Federal Court  Cour fédérale

Date: 20110126

Docket: IMM-5052-10

Citation: 2011 FC 92

Ottawa, Ontario, January 26, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

JOSHUA ADAM KEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Joshua Adam Key, has filed a Notice of Motion (the "Notice") under Rule 397(1) of the *Federal Courts Rules*, SOR/98-106, on December 6, 2010, seeking the reconsideration of my Order dated November 26, 2010 (the "Order"), dismissing leave on his Application for Leave and for Judicial Review (the "Application"), as well as seeking an order granting leave for review of the decision of the Refugee Board (the "Board") dated August 13, 2010, wherein the Board held that the Applicant would be afforded adequate state protection in the United States.

[2] The Application was disposed of without personal appearance pursuant to subsection 72(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. As is the usual practice of this Court, the Order determining the Application was issued without reasons. As provided for by section 72(2)(e) of the Act, no appeal lies from a judgement on an application for leave for judicial review.

[3] The Applicant is represented and has submitted a motion pursuant to *Federal Courts Rules* 369 and 397 for reconsideration, in writing and without personal appearance. The Applicant and Respondent have both filed written submissions.

[4] Rule 397 of the *Federal Court Rules*, 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 :
(*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.
Mistakes	Erreurs
(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.

This Rule allows a party to request that the Court, as constituted at the time the Order was made, reconsider its terms on the ground that: a) the Order does not accord with any reasons given for it; or b) a matter that should have been dealt with has been overlooked or accidentally omitted.

[5] In this proceeding, as is the usual practice of this Court, the Order dismissing the Application was issued without reasons; therefore, Rule 397(1)(a) cannot apply.

[6] The issue for my consideration then becomes whether I should reconsider the terms of my Order because a matter that should have been dealt with has been overlooked or accidentally omitted.

[7] In support of this motion the Applicant has filed written representations, including four (4) affidavits: one (1) from Brigit J. Wilson, a practising US attorney specializing in US military law; one (1) from Professor Sean Rehaag, professor at the Osgoode Hall Law School; one (1) from an adjunct Professor at the same law school, Geraldine Sadoway, and a sworn declaration by Donald Rehkopf Jr., practising US attorney in military law.

[8] The Respondent has objected to the production of the affidavits of Professors Sadoway and Rehaag on the basis that they contain argument and therefore should be struck. The Respondent has also objected to the production of the sworn declaration of Donald G. Rehkopf Jr., as well as the affidavit of Brigit J. Wilson, both of which were sworn after leave was dismissed, on the basis that

they contain new evidence, none of which was before the Refugee Division, and are therefore inadmissible.

[9] In response, the Applicant submits that the affidavits of Professors Sadoway and Rehaag are admissible on the basis of Rule 81(1).

[10] This Court rejects the objection filed by the Respondent with respect to the affidavits of Professors Sadoway and Rehaag on the basis that they should be allowed in support of a motion.

[11] With respect to the objection filed against the production of the affidavit of Brigit J. Wilson and the sworn declaration of Donald Rehkopf Jr., the Applicant has responded that both documents are admissible on the basis that they do not constitute the introduction of new evidence, but rather are filed in support of his motion, to establish that a matter that should have been dealt with must have been overlooked.

[12] The essence of Rule 397 is technical; it is to permit the Court to correct an oversight on its own part, not that of a party (see *Boateng v Canada* (*Minister of Employment and Immigration*) (1990), 11 Imm LR (2nd) 9 (FCA); at the time Rule 337(5)(b)).

[13] In the case of *Samaroo v Canada* (*Minister of Citizenship and Immigration*), 2007 FC 431, para 3, Justice Barnes, in discussing the limited scope of an application under Rule 397(1), states:

> "What is required for such relief is evidence that the Court overlooked a matter or accidentally omitted something material from the decision. The Rule does not provide a basis for the Court to

> reconsider its decision on the merits or to provide an opportunity for an applicant to correct deficiencies in the evidence tendered in the earlier proceeding."

I fully agree with this description of the purpose of Rule 397(1).

[14] In this case the Applicant, through the sworn declarations of Donald Rehkopf Jr. and Brigit J. Wilson, is trying to establish that I must have overlooked some significant matter since I have not accepted the leave for judicial review. However, as then-Assistant Chief Justice Lutfy stated regarding similar circumstances in *Dan v Canada* (*Minister of Citizenship and Immigration*), [2000] FCJ No 638, at para 17: "in the absence of any reasons accompanying the order dismissing the application for leave, it is difficult to understand how the applicant could establish that the decision in *Baker*, made public some six months previously, was not considered". In this case, the Applicant is attempting to establish that I did not consider the evidence referred to in these affidavits, but in the absence of reasons, there is no solid basis for the Applicant's belief.

[15] The affidavits discuss the state of American military law, and therefore do not appear to be introducing evidence which has arisen since my decision was made. The case law establishes that the rule on reconsideration applies only to an oversight of the Court, and not one of the parties', so I cannot accept any evidence that the Applicant failed to place before the Board. Therefore, the Applicant can only re-state his previous arguments in an attempt to show that I overlooked a relevant matter in arriving at my decision to refuse leave.

[16] It should be noted that even in cases where reasons have been provided, the jurisprudence shows that reconsideration need not be given in cases where the reasons simply do not address

every individual argument made by a party (see *Haque v Canada* (*Minister of Citizenship and Immigration*), [2000] FCJ No 1141, paras 5-6).

[17] Having considered these affidavits, I can assure the Applicant that no significant matter has been overlooked in arriving at my Order.

[18] Therefore, the Motion is dismissed.

ORDER

THIS COURT ORDERS that :

1. The Notice of Motion dated December 6, 2010 is dismissed;

2. The Order rendered on November 26, 2010 stays; and

3. There is no issue as to costs.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5052-10
STYLE OF CAUSE:	JOSHUA ADAM KEY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	In writing
DATE OF HEARING:	December 6, 2010
REASONS FOR ORDER:	SCOTT J.
DATED:	January 26, 2011

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