

Federal Court



Cour fédérale

**Date: 20180314**

**Docket: IMM-3663-17**

**Citation: 2018 FC 295**

**Ottawa, Ontario, March 14, 2018**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**BASHIR AHMAD**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**ORDER AND REASONS**

**UPON MOTION** in writing made by the Applicant, Bashir Ahmad, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (“Rules”) requesting that the Court reconsider its dismissal of the Applicant’s request for an extension of time within which to file his application for leave and judicial review and his Application for Leave and Judicial Review (“Reconsideration Motion”);

**AND UPON** noting that the Reconsideration Motion was brought pursuant to Rules 397(1)(b) or 397(2) which state:

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

...

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

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 :

...

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

**AND UPON** noting that the Applicant asserts that when submitting the initial process form the Applicant was asked by the Federal Court Registry Office to provide supporting reasons for the extension of time request on the IR-1 form (presumably this is a reference to the Application for Leave and Judicial Review, the form of which document is prescribed in the Schedule to the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 ("FC Immigration Rules"), Form IR-1) without supporting evidence. Counsel for the

Applicant subsequently filed a perfected Application Record as well as a Motion Record for an extension of time (“Motion to Extend Time”). However, the Registry informed counsel that, as a request for an extension of time had already been made, the latter motion record was unnecessary. In the result, an evidentiary basis for the Motion to Extend Time was not filed;

**AND UPON** noting that an affidavit made in support of the Reconsideration Motion by Ms. Vanessa Leigh, an articling student with Orange LLP, sworn on January 10, 2018, states that the Application for Leave and Judicial Review was submitted on August 23, 2017. When filing the perfected Application Record, Ms. Leigh also sought to file the Motion to Extend Time. Ms. Leigh deposes that she was told that the decision pertaining to the extension of time would be based on materials submitted with the IR-1 and, therefore, a separate motion was not necessary;

**AND UPON** noting a further supporting affidavit, sworn on January 10, 2018 by Mr. Rui Chen of Orange LLP, who identifies himself as previous counsel for the Applicant concerning the judicial review of his application for permanent residence. Mr. Chen states that he prepared and submitted to Immigration, Refugees and Citizenship Canada (“IRCC”) a request for reconsideration of its refusal of the Applicant’s permanent residence application. That request was attached as Exhibit A to Mr. Chen’s affidavit and he deposes that it was also contained in the Motion to Extend Time;

**AND UPON** noting that the written representations of current counsel for the Applicant, Mr. Matthew Wong of Orange LLP, submit that the Registry’s refusal to accept the Motion to

Extend Time constitutes a clerical error that caused the accidental omission of the supporting evidence required to satisfy the Court that the Applicant's request for an extension of time be granted;

**AND UPON** noting that on January 19, 2018 the Respondent filed its Motion Record containing its written response opposing the Reconsideration Motion. The Respondent noted that, as set out in its Memorandum of Fact and Law filed at the leave stage, the application for leave and judicial review was made 8 months after the IRCC's decision refusing to reconsider. Further, pursuant to Rule 6(1) of the FC Immigration Rules, the Applicant was required to seek to extend the time for filing and serving his application for leave in his application for leave, which was done. However, the Applicant failed to include in his Application Record any materials he deemed necessary for the determination of the request for an extension of time as required by Rule 6(2), instead blaming the error on an unidentified member of the Registry staff for allegedly giving advice contrary to the Rules. The Respondent submits that Rule 397 does not apply in this circumstance. Further, that the Order of this Court which the Applicant seeks to have reconsidered dismissed both the application for an extension of time and the leave application. Accordingly, the request for reconsideration cannot succeed as the lack of merit element of the test for an extension of time is not met. The Respondent also seeks costs;

**AND UPON** noting that by letter of January 18, 2018 (received by the Registry on January 19, 2018) Mr. Wong, counsel for the Applicant, sought to file an affidavit of Naveed Ahmad, sworn on January 18, 2018, which attached as Exhibit A an email dated May 26, 2016 and attachment from Kauser Zafar;

**AND UPON** noting that by letter dated January 22, 2018 the Respondent strenuously objected to the Applicant's attempt to file the affidavit of Naveed Ahmad on the date that the Respondent's record was due without seeking leave to do so and without explanation as to why it was not included in the Applicant's motion record, and without any submissions as to the source or relevance of the documents;

**AND UPON** noting that, undeterred, by letter dated January 31, 2018, Mr. Wong sought to add further affidavit evidence to the Reconsideration Motion record. Counsel acknowledged that leave should be sought to achieve this but stated that his firm was acting on their client's instructions and "given the nature of the motion and the interest of judicial economy, we assume that the Court will deal with the enclosed affidavit and the previous affidavits filed on January 19, 2018 pursuant to Rules 55-60". Counsel stated that he also understood that the Respondent could file a motion for non-compliance. Attached was the affidavit of the Applicant's daughter-in-law, Rashada Perveen, sworn on January 24, 2018, Exhibit A of which is comprised of various documents, such as copies of passports and a health card (7 pages in total);

**AND UPON** noting that the Respondent, by letter of February 1, 2018 (received by the Registry on February 2, 2018) again strongly objected to the Applicant's conduct and amplified its request for costs;

**AND UPON** noting that February 1, 2018 the Applicant personally attempted to file the January 24, 2018 affidavit of Rashada Perveen but this time, in addition to the 7 pages of

documents originally attached as Exhibit A, 48 pages of other documents were added. This addition to Exhibit A was not noted, nor were the documents served on the Respondent;

**AND UPON** noting that by email of February 1, 2018 the Respondent advised that it opposed the filing of any additional materials;

**AND UPON** noting that by letter of February 2, 2018 Mr. Wong wrote to the Court stating that he had not been attempting to subvert or show disregard for the Rules, but that he felt morally compelled to file the additional materials as requested by the Applicant. Counsel stated that the additional materials at best illustrate a continuing intention and are an emotional plea. Further, that leave was not sought as he assumed that, as the reviewing judge, I would simply exercise my judicial discretion and, therefore, seeking leave would be a waste of the Court's resources;

**AND UPON** noting that by letter of February 5, 2018 the Respondent took issue with the February 2, 2018 letter from counsel for the Applicant, on many grounds, and also asserted that it contains evidence and additional submissions intended to bolster the record;

**AND UPON** noting that on February 5, 2018 the Applicant filed an unsigned Notice of Intention to Act in Person, again attaching the January 24, 2018 affidavit of Rashada Perveen, again with additional documents not contained in the original Exhibit A of the affidavit when it was originally attempted to be filed by counsel but now, along with the previously added

48 pages, a further addition of 7 more pages of documentation was made and the signature of the witness, Mr. Wong, was struck out;

**AND UPON** noting that by email of February 6, 2018 the Respondent advised the Registry that the documents had not been served on the Respondent and objected to the attempt to file additional documents;

**AND UPON** concluding that the motion for reconsideration cannot succeed. Rule 5(1) of the FC Immigration Rules states that an application for leave shall be in accordance with Form IR-1, as set out in the schedule, and must include the information listed. Rule 6 states that a request to extend the time for filing and serving an application for leave shall be determined “At the same time, and on the same materials, as the application for leave”. It is the obligation of counsel to comply with the rules. If counsel were of the view, given the alleged prior advice of the Registry that supporting evidence was not required or that the Registry erred in refusing to file the separate motion, it was open to them to request that a direction be obtained from the Court on the question, or to bring a motion seeking leave to file the motion or to amend the Application Record to include the information. There is no evidence before me suggesting that this was done even though it would have been known to counsel that the Motion to Extend Time lacked an evidentiary basis;

Rule 397(1)(b) permits the Court to reconsider an order where a matter that should have been addressed was overlooked. Rule 397(2) permits the correction of clerical mistakes, errors or omissions in the Court’s judgment or order. Rule 397 is not an appeal or a redetermination of

the matter on its merits. Nor is it intended to address errors or omissions made by the Applicant (*Yeager v Day*, 2013 FCA 258 at para 9; *Ha v Canada (Citizenship and Immigration)*, 2008 FC 986 at para 7; see also *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859 at para 16). As in this matter there is no clerical mistake, error or omission contained in my Order, Rule 397(2) does not apply;

And, as in *Kang v Canada (Citizenship and Immigration)*, 2011 FC 1256 at para 9, nothing was overlooked by the Court, which is a condition precedent for a motion for reconsideration under Rule 397(1)(b), as no evidence was filed in support of the Motion to Extend Time. The Court is *functus officio* as the Applicant has not established that the criteria for reconsideration have been met. Accordingly, the Court is without jurisdiction to reconsider its Order dated December 18, 2017 which dismissed the request for an extension of time and dismissed the application for leave and judicial review;

In any event, my Order denying leave stated that “The request for an extension of time and this application for leave and judicial review is dismissed”. The application for leave was dismissed on the merits. Accordingly, the conjunctive test for an extension of time cannot be met (*Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA));

**AND UPON** considering the Respondent’s submissions as to costs, specifically, while Rule 22 of the FC Immigration Rules provides that no costs shall be awarded to or payable by any party in respect of an application for leave or an application for judicial review unless the Court, for special reasons, so orders. However, that the Court has found special reasons to exist



when one party has acted in a manner that may be characterized as improper or where conduct unnecessarily or unreasonably prolonged the proceedings (*Adewusi v Canada (Citizenship and Immigration)*, 2012 FC 75 at paras 24-25; *Manivannan v Canada (Citizenship and Immigration)*, 2008 FC 1392 at para 51) and that this is such a case;

In this matter, I have serious concerns about the manner in which the Applicant and his counsel have pursued the Reconsideration Motion. Rule 364(2) requires motion records to include all affidavits and other materials served by the moving party for use in the motion. The attempt to file the January 18, 2018 affidavit of Naveed Ahmad was made under cover of counsel's letter on January 19, 2018, the date that the Respondent's motion record was due. It was submitted without explanation, other than "as per client's instruction". No submissions were made as to its content nor was a motion brought seeking leave to file an additional supporting affidavit. Whether it is relevant and why it was not previously submitted was simply not addressed;

The same is true of the January 31, 2018 attempt to file the 12 page affidavit of Rashada Perveen. Counsel for the Applicant states in his covering letter that he realized that leave should be sought but decided not to do so given the nature of the motion, in the interest of judicial economy and on the assumption that the Court would deal with it, and the prior affidavit, on the basis of Rules 55-60 of the Rules;

In that regard I would first note that Rule 55 simply has no application in this circumstance. Attempting to file affidavits under letter of counsel without any explanation

whatsoever, other than as per client's direction, cannot possibly amount to special circumstances warranting the varying or dispensing of the Rules. Nor, in my view, is the attempt to file affidavits in these circumstances an irregular step taken by the Applicant that would compel the Respondent to bring a motion pursuant to Rule 58 to challenge it. In any event, it is difficult to see why the Respondent should be forced to bring a motion in these circumstances. The Applicant essentially declines to comply with the rules and then seeks to shift to the Respondent and the Court the responsibility of dealing with the filing of proposed affidavits;

In conclusion, the attempts by counsel to cause supporting affidavits to be filed without explanation and without seeking leave was unacceptable. Counsel cannot blindly follow the instructions of their clients in disregard of the rules and their obligations as officers of the Court. The attempts by the Applicant himself to file varied versions of the affidavit of Rashada Perveen were also unacceptable. The actions of the Applicant and his counsel have had the opposite effect of preserving judicial economy;

While the conduct of the Applicant's counsel and the Applicant was improper, there is no evidence of bad faith. Those actions did unnecessarily prolong the time required by the Court to consider the Reconsideration Motion, however, the Respondent did not incur the expense of filing a motion in response. For that reason, I will not award costs but it would certainly be open to the Court to do so in the circumstances;

**ORDER IN IMM-3663-17**

**THIS COURT ORDERS that**

1. The affidavit of Naveed Ahmad, sworn on January 18, 2018, and the affidavit of Rashada Perveen, sworn on January 24, 2018, shall not be filed;
2. The motion seeking reconsideration of my Order of December 18, 2017 dismissing the Applicant's request for an extension of time and the application for leave and judicial review, is dismissed;
3. There is no order as to costs.

“Cecily Y. Strickland”

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3663-17

**STYLE OF CAUSE:** BASHIR AHMAD v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE  
369 OF THE *FEDERAL COURTS RULES*

**ORDER AND REASONS:** STRICKLAND J.

**DATED:** MARCH 14, 2018

**WRITTEN REPRESENTATIONS BY:**

Matthew Wong

FOR THE APPLICANT

David Knapp

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Orange LLP  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT