Date: 20070706

Docket: IMM-204-07

Citation: 2007 FC 712

BETWEEN:

CHRISTOPHER JOEL SMITH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing at Toronto on Monday, the 28th of May, 2007 of a motion pursuant to Rules 399(2) and (3) of the *Federal Courts Rules*[1] (the "*Rule*") seeking the setting aside or variation of two (2) Orders of this Court.

[2] The Orders at issue are the following: an Order granted by the Honourable Maurice E. Lagacé, Deputy Judge, on the 4th of April, 2007 denying a motion on behalf of the Applicant for a stay of the execution of a removal order issued against him; and my Order, dated the 16th of April, 2007, in the following terms:

[1] SOR/988-106.

> Extension of time to file is denied. If an extension of time to file were granted, leave would be denied. This application for leave and for judicial review is dismissed.

The underlying application for leave and for judicial review referred to in my Order sought judicial review of a decision of a member of the Immigration and Refugee Board, Immigration Appeal Division, dated the 20th of September, 2006 and apparently received by the Applicant on or about the 15th of October, 2006. The application for leave and for judicial review was filed the 15th of January, 2007.

[3] In written representations filed on behalf of the Applicant on the motion here at issue, the following relief is sought:

> 1. That the stay of deportation that was dismissed on April 4, 2007 be varied to grant the stay.
> 2. That the Minister undertake all costs and efforts to return Mr. Smith to Canada forthwith.
> 3. That the decision dated April 18 [sic], 2007 dismissing the leave application be varied to allow the leave application to proceed.
> 4. That costs be awarded on a solicitor-client basis in the amount of $25,000 inclusive of GST and disbursements.

[4] *Rule* 399(2) and (3) reads as follows:

(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	(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

done or not done before the order was set aside or varied.	nature des actes ou omissions antérieurs à cette annulation ou modification.
[emphasis added]	[je souligne]

It was not argued before the Court that *Rule* 399(2)(b) has any application to the facts of this matter.

BACKGROUND

[5] The Applicant is a citizen of Jamaica. He entered Canada as a permanent resident some nineteen (19) years ago. He has extensive family connections in Canada. He has very limited family connections in Jamaica. He is diagnosed as suffering from hvtg schizophrenia. During his time in Canada, and apparently by relation to his illness, he acquired an extensive criminal record. He was found to be criminally inadmissible under subsection 36(1) of the *Immigration and Refugee Protection Act*[2] (the "*Act*") and a removal Order was issued against him.

[6] The Applicant appealed the removal Order issued against him to the Immigration Appeal Division earlier referred to. The Immigration Appeal Division granted the Applicant a stay of his removal. The Applicant was subsequently convicted of another offence that fell within the ambit of subsection 36(1) of the *Act* and, in the result, pursuant to subsection 68(4) of the *Act*, the stay of his removal was vacated by operation of law.

[7] The Respondent moved to have the Applicant's stay and his appeal to the Immigration Appeal Division recognized as vacated. In response, the Applicant filed a Notice of Constitutional

[2] S.C. 2001, c. 27.

Question before the Immigration Appeal Division asserting that subsection 68(4) of the *Act* infringed his *Charter*[3] rights and urged that he should be given a constitutional exemption from that subsection. The Immigration Appeal Division found that it lacked the jurisdiction to decide the *Charter* challenge.

[8] The Respondent began the process for removal of the Applicant from Canada. The Applicant filed a Pre-Removal Risk Assessment Application ("PRRA"). He was advised on the 20th of December, 2006 that his PRRA application was refused. He was again advised of this refusal on the 29th of March, 2007.

[9] On the 15th of January, 2007, the Applicant filed the application for leave and for judicial review of the decision of the Immigration Appeal Division that underlies the motion here at issue. To date, no judicial review has been sought of the negative PRRA decision in respect of the Applicant. The Applicant's removal from Canada was scheduled for the 5th of April, 2007. On the 30th of March, the Applicant requested a deferral of his removal. His deferral request was denied. The Applicant filed a motion before this Court to stay his removal from Canada pending the decision on his application for leave and for judicial review underlying this motion. Deputy Justice Lagacé's Order denying a stay followed.

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[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (R.S.C. 1985, Appendix II, No. 44), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[10] Shortly thereafter, and following the removal of the Applicant on the 5th of April, my Order denying an extension of time to file the underlying application for leave and for judicial review and, in the result, dismissing the application for leave and for judicial review, followed.

