Federal Court Cour fédérale

Date: 20210222

Docket: T-2083-18

Citation: 2021 FC 168

Ottawa (Ontario), February 22, 2021

PRESENT: Mr. Justice Gascon

BETWEEN:

MOHAMMED ALSALOUSSI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Mr. Mohammed Alsaloussi, brings a motion [Motion] pursuant to Rule 399(2)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules], seeking a variation of an order contained in the Judgment and Reasons I issued on March 13, 2020 in *Alsaloussi v Canada (Attorney General)*, 2020 FC 364 [Judgment], as amended by the subsequent Order and Reasons

I made on April 20, 2020 in *Alsaloussi v Canada (Attorney General)*, 2020 FC 533 [together, the Order].

[2] In the Judgment, I granted in part Mr. Alsaloussi's application for judicial review of a decision of the Passport Entitlement and Investigations Division [Passport Division] of Immigration, Refugees and Citizenship Canada, and ordered that the issue of the period of refusal of passport services to Mr. Alsaloussi be reconsidered and re-determined by a different decision-maker. Further to a motion filed by the Respondent, the Attorney General of Canada [AGC], pursuant to Rule 397, I agreed to reconsider the Judgment and to add, for greater clarity, the words "in part" to the second conclusion of my Order.

[3] On July 16, 2020, a new decision-maker of the Passport Division rendered its decision on re-determination [Decision]. Mr. Alsaloussi did not seek a judicial review of the Decision, but he instead elected to file this Motion. Mr. Alsaloussi argues that the Decision and the facts underlying it constitute a new "matter" within the meaning of Rule 399(2)(a), and that there are exceptional circumstances justifying a variation of my Order.

[4] For the reasons that follow, I will dismiss Mr. Alsaloussi's Motion. Despite the able arguments put forward by counsel for Mr. Alsaloussi, I am not persuaded that the Motion raises a matter meeting the stringent requirements of Rule 399 and justifies the intervention of the Court. On the contrary, I find that the Motion falls outside the scope of Rule 399(2)(a), that nothing needs to be varied or clarified in my Order, and that the Decision would not have a determining influence on my conclusions. In fact, through his Motion, Mr. Alsaloussi complains about the

Passport Division's alleged failure to comply with my Order, and attempts to indirectly obtain a judicial review of the Decision rendered by the Passport Division upon re-determination. A motion under Rule 399 is not the proper vehicle for doing so, nor can it lead to the reliefs sought by Mr. Alsaloussi on his Motion.

II. **Background**

[5] The facts relevant to this Motion can be summarized as follows.

[6] In the Judgment, I granted in part Mr. Alsaloussi's application for judicial review against a decision of the Passport Division, which had revoked his Canadian passport and imposed on him a three-year suspension of passport services. In my reasons, I reviewed the two main dimensions of the impugned decision. I first found that the Passport Division's conclusion that Mr. Alsaloussi had provided false or misleading information on his April 2018 passport application was reasonable in light of the evidence. However, with respect to the ensuing three-year period of suspension of passport services imposed by the Passport Division, I found it unreasonable and remitted this specific issue for reconsideration and re-determination by a new decision-maker.

[7] The conclusions of the Judgment read as follows:

> 1. The application for judicial review is granted in part.
> 2. The November 28, 2018 decision of the Passport Division is set aside and the matter is remitted to a different decision maker for reconsideration and re-determination of the issue

> of the period of refusal of passport services, in accordance with these reasons.
>
> 3. The Passport Division shall make a decision within 60 days of the date of this judgment.
>
> 4. No costs are awarded.

[8] On March 26, 2020, the AGC brought a motion to reconsider the Judgment pursuant to Rule 397(1)(a), asking me to amend the Judgment in order to bring it in accord with the reasons given for it. Mr. Alsaloussi strongly opposed that motion, saying the Judgment was clear and did not need to be amended. Even though I considered my Judgment to be clear – as it expressly limited the re-determination to the issue of the period of suspension of passport services –, I granted the AGC's motion in part and agreed to repeat the words "in part" in the terms of my second conclusion, in order to provide even greater clarity and certainty. The Judgment was therefore amended as follows, to make the second conclusion "crystal-clear" (as I expressly said in my April 2020 Order and Reasons):

> 1. The motion to reconsider the Judgment issued on March 13, 2020 is granted in part and paragraph 2 of the Judgment is hereby amended as follows:
>
> "The November 28, 2018 decision of the Passport Division is set aside in part and the matter is remitted to a different decision maker for reconsideration and re-determination of the issue of the period of refusal of passport services, in accordance with these reasons."

[9] On July 16, 2020, the Passport Division rendered its Decision on re-determination. Further to a detailed analysis covering 18 pages, the new decision-maker revised the period of refusal of passport services to Mr. Alsaloussi, increasing it to three years and six months, and

modifying the starting date of the refusal period from April 28, 2018 to August 3, 2018. Therefore, the Decision effectively extended the sanction imposed on Mr. Alsaloussi by a full year. Needless to say, Mr. Alsaloussi was very displeased with the Decision.

[10] Mr. Alsaloussi claims that the new decision-maker willfully ignored the findings of facts, the reasons and the scope of the conclusions contained in my Order. He maintains that the Decision and the facts leading to it constitute a new “matter” justifying the variance of my Order, as he submits that the new decision-maker did not understand what I had ordered and did not conduct the re-determination in accordance with my reasons. Mr. Alsaloussi further argues that the Decision could not be judicially reviewed as it simply should not exist and reflects either a profound misunderstanding of my Order or bad faith on the part of the Passport Division. Even though Mr. Alsaloussi brought his Motion under Rule 399 and seeks to “vary” the Order, I observe that, in his Motion materials, he does not specify how exactly my conclusions ought to be modified. Mr. Alsaloussi instead asks the Court to order the following remedies:

> **A.** **GRANT** the present Motion;
>
> **B.** **VARY** the order contained in the Judgment rendered on March 13, 2020, by the Honourable Justice Mr. Denis Gascon and/or the order contained in the Order and Reasons rendered on April 20, 2020 by the Honourable Justice Mr. Denis Gascon;
>
> **C.** **QUASH** the decision of July 16, 2020, rendered by the new decision-maker of the Domestic Network, Passport Entitlement and Investigations Division of Immigration, Refugees and Citizenship Canada in connection with the Judgment rendered on March 13, 2020 by the Honourable Justice Mr. Denis Gascon and the order contained in the Order and Reasons rendered on April 20, 2020 by the Honourable Justice Mr. Denis Gascon;

D. **ORDER** that the IRCC appoint a new Decider to the present matter to apply the Order of the Court and reconsider the period of limitation only without conducting a new investigation;

E. **ORDER** that until a final decision is made pursuant to this matter, the Applicant is admissible to passport services and within his lawful right to obtain a Canadian Passport until a final decision is made by the new decider;

F. **RENDER** any order this Honourable Court deems appropriate to ensure the proper interpretation, application and execution of the order to intervene or any other order it might find appropriate;

G. **THE WHOLE WITH COSTS**.

ALTERNATIVELY:

H. **SUBSTITUTE** the decision of July 16, 2020 of the Decider and order that the Applicant is admissible to passport services and within his lawful right to obtain a Canadian Passport without any restrictions or limitation by applying for the same under the normal and applicable conditions;

I. **THE WHOLE WITH COSTS**.

III. Analysis

[11] The general principle is that judicial decisions are final. This is “necessary to ensure certainty in the judicial process as well as to preserve the integrity of that process” (*Collins v Canada*, 2011 FCA 171 [*Collins*] at para 12).

[12] When a judge has issued a final order or judgment, he/she is *functus officio*. It means that he/she has exhausted his/her jurisdiction over the subject matter of the litigation and that an order or judgment, once made, cannot be revisited by the court that made it (*Janssen Inc v Abbvie*

Corporation, 2014 FCA 176 [*Janssen*] at para 35; *Halford v Seed Hawk Inc*, 2004 FC 455 at para 6, citing *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848). The principle of *functus officio* ensures the finality of orders or judgments, and provides that the Court cannot reconsider or alter its decisions once they have been rendered.

