by the applicant and of the manner in which those instructions were followed. Assuming that the applicant's instructions were not written down, which is apparent from her affidavit, and which I accept, the former counsel must be held responsible for the consequences that resulted from this misunderstanding. In failing to assume responsibility, I find that the former counsel sought to create the impression that it was the applicant who was responsible for the "misunderstanding" and it would appear that such an inference was in fact made by Justice Locke.

[29] The former counsel filed the applicant's affidavit from December in the record for the purposes of the status review. This had been prepared for the purposes of examining the application for judicial review on the merits. It is obvious that the affidavit contained no facts that would be relevant to the status review. More specifically, the affidavit is silent on the applicant's continuing intention to appeal the citizenship judge's decision. The same is true of the affidavit of the former counsel of the applicant. Thus, the lack of evidence of the applicant's continuing intention to pursue the application before the Federal Court constituted the second ground of dismissal cited by Justice Locke.

[30] Lastly, the former counsel's affidavit is silent on the utter lack of corrective measures, such as the filing of documents into the Court record between December 2014 and February 2015. I am of the view that it is highly likely that the affidavit was fashioned to create a certain impression and that the aforementioned silence was deliberate. Furthermore, this affidavit provides a perfect illustration of why counsel who is in a conflict of interest and who has breached their professional obligations must not attempt to correct their own errors. Finally, the lack of explanation for counsel's inaction between December 2014 and February 2015 constitutes the third ground of Justice Locke's dismissal of the applicant's judicial review application.

(iv) Administrative nature of status review proceeding

[31] It should also be noted that Justice Locke had considerable discretion with regard to the status review. More rigour is required of a judge where there is a failure to commence an action, or to file an application for judicial review or where an appeal is not filed in a timely manner; the same is true in respect of prescription; those are examples of cases in which failure to meet deadlines is sanctioned more severely.

[32] When the Court is called upon to favourably exercise its discretion in a status review, the applicants are required to demonstrate [1] their intention to pursue the matter within the established timelines, [2] the existence of an arguable case, [3] the true cause of the delay and [4] the absence of prejudice to the opposing party from the delay. In principle, the poor handling of a case by counsel does not constitute, in and of itself, a ground for dismissing an application in a status review.

[33] Dismissal for delay is a more serious consequence than that of the opposing party enduring a mere delay. Moreover, it often results in irreparable harm being done, as in this case. Indeed, this may be explained by the fact that a sanction of a technical defect must be founded upon the harm that would be caused: rejecting a ground that is generally valid on the merits would thus constitute a form of failure on the part of the judicial system. Causing irreparable harm to a client for the misconduct of his or her counsel is an outcome that, on principle, is to be avoided.

[34] It appears to me that among the factors that come into play in a status review, only the existence of an arguable case would ultimately prompt a judge to opt for a drastic solution of this sort. In that regard, I am of the view that, given that there were three tests for determining the number of days of physical presence in Canada prior to the recent amendments to the Act, the applicant would have been able to argue her case and would have a had a reasonable chance of success doing so.

[35] The case law of the Federal Court has been clear: it has recognized three separate residency tests under the *Citizenship Act* before recent amendments made to it. According to the test selected by the citizenship judge, the number of days that the applicant was required to have been physically present in Canada could vary from fewer than 100 days to three out of the four years of the reference period, namely, 1,095 days. It is up to the citizenship judge to apply the chosen test. Given that citizenship judges are free to choose from among these three tests, it is difficult to imagine an applicant not having a *prima facie* arguable case based on the number of

days spent in Canada. In this case, the applicant could have also cited an incorrect observation on the part of the citizenship judge that mistakenly led her to leave the country.

[36] Thus, I am of the view that if the contents of the applicant's affidavit, as submitted to me, are correct, it is likely that her application would not have been dismissed at the status review stage, in light of the fact that the failure to file the applicant's record was a direct result of the negligence of her former counsel.

E. Does counsel's negligence constitute a new fact?

[37] The general principle is that negligence on the part of an applicant's counsel, even in cases in which it was unknown to the client, does not warrant a decision being set aside or varied under subsection 399(2) of the *Federal Courts Rules*. This principle appears to be based on the exceptional nature of this remedy, as Justice Stone explained in *Saywack*, above, and on reluctance on the part of judges to make any pronouncements regarding the competence of counsel.

