

**Date: 20080902**

**Docket: IMM-4112-07**

**Citation: 2008 FC 986**

**Ottawa, Ontario, September 2, 2008**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**TAY HA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**I. INTRODUCTION**

[1] The Applicant brought a motion in writing under Rule 369: (a) to set aside an Order dated January 4, 2008 dismissing the Applicant's Application for Leave for Judicial Review due to the Applicant's failure to file an Applicant's Record and (b) for an Order extending time to serve and file the Applicant's Record.

## II. BACKGROUND

[2] The Applicant filed an Application for Leave for Judicial Review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board. That Application was filed on October 9, 2007, and contained grounds of breach of procedural fairness, erroneous findings of fact, errors of law and fettering of discretion. There were no details of these alleged errors.

[3] On December 19, 2007, the Application was dismissed for failure to file the Applicant's Record. That Order was sent to the Applicant's counsel on January 4, 2008. The Applicant's Record had been due on November 8, 2007.

[4] On June 17, 2008, more than five months after the Order was communicated to the parties, the Applicant brought this motion.

[5] The basis for the motion is that the Applicant's counsel had given the Applicant's Record to a process server who had failed to serve and file the documents.

[6] The Applicant's evidence, as given by an employee of his counsel, was that once counsel became aware of the Order dismissing the Application, counsel's office began an investigation including telephone calls to the process server which were never answered. The Applicant claims that there are serious issues to be considered and evidence to support the allegations.

III. ANALYSIS

[7] There are serious concerns as to whether this type of situation falls within Rule 397(1)(b). Justice O’Keefe held in *Jalil v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 321, that this provision contemplates an oversight by the Court, not by a party itself.

[8] However, for purposes of this motion, I have assumed, if on no other basis than the Court’s general equitable jurisdiction, that the Court can provide relief due to misconduct or neglect of a party’s own agents.

[9] In this case, the Applicant does meet the threshold for establishing either the alleged misconduct/neglect or the test for an extension of time.

[10] Other than the affidavit of an employee, there is no corroborating evidence that anything was sent to the process server. The Applicant has not even produced (or explained the failure to produce) the Applicant’s Record which was supposed to have been ready last November and given to the process server.

[11] There is no satisfactory explanation for the five plus months of delay in bringing this motion – a matter which should have been done shortly after the Applicant became aware that the Record has not been served and filed.

[12] The Applicant has not shown that there is some arguable case upon which the Leave Application was based – a general requirement for extensions of time. The Applicant's Record, as earlier noted, was not filed with this motion and the Court is left with bald allegations of error without details or any substantiation.

[13] For these reasons, I have dismissed this motion.

**ORDER**

**THIS COURT ORDERS that** the motion to set aside an Order dated January 4, 2008 dismissing the Applicant's Application for Leave for Judicial Review due to the Applicant's failure to file an Applicant's Record and for an Order extending time to serve and file the Applicant's Record, is dismissed.

\_\_\_\_\_  
"Michael L. Phelan"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4112-07

**STYLE OF CAUSE:** TAY HA

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE AND DATE  
OF HEARING:** Motion in writing considered in Ottawa, Ontario  
pursuant to Rule 369 of the *Federal Courts Rules*

**REASONS FOR ORDER  
AND ORDER:** Phelan J.

**DATED:** September 2, 2008

**APPEARANCES:**

Mr. Calvin Chung Huong FOR THE APPLICANT

Ms. Catherine Vasilaros FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

MR. CALVIN CHUNG HUONG FOR THE APPLICANT  
Barrister & Solicitor  
Toronto, Ontario

MR. JOHN H. SIMS, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario