Federal Court  Cour fédérale

Date: 20240808

Docket: IMM-10071-24

Citation: 2024 FC 1243

Ottawa, Ontario, August 8, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ABIDEEN OLALEKAN OLADIPUPO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Respondent brings a motion seeking an order for this Court to reconsider and/or vary its decision in *Oladipupo v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 921 (the "Stay Decision"), dated June 14, 2024, pursuant to Rules 397 and 399 of the *Federal Courts Rules*, SOR/98-106 ("*Rules*").

[2] The Respondent maintains that the decision contains remarks made without regard to the evidence that are damaging to counsel for the Respondent's professional reputation.

[3] For the following reasons, the Respondent's request is dismissed.

II. **Analysis**

A. *Issue and Legislative Scheme*

[4] The sole issue in this motion is whether the Court ought to reconsider or vary the Stay Decision pursuant to Rules 397 and/or 399 of the *Rules*.

[5] Once an order is made, it is final and must stand unless set aside on appeal, or reconsidered, varied, and/or set aside within the narrow ambit of Rules 397 or 399.

[6] Rule 397 of the *Rules* provides:

Motion to reconsider	**Réexamen**
397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397 (1)** Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

seulement pour l'une ou l'autre des raisons suivantes :

a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

Mistakes

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

Erreurs

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[7] Rule 399 of the *Rules* provides:

Setting aside or variance

399 (1) On motion, the Court may set aside or vary an order that was made

(a) ex parte; or

(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.

Annulation sur preuve *prima facie*

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) toute ordonnance rendue sur requête ex parte;

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 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;
(b) where the order was obtained by fraud	b) l'ordonnance a été obtenue par fraude.

A. *The Stay Decision will not be reconsidered, varied, and/or set aside*

[8] The Respondent submits that three portions of the Stay Decision ought to be reconsidered or varied pursuant to Rules 397 and/or 399.

[9] The first is paragraphs 33-40 of the Stay Decision, which the Respondent submits conflates at various points the Court's assessment of the reliability of evidence with the personal integrity of counsel for the Respondent. The Respondent submits that counsel for the Respondent made best efforts with respect to the evidence, acknowledged contrary evidence, and conceded that the discrepancy between the evidence proffered and the contradictory evidence could have been a miscommunication. The Respondent submits that at paragraph 36 of the Stay Decision, it is unclear if it was the Respondent itself (*i.e.*, the Minister) or counsel for the Respondent that was bordering on misleading the Court. The Respondent further submits that at paragraph 39 of the Stay Decision, the decision "reads" as an accusation that counsel for the Respondent lacks compassion or is unmoved by the human element of the removal, a personal

attack on counsel that is unsupported by the evidence. Moreover, the Respondent submits that paragraph 40 of the Stay Decision "appears to impugn" counsel's professional integrity without any evidence, warranting that this paragraph be removed or varied to ensure there is no questioning of the candour or professionalism of counsel for the Respondent.

[10] The second portion the Respondent seeks to have reconsidered and/or varied is paragraphs 46-47 of the Stay Decision. The Respondent submits that the language used by the Court in these paragraphs is without basis and against counsel for the Respondent. The Respondent further submits that the findings in paragraphs 46-47 "are not supported by the record" and "convey the impression" that counsel for the Respondent "was cavalier in her approach" to the issue at hand, being damaging to her professional reputation.

[11] The third portion challenged is paragraph 56 of the Stay Decision, which the Respondent submits could be read as referring to either the Minister or his counsel, and if the latter, is a further instance of baseless disparagement.

[12] The Applicant takes no position with respect to paragraphs 46 or 47 of the Stay Decision or the Court's alleged reference to counsel for the Respondent. The Applicant opposes the Respondent's request any variance to the Stay Decision, and/or excision of any specific paragraphs challenged (namely, paragraphs 36, 39, 40, and 56).

[13] The Respondent's allegations are baseless. The Court will not reconsider, set aside, or vary any part of the Stay Decision.

[14] I note first that neither Rule 397 nor Rule 399 are applicable to the Respondent's allegations. The purpose of Rule 397 is to allow the Court to address inadvertent mistakes or omissions in a judgment and ensure such a judgment reflects the issuing judge's intention and deals will all issues that ought to have been adjudicated (*Rebello v Canada (Justice)*, 2021 FC 275 ("*Rebello*") at para 2, citing *Pharmascience Inc v Canada (Minister of Health)(F.C.A.)*, 2003 FCA 333 ("*Pharmascience*") at paras 12-15, and the cases cited therein).

