Federal Court  Cour fédérale

Date: 20200605

Docket: IMM-1744-20

Citation: 2020 FC 671

Ottawa, Ontario, June 5, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ABEER QITA

Applicant

and

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL (THE)

Respondent

ORDER AND REASONS

[1] Ms. Abeer Qita (the "Applicant") filed a Notice of Motion, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), on March 30, 2020, seeking the following relief:

> 1. An Order setting aside the Order of Prothonotary Kevin Aalto dated March 6, 2020 and permitting the Application for Judicial Review, bearing Court File Number T-168-20 to continue as an Application commenced under section 18.1 of the *Federal Courts Act*, without the requirement to first obtain the Court's Leave;

2. An Order granting a new timeline for the steps to be taken in the Application for Judicial Review, bearing Court File Number T-168-20;

3. An order directing the Respondent the Immigration Consultants of Canada Regulatory Council to deliver certified copies of the Tribunal Record to the Applicant and to the Court;

4. Costs of this motion; and

5. Any other relief the Honourable Court may deem just and appropriate.

I. BACKGROUND

[2] The following details are taken from the pleadings in this file, including the Motion Records filed in respect of the Applicant's Motion and the affidavit of the Applicant sworn March 30, 2020, and from the Index of Recorded Entries.

[3] The Applicant is an immigration consultant. She was the subject of disciplinary proceedings before the Immigration Consultants of Canada Regulatory Council (the "Respondent"). In a decision dated January 20, 2020, the Discipline Committee of the Respondent found that the Applicant committed several breaches of the Respondent's *Code of Professional Ethics*.

[4] On February 3, 2020, the Applicant filed an application for judicial review in this Court in cause number T-168-20, in respect of that decision.

[5] By letter dated February 6, 2020, Counsel for the Respondent advised the Applicant that the application for judicial review was subject to the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (the "Citizenship, Immigration and Refugee Rules") and that it should proceed as an application for leave and judicial review. The Respondent requested that the Applicant amend her Notice of Application accordingly and name the Minister of Citizenship and Immigration (the "Minister") as a respondent pursuant to the Citizenship, Immigration and Refugee Rules.

[6] The Applicant filed an informal motion on February 21, 2020, asking the following:

> IT IS REQUESTED TO RESPONDENT KINDLY GRANT PERMISSION TO APPLICANT TO CHANGE THE FILE
>
> T-186-20
>
> TO
>
> IMM-168-20
>
> THE ABOVE OBJECTION WAS MADE BY THE RESPONDENT TO CHANGE THE FILE FROM
>
> T-168-20 TO IMM-168-20
>
> IT IS REQUESTED TO RESPONDENT TO KINDLY GRANT US PERMISSION.
>
> I AM WAITING FOR PERMISSION.
>
> [*sic*]

[7] On March 6, 2020, Prothonotary Aalto issued an Order in the following terms:

> 1. The Applicant is granted leave to change this application from T-168-20 to an IMM file number in the Court Registry system.
>
> 2. All timelines relating to IMM files shall apply to this application which shall commence as of the date of this Order.

[8] On March 30, 2020, as noted above, the Applicant filed a Notice of Motion seeking an order to set aside the Order of Prothonotary Aalto.

[9] In her affidavit filed in support of this Notice of Motion, the Applicant said that she did not understand the consequences of her informal request to convert her application for judicial review. She further deposed that she relied on the Respondent's interpretation of the case law in its letter, dated February 6, 2020, and that this letter misled her. As well, she says that the Respondent's letter "likely misled the [*sic*] Prothonotary Aalto."

[10] By Direction of the Court, dated April 2, 2020, Counsel for the Applicant was directed to serve the Notice of Motion upon the Respondent and the Department of Justice, as Counsel for the Minister.

[11] By email, Counsel for the Applicant confirmed service of the Notice of Motion upon the Respondent and the Minister on April 2, 2020 and April 7, 2020, respectively.

