Federal Court Cour fédérale

Date: 20210608

Docket: IMM-3527-19

Citation: 2021 FC 561

Fredericton, New Brunswick, June 8, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

YANYU CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant brings this motion in writing under Rule 399 of the *Federal Courts Rules,* SOR/98-106, seeking to set aside my previous Order dated August 29, 2019 (Order), in which I dismissed the Applicant's application for leave and judicial review (Leave Application).

[2] The Leave Application challenged a decision of the Immigration and Refugee Board rendered on May 28, 2019. I dismissed the Leave Application because of the Applicant's failure to perfect her leave application.

[3] The Applicant claims to have not become aware of my Order until sometime in December 2019.

[4] However, the Applicant did not file this Motion until May 6, 2021, 17 months after she claims to have become aware of the Order. The Applicant has provided no explanation for the significant delay between the Applicant learning of my Order dismissing her leave application and the filing of this Motion seeking to set aside my Order. In my view, the lack of timeliness in filing this Motion is fatal to the Applicant's request. However, I will nonetheless briefly address the Rule 399 requirements below.

[5] The Applicant relies upon the following grounds in her Motion:

i. the application for leave and judicial review of the Applicant was submitted without the Applicant's knowledge and proper consent by a consultant unauthorized to do so. This included forging the applicant signature. As a result, the Applicant was not aware of this matter at the time of the decision;

ii. the Applicant has a fairly arguable case;

iii. for reopening: Rule 399 of the *Federal Courts Rules.*

Applicant's Affidavit

[6] In her Affidavit dated February 23, 2021, the Applicant states that she retained New Generation Immigration Company (NewG) when she applied for a permanent resident permit. In

May 2017, NewG completed her Express Entry application under the Canadian Experience Class. In June 2017, the IRCC invited the Applicant to apply for permanent residence status. In July 2017, as the result of an error in her application, NewG withdrew her application and reapplied on her behalf.

[7] In 2019, the IRCC again invited the Applicant to apply for permanent residence status. However, by 2019, the Applicant had returned to China and did not have passports for her husband or her newborn child. With the Applicant's knowledge NewG submitted an application without her husband or child's passports. In June 2019, NewG advised the Applicant that her application had been denied. The Applicant learned that this was her final chance to obtain permanent resident status as she had returned to China and no longer had sufficient Canadian work experience to qualify under the Express Entry system.

[8] The Applicant states that she agreed with NewG's offer to "appeal" the denial but did not have any further information from NewG about the appeal. The Applicant states that she now presumes the appeal referenced by NewG was an application to the Federal Court for judicial review. She states that in June 2019, NewG filed a notice of application for leave and judicial review on her behalf. In July 2019, NewG filed an Application Record with the Court.

[9] The Applicant claims that the NewG representatives were "lying" to her about the dismissal of the Federal Court leave application dated September 9, 2019. Instead, the Applicant states that she did not become aware of the dismissal of the Leave Application until December 2019 when her mother visited her property in Canada and found correspondence from the Court.

[10] The Applicant denies that she submitted the Leave Application despite the application indicating that she was self-represented. The Applicant claims that NewG prepared and submitted the application on her behalf without her review or understanding.

[11] The Applicant argues that the Order dismissing her Leave Application was made in her absence because she did not consent to the filing of the application. The Applicant also argues that the Order should be varied on the basis that the judicial review application was filed without her knowledge thereby constituting "a matter that arose or was discovered subsequent to the making of the order". Finally, she claims that the conduct of NewG was fraudulent.

Rule 399

[12] Rule 399 states as follows:

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,	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
if the party against whom the order is made discloses a *prima facie* case why the	

order should not have been made.	
(2) On motion, the Court may set aside or vary in 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 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;
(a) where the order was obtained by fraud.	b) l'ordonnance a été obtenue par fraude.

Analysis

[13] In my view, Rule 399(2) is the only Rule potentially applicable to the Applicant.

[14] It is only in the narrowest of circumstances that the *Rules* permit an Order setting aside an earlier dismissal of a proceeding (*Bergman v Canada*, 2006 FC 1082 [*Bergman*] at para 7; *Fernandez v Canada (Minister of Citizenship and Immigration),* 2001 FCT 909; [2001] F.C.J. No. 1287 (QL); and *Boubarak v Canada (Minister of Citizenship and Immigration),*2003 FC 1239 [2003] F.C.J. No. 1553 (QL);

[15] The Court in *Evans v Canada,* 2014 FC 654 [*Evans*]at para 19 notes that in considering applications pursuant to Rule 399(2)(a):

> … three conditions must be satisfied: (i) the newly discovered information must be a "matter" with the meaning of the Rule, (ii) the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence, and (iii) the "matter" must be something which would have a determining influence on the decision in question: *Ayangma v Canada*, 2003 FCA 382 at para 3.

[16] The Court in *Evans* at para 20 confirms that the term "matter" as used in the Rule may "encompass something broader than fresh evidence".

[17] It appears the "matter" relied upon by the Applicant to support her request is the conduct or negligence of her immigration consultant who she claims took steps on her behalf without her full knowledge and understanding. However, the Applicant's own evidence is that she was complicit in the steps taken either directly or indirectly on her behalf by NewG. Although she now claims that she would have obtained legal representation, that is not consistent with her past conduct with NewG who had previously made errors on her residency applications but the Applicant nonetheless continued to use their services.

[18] In my view, the Applicant's failure to properly inform herself of the steps being taken by her immigration consultant does not qualify as a "matter" within the meaning of Rule 399(2)(a).

[19] As noted by Justice Barnes in *Bergman* above at paras 13 and 14:

> [13] In the case of *Cove v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266; [2001] F.C.J. No. 482 (QL), Justice Denis Pelletier dealt with an application to extend time to file an application for judicial review based upon allegations of negligence on the part of an immigration consultant. He refused to grant relief on that basis and held at para. 10 that clients will be bound by the negligence and mistakes made by their representatives:
>
>> 10 If individuals are going to hold themselves out as skilled in immigration matters and, as is increasingly the case, adopt the designation of "counsel", then they will be held to the same standard as those who customarily appear before the Court. The consequences to their clients of non-performance will be the same as it is for clients of the immigration bar. There is no reason why the

> Court should shelter consultants from negligence claims by overlooking their mistakes. Members of the immigration bar pay large liability insurance premiums for coverage which is subject to being called upon every time a court refuses to gloss over their mistakes. To apply a different standard to consultants is to subsidize their competition with the immigration bar.
>
> [14] The apparent failings by the Applicants' representatives in this case similarly do not bring their situations within the scope of the Rules which permit the Court to set aside its previous orders…The long delays in bringing this matter before the Court have not been adequately explained, nor have the Applicants established that they have an arguable case on the merit.

[20] The issue in this case is not a mistake or misunderstanding by the Court with respect to the Applicant's application for leave but rather the Applicant's allegations regarding the conduct of her immigration consultant. However, such conduct is not a matter before the Court in relation to her application for leave and judicial review.

[21] In any event, even incompetence on the part of legal counsel will only constitute a breach of natural justice in "extraordinary circumstances" (*Memari v Canada (Minister of Citizenship and Immigration),* 2010 FC 1196 at para 36.

[22] The second part of the test laid out in *Evans* is that the matter must not have been discoverable through due diligence by the Applicant. The Applicant's Affidavit alludes to the fact that NewG notified her that an appeal would be filed on her behalf. The Applicant's own failure to make inquiries about the matter is her failing, not a mistake on the part of the Court.

[23] The third part of the test in *Evans* is that the matter must have a determining influence on the decision that was made. Issues with the quality of legal counsel or one's representative do not meet this part of the test.

[24] Finally, although the Applicant makes allegations of fraud, the alleged fraud must go to the foundation of the case and must be proven on a balance of probabilities. Simply stating that she has been the victim of fraud is insufficient in the present circumstances to support the extraordinary relief being requested. I note that the Applicant filed a complaint against her consultant in November 2020. However, merely filing a complaint is not evidence of fraud.

[25] The record shows that the consultant denied filing the leave application on the Applicant's behalf. In the context of this Motion, the Court cannot make findings on disputed facts.

[26] In any event and as noted above, the failure of the Applicant to seek this relief immediately upon learning of the Order dismissing her leave application is determinative of the relief she now seeks.

<u>ORDER IN IMM-3527-19</u>

THIS COURT'S JUDGMENT is that this motion is dismissed.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3527-19
STYLE OF CAUSE:	YANYU CHEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING, WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS:	MCDONALD J.
DATED:	JUNE 8, 2021

WRITTEN REPRESENTATIONS BY:

Ravi Jain Neerja Saini	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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