Federal Court  Cour fédérale

Date: 20111103

Docket: IMM-3361-11

Citation: 2011 FC 1256

Ottawa, Ontario, November 3, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

AMARJIT KANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER (ON MOTION FOR RECONSIDERATION)

[1] On 26 September 2011, I dismissed an application for leave of the Court to commence an application for judicial review of a visa officer's decision refusing Ms. Kang's application for a temporary work permit as a live-in-caregiver. A motion for reconsideration was filed in this Court on 14 October 2011 by the Applicant. The grounds for reconsideration are:

a. a failure of the Minister to file a motion record in opposition to the application;

b. a procedural error in that there was no application by the Minister asking the Court to dismiss the application for judicial review; and

c. a procedural error in that the application was dismissed without any evidence before the Court, or any opposing application by the Minister.

[2] The Minister not only opposes on the broad ground that the Court is *functus officio*, but also on the grounds that he had never been served with the application record and that the motion for reconsideration has been filed too late. I need not take into account the last two grounds. In this case, there is an affidavit sworn 27 June 2011 and filed in Court that day which states that applicant's record had been served upon solicitors for the Minister. There was something served, but it may not have been the entire record. Had I granted leave, it would have been open to the Minister to move under rule 399 of the *Federal Courts Rules* to have the order set aside on the basis that he failed to file a record by accident or mistake or by reason of insufficient notice of the proceeding. However, that is not the case.

[3] Motions to reconsider are covered by rule 397 which provides:

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 :
(*a*) the order does not accord with any reasons given for it; or	*a*) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

(*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.
(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.	(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[4] The motion to reconsider is without merit and is dismissed.

[5] In this particular case, as is usual, the Minister filed an appearance. However, he did not follow-up with his own record, which is somewhat out of the ordinary. In addition, from time to time, after filing an appearance, the Minister may write to the Court to say he does not take a position on the application for leave but, if granted, reserves the right to make representations on the subsequent judicial review. It has even been known that the Minister has written to the Court consenting to both the application for leave and the judicial review.

[6] Rule 14 of the *Federal Courts Immigration and Refugee Protection Rules* provides that where a party has failed to file and serve a document within the time fixed, the judge may, without further notice, determine the application on the basis of the material then filed.

[7] In my opinion, the material filed by the applicant did not support an arguable case (*Bains v Canada (Minister of Employment and Immigration)* (1990), 109 NR 239, [1990] FCJ No 457 (QL);

and *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1007, [2008] FCJ No 1252 (QL)) and so the application for leave was dismissed.

[8] Leave is granted by the Court, not by the Minister. Section 72 of the *Immigration and Refugee Protection Act* requires that an application for leave be made to the Court. The Minister's silence, non opposition or even acquiescence is not relevant.

[9] Nothing was overlooked, which is a condition precedent for a motion for reconsideration under rule 397. The Court is *funcus officio*.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the motion for reconsideration is dismissed.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3361-11
STYLE OF CAUSE:	KANG v MCI

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

REASONS FOR ORDER AND ORDER (ON MOTION FOR RECONSIDERATION):	HARRINGTON J.
DATED:	NOVEMBER 3, 2011

WRITTEN REPRESENTATIONS BY:

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