[12] On April 16, 2020, Counsel for the Minister filed his responding Motion Record.

[13] On April 17, 2020, Counsel for the Respondent filed a responding Motion Record. Included in that Record was the affidavit of Christine Le Dressay, a law clerk. The affidavit referred to several exhibits that were attached, including a copy of the Notice of Application and a copy of the Applicant's informal request.

[14] The Applicant filed her reply submissions on April 23, 2020.

II. SUBMISSIONS

A. *The Applicant's Submissions*

[15] The Applicant submits that the Court should exercise its plenary powers to "set aside" Prothonotary Aalto's Order, citing *Philipos v. Canada (Attorney General)*, [2016] 4 F.C.R 268 (F.C.A.). In her reply submissions, the Applicant clarified that she is not seeking an appeal or to set aside the Order pursuant to Rules 51 and 399, respectively, of the Rules.

[16] The Applicant argues that her circumstances, including her lack of counsel, her misunderstanding of the jurisprudence, and the irregularity of the Respondent's letter that initiated the relief ultimately granted by Prothonotary Aalto, warrant the exercise of the Court's plenary powers.

[17] The Applicant submitted in her reply that it is unsettled that decisions of the Respondent's Discipline Committee are subject to the Act and the Citizenship, Immigration and Refugee Rules.

[18] In her reply, the Applicant also argued that if the Court were to treat her Motion as an appeal pursuant to Rule 51 of the Rules, that the circumstances surrounding the COVID-19 epidemic warrant an extension of time.

B. *The Respondent's Submissions*

[19] The Respondent submits that the Motion should be dismissed since the facts do not fit within the scope of Rule 399 of the Rules and if the Applicant seeks to appeal the Order of Prothonotary Aalto, she is out of time to do so, in light of the time limit imposed by Rule 51 of the Rules.

C. *The Minister's Submissions*

[20] The Minister submits that he is not a proper party to this proceeding and seeks an order removing him as a party. Otherwise, he argues that there is no basis to overturn the Order of Prothonotary Aalto because the Applicant has not established that she meets the requirements of Rule 399 of the Rules.

III. DISCUSSION

[21] In this Motion, the Applicant seeks an order to set aside Prothonotary Aalto's Order by which this proceeding was converted to an application for leave and judicial review governed by the Act. As originally filed by the Applicant, her proceeding was an application for judicial review pursuant to Part V of the Rules.

[22] Although the Applicant submits that she is not relying on Rules 51 and 399 of the Rules, respectively, those Rules cannot be ignored considering she requests a setting aside or variance of the Order of Prothonotary Aalto.

[23] Rule 399 of the Rules allows the Court to set aside or vary an order, in certain circumstances. Rule 399 provides as follows:

Setting aside or variance	**Annulation sur preuve prima facie**
399 (1) On motion, the Court may set aside or vary an order that was made	**399 (1)** La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve prima facie démontrant pourquoi elle n'aurait pas dû être rendue:
(a) *ex parte*; or	**a)** toute ordonnance rendue sur requête *ex parte*;
(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding, if the party against whom the order is made discloses a prima facie case why the order should not have been made.	**b)** toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
Setting aside or variance	**Annulation**
(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	**a)** des faits nouveaux sont survenus ou ont été

subsequent to the making of the order; or	découverts après que l'ordonnance a été rendue;
(b) where the order was obtained by fraud.	**b)** l'ordonnance a été obtenue par fraude.
Effect of order	**Effet de l'ordonnance**
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	**(3)** Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[24] In my opinion, the circumstances outlined by the Applicant do not fit within Rule 399 of the Rules.

[25] The Applicant herself submitted an informal request to convert her "ordinary" judicial review application into an "immigration" judicial review application. Such an application is subject to the Citizenship, Immigration and Refugee Rules, promulgated pursuant to the Act.

[26] The Applicant has failed to show that there are grounds to set aside or vary the Prothonotary's Order, pursuant to Rule 399(1) of the Rules.

