Federal Court  Cour fédérale

Date: 20100916

Docket: T-1301-09

Citation: 2010 FC 926

Toronto, Ontario, September 16, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NELL TOUSSAINT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] On August 6, 2010 Reasons for Judgment and Judgment were issued dismissing the application for judicial review in this file. On August 16, 2010 the applicant brought a motion for reconsideration pursuant to Rule 397 of the *Federal Courts Rules*. The following passage from the Notice of Motion provides the basis of the applicant's request:

> THIS MOTION IS FOR an order that His Lordship reconsider his holding in his Reasons for Judgment and Judgment dated August 6, 2010 herein, that the applicant did not argue her immigration status was an analogous ground of discrimination under section 15(1) of the *Canadian Charter of Rights and Freedoms*. In any event, if it is thought that the matter was not argued and the Court overlooked

> determining the point because of a misunderstanding in terminology, the applicant seeks an opportunity to argue the point and requests that the hearing be reconvened and the parties be asked to make argument thereon.

[2] The parties appeared before me in Toronto on September 15, 2010 to make submissions on the motion to reconsider. At that time counsel stated that the applicant was relying only on Rule 397(1)(b) of the *Rules*, which provides as follows:

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 seulement pour l'une ou l'autre des raisons suivantes : …
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

[3] In her Memorandum of Argument the applicant requests that I "reconsider the statements at paragraphs 79, 81 and 82 of the Reasons for Judgment, 2010 FC 810, and the wording of Footnote 3 to paragraph 82" submitting that these paragraphs "inaccurately summarize her arguments with respect to discrimination because of 'citizenship,' 'citizenship status' or 'immigration status.'" The

applicant expressed the concern that unless this was done, the applicant might be prevented from advancing the arguments which she asserts were made at the initial hearing to the Court of Appeal.

[4] Counsel for the respondent offered the Court her client's undertaking that the respondent would not raise any objection or take any step that might prevent the applicant from making full submissions on her section 15 *Charter* argument if an appeal was filed. While of some comfort, the applicant submitted that it was open to the Court of Appeal, based on precedent, to refuse to hear a matter that had not been dealt with by the Federal Court at first instance. She relied on the decision in *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 and the following comments from the Court at paragraph 13:

> In this case, the certified question was not dealt with by the applications judge. This court was invited to address the question at first instance but in the end we have decided to remit the matter for a decision by a Federal Court judge. While this will result in an unfortunate delay in the resolution of this matter, it is our view that the parties will be best served by having the matter dealt with at first instance in the Federal Court. Should the matter require a second look, the parties will have access to this court. If this court deals with it at first instance, the parties lose the benefit of an appeal for all practical purposes, unless their case falls within the small group for which leave to appeal is granted by the Supreme Court of Canada.

[5] I am not convinced that this authority, applied to the present circumstances, would result in the Federal Court of Appeal refusing to hear the applicant's submissions on appeal. In *Zazai*, the application judge allowed the application on the basis that the adjudicator erred in law in holding that he or she was bound by the earlier decision of the Convention Refugee Determination Division of the Immigration and Refugee Board. In so ruling, Justice Campbell followed and relied upon an earlier decision of Justice Gibson in *Canada (Minister of Citizenship and Immigration) v. Varela*, [2002] F.C.J. No. 230 (T.D.). Justice Campbell then certified the same question for appeal as had

Justice Gibson. The problem arose because after having issued his Judgment, Justice Campbell, at the urging of the respondent, certified two additional questions that related to issues with which he had not dealt as he considered only the aforementioned error of law which was sufficient to allow the application.

[6] Unlike in *Zazai*, here I dealt with the issue of the applicant's section 15 *Charter* rights; however the applicant asserts that I erred in characterizing her submissions on that issue. In my view, the proper course for the applicant to take is to raise that issue before the Court of Appeal based on a submission that I erred in my judgment in dismissing her application on section 15 *Charter* grounds.

[7] I agree with the respondent that Rule 397(1)(b) does not apply in these circumstances. I did not overlook or accidentally omit the applicant's submissions; rather I dealt with them, as I understood them to be. If I was in error in my understanding, then the proper avenue for the applicant is an appeal, not reconsideration.

ORDER

THIS COURT ORDERS that the motion for reconsideration of the Judgment dated August 6, 2010 is dismissed. There shall be no order as to costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1301-09
STYLE OF CAUSE:	NELL TOUSSAINT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 15, 2010
REASONS FOR ORDER:	ZINN J.
DATED:	September 16, 2010

APPEARANCES:

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