Federal Court  Cour fédérale

Date: 20181128

Docket: IMM-3005-18

Citation: 2018 FC 1191

Ottawa, Ontario, November 28, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HASSAN MOHAMED ISMAEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant brings a motion in writing to set aside the Court's Order dated September 7, 2018 [the Order], which dismissed the Applicant's Application for Leave and for Judicial Review [the Application] of the decision of a Senior Immigration Officer, made on June 18, 2018, which refused the Applicant's Pre-removal Risk Assessment [PRRA].

[2] The Applicant filed his Application for Leave and for Judicial Review on June 28, 2018. However, the Applicant did not file an Application Record within the statutorily required time period. As a result, the Court dismissed the Application on September 7, 2018, which was more than five weeks after the Application Record should have been filed.

[3] The Applicant now also seeks an extension of time to file his Application Record in the event that the motion is granted and the Order is set aside.

[4] For the reasons that follow, the motion is dismissed.

I. Preliminary Issue

[5] Counsel for the Applicant [Counsel] filed an affidavit in support of this motion and seeks to rely on his own affidavit to support the submissions set out in the Memorandum of Argument. As noted by the Respondent, this is contrary to Rule 82 of the *Federal Courts Rules*, SOR/98-106 [Rules], which provides that "[e]xcept with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit."

[6] Counsel has not sought leave of the Court for his affidavit to be accepted nor has he acknowledged Rule 82.

[7] In *Twinn v Poitras,* 2011 FCA 310 at paras 7-8, 428 NR 219, the Court explained that counsel cannot offer evidence, i.e., be a witness, on a motion in which he or she is counsel. The Court explained the proper practice at para 8:

> [8] . . . A person cannot act as a witness and a lawyer at the same time: *Federal Court Rules*, SOR/98-106, Rule 82. The proper practice for a lawyer who has to give evidence is to have another lawyer act as counsel on the motion. Often it is acceptable for another lawyer in the firm to serve as counsel on the motion: *Polaris Industries Inc. v. Victory Cycle Ltd.*, 2007 FCA 259, (2007), 60 C.P.R. (4th) 194. After the motion, it is usually the case that the lawyer who swore the affidavit for the motion can represent the client in future motions and the hearing on the merits: *Viacom Ha! Holding Co. v. Jane Doe*, 2002 FCT 13 at paragraph 10.

[8] In the present case, Counsel should have considered engaging an associate to represent the Applicant on this motion or alternatively, providing an affidavit from another person with the requisite information or from the Applicant to attest to his knowledge of the status of his Application and his ongoing reliance on Counsel.

[9] The Court has an additional concern regarding the affidavit because it is not completely consistent with the submissions in the Applicant's Memorandum of Argument regarding Counsel's failure to file the Application Record.

[10] Counsel attests that he could not file the Application Record on time because he was on a preplanned vacation and that upon his return he faced a high volume of urgent matters. He adds that upon his return, his associate was on vacation and that "we were unable to complete the application" within the time frame. Counsel attests that he completed the Application Record the week of September 10, 2018 and prepared a motion for an extension of time to file the Application Record. Counsel states that the motion for an extension of time was not accepted for filing. He also states that the Applicant was not aware that the Application Record had not been filed.

[11] In the Memorandum of Argument, Counsel submits that the Applicant did not know that the Application Record was not filed within the statutory time period. Counsel also submits that he, Counsel, did not know that the Application Record was not filed on time because while he was on vacation his staff did not complete and file the Application Record. This differs from Counsel's affidavit.

[12] Counsel also states that he was not aware of any opposition by the Respondent to his motion for an extension of time. However, this is contradicted by the Respondent. The Respondent's Record establishes that the Respondent provided Counsel with a copy of their Motion Record opposing the Applicant's motion for an extension of time, which had been served on the Respondent but not filed with the Court. The Respondent's Memorandum of Argument in response notes, among other things, that no reasonable explanation for the delay had been offered, the PRRA decision at issue was not included in the Applicant's Motion Record, there was no evidence to support the assertion that the Applicant had an arguable case, and the Respondent was prejudiced by the obligation to respond to motions that do not respect the Rules of the Court and are without merit.

[13] In addition, the Respondent advised Counsel that the Application had been dismissed on September 7, 2018 and as a result, the Respondent's Motion Record was not accepted for filing. However, the Respondent provided a courtesy copy to Counsel, which clearly alerted Counsel to the fact that the Order had been issued dismissing the Application and to the Respondent's opposition to the extension of time.

[14] If the affidavit is not accepted, there is no evidence at all to support Counsel's submissions. If it is accepted, there is inconsistent information. However, the gist of it is that Counsel missed the deadline because he was on vacation and busy upon return. Either way, as explained below, the explanation of Counsel for not filing the Application Record within the statutory time periods is not a compelling reason to set aside the Order.

[15] The ongoing role of Counsel also raises questions given that Counsel acknowledges his own failure and argues that it should not be held against the Applicant and that the Order should be set aside. This is problematic because Counsel still represents the Applicant. There is no evidence to support Counsel's assertion that the Applicant was not aware that the Application Record had not been filed. There is also no evidence of the Applicant's current awareness of the status of his Application.

II. The Applicant's Submissions

[16] The Memorandum of Argument acknowledges that all the submissions are based on Counsel's affidavit.

[17] Counsel submits that the Applicant's motion to set aside the Order should be granted pursuant to Rule 399, in particular Rule 399(1)(b) and (2)(a).

[18] With respect to Rule 399(2)(a), Counsel submits that a "new matter" has arisen subsequent to the making of the Court's Order, which is that the Applicant did not know that the Application Record was not filed in the statutory time period. Counsel further submits that

Counsel also did not know that the Application Record was not filed on time because his staff had not done so while he was on vacation.

[19] Counsel asserts that the test for the Court to exercise its jurisdiction pursuant to Rule 399(2) established in *Ayangma v Canada*, 2003 FCA 382, [2003] FCJ No 121, [*Ayangma*] is met.

[20] Counsel also argues that although the jurisprudence has established that, generally, an applicant and counsel should be regarded as one, an exception is justified in the present case, because the Applicant was unaware of Counsel's failure to file the Application Record and to act in the Applicant's interests. Counsel relies on *Evans v Canada (Citizenship and Immigration),* 2014 FC 654, 458 FTR 196 [*Evans*] where the Court set aside an order because counsel had failed to act in the applicant's interests.

[21] In the event that the Order is set aside, Counsel also seeks an extension of time to file the Application Record. Counsel submits that the Applicant meets the criteria established in *Canada (Attorney General) v Hennelly*, 244 NR 399 at para 3, [1999] FCJ No 846 (QL) (FCA) [*Hennelly*]; *Grewal v Canada (Minister of Employment & Immigration)*, [1985] FCJ No 144 (QL), 63 NR 106 at 272, 277-278; and *Attorney General (Canada) v Larkman*, 2012 FCA 204 at para 62, [2012] FCJ No 880 (QL), including that he had a continuing intention to pursue judicial review, he has a reasonable explanation for the delay, his Application has merit, and the Respondent will not be prejudiced. Counsel argues that the merits of the Application are strong and that the extension could be granted on this basis, if not also on the other criteria. Counsel

relies on the proposed Application Record that he seeks to file if the Order is set aside and an extension of time is granted. The Respondent's Submissions

[22] The Respondent submits that once the affidavit of Counsel is struck, there is no evidence before the Court and the motion should be dismissed on this basis alone.

[23] Alternatively, the Respondent submits that the Applicant has not satisfied the criteria for the Order to be set aside pursuant to Rule 399. No reasonable explanation has been offered for the failure of Counsel to file the Application Record and there are no compelling reasons to set aside the Order.

[24] The Respondent notes that Counsel is presumed to be the Applicant's counsel of choice and the Applicant is bound by Counsel's actions.

[25] The Respondent notes that an extension of time cannot be considered unless the Order is set aside. Moreover, the Applicant has not met the criteria for an extension of time. The Respondent submits that Counsel has not adequately explained his delay in filing the Application Record, in pursuing the previous motion seeking an extension of time or in pursuing the within motion, which was brought a full month after the Order.

[26] The Respondent also submits that costs should be awarded to the Respondent in these circumstances given that the Respondent has been put to the task of responding to two meritless motions and that Counsel has misled the Court by stating that he was not aware that the

Respondent opposed the Applicant's previous motion for an extension of time. The Respondent clearly opposed the extension of time and provided their Memorandum to Counsel [on September 24, 2018], which set out the Respondent's opposition.

III. The Issue

[27] The issue is whether Rule 399 permits the Court to set aside the Order based on Counsel's submission that Counsel did not adequately represent the Applicant and, if so, whether the Court should exercise its discretion to set aside the Order. In other words, is the error or failure of Counsel to file the Application Record a "failure to appear by accident or mistake" as contemplated by Rule 399(1)(b) or is the error or failure of Counsel a "new matter" falling within Rule 399(2)(a) and are the other criteria of Rule 399(2)(a) met?

IV. The Motion is dismissed: the Applicant has not established any grounds to permit the Court to set aside the Order

[28] In the present case, there is no evidence before the Court to support the submissions that the criteria of Rule 399 are met and that the Court should exercise its discretion to set aside its Order. In addition, even if the affidavit of Counsel were considered, Counsel has not established that the narrow criteria to set aside an Order pursuant to Rule 399 have been met.

[29] Once the Court has dismissed an Application for Leave and for Judicial Review, the Court is generally *functus officio.* That is, the Court has no further authority, except to correct errors pursuant to Rule 397 or to set aside or vary an order pursuant to Rule 399, where the narrow criteria of those Rules are established.

[30] Counsel relies on Rule 399, which provides:

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 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.
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	**(3)** Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation

ou modification.

[Emphasis added]

[31] The Court's Order dismissing the Application cannot be characterized as an *ex parte* order as contemplated by Rule 399(1)(a). An *ex parte* order is one that is made in the absence of a party and without notice to them. In the present case, the Applicant through his Counsel filed the Application and he had the onus to file his Application Record in accordance with the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [the Immigration Rules]. There is no requirement for the Court to alert the Applicant or Counsel that the Application would be dismissed if the Application Record were not filed. The Immigration Rules establish the time limits and other requirements to perfect the Application. An applicant's own failure to file an Application Record in accordance with the Immigration Rules cannot be characterised as an *ex parte* order.

[32] Rule 399(1)(b) does not apply for the same reasons. Counsel's submission that the absence of a party "who failed to appear" by mistake should include the failure to appear in writing, i.e., by failing to file the Application Record, overlooks that the Applicant launched the Application and was required to comply with the Immigration Rules and to file the Application Record on time. In addition, Counsel has not established a *prima facie* case why the Order dismissing the Application should not have been made.

[33] Counsel's submission that Rule 399(2)(a) applies because a "new matter" has been discovered, which is that the Applicant did not know that the Application Record was not filed

within the statutory time limits is a novel but bizarre argument, which cannot succeed. First, there is no evidence to indicate that the Applicant did not know and may still not know that the Application Record was not filed. If the Applicant does not know, then the Applicant has still not discovered this alleged "new matter". Second, Counsel cannot rely on his own discovery of his failure to file the Application Record on time as a "new matter" to excuse his error. This is a circuitous argument which would invite countless other requests for relief based on similar errors. Moreover, as noted below, the jurisprudence has clearly established that ignorance of the law or the process is not an excuse.

[34] If the Applicant still does not know that the Application Record has not been filed, this is only because Counsel has not informed him or he has not checked the Court's Recorded Entries. Counsel cannot keep the Applicant in the dark and then rely on either a late in the day revelation or Counsel's continued lack of candor as a "new matter".