[27] The Applicant has also failed to show a basis to set aside or vary the Prothonatory's Order, pursuant to Rule 399(2) of the Rules.

[28] There is no evidence that the Applicant became aware of "a matter" subsequent to the date the Prothonotary issued his Order that would justify setting aside or varying that Order.

[29] There is no evidence that the Order in question was obtained by fraud.

[30] A consequence of the Prothonotary's Order is that the Applicant must obtain leave to pursue an application for leave and judicial review, pursuant to subsection 72(1) of the Act. The requirement to obtain leave is not a factor that justifies setting aside or varying the Prothonotary's Order, pursuant to Rule 399 of the Rules.

[31] In its submissions, the Respondent addressed the possibility that the Applicant seeks to appeal the Order of Prothonotary Aalto and submits that she is out of time to do so.

[32] Rule 51 of the Rules provides that an appeal lies against an order of a prothonotary within ten days of the making of such order. Rule 51 provides as follows:

Appeal	**Appel**
51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51 (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
Service of appeal	**Signification de l'appel**
(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of	**(2)** L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition

the motion. de la requête.

[33] It is clear from the record that the Applicant did not appeal the Order of Prothonotary Aalto within ten days. In her present Motion, she does not clearly request an extension of time to bring an appeal.

[34] In *Alberta v. Canada* (2018), 2018 FCA 83, at paragraph 44, the Federal Court of Appeal referred to the test for an extension of time as discussed in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.) as follows:

> In *Canada (Attorney General)* v. *Hennelly* (1999), 244 N.R. 399 (F.C.A.) *(Hennelly)*, this Court listed four questions relevant to the exercise of discretion to allow extension of time under Rule 8:
>
> > (1) Did the moving party have a continuing intention to pursue the proceeding?
> >
> > (2) Is there some merit to the proceeding?
> >
> > (3) Has the defendant been prejudiced from the delay?
> >
> > (4) Does the moving party have a reasonable explanation for the delay?

[35] The Applicant, that is the moving party, has shown continuing intention to pursue judicial review of the decision of the Respondent. She has not lost that opportunity, as a result of the Order in question.

[36] However, I see no merit in an appeal against an Order that the Applicant herself requested.

[37] There is no issue of prejudice to the Respondent; it remains a party to the converted application for leave and judicial review.

[38] The only explanation offered by the Applicant for a delay in appealing the Order of Prothonotary Aalto is the current COVID-19 situation.

[39] I note that in her supporting affidavit, the Applicant now alleges that Prothonotary Aalto misunderstood the facts when considering her informal motion to convert her "general" application for judicial review into an "immigration" application for leave and judicial review.

[40] If the Applicant alleges error by the Prothonotary in this manner, her remedy lies in appealing his Order. In the present Motion, she argues that she is not seeking an extension of time to file an appeal. In my opinion, her actions are inconsistent with her submissions and evidence.

[41] Considering the relevant factors for granting an extension of time, and the evidence and submissions of the Applicant, in my opinion it is unlikely that a motion for an extension of time to appeal that Order would succeed.

[42] Finally, I refer to the observations of the Federal Court of Appeal in *Curtis v. Bank of Nova Scotia* (May 3, 2019), 19-A-18 where the Court dismissed a motion to extend the time for filing a notice of appeal, after reviewing the relevant considerations. The Court noted at

paragraph 4 that "the need for finality of court decisions is an important concept; time limits are not whimsical."

[43] The Applicant argues that the Court enjoys "plenary powers" which may be exercised to grant the relief sought. She relies on the decision of the Federal Court of Appeal in *Philipos, supra*.

[44] In *Philipos, supra*, the Court dealt with a motion for an order resurrecting an appeal that the appellant had discontinued. Justice Stratas, writing as a single judge of the Federal Court of Appeal, set out a framework for allowing discontinued proceedings to be resurrected and continued. He spoke about the need for a "fundamental event."

[45] While the factual circumstances in *Philipos, supra* differ from those in the present case, the observations of Justice Stratas are relevant when the Court is asked to exercise its discretion to avoid the usual application of the Rules.