[15] In the Stay Decision, none of the alleged "mistakes" were inadvertent and the Stay Decision reflected the Court's intention. Moreover, all issues that ought to have been adjudicated were adjudicated, namely, whether the Applicant had met all three components of the tripartite test for being granted a stay of his removal. Crucially, the Respondent does not take issue with any aspect of the Stay Decision's holdings about this test for the purposes of this motion. Granting the Respondent's request to reconsider the Stay Decision would therefore contradict of the purpose and use of Rule 397 (*Rebello* at para 2; *Pharmascience* at para 15).

[16] Furthermore, Rule 399(2) requires that a matter arise or be discovered subsequent to an order made to set aside or vary an order (*Dabiri Sharifabad v Canada (Citizenship and Immigration)*, 2024 FC 740 at para 11 [citations omitted]). Three conditions must be met for Rule 399(2)(a): to be effected: "the newly-discovered information must be a 'matter' with the meaning of the Rule; the 'matter' must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and the 'matter' must be something which would have a determining influence on the decision in question" (*Shen v Canada (Citizenship and Immigration)*, 2017 FC 115 at para 14 [citations omitted]). None of the Respondent's alleged

new matters would have had a determining influence on the Stay Decision. As just mentioned, the Respondent "does not take issue with any of these substantive findings of the Court" with respect to the tri-partite test for removal. Thus, setting aside or varying the Stay Decision would not be consistent with Rule 399(2)(a).

[17] Rules 397 and 399 of the *Rules* therefore do not assist Respondent. The Respondent has not met any legal requirements for the Court to reconsider, set aside, or vary the Stay Decision. That said, for the edification of the moving party, the Court will address each of their allegations.

(1) Paragraphs 33-40 of the Stay Decision

[18] The Court disagrees with the Respondent that paragraphs 33-40 of the Stay Decision warrant an order pursuant to Rules 397 or 399 of the *Rules*.

[19] First, not once in the Stay Decision did the Court refer to counsel for the Respondent. If the Court had intended that counsel for the Respondent be addressed specifically, the Court would have addressed her specifically (see *e.g.*, *Igreja Ferreira de Campos v Canada (Citizenship and Immigration)*, 2024 FC 1193 at para 26; *Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160 at para 23; *Rocha Badillo v Canada (Citizenship and Immigration)*, 2024 FC 1092 at para 34; *Ramo Salazar v Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 59712 (FC)). Indeed, throughout the Stay Decision, the Court referred to counsel for the Applicant specifically on three different occasions (Stay Decision at paras 23, 32, 37) without ever mentioning counsel for the Respondent.

[20] Furthermore, whether or not the impugned portion of the decision "reads" as or "appears to be" applying to counsel for the Respondent is irrelevant. Read in context, the decision is unambiguous in who it is referring to. See, for example, the following: "This is not merely troubling litigation tactics from the Respondent—a Minister of the Canadian government—whereby they attempt to smuggle equivocal evidence into a record to support their position. This conduct borders on—and very closely borders on—misleading the Court" (Stay Decision at para 36 [emphasis added]). This paragraph, as with all of impugned others, did not state "…counsel for the Respondent."

[21] Moreover, the Respondent submits that his counsel acknowledged that there was contradictory evidence, "conceded that it was not entirely clear on how this came to be and suggested that one possible explanation for the discrepancy was a miscommunication". The Respondent goes on to argue that "[t]here is nothing in the transcript to support any suggestion that Respondent's Counsel was anything other than forthcoming." The Respondent cites specific portions of the transcript for the hearing in support of this submission.

[22] For instance, the Respondent refers to the passage from the hearing concerning a discrepancy regarding an email from Gracehill Behavioral Health Services.

[23] At the hearing, counsel for the Respondent stated the following regarding the email: "I acknowledge that the applicant has provided an e-mail from Grace Hill saying the contrary. So there … appears to be some miscommunication on this point." The Court asked counsel to

expand on this “miscommunication.” Counsel replied: “Well, it's not clear. We haven't been in contact with the liaison officer directly.”

[24] The transcript thus shows that the “miscommunication” was not “one possible explanation” for the “discrepancy” in the evidence, as counsel for the Respondent argues. Rather, the provided “miscommunication” was the only explanation.

[25] Moreover, let us recall what the “discrepancy” was in the evidence.

[26] Per the hearing, the Respondent put forward evidence whereby an affiant had received an email from a liaison officer, the liaison officer telling the affiant that a hospital in Nigeria had “confirmed that they would admit the applicant” (see also Stay Decision at para 34). This evidence was contradicted by emails from the hospital, including that there were not beds available at the hospital and that there had been only general inquiry about the Applicant’s care (see Stay Decision at para 35).

[27] The Court accordingly noted that it was troubling that the Respondent—not the counsel for the Respondent—had put forward evidence that could have lead the Court astray in rendering the decision (Stay Decision at para 36).

[28] Counsel for the Applicant suggested at the hearing that this conduct could be viewed as “getting very close to misleading the Court.” The Court agreed. The Court articulated specifically how this evidence could have mislead the Court (Stay Decision at paras 37-38). The

Court asked about this evidence at the hearing, and was provided with the response about a "miscommunication."

[29] Despite the effort by Respondent's counsel to explain away the contradiction in the hospital information provided to the Court, I did not find that the explanation for why there was misleading evidence in the record sufficed (Stay Decision at para 39). I thus cautioned the Respondent—again, not counsel for the Respondent (Stay Decision at para 40).

[30] Therefore, in fact, far from there being a lack of evidence—or "nothing in the record" as the Respondent put it in this motion—the clear wording in paragraphs 33-40 of the Stay Decision was in reference to the evidence in the record and from the hearing. To borrow the Respondent's phrase, the Court finds that there is nothing in the record to support that the Court was at all directing its reasons at counsel for the Respondent or rendering a decision without reference to the facts.

[31] Curiously, in this motion the Respondent has been selective about only certain parts of the Stay Decision. Indeed, other material aspects of the record referred to in the Stay Decision go unmentioned by the Respondent in this motion.

[32] First, I note the following written submission provided by the Respondent in his submissions provided for the stay hearing: "the Respondent has made considerable efforts to ensure the Applicant's welfare upon arrival in Nigeria. In addition to the medical escort, there is

a plan in place to admit him to a psychiatric facility if required" (Respondent's Memorandum at para 33).

[33] In support of this submission, the Respondent cited the evidence that the Applicant would be admitted to a hospital upon arrival in Nigeria (see Affidavit filed in support of Respondent's motion record for the Stay Decision at paras 5-6). That affidavit stated *inter alia* that: "The [Liaison Officer] also reached out to Gracehill Behavioral Health Services (Gracehill Hospital & Rehab), who have confirmed they would admit the Applicant to their facility upon arrival if required and would provide ambulance services to transport him from the airport to the hospital" (Affidavit filed in support of Respondent's motion record for the Stay Decision at para 6).

[34] As noted above, the evidence directly from Gracehill was that only general inquiry had been made about the Applicant and that there was no beds available to him (Stay Decision at para 35). Again, as noted, at the hearing there was a "miscommunication" cited about the evidence of the Applicant receiving care in Nigeria, despite the Court asking counsel about this contradicted evidence and counsel for the Respondent acknowledging that "the applicant has provided an e-mail from Grace Hill saying the contrary." The Respondent did not withdraw the written submission that there was a plan in place to admit the Applicant to the hospital despite the directly contrary evidence.

[35] Accordingly, in the context of paragraphs 33-40 as a whole, the Court cautioned the Respondent against engaging in tactics that would interfere with the integrity of Court proceedings (*i.e.*, the possibility of misleading the Court through the Respondent's evidence) and

questioned whether the Respondent was being forthcoming with the Court (*i.e.*, this misleading evidence in light of contrary evidence) with respect to the stakes at hand (*i.e.*, someone's life).

[36] In short, the Respondent's submissions on this point in this motion are spurious and misguided, failing to acknowledge the words in the Stay Decision or address the full factual context that was placed before the Court.

(2) Paragraphs 46-47 of the Stay Decision

[37] The Respondent's submission that language in Paragraphs 46-47 of the Stay Decision warrant an order pursuant to Rules 397 or 399 of the *Rules* is similarly meritless. Once more, the Respondent appears to have failed to properly read the Stay Decision or evaluate the entirety of the factual context before the Court.

[38] First, and as above, there is nothing in Paragraphs 46-47 of the Stay Decision that mentions counsel for the Respondent. This alone is enough to dismiss the Respondent's allegations.