THE GROUND FOR THE MOTION BEFORE THE COURT

[11] On the motion before the Court leading to the Order of Deputy Justice Lagacé, the Respondent filed the affidavit of a paralegal in the Ontario Regional Office of the Department of Justice, Immigration Law Section, wherein she attested:

> 23. On April 3, 2007, I personally spoke with Amit Soin, the Enforcement Officer with carriage of this matter. Mr. Soin has advised me and I verily believe that the following arrangements have been made. Once the Applicant arrives in Kingston, Jamaica, [he, Mr. Smith] will be transported from the airport to the Emergency Department at the Kingston Public Hospital on North Street, where he will be seen by Dr. Reed.
>
> [emphasis added]

The hearing before Deputy Justice Lagacé took place on the day following the discussion between the paralegal and Mr. Soin and one day before the removal of the Applicant to Jamaica.

[12] The circumstances of the Applicant's removal and the events immediately following his arrival, under escort, in Jamaica, proved to be at variance with the arrangements attested to by the paralegal. In fact, the Applicant arrived in Jamaica with four (4) days supply of prescription medication for the treatment of his schizophrenic illness. He was advised of his medical appointment at the Kingston Public Hospital, was provided with sufficient funds to cover taxi fare to that hospital and was advised to attend at the hospital. He apparently advised his escorting officers that he was a Jamaican citizen, that they were now in Jamaica and that the officers had no

jurisdiction over him. The escorting officers advised Jamaican authorities at the airport of the Applicant's condition and of his appointment at the Kingston Public Hospital and were requested to assist the Applicant in fulfilling that appointment.

[13] The Applicant's escorting officers returned to Canada in very short order. The Applicant did not attend his appointment and did not attend at the Kingston Public Hospital for several days after his arrival in Jamaica and after his supply of prescription medication would have run out, if he had been consuming it as prescribed.

[14] In an affidavit filed on this motion, Amit Soin, the enforcement officer to whom the paralegal attests that she spoke, confirms that he and the paralegal spoke but denies that, at the time of that conversation, arrangements regarding the Applicant's removal to Jamaica had been finalized and, in particular, that he indicated to the paralegal that the Applicant "[would] be "transported" from the airport to the Emergency Department at the Kingston Public Hospital…" with the implication, which I draw from those words, that the transportation would be in the company and under the supervision of others.

[15] The totality of the evidence before the Court on this motion leads me to conclude that it was known to the officers escorting the Applicant to Kingston, Jamaica, that the Applicant's conduct, under the influence of his condition, and particularly when he was not medicated in accordance with his prescription, could be erratic, unreliable and dangerous to himself and to others.

THE ISSUES

[16] I am satisfied that the issues before the Court can be briefly summarized as follows:

1. If the motion to set aside or vary my Order dismissing the application for leave and for judicial review is not granted, does the Court have jurisdiction to set aside or vary Deputy Justice Lagacé's Order denying a stay of removal?

2. What is the test for the exercise of jurisdiction under *Rule* 399(2) and, in particular, *Rule* 399(2)(a)?

3. Is there here before the Court a matter that arose or was discovered subsequent to the making of each of the Orders at issue that would justify the setting aside or variation of either or both of those Orders?

4. If either or both of the Orders at issue is or are set aside or varied, should that setting aside or variation affect the "validity or character" of the removal of the Applicant on the 5th of April, 2007? and

5. What relief, if any, including relief in the nature of costs, is justified?

ANALYSIS

1) Jurisdiction

[17] Section 18.2 of the *Federal Courts Act* reads as follows:

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	**18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[18] Counsel for the Respondent urged that, under the foregoing section, interim relief can only be given if and while an application for judicial review, in this case an application for leave and for judicial review, is pending.[4] On the facts of this matter, if the judicial review application that underlay the motion for a stay of removal that resulted in Deputy Justice Lagacé's Order here at issue stands dismissed by my Order of the 16th of April, no purpose whatsoever could be served by setting aside or varying an Order in the context of a proceeding that is no longer before the Court.

[19] I accept without reservation the submissions of counsel for the Respondent to the effect that, on this motion, if my Order dismissing the underlying application for leave and for judicial review is not itself set aside or varied, I lack jurisdiction under *Rule* 399 to set aside or vary Deputy Justice Lagacé's Order of the 4th of April, 2007.

2) The test for the exercise of jurisdiction under Rule 399(2) and, in particular, *Rule* 399(2)(a)

[20] In *Ayangma v. Her Majesty the Queen*[5], Justice Pelletier, for the Court, wrote at paragraphs [2] and [3]:

> 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".
>
> The jurisprudence establishes three conditions which must be satisfied before the Court will intervene:
>
> 1-the newly discovered information must be a "matter" with[in] 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.

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[4] See for example: *Forde v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 310 (C.A.) (QL).
[5] [2003] FCA 382, 1st of October, 2003.

In the foregoing quotation, and in particular in the third condition, Justice Pelletier provides that the "matter" at issue must be something which "…would have a determining influence…" on the decision in question. Given that the Order sought to be set aside or varied may, as here in respect of one order, have been made by a different judge from the one considering the motion, I do not read the words "would have a determining influence" as conclusive but rather as conditional as in "might have a determining influence".

[21] In *Proctor & Gamble Pharmaceuticals Canada Inc. v. Canada (Minister of Health)*[6], my colleague Justice Snider wrote:

> In satisfying the first part of the test, P & G must convince me that this is a new matter. The term "matter" is a word of broad import and may encompass something broader than fresh evidence… . "Matter" refers to an element of the relief sought as opposed to an argument raised before the court… . The new matter must be relevant to the facts giving rise to the original Order… .
>
> [citations omitted]

3) Matter that arose or was discovered subsequent to the making of the Order at issue

a) My Order dismissing the underlying application for leave and for judicial review

[22] The alleged "matter" arising or discovered subsequent to the making of my Order dismissing the underlying application for leave and for judicial review, as with Deputy Justice Lagacé's Order denying a stay of removal, was the failure of the escorting officers, on their arrival with the Applicant in Kingston, Jamaica to ensure that he was "…transported from the airport to the

[6] 2003 FC 911, 24th July, 2003.

Emergency Department at the Kingston Public Hospital on North Street, where he will be seen by Dr. Reed". That he was not so "transported" and that he did not, at the urging of his escorts from Canada, make his own way to the Kingston Public Hospital to meet with Dr. Reed, was not in issue before the Court. I am satisfied this constitutes a "matter" within the contemplation of Rule 399(2)(a). The question then arises, was it likely, or even conceivable, that Deputy Justice Lagacé relied on the undertaking by way of affidavit on this issue that was before him. In relation to my own Order, the question must be whether, if I had known about the issue regarding the evidence before Deputy Justice Lagacé, would I nonetheless have reached the decision that I did.

[23] I conclude that the answer in relation to my Order must be that I would not, at least at the time that I made my Order, have made the Order that I did. Rather, since there was no compulsion in law for me to determine the question of leave on the application for leave and for judicial review when I did, it would have been the better course of action for me to have set aside the question before me until the issue surrounding Deputy Justice Lagacé's Order was resolved. In so doing, I would have preserved the jurisdiction of this Court to deal with that controversy, if necessary, and in no way would I have prejudiced either the Applicant or the Respondent.

[24] I have no concern but that the Applicant's known relative in Jamaica, his relatives in Canada and his counsel here in Canada acted diligently to discover and to pursue the issue of "transport" of the Applicant to hospital in Kingston when it first came to their attention. Equally, I have no difficulty concluding that Applicant's counsel drew the issue to the attention of the Court in a timely

manner, albeit that the Court's attention was drawn to the matter after my Order of the 16th of April, 2007 first came to her attention.

[25] In *Guzman v. Canada (Minister of Citizenship and Immigration)*[7], Justice Teitelbaum considered a motion to set aside an Order dismissing an application for leave and for judicial review where the Order was granted solely due to counsel's failure to understand and comply with procedural requirements. Justice Teitelbaum concluded 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.
>
> [emphasis added]

Absent jurisdiction under *Rule* 399, Justice Teitelbaum went on to consider whether he had inherent jurisdiction to nonetheless set aside the final Order in question. He wrote at paragraph [44] of his reasons:

> Notwithstanding my finding of having inherent jurisdiction to deal with a matter involving the law of immigration because of the Federal Court's exclusive jurisdiction in immigration matters, I am not convinced that I have the jurisdiction to set aside or vary a final judgment of the Federal Court – Trial Division.

[7] [2000] 1 F.C. 286 (T.D.).

[26] I am satisfied that the *Guzman* decision is distinguishable. Justice Teitelbaum found that the motion before him did not fit within the bounds of *Rule* 399(2). Absent jurisdiction under the *Rule*, he concluded that he had no relevant inherent jurisdiction supplementary to that provided by *Rule* 399(2). As noted above, on the facts of this matter, I am satisfied that the motion before me with regard to my Order of the 16th of April, 2007, falls four-square within the ambit of *Rule* 399(2).

[27] In the circumstances, I conclude that I should set aside my Order of the 16th of April, 2007 by reason of a matter that was discovered and diligently brought to the attention of the Court only after my Order was made.

[28] In light of my foregoing conclusion, I am satisfied that I retain jurisdiction to consider whether Deputy Justice Lagacé's Order denying a stay of removal should be set aside or varied since the underlying application for leave and for judicial review will be reinstated before the Court.

b) Matter that arose or was discovered subsequent to the Order of Deputy Justice Lagacé

[29] Deputy Justice Lagacé gave no reasons for dismissing the motion before him for a stay of removal of the Applicant to Jamaica. In the normal course of such a motion the issues for consideration are whether or not the underlying application for leave and for judicial review raises a serious issue to be tried, with the existence of a serious issue being determined on a low threshold, whether or not the Applicant would suffer irreparable harm through the proposed removal, bearing in mind all of the circumstances of the matter, and whether the balance of convenience as between

the Respondent and the Applicant favours the Applicant. The three considerations are conjunctive; that is to say, in order for an Applicant to succeed on a motion for a stay of removal, all three considerations must weigh in favour of the Applicant.

[30] As noted above, the first consideration before Deputy Justice Lagacé was whether or not the underlying application for leave and for judicial review raised a serious issue to be tried with that question to be answered against a low threshold. I subsequently dismissed the application for leave and for judicial review flowing from a denial of an extension of time to file. That being said, I did conclude that if an extension of time to file were granted, leave would nonetheless have been denied where the issue before me on the application for leave was very similar to, but not identical to, the concept of "serious issue to be tried" on a stay of removal motion. In the absence of reasons for Deputy Justice Lagacé's Order, I will assume that Deputy Justice Lagacé might have found a serious issue to be tried, against a low threshold, and nonetheless would have rejected the motion for a stay on the critical issue of "irreparable harm" and in the light of the evidence that was before him.

[31] The Applicant's schizophrenia, his reliance on prescribed medication to control his mood swings and the interrelationship between those mood swings and the danger that he poses, not only to the public, but to himself, all impact the issue of irreparable harm.

[32] Deputy Justice Lagacé had before him the recognition of the foregoing reality and the response to that reality that the Applicant would, on arrival in Kingston, Jamaica, be transported to

see a Dr. Reed who would be in a position to prescribe appropriate medication to control the Applicant's mood swings and violent impulses in the absence of such medication.

[33] While I can only surmise as to the impact that such a response might have had on Deputy Justice Lagacé's analysis on the issue of irreparable harm, I feel compelled to conclude that it would not have been ignored and would have weighed in favour of a finding that the Applicant would not suffer irreparable harm from his removal to Jamaica and thus would have augured in favour of a determination against the Applicant on one of the three factors for consideration, when a decision on that factor against the Applicant, would in itself have been conclusive on a determination not to stay removal.

[34] For the foregoing brief reasons, once again, I conclude that I should set aside Deputy Justice Lagacé's Order on the ground that a matter that arose or was discovered subsequent to the making of his Order might well have resulted in a different Order.

[35] Concerns regarding appropriate diligence in discovering that the Applicant was not "transported" to the hospital when he reached Kingston, Jamaica are responded to in the same manner as they were in respect of my own Order.

4) Effect on the "validity or character" of the Removal

[36] *Rule* 399(3) provides that unless the Court orders otherwise, the setting aside of an Order, as I have here determined should follow, does not affect the validity or character of anything done or not done before the Order was set aside, unless the Court orders otherwise.

[37] I cannot conclude that there is any impact that would flow from the setting aside of my own Order, dismissing the underlying application for leave and for judicial review, that is relevant. By contrast, the impact flowing from the removal of the Applicant to Jamaica following Deputy Justice Lagacé's Order dismissing the motion for a stay of removal might well prove to have been profound for the Applicant, his family members and for community members in Jamaica. That effect, I have concluded, might well have been attributable to a failure to effect what I take to be an undertaking included within the affidavit of a paralegal filed on the motion that was before Deputy Justice Lagacé. In the circumstances, notwithstanding that any misunderstanding that occurred between the paralegal and the Enforcement Officer with carriage of removal arrangements for the Applicant was, I am satisfied, simply an innocent misunderstanding, and certainly not fraud within the meaning in *Rule* 399(2)(b), I feel compelled to determine that the setting aside of the Order dismissing the motion for a stay of removal must have the effect of invalidating the removal of the Applicant from Canada to Jamaica.

[38] The only authority to which counsel referred me on the exercise by the Court of jurisdiction under *Rule* 399(3), in the immigration context, was *Cassells v. The Minister of Citizenship and Immigration*[8] where Justice Sharlow, then of the Trial Division of the Federal Court of Canada,

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[8] (1999), 171 F.T.R. 1; affirmed, [2000] F.C.J. No. 1879, 16th of June, 2000, (F.C.A.).

quoted from Justice Brockenshire of the Ontario Court, General Division who dealt with an earlier aspect of the same matter, which involved a deportation from Canada of an individual who, like the Applicant here, was in Canada without status. Justice Brockenshire is quoted, in part, to the following effect:

> I have no doubt that immigration matters are best dealt with by the Federal Court system. But this, in my view, is not a case about immigration. It is about preserving the authority of the Courts – all of the Courts – against usurpation by well-meaning persons in the civil service.

[39] While the factual background in *Cassells* is very different from the factual background before me, I am satisfied that the foregoing quotation is, in part, apt. Deputy Justice Lagacé had before him a motion seeking a deferral of execution of a removal order. While he denied that motion, I have here determined that he might well not have denied the motion but for affidavit evidence before him from a "well-meaning" person, based on information provided by another "well-meaning" person. By my Order that will follow from these reasons, I will reinstate the motion that was before Deputy Justice Lagacé. In effect, that motion which sought and could have resulted in a stay of execution of the removal of the Applicant from Canada will be brought back to life and the removal of the Applicant on the 5th of April, 2007 could have amounted to a "usurpation" of the authority of this Court if the Court had had before it accurate and complete information regarding what would transpire, and what actually transpired, when the Applicant was removed to Jamaica.

[40] For the foregoing reasons, subject to terms and conditions hereinafter described, I will declare the removal of the Applicant to Jamaica on the 5th of April, 2007 to be invalid and direct the return of the Applicant to Canada at the Respondent's expense.

5) Relief

[41] Based on the foregoing analysis, the two Orders of this Court that are before me, that is to say, my Order of the 16th of April, 2007 denying an extension of time to file the Applicant's application for leave and for judicial review, filed the 15th of January, 2007 and dismissing that application, and Deputy Justice Lagacé's Order of the 4th of April, 2007 denying the Applicant's motion for a stay of the execution of the removal Order issued against him, will be set aside. The impact of the setting aside of my own Order is to revive the Applicant's application for leave and for judicial review underlying this motion. Similarly, the impact of the setting aside of Deputy Justice Lagacé's Order is to revive the motion that was before him. The revival of the latter motion will be of little effect, if any, given the removal of the Applicant on the 5th of April, 2007, unless that removal is rendered invalid in accordance with *Rule* 399(3).

[42] At the close of the hearing of this motion, I advised counsel that I would set aside the Orders at issue and that, if the Applicant signified in writing, to the satisfaction of the Court, that he wished to return to Canada from Jamaica, that he understood the implications of return, and that he would abide by terms and conditions regarding his return and supervision throughout his return, I would declare his removal on the 5th of April, 2007 invalid and order his return to Canada at the Respondent's expense. I invited counsel to determine whether the Applicant wished to return to Canada in all of the circumstances and, if so, to provide the Court with an agreed draft order in this regard, if agreement could be reached.

[43] By fax received at the offices of the Federal Court in Toronto on the 11th of June, 2007, counsel for the Applicant provided the Court with a copy of a very informal letter dated the 28th of May, 2007, from the Applicant, in which he expresses a wish to return to Canada. He makes no reference whatsoever to agreeing to supervision during the return or to an understanding of the implications of return. Counsel's fax implies that agreement on the terms of an order could not be reached. She suggests that an order requiring return should address the following issues:

> 1. that a copy of Mr. Smith's emergency travel document used by the Minister to deport Mr. Smith be provided forthwith to applicant's counsel so that Mr. Smith can commence a request for a valid passport…;
> 2. that the Minister…provide in writing a request to add any other parties to these proceedings deemed necessary;
> 3. that given Mr. Smith has provided his written intent to return to Canada via letter dated May 28, 2007, that the Minister commence arrangements to book a ticket for Mr. Smith to return to Canada within 7 days of receipt of a valid travel document;
> 4. the Minister to co-operate fully and issue a TRP (Temporary Resident Permit) or any other document which would facilitate Mr. Smith's re-entry into Canada and waive any necessary processing fees associated with the same;
> 5. the Minister to provide an escort and nurse to accompany Mr. Smith on his flight back to Canada if deemed necessary and be responsible for all costs associated with the same;
> 6. the Minister to pay for all expenses related to Mr. Smith's flight back to Canada;
> 7. that the return date to Canada for Mr. Smith be scheduled no later than 30 days after the receipt of a valid travel document;

Counsel also addressed the issue of costs in her fax communication.

[44] Counsel for the Respondent promptly responded to the communication to the Court from counsel for the Applicant indicating a continuing concern regarding the Applicant's understanding of the implications of his return to Canada and regarding appropriate arrangements to ensure the safety of the travelling public, of the Applicant himself and of any escorts provided by the Respondent, if the Applicant is required to be returned to Canada.

[45] A teleconference involving the Court and counsel was scheduled for the 27th of June. In the interim between the scheduling of the teleconference and the 27th of June, negotiations continued between counsel and, in the view of the Court, resulted in a substantial narrowing of the areas of disagreement and concern. The teleconference itself would appear to have further narrowed the areas of concern.

[46] In the result, an Order pursuant to *Rule* 399(3) will go, subject to the Court receiving satisfactory notice in writing of the Applicant's continuing wish to return, of his understanding of the implications of return and of his willingness to comply with supervision throughout his return, declaring the removal of the Applicant from Canada to Jamaica on the 5th of April, 2007 to be invalid and requiring the Respondent to return the Applicant to Canada on terms and conditions generally to the following effect:

- first, the Applicant and his counsel shall provide reasonable assurances to the Respondent that the Applicant continues to wish to return to Canada and understands all of the implications of any such return, including that he will have no status in Canada other than what might be provided for the sole purpose of facilitating his return, that, on his arrival in Canada, he might be detained at the discretion of the Respondent and that the deportation Order that underlay his removal on the 5th of April, 2007 remains in effect unless and until otherwise ordered[9];

[9] See *Cassells v. The Minister of Citizenship and Immigration*, *supra*, note 8.

- secondly, reasonable advice and assurances to the satisfaction of the Respondent shall be provided by the Applicant and his counsel to ensure the safety of the travelling public as well as of the Applicant and any escorts provided by the Respondent for the duration of the Applicant's travel to Canada; and
- finally, all reasonable costs and expenses, including any fees and disbursements related to the issuance of a Temporary Resident Permit to facilitate the re-entry of the Applicant to Canada, reasonably associated with the return of the Applicant to Canada, shall be borne by the Respondent.

[47] Counsel for the Respondent has requested that the Minister of Public Safety and Emergency Preparedness be added as a Respondent to this motion. Counsel for the Applicant does not object to the request. Certainly, particularly in light of the Order requiring return of the Applicant subject to terms and conditions, and of the fact that removal of the Applicant on the 5th of April, 2007 was implemented on behalf of the Minister of Public Safety and Emergency Preparedness, the Court is satisfied that the request of counsel for the Respondent is appropriate. The Court's Order will so provide.

[48] Finally, as noted earlier in these reasons, counsel for the Applicant has requested costs on a solicitor-client basis, not simply related to this motion but for "…all services rendered from April 5, 2007 to until [the Applicant] is returned to Canada."

[49] Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties[10]. No such conduct on the part of the Respondent is established on the evidence before the Court in this matter. As earlier noted, while the Court was misled as to the arrangements in place for removal of the Applicant to Jamaica when a motion for the stay of that removal was before the Court, the evidence before the Court establishes that the misleading of the Court was inadvertent or based upon a misunderstanding arising from a telephone conversation relied on by the Respondent's affiant on the stay motion by reason of the very short interval provided to the Respondent to prepare for the stay motion. While it was open to the Respondent to provide a brief administrative deferral of removal to allow for a more thoughtful response to the stay motion, the Respondent's failure to provide such a delay certainly does not reach the level of reprehensible, scandalous or outrageous conduct. It does, however, justify some recognition on the issue of costs of this motion.

[50] In the result, the Court's Order will provide for costs of the motion to the Applicant calculated on the basis of the mid-range of Column V in Tariff B to the *Federal Courts Rules*.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
July 6, 2007

[10] See: *Young v. Young* [1993] 4 S.C.R. 3 at page 134.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-204-07
STYLE OF CAUSE:	CHRISTOPHER JOEL SMITH Applicant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	Toronto
DATE OF HEARING:	May 28, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	July 6, 2007

APPEARANCES:

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Mr. Martin Anderson	FOR THE RESPONDENT
Ms. Kareena R. Wilding	FOR THE RESPONDENT

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