[13] Only limited exceptions to this principle exist. In the Federal Courts, Rules 397 to 399 express those strictly defined exceptions. One of them is Rule 399(2)(a), which states that the Court may set aside or vary one of its orders "by reason of a matter that arose or was discovered subsequent to the making of the order." Mr. Alsaloussi's Motion is brought under that Rule.

[14] The case law has established that three conditions must be satisfied before the Court may grant a motion under Rule 399(2)(a): 1) the newly discovered information must be a "matter" with the meaning of the Rule; 2) the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and 3) 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; *Procter & Gamble Pharmaceuticals Canada Inc v Canada (Minister of Health)*, 2003 FC 911 [*P&G*] at para 15). To be successful, an applicant is required to meet all three branches of this Rule 399(2)(a) test.

[15] Since preserving the certainty and integrity of the judicial process is a necessity, a motion to set aside or vary an order under Rule 399(2)(a) must be based on "exceptionally serious and compelling grounds" (*Collins* at para 12). The remedy is extraordinary and will only be granted "in the clearest of cases" (*P&G* at para 26). To echo what the Court said in *Smith v Canada*

(Citizenship and Immigration), 2007 FC 712 [*Smith*], Mr. Alsaloussi's Motion must thus fall "four-square within the ambit" of the Rule (*Smith* at para 26).

[16] I conclude that Rule 399 has no application here, as the circumstances described by Mr. Alsaloussi in his Motion fail to meet the requirements of Rule 399(2)(a) and are not a matter contemplated by this Rule for several reasons. First, Mr. Alsaloussi's Motion exceeds the strict limits of Rule 399(2)(a) in numerous respects. Second, I am not persuaded that anything needs to be varied or clarified in my Order by reason of the Decision on re-determination and its underlying facts. I instead find that the Decision would not have had a determining influence on my Order and would not have led me to issue a different one. Third, Mr. Alsaloussi's Motion clearly constitutes a disguised attempt to judicially review the Decision, for which the proper recourse was an application for judicial review under Part 5 of the Rules. There is nothing unique to the situation faced by Mr. Alsaloussi that would justify circumventing the usual process for challenging a decision issued by an administrative decision-maker further to an order for reconsideration and re-determination from this Court.

A. *The Motion does not fall within the strict limits of Rule 399(2)(a)*

[17] I do not dispute that a "matter" under Rule 399(2)(a) is "a word of broad import" (*Shen v Canada (Citizenship and Immigration)*, 2017 FC 115 [*Shen*] at para 15; *P&G* at para 16). However, there are limits to the scope of Rule 399(2)(a) : a motion to vary cannot be used as a vehicle for revisiting orders and judgments every time a change in the facts occurs, or every time a litigant is unsatisfied with a judgment (*Collins* at para 12). Here, Mr. Alsaloussi's Motion exceeds the strict limits of Rule 399(2)(a) in at least three distinct but interrelated respects.

[18] First, a motion under Rule 399(2)(a) cannot be used to simply obtain some further clarifications as to the scope of conclusions reached by a judgment or an order.

[19] In his written representations, Mr. Alsaloussi expressly states that he seeks a variance of my Order "in order to extensively detail the limited scope of the judgment and indicate that the new decision-maker is indeed bound to respect said judgment, its reasons and said limited scope and limit the exercise of their duty to the reconsideration and re-determination of the issue of the period of refusal of passport services […], the whole in accordance with the reasons of the judgment and nothing more." As the Court clearly affirmed in *Shen* and in *Teva Neuroscience GP-SENC v Canada (Attorney General)*, 2010 FC 1204 [*Teva*], and contrary to what Mr. Alsaloussi maintains, this remedy does not fall within the powers of the Court and this is not what Rule 399 stands for.

[20] In *Shen* and in *Teva*, the Court was seized of motions brought under Rule 399 in the context of decisions which had been issued by the Court on applications for judicial review. The motions related to events within the on-going re-determination process conducted by the administrative decision-maker. In both of these instances, contrary to the situation prevailing in this Motion, the decision on re-determination had not yet been issued by the administrative decision-maker, and the motions to vary the Court's orders were seeking variations of the orders to clarify the process to be followed by the administrative decision-maker in conducting the re-determination, or to deal with issues relating to evidence used in the re-determination process.

[21] In *Teva*, the Court found that the Rule 399 motion, which sought variations to explain how the re-determination process should unfold, would in effect require "the Court to exercise continuing supervisory jurisdiction over the steps the [decision-maker] may take or refuse to take in the course of conducting its redetermination" (*Teva* at para 25). This, said the Court, "is not the Court's function" (*Teva* at para 25). The Court added that, if and when the decisions-maker will have made a final decision on re-determination, one of the parties may, if so advised, apply for judicial review (*Teva* at para 25). Similarly, in *Shen*, the Court refused the alternative relief sought to "clarify the scope" of the judgment at stake in order "to assist in the resolution of disputes before the [decision-maker] regarding its interpretation and application" (*Shen* at para 25). The Court found that such a request "is clearly outside the scope of Rule 399" (*Shen* at para 25).

[22] I agree with these precedents and I similarly find that what Mr. Alsaloussi is in fact seeking on this Motion, namely a variation of my Order to insert additional details restating the narrow scope of the re-determination at issue, does not fall squarely within the ambit of Rule 399. As in *Teva*, I gave no specific directions in the Order as to how the re-determination of the period of refusal of passport services was to be conducted by the Passport Division's new decision-maker, I gave no shopping list as to what ought to be done, and a motion under Rule 399(2)(a) is not an instrument to clarify how an order is to be implemented.

[23] If providing additional clarifications within the context of a re-determination process that is still in progress is not part of "the Court's function," as it would imply a "continuing supervisory jurisdiction" over the steps to be taken by an administrative decision-maker in the course of the re-determination (*Teva* at para 25), it is even more so in a situation like Mr. Alsaloussi's, where the

new decision-maker has already completed its re-determination process. I would add that I find it preposterous to suggest that a court order could or should be varied to remind an administrative decision-maker that it is bound to respect its terms. The very essence of any order or judgment issued by the courts is that they be followed.

[24] Furthermore, Rule 399(2)(a) is not meant to be an avenue to address an alleged failure to comply with an order or an alleged erroneous implementation of an order. This is the second way in which Mr. Alsaloussi's Motion steps outside the boundaries of this Rule.

[25] A "matter" under Rule 399(2)(a) must be "relevant to the facts giving rise to the original order" (*Shen* at para 15; *P&G* at para 16). In the case of Mr. Alsaloussi, the Decision and the facts surrounding it do not relate to facts giving rise to my Order. They are instead a consequence of the execution and application of the Order; they are facts resulting from the actual implementation of the Order itself, namely the issuance of the Decision by the new decision-maker.

[26] It would be ironic that the Court could set aside or vary one of its orders by reason of circumstances that only arose or were "discovered" as a direct consequence of the implementation of its orders. Such a situation is not one of those exceptional and compelling grounds contemplated by Rule 399, but is instead an issue of compliance – or failure of compliance – with an order, for which the Rules provide for specific recourses. These recourses include applications for a contempt order and, in the case of orders directing an administrative

decision-maker to reconsider and re-determine a matter, applications for judicial review of the decision on re-determination.

[27] Rule 399(2)(a) is not meant to apply to situations where, as is the case here with Mr. Alsaloussi, a person is not satisfied with the work done by an administrative decision-maker on re-determination. If an alleged failure to comply with a clear and unambiguous order were to open the door to a motion to vary under Rule 399(2)(a), it would mean that Rule 399 could be used to ask the Court to police the implementation of its own orders and to exercise a continuing supervision over compliance with its orders. This is clearly not the purpose of Rule 399, and would in fact squarely negate the fundamental principle of *functus officio*. In other words, if the Court could be asked to set aside or vary one of its orders by reason of what a decision-maker should have done in implementing the order or in complying with it, a judge would never be *functus officio* and would continue to assume a supervisory and monitoring role over the implementation of his/her decisions as long as a party considers that a decision-maker is not complying with the order on re-determination. As the Court stated in *P&G*, a motion to vary under Rule 399(2)(a) cannot be used as a vehicle for revisiting judgments every time a change in the facts occur or for conferring a continuing jurisdiction to undertake a review of a judgment depending on how it is applied or complied with (*P&G* at para 14).

[28] Thirdly, Rule 399(2)(a) cannot apply to situations where the order sought to be varied has already been executed and acted upon and where, as is the case here for Mr. Alsaloussi, the decision on re-determination, which was the subject of the order at stake, has already been issued.

[29] Stated differently, Mr. Alsaloussi's Motion goes beyond the limits of Rule 399(2)(a) since there is no longer anything to be varied, reconsidered or modified as the Order has been implemented and acted upon, with the issuance of the Decision by the Passport Division. When the horse has already left the barn, a motion to vary an order for the purpose of clarifying how the horse should have done so and which door it should have used serves strictly no purpose, and certainly does not fit within the exceptional and compelling grounds contemplated by Rule 399(2)(a).

[30] I point out that, contrary to what Mr. Alsaloussi argues, there is no "spectre" of contempt to eliminate here. A "spectre" of contempt refers to a preoccupation for a possible contempt. Here, the Decision has already been issued and, if there is any issue of a possible contempt, the facts underlying such contempt have already occurred. We are beyond the "spectre" that, in some of the decisions cited by Mr. Alsaloussi, prompted the Court to grant a motion varying the terms of an order.

B. *There is nothing to be varied or clarified in my Order*

[31] As part of the requirements established by the case law to grant a motion under Rule 399(2)(a), the judge considering such motion must determine what he/she would have done if the new matter were before him/her (*Shen* at para 18; *P&G* at para 26). As was the case in *Arysta Lifescience North America, LLC v Agracity Crop & Nutrition Ltd*, 2020 FC 388 [*Arysta*] and in *Shen*, I am the judge who issued the previous judgment, and the test is therefore whether the new matter would have had a "determining influence" on that judgment. In other words, I have to determine whether I would have varied my Order and added any terms to it in light of the

Decision and the facts surrounding it, had these been raised with me (*Arysta* at para 19; *Shen* at para 24).

[32] Throughout his submissions, Mr. Alsaloussi contends that, had I known about the Decision, its contents and the facts leading up to it, I would have worded my Order differently and I would have dissipated any possible ambiguity.

[33] I do not agree. I am not convinced that my Order contains any ambiguity and I instead find that the Decision, its contents and the facts leading up to it would not have had a determining influence on the conclusions I reached.

[34] With respect, the Order is clear and leaves no ambiguity whatsoever as to the scope of the re-determination that was to be conducted by the Passport Division. As I have already stated when I considered the AGC's motion under Rule 397, the reasons for the Judgment leave no doubt that what was remitted to the Passport Division for reconsideration and re-determination by a new decision-maker was solely the issue of the period of refusal of passport services. No other parts of the impugned initial decision were remitted for re-determination.

[35] The conclusions of the Judgment expressly state, at paragraph 1, that Mr. Alsaloussi's application was "granted in part" and, at paragraph 2, that the decision of the Passport Division "is set aside and the matter is remitted to a different decision-maker for reconsideration and re-determination of the issue of the period of refusal of passport services, in accordance with these reasons." The reasons extensively echo that. My conclusions were slightly amended in April

2020, when I agreed to add the words “in part” to make paragraph 2 of my conclusions “crystal-clear.”