[46] The Court enjoys the discretionary power to control its own processes; see Rules 53, 55 and 56 of the Rules.

[47] In my opinion, the Applicant has failed to show that any "fundamental event" occurred here to justify the exercise of the Court's discretion to override the relevant Rules.

[48] The Applicant herself sought the conversion of her application for judicial review into an "immigration" application for leave and judicial review. She has not adduced evidence to show that she was misled at the time she filed her informal motion, rather she deposed in her supporting affidavit for this Motion that she did not understand the consequences of her informal motion.

[49] The Applicant was at liberty to seek legal advice prior to initially filing her application for judicial review and submitting her informal motion. She did not. In my opinion, the Applicant cannot ignore the practice and processes of the Court.

[50] Paragraph 46(1)(i) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the "Federal Courts Act") provides as follows:

Rules	**Règles**
46 (1) Subject to the approval of the Governor in Council and subject also to subsection (4), the rules committee may make general rules and orders	**46 (1)** Sous réserve de l'approbation du gouverneur en conseil et, en outre, du paragraphe (4), le comité peut, par règles ou ordonnances générales:
…	…
(i) permitting a judge or prothonotary to vary a rule or to dispense with compliance with a rule in special circumstances;	**i)** permettre à un juge ou à un protonotaire de modifier une règle ou d'exempter une partie ou une personne de son application dans des circonstances spéciales;
…	…

[51] The Rules are not "mere guidelines" to be ignored by a party; see the decision in *Abi-Mansour v. Passport Canada*, 2015 FC 363. In that decision, the Federal Court said at paragraph 32 that "[t]he Rules are therefore carefully crafted binding legal instruments that apply equally to all litigants coming before the Federal Courts, including self-represented litigants."

[52] In *Canada v. Hamer Gauge & Tool Co. Ltd.*, (1985), 3 W.D.C.P. 280, the Court said a rule of court made to regulate practice and procedure pursuant to section 46 cannot be applied to override an Act of Parliament. In this case, the "Act of Parliament" is the Act.

[53] The Act creates a requirement for leave on applications for judicial review on matters arising under the Act; see subsection 72(1), which provides as follows:

Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

[54] In her submissions, the Applicant challenges the status of the Respondent as a "federal board, commission or other tribunal," as defined in section 2 of the Federal Courts Act, relying on the decision in *Watto v. Immigration Consultants of Canada Regulatory Council*, 2018 FC 890.

[55] In *Watto, supra*, the applicant was an immigration consultant registered with the Respondent and the subject of a complaint. The applicant made several preliminary objections to his disciplinary hearing, which were dismissed by the respondent and subject to judicial review. The jurisdiction of the Federal Court to hear the judicial review was addressed as a preliminary matter and the Court found that it had jurisdiction.

[56] However, the Applicant relies on the following observations of the Court to again question jurisdiction:

> [14] As the Federal Court of Appeal held, the fact that the ICCRC derives its authority to regulate immigration professionals from the Minister's designation of that organization under subsection 91(5) of the *IRPA* is sufficient to make it subject to the jurisdiction of the Federal Courts. However, the Court does not explain in any detail why it also found that this entails that decisions of the ICCRC, a self-governing body of professionals, are "matters" under the *IRPA* within the meaning of subsection 72(1) of that Act and, thus, are subject to the more restrictive judicial review process set out therein.

[57] In my opinion, these comments are obiter and not germane to the issues raised in the present Motion.

[58] In *Zaidi v. Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116, the Federal Court of Appeal recognized the Respondent as a "federal board, commission or other tribunal."

[59] In paragraph 6 of its decision, the Federal Court of Appeal said in deciding whether a body is a "federal board, commission or other tribunal" "…the Court must consider (1) the

particular jurisdiction or power being exercised and (2) the source of that jurisdiction or power…."

[60] As well, the Federal Court of Appeal said that a Court must consider whether the exercise of the power is public or private in nature.

[61] In *Zaidi*, *supra*, the Federal Court of Appeal found that the underlying decision to be reviewed, that is whether the applicant did not meet the language requirements for registration as an immigration consultant, lay "at the core of the ICCRC's mandate to regulate who is able to practice a profession." The Federal Court of Appeal found that the source of the Respondent's authority is federal legislation, that is the Act, and was public in nature.

[62] In *Zaidi*, *supra*, the Federal Court of Appeal found that it lacked jurisdiction to hear an appeal in the absence of a certified question.

[63] In my opinion, the Applicant is not so much arguing that the Respondent is not a "federal board, commission or other tribunal" as she is arguing that its decision is not subject to the leave requirement in subsection 72(1) of the Act. However, in commencing an application for judicial review under Part V of the Rules, the Applicant recognized that the Respondent is a "federal board, commission or other tribunal" because judicial review is only available in respect of a decision of such a body.

[64] I interpret the ruling by the Federal Court of Appeal in *Zaidi*, *supra* that it lacked jurisdiction to hear the appeal in the absence of a certified question, to mean that at least certain decisions of the Respondent are subject to the leave requirement set out in subsection 72(1) of the Act.

[65] The Federal Court of Appeal specifically noted the authority of the Respondent to regulate the profession of immigration consultants. In my opinion, the power to discipline is part of that regulatory process. In the within proceeding, the Applicant is seeking judicial review of a disciplinary decision.

[66] In my view, when the Respondent makes a decision pursuant to its authority under the Act, then judicial review of such a decision is subject to subsection 72(1) of the Act, that is the leave requirement.

[67] In my opinion, in determining that it lacked jurisdiction to hear the appeal in *Zaidi*, *supra*, in the absence of a certified question, the Federal Court of Appeal determined a question of law.

[68] In its decision in *Apotex Inc. v. Allergan Inc.*, 2012 FCA 308, the Federal Court of Appeal referred to the principle of *stare decisis* which requires "judges to follow binding legal precedents from higher courts." In light of this instruction, I am bound by the finding of the Federal Court of Appeal in *Zaidi*, *supra* about the status of the Respondent as a "federal board, commission or other tribunal."

[69] It follows that in this proceeding, the decision of the Respondent at issue is subject to the leave requirement in subsection 72(1) of the Act.

[70] There remains the status of the Minister as a party to this proceeding.

[71] Pursuant to a Direction dated April 2, 2020 the Minister was given the opportunity to make submissions.

[72] The Minister was given the opportunity to make submissions in respect of the Applicant's Motion and did so.

[73] The Minister submits that he is not a necessary party and should not be named as a party. I agree with this position and the Minister will not be named as a party to this proceeding.

IV. Conclusion

[74] In conclusion, there is no basis to grant the relief sought by the Applicant, whether pursuant to Rule 399 of the Rules or by granting an extension of time to appeal the Order of the Prothonotary, and the Motion will be dismissed.

[75] The Respondent seeks costs on this Motion. Pursuant to Rule 400(1) of the Rules, costs lie fully within the discretion of the Court.

[76] In the exercise of my discretion, I award costs to the Respondent in the amount of $250, inclusive of disbursements and GST.

ORDER in IMM-1744-20

THIS COURT'S ORDER is that: the motion is dismissed with costs to the Immigration Consultants of Canada Regulatory Council in the amount of $250, inclusive of disbursements and GST.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1744-20
STYLE OF CAUSE:	ABEER QITA v. IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL (THE)

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

ORDER AND REASONS:	HENEGHAN J.
DATED:	JUNE 5, 2020

WRITTEN REPRESENTATIONS BY:

Obaidul Hoque	FOR THE APPLICANT
Jordan Glick Jordan Stone	FOR THE RESPONDENT
David Knapp	FOR THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

SOLICITORS OF RECORD:

OWS Law Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
GlickLaw Toronto, Ontario	FOR THE RESPONDENT