[35] In *Ayangma*, the Federal Court of Appeal reiterated the stringent conditions necessary to invoke Rule 399(2) (a) and the need for finality in the Court's jurisprudence. The Court of Appeal stated at paras 2-4:

> [2] Rule 399(2) (a) authorizes the Court to vary or set aside an order:
>
> "by reason of a matter that arose or was discovered subsequent to the making of the order."
>
> [3] The jurisprudence establishes three conditions which must be satisfied before the Court will intervene:
>
> 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.

[36] Apart from citing the test established in *Ayangma*, Counsel has not addressed the elements of that test.

[37] The jurisprudence does not support a finding that the error of Counsel is a “new matter” within the meaning of Rule 399(2)(a). Ignorance of the law or process has not been found to fall within the notion of a “new matter”. To find otherwise would be contrary to the principles of finality and would invite ongoing motions pursuant to Rule 399 based on claims of inadequate representation arising from counsel’s failure to comply with the Rules or to raise an argument.

[38] In *Collins v Canada*, 2011 FCA 171 at para 12, [2011] FCJ No 722 (QL), the Federal Court of Appeal emphasized the principle that decisions are final and that “exceptionally serious and compelling grounds” must be shown to invoke Rule 399(2)(a), noting:

> [12] In this case, the appellant has utterly failed to demonstrate the existence of any matter subsequent to the Order of March 30, 2011 which could justify the setting aside of that Order. Paragraph 399(2)(a) of the Rules cannot be used as a vehicle for revisiting judgments every time a litigant is unsatisfied with a judgment. The general principle is that judicial decisions are final, and consequently the setting aside of such a decision under paragraph 399(2) (a) of the Rules must be based on exceptionally serious and compelling grounds. This is necessary to ensure certainty in the judicial process as well as to preserve the integrity of that process.

[39] In *Noahs Ark Foundation v Canada*, 2015 FC 1183 at para 20, 259 ACWS (3d) 655, the Court noted:

> Thus, the case law is clear that ignorance of the law or failure to raise an argument that could otherwise properly have been brought before the Court is not a valid reason for setting aside an order of this Court under Rule 399 (*Procter & Gamble*, at para 19; *Desouky v Canada (Minister of Citizenship and Immigration)*, 176 FTR 302, 92 ACWS (3d) 674, at para 17; *Guzman v Canada (Minister of Citizenship and Immigration)* [2000] 1 FC 286, 174 FTR 43, at para 40).

[40] In *Guzman v Canada (Minister of Citizenship and Immigration)*, [2000] 1 FC 286, 174 FTR 43 [*Guzman*], the Court refused to set aside an order where the applicant, who relied on his lawyer, had failed to comply with the applicable Rules, noting at para 40:

> I am satisfied that subsection 399(2) of the Rules was not meant to apply to vary or set aside a final judgment of the Court because one of the parties to the final judgment had retained the services of a lawyer who, it is subsequently found out, was not properly versed in the law or the rules of a Court.

[41] Even if the discovery by Counsel that the Application Record was not filed could be considered a "new matter" within the meaning of Rule 399(2)(a) (which it cannot), this matter was discoverable before the Order was made. Counsel was clearly aware that he had not filed the Application Record within the statutory time period, which would have been the end of July, because he sought to file a motion for an extension of time around September 10, 2018. The Rules which set out the statutory time periods were accessible and known to Counsel given that the Applicant's own Notice of Application for Leave and for Judicial Review, filed by Counsel on June 28, 2018, states that copies of the relevant Rules and other necessary information may be obtained from local offices of the Federal Court.