[36] I further noted in the Order that the Passport Division well understood the limited scope of the Judgment from the very beginning, when it initiated the re-determination process in late March 2020. At that time, the Passport Division requested Mr. Alsaloussi to make submissions regarding “the suspension of passport services” and expressly referred to the impugned decision being reviewed “in part for reconsideration and re-determination of the period of refusal of passport services.” In my opinion, the Order could not have been clearer, more precise or more detailed with respect to the task sent back to the new decision-maker on re-determination.

[37] Indeed, at the time of the motion brought by the AGC in April 2020, Mr. Alsaloussi considered that the Judgment was abundantly clear and needed no further precision. Furthermore, in his Motion materials, Mr. Alsaloussi has again profusely repeated that the terms of my Order suffered no ambiguity.

[38] A motion under Rule 399(2)(a) cannot serve to vary an order simply to restate or underline what has already been clearly stated by the Court, or to remind the litigants that an order of the Court is there to be followed and respected.

[39] Turning to the Decision, its contents and the facts leading up to it, I have reviewed them thoroughly and I cannot detect anything in them that would suggest that the new decision-maker considered my Order to be ambiguous or unclear. I have found no passage or instance where the

new decision-maker expressed any difficulty with the reasons contained in my Order. Upon my review of the Decision and the facts put forward by Mr. Alsaloussi in his Motion, I am not convinced that the Order was necessarily misunderstood by the new decision-maker. Nor am I persuaded that the Passport Division "ignored" my Order. The new decision-maker looked at the period of refusal of passport services, determined what needed to be done to complete this reassessment, and did not revisit the conclusion on Mr. Alsaloussi's false and misleading representations.

[40] At the hearing before the Court, counsel for Mr. Alsaloussi submitted that I should ask myself not whether my Order is clear and unambiguous from my own perspective or even from the perspective of Mr. Alsaloussi, but whether it is clear to any litigant involved in the process, including the decision-maker. I am satisfied that the answer to that question is a resounding yes.

[41] The issue here is not one of ambiguity or even of a possible ambiguity to be corrected in the Order. In this case, what Mr. Alsaloussi in fact complains about has nothing to do with the clarity of my Order or the reasons underlying it. His Motion instead relates to the process followed by the Passport Division to reassess the period of suspension of passport services, to the new decision-maker's alleged failure to comply with the terms of my conclusions and to the decision-maker's actual implementation of the Order – which Mr. Alsaloussi claims is shockingly deficient. Mr. Alsaloussi confuses a possible ambiguity in the terms of an order with a possible erroneous implementation of such order. These are two vastly different things.

[42] There is no ambiguity to dissipate and it is not a situation where, had I known about the Decision itself and how the new decision-maker conducted the re-determination I had ordered, the conclusions of my Order would have been different (*P&G* at para 32). On the basis of the facts before me, I instead find that I would have reached the same conclusions as I did and that I would not have worded the Order differently, with the detailed reasons that were given in the Judgment. In other words, in light of the lack of ambiguity in the Order, I do not see how, on the basis of the Decision and the facts brought before me by Mr. Alsaloussi on this Motion, I would need to amend and vary it to ensure that the scope of the new decision-maker's duty on re-determination is correctly outlined and described.

[43] In sum, I am not persuaded that the Decision and the circumstances surrounding it would have a determining influence on my Order as I cannot tell, without proceeding to a proper judicial review of the Decision, whether the new decision-maker complied with my Order or not, and whether a reasonable process was used in implementing my conclusions.

[44] I pause to point out that I cannot simply presume or take for granted, as Mr. Alsaloussi invites the Court to do, that, in rendering the Decision, the new decision-maker has "ignored" the reasons supporting the conclusions contained in the Order, that it did not properly follow the Court's determination and directions or misunderstood them, and that my Order should be varied on the assumption that the decision-maker allegedly failed to comply with it. Before ruling on this point, a thorough review of the analysis made by the new decision-maker would need to be undertaken in order to assess what reasoning process was followed and how the outcome about the new period of refusal of passport services was reached, and to determine whether a further

intervention of the Court in the Passport Division's administrative decision-making is warranted. This is precisely what the judicial review process, conducted as it should under the framework established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], is there to accomplish.

