Federal Court  Cour fédérale

Date: 20240613

Docket: IMM-3825-22

Citation: 2024 FC 911

Ottawa, Ontario, June 13, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant (Responding Party)

and

DEMAINE ATHOL ASPHALL

Respondent (Moving Party)

ORDER

UPON the motion of the Respondent Demaine Athol Asphall brought pursuant to Rule 397(1)(b) of the *Federal Courts Rules*, SOR/98-106 for reconsideration of a judgment issued by Justice Susan Elliott on August 9, 2023 (*Canada (Citizenship and Immigration) v Asphall*, 2023 FC 1090 [*Asphall*]);

AND UPON reading the materials filed;

AND CONSIDERING the following:

Save in exceptional circumstances, a motion for variation or reconsideration should be brought before the judge whose order is sought to be varied. Exceptional circumstances relate to the exigencies of court administration as well as the illness or incapacity of the authorizing judge (*Arif v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 1714 at paras 13-16, citing *Gabriel v Mohawk Council of Kanesatake et al*, 2003 FCT 335 and *Canada (Attorney General) v Khawaja*, 2007 FCA 342 *per* Pelletier JA, concurring). Justice Elliott did not decide this motion for reconsideration prior to her retirement from the Court on June 1, 2024, and the motion has therefore been referred to another judge for disposition.

The background of this proceeding was summarized by Justice Elliott as follows (*Asphall* at paras 3-14):

> [3] The Respondent is a citizen of Jamaica who has held permanent resident status in Canada since November 1993.
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> [4] On March 11, 2015, he pled guilty to possession of a restricted firearm with ammunition, carrying a concealed weapon, and a breach of weapons prohibition. He was convicted and sentenced to two years less a day for the possession charge, 90 days consecutive for carrying a concealed weapon, and 60 days consecutive for breach of the weapons prohibition, resulting in a global sentence of more than two years imprisonment.
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> [5] In October 2020, the Respondent learned that the Canada Border Services Agency was referring a report under subsection 44(1) of the *Immigration and Refugee Protection Act* [IRPA] alleging that, given his March 2015 conviction for possession of a

restricted firearm with ammunition, he was inadmissible to Canada.

[6] The Respondent subsequently retained counsel to appeal his criminal convictions and sentences at the Ontario Court of Appeal (ONCA) on the basis that his trial counsel did not inform him of the potential collateral immigration consequences of his guilty plea and the range of sentences the judge might impose.

[7] The Respondent requested that his admissibility hearing be postponed pending the outcome of his criminal appeal. The Immigration Division ("ID") refused the Respondent's request and proceeded with the Applicant's admissibility hearing on February 1, 2021.

[8] At the conclusion of his hearing, the ID issued a deportation order after finding the Respondent was inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the IRPA.

[9] In December 2021, the Crown conceded the Respondent's criminal appeal and on January 7, 2022, the ONCA issued an order and reasons allowing his appeal and setting aside the Respondent's convictions: *R v Asphall*, 2022 ONCA 1.

[10] On January 10, 2022, the Respondent filed an application with the Immigration Appeal Division (IAD) requesting an extension of time to appeal his removal order. The Respondent also requested, if the extension of time was granted, that the appeal be allowed in chambers given that his reportable convictions were set aside.

[11] The Minister opposed the Respondent's application and argued that the Respondent did not have a right of appeal under subsection 64(1) of the IRPA.

[12] On March 1, 2022, the IAD granted the Respondent's application for an extension of time to file his appeal, finding that the interests of justice supported an extension in the circumstances.

[13] Both the Applicant and the Respondent made submissions to the IAD addressing the legal validity of the Respondent's removal order in light of the extension of time being granted to allow filing of the appeal.

[14] On April 12, 2022, the IAD allowed the Respondent's appeal, finding that the removal order was no longer legally valid at the time of the IAD appeal based on the ONCA order setting aside the reportable conviction.

The Minister sought leave and judicial review of the IAD's decision. On August 9, 2023, Justice Elliott granted the application for judicial review and set aside the IAD's decision. Having found that the IAD was without jurisdiction to grant either the extension of time or the appeal, she did not remit the matter to the IAD for redetermination.

Mr. Asphall says that Justice Elliott's judgment was a departure from precedent. In declining to remit the matter to the IAD for redetermination, she went beyond what the Minister had requested and thereby exceeded her jurisdiction. Mr. Asphall says he has been left in legal limbo: the successful appeal of his criminal convictions means the deportation order is no longer enforceable, but he has lost his permanent resident status and remains inadmissible to Canada. He says that Justice Elliott's decision has serious implications for similarly-situated individuals, and Justice Elliott did not give the parties an opportunity to propose serious questions of general importance to be certified for appeal (IRPA, s 74(d)).

Mr. Asphall asks the Court to do one of the following:

(a) dismiss the Applicant's application for judicial review, effectively reversing the outcome of the application for leave and judicial review;

(b) in the alternative, remit the matter for redetermination by the IAD with amended reasons, effectively changing the remedy and the supporting reasons;

(c) certify a question of general importance for appeal; or

(d) give the parties the opportunity to make submissions addressing the existing remedy and render a fresh determination on that issue, and certify a question of general importance for appeal.

None of these remedies may be obtained by a motion for reconsideration brought pursuant to Rule 397.

The power conferred upon the Court by Rule 397 to reconsider orders and judgments to address mistakes, omissions, or matters that have been overlooked is "much narrower than it sounds" – "the Court cannot rethink the matter and reverse itself" (*Canada v MacDonald*, 2021 FCA 6 at para 17). As Justice Denis Gascon explained in *Alsaloussi v Canada (Attorney General)*, 2020 FC 533:

> Rule 397 does not allow the Court to entertain a motion which is in the nature of an appeal from its own decision. The proper way to challenge the merits of a decision is to file an appeal, when such appeal is available. Similarly, an argument that goes to the substantive validity of a decision rather than correcting a slip or oversight by the Court cannot be asserted in a motion for reconsideration under Rule 397 (*Yeager v Day*, 2013 FCA 258 at para 14).
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> The purpose of Rule 397(1) is not to reverse a decision that has already been issued (*Taker v Canada (Attorney General)*, 2012 FCA 83 at para 4), but to enable the Court to address inadvertent mistakes or omissions in a judgment, and to ensure that the judgment reflects the intention of the issuing judge and deals with all of the issues that should have been adjudicated (*Pharmascience Inc v Canada (Minister of Health)*, 2003 FCA 333 at paras 12-15).
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> More specifically, the power to reconsider an order on the basis that it "does not accord with any reasons given for it", contemplated by Rule 397(1)(a), is limited. In such a case, the Court can only correct an order "if it does not reflect the manifest intention of the Court as expressed in the reasons provided by that

> Court" (*McCrea v Canada (Attorney General)*, 2016 FCA 285 [*McCrea*] at para 10).
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> The discordance addressed in Rule 397(1)(a) refers to situations where the reasons favor one party and yet, through a clear and obvious error or omission, the order does not (*Davey v Canada*, 2016 FC 492 at para 17).

It is clear from Mr. Asphall's arguments that he is challenging the substantive validity of Justice Elliott's decision, rather than seeking to correct a slip or oversight by the Court. In asking the Court to dismiss the application for judicial review, he seeks to reverse the outcome. In asking for a different remedy and revised reasons, he seeks to alter a decision that has already been issued. There can be no serious question that Justice Elliott's judgment "reflect[s] the manifest intention of the Court as expressed in the reasons provided".

As a matter of principle, Rule 397 does not permit judgments to be reopened to certify questions for appeal (*Naboulsi v Canada (Citizenship and Immigration)*, 2020 FC 357 at paras 13, 20, citing *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at para 29 and *Raina v Canada (Citizenship and Immigration)*, 2011 FC 318 at para 9).

As the Federal *Court* of Appeal held in *Sharma v Canada (Revenue Agency)*, 2020 FCA 203 (at para 3):

> Rule 397 provides that a party may request that the Federal Court reconsider the terms of an order on the grounds that the order does not accord with any reasons given for it, or that a matter that should have been dealt with has been overlooked or accidentally omitted. It is clearly not meant to be an appeal in disguise, allowing a litigant to re-argue an issue a second time, in the hope that the Court will change its mind: *Bell Helicopters Textron Canada Limitée v. Eurocopter*, 2013 FCA 261, at para. 15.

I agree with the Minister that the implications of Justice Elliott's judgment for Mr. Asphall personally, and for other similarly-situated persons, are not as severe as he alleges. The deportation order against him is not currently enforceable. Should he wish to apply for permanent residence on humanitarian and compassionate [H&C] grounds, he may do so: inadmissibility under s 36 of the IRPA does not preclude an H&C application (IRPA, s 25). To the extent that Justice Elliott's judgment has given rise to serious questions of general importance, these same questions are currently before the Court in *Rebelo v Canada (Citizenship and Immigration)*, Court File No IMM-704-24. The parties in that proceeding will have an opportunity to propose certified questions for appeal as they consider appropriate.

THIS COURT ORDERS that Mr. Asphall's motion for reconsideration of the judgment of Justice Elliott dated August 9, 2023 is dismissed.

"Simon Fothergill"
Judge