[38] Justice Nadon, writing for the Court in *Skorokhodov v Canada (Minister of Citizenship and Immigration)*, [1997] [QL] FCJ No 1008, at paras 14-20, outlined the relevant case law as follows:

> [14] Before proceeding, it is necessary, in my view, to refer to another decision, the decision of the Federal Court of Appeal in *Moutisheva v. Canada (Minister of Employment and Immigration)* [1993] 24 Imm. L.R. (2d) 212. In that case, the applicants Moutisheva and Stefanov had brought a motion to set aside a judgment of the Court of Appeal dismissing their appeal on the ground that they had not prosecuted their appeal with the necessary diligence.

[15] In order to understand the decision of the Court of Appeal, it is essential to briefly summarize the relevant facts. On August 9, 1991, counsel for the applicants had filed a notice of appeal. The appeal case was sent to the parties on July 9, 1992. On September 23, 1992, counsel for the Minister informed counsel for the applicants that the time provided by Rule 1307 for filing their memorandum had expired and, accordingly, that the Minister was expecting it without delay. On October 21, 1992, counsel for the Minister reiterated their request for the applicants' memorandum. On January 21, 1993, counsel for the Minister filed a motion to dismiss the notice of appeal. That motion was served on counsel for the applicants on January 22, 1993.

[16] On two occasions, a registry employee at the Federal Court wrote to counsel for the applicants Moutisheva and Stefanov to inquire whether he intended to file his memorandum as required by Rule 1307. On March 1, 1993, another registry employee wrote to counsel for the applicants by registered mail asking him whether he was going to file his memorandum. No reply was received from counsel for the applicants, and so the Court of Appeal dismissed the applicants' appeal on March 25, 1993.

[17] In support of the motion to set aside the judgment of March 25, 1993, the applicants filed an affidavit stating that they had met with their lawyer during October and December 1992 and in February and April 1993 and that he had not informed them that a motion to dismiss had been made and allowed by the Court of Appeal. According to the affidavit, the applicants did not learn that their appeal had been dismissed until April 17, 1993. The same day, they contacted their lawyer who confirmed that the appeal had been dismissed. Four months later, on August 9, 1993, the applicants retained a new lawyer to have the judgment dismissing their appeal set aside.

[18] The issue as stated by Létourneau J. of the Federal Court, at page 215, was as follows:

> In general, the new counsel for the applicants argued that this Court's judgment should be set aside on the ground that the applicants were victims of misrepresentation and fraud. These fraudulent acts allegedly arose from the fact that the applicants were not told either by their counsel or by this Court of the existence of an application to dismiss the appeal.

> [19] Létourneau J. disposed of the applicants' argument that they had been victims of misrepresentation and fraud on the part of their lawyer as follows, at page 217:
>
> > [16] It would suffice to dispose of this argument, so far as the misrepresentation by their counsel of which the applicants were allegedly victims is concerned, to say that there is not sufficient evidence in the record to establish that counsel for the applicants was guilty of misrepresentation towards them. It is not this Court's function on the application at bar to assess the behaviour of counsel for the applicants in his relationship as agent, his competence or the quality of the services he may have rendered.
> >
> > [17] Further, inaction by counsel in a case, while it may be negligence toward the client he is representing, is not necessarily fraud or misrepresentation and is certainly not fraud on the Court which could be a basis under Rule 1733 for setting aside a judgment made under Rule 1308 specifically because of such inaction. Similarly, the omission by counsel for the applicants to inform his clients that a motion to dismiss the appeal existed, while it may be a basis for other civil or disciplinary remedies, cannot constitute fraud on the Court that would vitiate the judgment to dismiss rendered by the Court as a consequence of delay by the said counsel to prosecute the appeal he had filed.
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> [20] In my opinion, the remarks of Létourneau J. are sufficient to dispose of the applicants' argument, in the instant case, that the discovery of Mr. Karpishka's alleged negligence means that they may rely on Rule 1733. In my opinion, that argument is not sound. I cannot see how the facts in Moutisheva can be distinguished from the facts before me. In the instant case, as in Moutisheva, the applicants are alleging the discovery of errors and omissions by their former counsel as grounds for relying on Rule 1733.
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> [Emphasis added.]

[39] It should be noted that these cases were quite different: the delays in taking corrective measures were a ground of the motion’s dismissal. Justice Nadon, in *Skorokhodov* quoted Justice

McGillis, who stated: “In the circumstances, the applicants will suffer no prejudice by reason of my refusal to vary my earlier order.” In *Moutisheva*, the delay in employing corrective measures was also a ground of dismissal of the motion. Moreover, neither counsel attempted to correct the situation and, as a consequence, mislead the Court about the true facts of the matter.

[40] Nevertheless, it appears to me that the philosophy behind rejecting errors by counsel as a ground for setting aside a decision is based on pragmatic considerations: judges are loath to assess “the behaviour of counsel for the applicants in his relationship as agent, his competence or the quality of the services he may have rendered” (*Saywack*, above).

[41] At the hearing, the relevance of the behaviour of counsel was challenged by the respondent, who rejected the teachings of Justice Strayer in *Beilin v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1863 (QL), 88 FTR 132 [*Beilin*]. The applicant had mistakenly retained the services of a consultant, when he believed he was dealing with a lawyer as a result of the consultant’s misrepresentations.

[42] Moreover, Justice Teitelbaum, in *Guzman v Canada (MC)*, [2000] 1 FCR 286, [1999] FCJ No 1334 (QL) [*Guzman*] made a distinction between the facts in *Beilin*; indeed, counsel retained apparently misinterpreted the Federal Court’s procedural rules, and thus failed to finalize the application for leave within the prescribed time limits, which then led to its dismissal.

[43] The distinction made by Justice Teitelbaum is explained at paragraphs 37 to 40 of *Guzman*:

> [37] In the Beilin case, the applicant believed he had retained a lawyer to act on behalf of the applicant. It turned out the person hired was not a lawyer.
>
> [38] In the case at bar, the applicant thought he retained a lawyer and did, in fact, retain the services of a lawyer.
>
> [39] Unfortunately, the applicant retained or was given a lawyer who was ignorant of the Federal Court of Canada's Rules and particularly as the rules are applied to immigration matters.
>
> [40] I am satisfied that Rule 399(2) was not meant to apply to vary or set aside a final judgment of the Court because one of the parties to the final judgment had retained the services of a lawyer who, it is subsequently found out, was not properly versed in the law or the rules of a Court.

[44] Aside from the distinctions already noted in the case law cited by the respondent, certain useful observations may also be made regarding the applicable principles of law. First, the assessment of the intervention of counsel poses no difficulty. He was clearly negligent insofar as the filing of his own affidavit is concerned. Second, much emphasis should be placed on the clear conflict of interest in which counsel placed himself when he argued the motion, having placed his own interests above those of his client, and this despite the fact that he was entirely responsible for the status review.

[45] I find that the applicant has established a *prima facie* case that counsel intended to mislead not only his client, but the Court as well. Counsel’s filing of his own affidavit, and that of the applicant, evinces an intention to lead the Court to conclude that his client had contributed

to the “misunderstanding” cited, and that she had no intention of pursuing the matter to its conclusion. Thus, counsel appears to have deliberately misled the Court.

[46] In my view, in this case at bar the case law in *Guzman* is more relevant than that in *Beilin*, as it appears to be founded on a form of breach of procedural fairness. Indeed, the applicant sought full and appropriate representation by a highly qualified professional. Due to the consultant’s mendacity, such representation was not provided. Thus the applicant was unable to participate in the proceedings without being accused of some sort of error or omission.

[47] The question in this case raises issues analogous to those relating to procedural fairness. The applicant had no opportunity to retain the services of another counsel, or to ensure that if her former counsel was to continue to represent her, that he would do so in a manner whereby he would fully defend her interests and not his own. Unbeknownst to Justice Locke, the motion was heard without procedural fairness having been afforded to the applicant.

[48] I am of the opinion that there is clear evidence of counsel’s negligence; he obviously placed himself in a conflict of interest and concealed this fact from the judge; *prima facie*, counsel intentionally misled the court. The requirements of subsection 399(2) of the *Federal Courts Rules* are therefore met.

VI. Conclusion

[49] As a result, the applicant must be granted an opportunity to fully and amply present her case in a new status review, in order that the Court may properly exercise its discretion under section 380 of the *Federal Courts Rules*.

ORDER

THE COURT:

(a) Allows the motion and sets aside the order by Justice Locke, dated March 25, 2015.

(b) Orders the Registry to issue a new notice of status review to the applicant and to make the necessary arrangements for the completion of the summary review in accordance with the *Federal Courts Rules*.

(c) Without costs.

"Peter Annis"

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1637-14
STYLE OF CAUSE:	MALIKA HADDAD v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 19, 2015
ORDER WITH REASONS:	ANNIS J.
DATED:	AUGUST 18, 2015

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