[45] I am not saying that the Decision necessarily complies with the Order or that there may not be grounds to argue that the new decision-maker failed to properly conduct the reconsideration and re-determination I had ordered. But an alleged misapplication of an order by a person subject to it, or an alleged failure to comply with an order, is not one of those exceptional circumstances contemplated by Rule 399(2)(a). The fact that Mr. Alsaloussi considers that, in issuing the Decision, the new decision-maker has turned a blind eye to my Order does not, in and of itself, provide a ground justifying a variation of such Order.

C. *The Motion is a disguised request for judicial review of the Decision*

[46] In the case of a decision of an administrative decision-maker made further to an order for re-determination, there is a specific procedural avenue open to a party dissatisfied with the way in which the order has been followed, implemented or complied with, and this avenue is an application for judicial review of the decision made upon re-determination. Mr. Alsaloussi says that, since the new decision-maker "ignored the clear conclusions" of my Order and the reasons in support thereof, "the only recourse available" to him is for a variance of the Order under Rule 399(2)(a). This is plainly incorrect.

[47] Not only is there an alternative and effective recourse available, but what Mr. Alsaloussi is effectively requesting by way of his Motion is that the Court undertakes a disguised and expeditious judicial review of the Decision rendered by the Passport Division on re-determination. That is not the role of the Court on a motion to vary, and it is certainly not the purpose of Rule 399(2)(a) to ask the Court to conduct what would be a partial and truncated judicial review of an administrative decision.

[48] Through his Motion, Mr. Alsaloussi is attempting to do indirectly, with an incomplete record with respect to the process actually followed by the new decision-maker in reaching the Decision, what could and should have been done directly by way of an application for judicial review. If there was any doubt as to what Mr. Alsaloussi's Motion effectively boils down to, suffice it to refer to the detailed review of the Decision undertaken by counsel for Mr. Alsaloussi at the hearing before the Court. In a meticulous exercise bearing all the attributes of what is usually done in an application for judicial review, counsel dissected the Decision and several exchanges leading to it, carved out numerous passages illustrating how, in his view, the Decision ignored or paid lip service to the Order, and invited the Court to consider those in its assessment of this Motion under Rule 399(2)(a). This is exactly what a litigant would ask the Court to do on a judicial review.

[49] In the same vein, the various remedies sought by Mr. Alsaloussi in paragraphs C, D, E and H of his conclusions clearly indicate that what Mr. Alsaloussi is ultimately looking for on this Motion are the hallmark remedies typically sought on an application for judicial review. These are not the type of remedies that the Court may or should order on a motion under Rule

399(2)(a), In fact, doing so would be highly prejudicial to the right of the decision-maker and of the AGC to a fair hearing, and would mean that the Court could invalidate the Decision on the basis of an expedited and curtailed process. This would usurp the role that the Court is called upon to fulfill in applications for judicial review, in accordance with a specific procedure stated in the Rules, and it is certainly not what is contemplated by the exceptional recourse offered by Rule 399.

[50] Mr. Alsaloussi is of course entitled to claim that the new decision-maker did not act in accordance with the Order when it conducted the re-determination of the issue of the period of refusal of passport services. However, as correctly pointed out by the AGC, Mr. Alsaloussi's dissatisfaction with the process followed in the re-determination and with the Decision rendered cannot be considered as a reason to vary the Order or a failure to obey it. It might justify seeking an application for judicial review of the Decision, or a contempt order, but it is not a proper ground to anchor a motion to vary an order under Rule 399(2)(a).

[51] Mr. Alsaloussi's disagreement with the Decision and his arguments against it could and should have been submitted to this Court by means of an application for judicial review, not by bringing a motion to vary the conclusions of my Order. This would have allowed the Court to properly review the Decision in light of the whole record before the decision-maker and to determine whether, under the lens of the *Vavilov* framework applicable to the review of administrative decisions, the Decision complies with the Order and meets the applicable standards of reasonableness or correctness.

[52] As I observed at the hearing before the Court, Mr. Alsaloussi has not referenced or directed the Court to any precedent where a final decision rendered by an administrative decision-maker following a re-determination ordered by the Court on an application for judicial review was considered to be a new “matter” within the meaning of Rule 399(2)(a). Nor has he identified any precedent where the Court has agreed to vary an order remitting a matter on judicial review on the basis that the administrative decision-maker failed to comply with such order. Similarly, I am unaware of any such precedents.

[53] This is not surprising since, once a decision on re-determination has been issued, it will no longer be a question of variance of the initial judgment ordering the re-determination but rather a question of compliance with the Court’s order on re-determination, a recourse which is to be exercised through an application for judicial review.

[54] Contrary to what Mr. Alsaloussi repeatedly argues, his situation is far from being unique or exceptional. This Court routinely renders judgments sending administrative decisions back to the decision-makers for reconsideration and re-determination, and it frequently happens that new applications for judicial review challenging the decisions on re-determination are filed and brought back before the Court on the ground that such decisions on re-determination do not comply with the initial conclusions, fail to follow the Court’s directions, and are therefore incorrect or unreasonable. In other words, the situation in which Mr. Alsaloussi finds himself is not unusual or of such a nature that his particular circumstance could justify using the exceptional avenue of Rule 399 to obtain the relief he claims to be entitled to. The only uniqueness in Mr. Alsaloussi’s case is his choice of opting for a motion under Rule 399 to

challenge the Decision instead of filing an application for judicial review. I have not found a single decision where, in such circumstances, a party has successfully brought a motion under Rule 399 seeking a variance of the initial order in the way that Mr. Alsaloussi has done so in this case.

[55] Given the well-accepted and easily accessible alternative option of an application for judicial review, Mr. Alsaloussi's Motion is manifestly not the type of compelling and extraordinary circumstances contemplated by Rule 399.

[56] The cases cited by Mr. Alsaloussi in support of his Motion are not of much assistance to him as they emanate from significantly different factual contexts. Mr. Alsaloussi has not demonstrated the applicability of the jurisprudence he references to a situation where, as here, a final decision has been made by an administrative decision-maker following a Court judgment ordering an issue to be re-determined.

[57] More specifically, this Motion is not a case similar to the situations described in *Janssen* or *Arysta*, where a party was seeking a variation of the terms of an injunction order where "the ambiguities create the spectre of contempt proceedings arising from the breaches of the injunction" and where specific particularized difficulties arose from the order itself (*Janssen* at paras 29, 34; *Arysta* at paras 25-26). Similarly, in *Smith*, it was an instance where the specific facts upon which the Court had confirmed a deportation order had not been fulfilled as promised in an affidavit and where it was clear that, had this fact been known, the order refusing a stay motion would not have been issued by the Court.

[58] At the hearing before the Court, counsel for Mr. Alsaloussi also referred the Court to the decision in *Annacis Auto Terminals (1997) Ltd v Cali (Ship)*, [1999] FCJ No 1579 (FC) [*Cali*], where the Court obliquely evoked the notion of "equity" in granting a variation of an order under Rule 399(2)(a) (*Cali* at para 23). Suffice it to say that, in that decision, the Court added the reference to an equitable remedy in a context where the specific requirements of Rule 399(2) had been satisfied. In the case of Mr. Alsaloussi, this is precisely what is missing, and equity concerns cannot serve to rescue his Motion.

IV. <u>Conclusion</u>

[59] For the above stated reasons, Mr. Alsaloussi's Motion is dismissed. The AGC is entitled to his costs.

ORDER in T-2083-18

THIS COURT ORDERS that:

1. The Applicant's Motion is dismissed, with costs.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2083-18
STYLE OF CAUSE:	MOHAMMED ALSALOUSSI v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARING HELD BY VIDEOCONFERENCE IN MONTRÉAL (QUEBEC)
DATE OF HEARING:	FEBRUARY 15, 2021
JUDGMENT AND REASONS:	GASCON J.
DATED:	FEBRUARY 22, 2021

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