[39] Nonetheless, the Respondent submits that counsel for the Respondent never said "that imminence in this context requires someone to succeed at suicide nor did she demonstrate a lack of understanding of the meaning of the word 'imminent'. Counsel merely referred the Court to the relevant jurisprudence as part of her submissions. She did not say that the risk of suicide was not imminent… These findings are not supported by the record."

[40] At the hearing, counsel for the Applicant did not raise the issue of imminence. On the other hand, at the hearing counsel for the Respondent did at the outset of her submissions on the irreparable harm branch of the tri-partite test: "…my understanding is that the… [k]ey question when it comes to suicide risk on irreparable harm is whether there is a serious and imminent risk of suicide." Counsel for the Respondent cited the case of *Bastien v Canada (Citizenship and Immigration)*, 2021 FC 926 at paragraph 23, which states *inter alia* that: "[i]t is true that this Court has previously issued stays of removal where applicants presented a serious and imminent risk of suicide." Counsel for the Respondent then stated: "So again, the question is, is there a serious and imminent risk of suicide?"

[41] What follows is the exchange that occurred between counsel and the Court immediately after posing this question:

> **Counsel for the Respondent**: I have placed all the information that I have before this court and I have no further information to provide at this time. If the court finds that there is a serious and imminent risk, then the irreparable harm is met. If the court finds that there is not a serious and imminent risk, then the test is … not met.
>
> **The Court**: But I thought the applicant… attempted to commit suicide yesterday.
>
> **Counsel for the Respondent**: That … my understanding as well.
>
> **The Court**: Isn't that imminent?
>
> **Counsel for the Respondent**: Well, again, if that's … what the court decides.
>
> **The Court**: Continue.
>
> **Counsel for the Respondent**: My …client instructed me that in their view, the most recent attempt does not significantly change the calculus given the … efforts that have been made to put in

> supports in place in Nigeria. That's all that I intended to say on the irreparable harm branch, and I will otherwise rely on my written submissions. [emphasis added]

[42] The written submissions for the Stay Decision from the Respondent that counsel stated she would be relying on provided the following: "The Applicant also has not demonstrated that he will suffer irreparable harm upon his return to Nigeria" (Respondent's Memorandum at para 31).

[43] In this motion, the Respondent is selectively reading evidence and the Stay Decision. When taking the written submissions about irreparable harm in tandem with the above exchange at the hearing for this matter—including the fact that counsel for the Applicant did not raise the issue of whether the suicidal risk had to be "imminent" and counsel for the Respondent did, with reference to jurisprudence—it was, in the Court's view, obvious that the Respondent was arguing that the suicidal risk had to be imminent to establish irreparable harm (Stay Decision at para 45).

[44] Furthermore, as mentioned, counsel for the Respondent raised this "key question" of imminence. Paragraph 47 of the Stay Decision responded to this question, with reference to jurisprudence from this Court.

[45] Thus, far from having "no basis in the evidence," the findings at paragraphs 46-47 of the Stay Decision are borne directly from the evidence. The Respondent's submissions are meritless.

(3) Paragraph 56

[46] The Court disagrees with the Respondent that anything in Paragraph 56 of the Stay Decision warrants an order pursuant to Rules 397 or 399 of the *Rules*. The Respondent argues that the second sentence of this paragraph ought to be varied or removed given "the Court's previous unwarranted findings." On the contrary, these findings were warranted. Once again, the Stay Decision plainly shows these findings were not directed at counsel for the Respondent, but rather at the position that her client took and evidence that he submitted.

B. *Concluding Remarks*

[47] The Respondent has alleged that his Court made a decision without basis in the evidence, going so far as to characterize the Court as making a "personal attack on [counsel for the Respondent's] character" and directing "disparaging and damaging remarks" towards counsel for the Respondent.

[48] These allegations are false. The Respondent may not like the language used in the decision or may feel that the decision reads a certain way. These considerations are irrelevant for a request for the Court to reconsider, vary, or set aside a final decision. One would expect more before challenging this Court's integrity.

III. **Conclusion**

[49] The Respondent's motion is dismissed.

ORDER in IMM-10071-24

THIS COURT ORDERS that the Respondent's motion is dismissed.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10071-24
STYLE OF CAUSE:	ABIDEEN OLALEKAN OLADIPUPO v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION PURSUANT TO RULES 397 AND 399 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	AHMED J.
DATED:	AUGUST 8, 2024

WRITTEN SUBMISSIONS BY:

Anthony Navaneelan	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT