

Federal Court



Cour fédérale

Date: 20170512

Docket: IMM-3569-16

Citation: 2017 FC 498

Ottawa, Ontario, May 12, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVID MOLSON

Applicant

and

**IMMIGRATION CONSULTANTS OF
CANADA REGULATORY COUNCIL**

Respondent

ORDER AND REASONS

I. Nature of the matter

[1] This is a motion from the Respondent for an order to grant costs.

II. Facts

[2] The Applicant was suspended from the Law Society of Upper Canada [LSUC] for misconduct on September 1, 2014. He resigned from the LSUC in June 2015. He later applied to write an exam offered by the Immigration Consultants of Canada Regulatory Council [ICCRC or the Respondent] to become a certified Immigration Consultant of Canada.

[3] On February 5, 2016, the ICCRC's Registrar excluded the Applicant from writing the exam for a period of four (4) years from the date of his initial registration application, due to the short lapse of time that has passed since the Applicant admitted to misconduct; and, then resigned from the LSUC.

[4] The Applicant appealed the Registrar's decision to the Appeal Committee of the ICCRC, identifying nine (9) errors in the Registrar's decision; the Appeal Committee accepted one of the Applicant's arguments for error. On August 18, 2016, the Appeal Committee nonetheless maintained the four-year exclusion period and substituted the Registrar's decision and reasons with its own.

[5] The Applicant brought an application for judicial review of the decision of the Appeal Committee of the Respondent before the Federal Court. On November 4, 2016, the Applicant's application for leave was dismissed by order without a decision as to costs.

III. Issue

[6] Should the Respondent be granted costs?

IV. Relevant Provisions

[7] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [FCCIRPR]:

Costs

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.

Dépens

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.

[8] Rule 400(1) to (3) of the *Federal Courts Rules*, SOR/98-106:

Awarding of Costs Between Parties

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en

compte

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| (3) In exercising its discretion under subsection (1), the Court may consider | (3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants : |
| (a) the result of the proceeding; | a) le résultat de l'instance; |
| (b) the amounts claimed and the amounts recovered; | b) les sommes réclamées et les sommes recouvrées; |
| (c) the importance and complexity of the issues; | c) l'importance et la complexité des questions en litige; |
| (d) the apportionment of liability; | d) le partage de la responsabilité; |
| (e) any written offer to settle; | e) toute offre écrite de règlement; |
| (f) any offer to contribute made under rule 421; | f) toute offre de contribution faite en vertu de la règle 421; |
| (g) the amount of work; | g) la charge de travail; |
| (h) whether the public interest in having the proceeding litigated justifies a particular award of costs; | h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens; |
| (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; | i) la conduite d'une partie qui a eu pour effet d'abrégé ou de prolonger inutilement la durée de l'instance; |
| (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit; | j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis; |
| (k) whether any step in the proceeding was | k) la question de savoir si une mesure prise au cours de l'instance, selon le cas : |
| (i) improper, vexatious or unnecessary, or | (i) était inappropriée, vexatoire ou inutile, |
| (ii) taken through | (ii) a été entreprise de |

negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

V. Analysis

[9] The Federal Court of Appeal, in *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208, further clarifies the application of Rule 22 of the FCCIRPR:

[6] There is no statutory definition of the phrase “special reasons” as used in Rule 22, and no definition has been developed in the jurisprudence. Perhaps no such definition is possible, given the variety of circumstances that can give rise to an application for judicial review in the immigration context, or an appeal upon a certified question.

[7] However, the cases involving the application of Rule 22 provide some examples of the circumstances that have been held to comprise “special reasons”, as well as circumstances that have been held to fall short of that standard. I summarize as follows the conclusions reached in some of the cases, based on a non-comprehensive survey:

The nature of the case

- 1) An appeal based on a certified question generally will be presumed to have been appropriately brought (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C.R. 537, 2002 FCA 89).
- 2) “Special reasons” justifying costs on a solicitor and client basis may be found where the Minister has applied for judicial review of an immigration decision which then takes on the nature of a test case as to the interpretation of a fundamental provision of the statute (for example, where the issues are whether “Trinidadian women subject to spousal abuse” comprise a particular social group and whether fear of that abuse, given the indifference of authorities, amounts to persecution: *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C.R. 154 (C.A.)).
- 3) After an unsuccessful judicial review application by refugee claimants challenging the establishment of a “lead case” format for determining refugee claims, the Federal Court found “special reasons”

justifying an award of costs to the applicants on the basis of “the novel and recognized contentious nature of the lead case at the time it was brought” (*Geza v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 3, 2004 FC 1039). That costs award was upheld on appeal. The applicant’s appeal on the merits was allowed, and costs were granted on the appeal for the reasons given by the Federal Court judge, and also because of the extra-record material obtained by counsel for the applicant establishing that the process culminating in the decisions in the lead cases was flawed (*Kozak v. Canada (Minister of Citizenship and Immigration)*, [2006] 4 F.C.R. 377, 2006 FCA 124).

Behaviour of the applicant

4) “Special reasons” justifying an award of costs against an applicant may be found where the applicant has unreasonably opposed the Minister’s motion to allow the application for judicial review, thereby prolonging the proceedings (*Chan v. Canada (Minister of Employment and Immigration)* (1994), 83 F.T.R. 158 (T.D.); *D’Almeida v. Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 309 (F.C.T.D.)).

Behaviour of the Minister or an immigration official

5) An award of costs against the Minister for “special reasons” cannot be justified merely because:

i) an immigration official has made an erroneous decision (*Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35);

ii) the Minister seeks summary dismissal of an immigration appeal for mootness after the appellant has expended resources to perfect the appeal, rather than applying at the earliest opportunity (*Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279); or

iii) the Minister discontinues an appeal on the eve of the hearing as a result of new legislation

undermining the basis of the appeal (*Harkat v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 179).

6) “Special reasons” justifying costs against the Minister may be found where:

i) the Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal (*Geza v. Canada (Minister of Citizenship and Immigration)* (2001), 266 N.R. 158 (F.C.A.));

ii) an immigration official circumvents an order of the Court (*Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 513);

iii) an immigration official engages in conduct that is misleading or abusive (*Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 941); *Said v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 663 (FCA);

iv) an immigration official issues a decision only after an unreasonable and unjustified delay (*Nalbandian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128; *Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 535; *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1182);

v) the Minister unreasonably opposes an obviously meritorious application for judicial review (*Ayala-Barriere v. Canada (Minister of Citizenship and Immigration)* (1995), 101 F.T.R. 310 (T.D.); *Ndererehe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 880; *Dhoot v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1295).

Behaviour of counsel

7) “Special reasons” justifying an award of costs personally against counsel may be found where counsel has repeatedly failed to appear at scheduled hearings (*Ferguson v. Canada (Minister of*

Employment and Immigration), [1986] F.C.J. No. 172 (F.C.A.)).

[10] The Applicant appealed the Registrar's decision and although the outcome remained the same, the Appeal Committee did indeed find an error was committed by the Registrar in its decision. The Applicant was entitled to apply for leave and judicial review. His application for leave was dismissed by the Federal Court.

[11] Given that there is no compelling evidence that the Applicant had committed an abuse of procedure, the case does not qualify regarding special reasons as per Rule 22 of the FCCIRPR.

VI. Conclusion

[12] Therefore, no costs should be granted to the Respondent.

ORDER

THIS COURT ORDERS no costs in regard to this matter.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3569-16

STYLE OF CAUSE: DAVID MOLSON v IMMIGRATION CONSULTANTS
OF CANADA REGULATORY COUNCIL

MOTION FOR COSTS CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS: SHORE J.

DATED: MAY 12, 2017

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