[42] In *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266, [2001] FCJ No 482 (QL) [*Cove*], the Court reiterated the general rule that a client is bound by the representations and actions of their counsel. The Court noted the rationale for the rule provided in *Williams v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 258 (QL), 74 FTR 34. In *Cove*, the applicant had relied on an immigration consultant, yet the same rule was applied. The Court noted at paras 5-7:

> 5. The applicant is fully entitled to entrust her immigration problems to an immigration consultant rather than to a member of the immigration bar. It may be that, in doing so, she saved some fees, but perhaps not. She is also fully entitled to take her immigration consultant's advice on the steps to be taken in pursuing her claim. But the applicant runs into difficulty when she suggests that she ought to receive a dispensation from the rules because she was not represented by a lawyer and received bad advice.
>
> 6. It is a fact that, generally speaking, applicants will be held to the consequences of their choice of advisor even when that advisor is a lawyer. Madam Justice Reed put it this way in *Williams v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J No. 258, (1994) 74 F.T.R. 34:
>
> > [20] ...The general rule, in the courts, is that a client is considered to have authorized and be bound by the representations made on his or her behalf by counsel. The system cannot operate if this is not so. In my view, to grant a stay in circumstances where the only prejudice the applicant can demonstrate is that he may or may not have grounds for judicial review, but does not know because his former counsel did not properly prepare his case, would create an unworkable precedent. It is the professional accreditation bodies, such as the Law Society, not the courts, which have the mandate to regulate the professional performance of their members.
>
> 7. In *Drummond v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 477, (1996), 112 F.T.R. 33, Rothstein J. (as he then was) identified an exception to the principle enunciated by Reed J.:

> However, in extraordinary cases, competency of counsel may give rise to a natural justice issue. In such cases, the facts must be specific and clearly proven; see *Sheikh v. Canada* (1990), 71 D.L.R. (4th) 604 (F.C.A.); *Huynh v. M.E.I.* (1993), 21 Imm. L.R. (2d) 18 (F.C.T.D.); and *Shirwa v. M.E.I.* (1993), 23 Imm. L.R. (2d) 123 (F.C.T.D.).

[43] Similarly in the present case, the Applicant is considered to have authorized Counsel to represent him and is bound by Counsel's actions. There is no evidence before the Court to conclude that this is an extraordinary case.

[44] Counsel relies on *Evans* for the proposition that there is an exception to the general rule that an applicant is bound by the actions of counsel who they have chosen to represent them where that counsel completely fails to represent the applicant. Counsel appears to argue that he failed to act in the Applicant's best interests, and that the circumstances are similar to those in *Evans* where the Court set aside the Order at issue.

[45] In *Evans*, the Court agreed that the dismissal of the Application for Leave and for Judicial Review of an Order, which found that Mr. Evans' application for refugee status had been abandoned, should be set aside. In that case, Mr. Evans, who was a minor, was completely unaware of the proceedings, due to the conduct of his mother, who was his legal representative, and his mother's counsel. Neither attempted to contact him to gather information or to notify him of the proceedings, and as a result, he did not appear as required. The Court found, at para 22:

> 22 . . . The new matter is the complete failure of Dequan's mother and his counsel to act in his best interest at any time. Their failures were such that Dequan had no knowledge of any of the hearing dates set by the RPD, of the basis of the refugee claim

> made on his behalf, of the contents of his PIF, or of the revised narrative filed on his behalf.

[46] The Court then went on to find that this matter could not have been discovered before the previous judgment and that the result would likely have been different had his interests been advanced.

[47] In the present case, the Applicant retained Counsel and was clearly aware that his Application for Leave and for Judicial Review was filed and that there were follow up steps beyond filing the Notice of Application. This is clear given that the Applicant's affidavit is included in the proposed Application Record, which Counsel seeks to file if the Order is set aside and the extension of time is granted. Therefore, it appears that the Applicant is aware that an Application Record is needed. Although there is no affidavit of the Applicant in support of the within motion to support the submission that the Applicant is not aware that the Application Record was not filed, the Record conveys that the Applicant is aware of the proceedings more generally.

[48] In *Evans,* the Court did not find that the "new matter" was the incompetence of counsel, but the "complete failure" of those responsible for the minor applicant to advance his claim. The present facts differ from *Evans*. In addition, Counsel continues to represent the Applicant. There is no evidence from the Applicant to support the assertion that there is a complete failure of Counsel to represent the Applicant's interests.

[49] In *Chin v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1033 (QL), 69 FTR 77 [*Chin*], counsel for the applicant missed the deadline to file the Application Record, the application was dismissed, and counsel brought a motion to set aside the order dismissing the application and to extend the time to file the Application Record. The Court found that the explanation of counsel, that she had conflicting demands, was not sufficient reason to set aside the Order, noting at para 10:

> 10 I know that courts are often reluctant to disadvantage individuals because their counsel miss deadlines. At the same time, in matters of this nature, counsel is acting in the shoes of her client. Counsel and client for such purposes are one. It is too easy a justification for non-compliance with the rules for counsel to say the delay was not in any way caused by my client and if an extension is not granted my client will be prejudiced. I come back again to the question of fairness. It is unfair for some counsel to be proceeding on the basis that barring unforeseen events the time limits must be met and for others to be assuming that all they need do is plead overwork, or some other controllable event, and they will be granted at least one extension of time. In the absence of an explicit rule providing for the latter I proceed on the basis that the former is what is required.

[50] The rationale provided by the Court in *Chin* is equally applicable in the present circumstances.

[51] Counsel's argument suggests that counsel should be permitted to rely on their own errors to support an application to set aside or vary an order. As noted, the jurisprudence does not support this (See e.g., *Chin*, *Cove*, *Guzman*). In addition, such a strategy would have consequences for the reputation of counsel.

[52] Unfortunately for the Applicant, no evidence has been provided to support any of the submissions in this motion with respect to the Court's jurisdiction or discretion to set aside the Order pursuant to Rule 399 as it has been interpreted in the jurisprudence. The explanation offered for failing to file the Application Record within the statutory period—which is simply that Counsel was on vacation and too busy with other urgent matters upon his return—falls far short of compelling reasons to set aside the Order.

[53] With respect to the request for an extension of time to file the Application Record, no extension can be considered unless the Order which dismissed the Application is first set aside. As explained by the Court in *Ali v Canada (Citizenship and Immigration)* 2013 FC 335, 227 ACWS (3d) 4, at para 6:

> The Applicant's motion to extend time to file his Application Record cannot be entertained. My Order of December 5, 2012 is a final decision which dismissed the application. Without first setting aside that Order, nothing further can be done to perfect the proceeding: see *Bergman v Canada*, 2006 FC 1082, [2006] FCJ no 1360, and *Boubarak v Canada*, 2003 FC 1239, [2003] FCJ no 1553. There is also no evidentiary basis supporting a grant of relief under Federal Courts Rules 397 or 399.

[54] However, given the unusual circumstances and the lack of evidence from the Applicant, the Court's determination of the within motion is without prejudice to the Applicant to retain other Counsel and bring a subsequent motion seeking the same relief, if sufficient grounds and evidence can be provided for consideration by the Court. Any such motion should be brought within 30 days of the receipt of this Order and Reasons.

[55] With respect to the Respondent's request for costs, Rule 22 of the Immigration Rules provides that "[n]o costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders". In *Adewusi v Canada (Citizenship and Immigration)*, 2012 FC 75 at paras 23-25, 403 FTR 258, the Court noted that the threshold for establishing special reasons to award costs is high and provided some examples from the jurisprudence where the threshold had been met, including bad faith or conduct that unduly prolongs the proceedings.

[56] Although the Respondent has been tasked with responding to ill-fated motions and Counsel has not been candid with the Court with respect to the Respondent's position, I am not persuaded that these circumstances constitute "special reasons" to award costs to the Respondent.

ORDER in IMM-3005-18

THIS COURT ORDERS that:

1. The Applicant's motion to set aside the Court's Order dated September 7, 2018 and to grant an extension of time to permit the Applicant to file an Application Record is dismissed.
2. There is no order for costs.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3005-18
STYLE OF CAUSE:	HASSAN MOHAMED ISMAEL V THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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

ORDER AND REASONS:	KANE J.
DATED:	November 28, 2018

Paul Dineen	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chapnick & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT