

Federal Court



Cour fédérale

**Date: 20130404**

**Docket: IMM-8714-12**

**Citation: 2013 FC 335**

**Ottawa, Ontario, April 4, 2013**

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

**BETWEEN:**

**MAKADOR ALI**

**Applicant**

**and**

**CITIZENSHIP AND IMMIGRATION CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] This is a motion in writing by the Applicant for an extension of time to file an Application Record and, in the alternative, for reconsideration of my Order dated December 5, 2012 dismissing this application for judicial review because of the Applicant's failure to file the Application Record.

[2] The underlying application was filed by Mr. Ali's previous counsel on August 29, 2012 and by then it was already out of time by several days. The Application Record was required to be filed by September 28, 2012 but, until this motion was filed on December 24, 2012, nothing was done to

rectify these filing deficiencies. Even this motion to reconsider was brought out of time by a number of days.

[3] This motion is supported by two affidavits alleging that the failure to file the required Application Record was caused by the negligence of Mr. Ali's previous counsel. Mr. Ali has deposed that when he retained his current counsel, Mr. Bruce Engel, he understood that his previous counsel had perfected his application. Mr. Engel's legal assistant has also deposed - by way of apparent hearsay - that Mr. Engel similarly understood that the application had already been perfected. In response to my Direction, these allegations of professional negligence were sent by Mr. Engel to Mr. Ali's previous counsel. Previous counsel responded with two affidavits attesting to Mr. Ali's failure to satisfy his unpaid account and to Mr. Engel's request in mid September 2012 to transfer the relevant file materials to Mr. Engel's office. This history is confirmed, in part, by a letter dated September 21, 2012 from Mr. Engel to Mr. Ali's previous counsel.

[4] According to the affidavit of Mr. Engel, he received Mr. Ali's file on September 26, 2012 with only three available days to deal with the matter and even then he states "that I should have made it clear in my authorization and direction that I was not acting as counsel for the Federal Court matter". He also asserts that previous counsel should have told him about the imminent filing deadline but, in any event, he could not have dealt with the matter in the three days available. There is nothing in Mr. Engel's affidavit to suggest that he took the time to look at the file until my dismissal Order was issued more than two months later.

[5] In my view the affidavits filed initially in support of these motions were misleading mainly because of the evidence that was withheld. Where there is any disagreement I accept the evidence of Mr. Ali's previous counsel over that of Mr. Ali and, in particular, I reject Mr. Ali's assertion that he expected his previous counsel to perfect his application. Neither Mr. Ali nor Mr. Engel had any plausible basis to make such an assumption and it was an oversight for Mr. Engel to fail to review the file immediately upon receiving it. Even if three days was insufficient to prepare and file the Application Record, there is no believable explanation offered for why nothing was done by Mr. Engel until this motion was filed on December 24, 2012 – almost three months after he took carriage of the file. I also reject Mr. Engel's evidence that he was not retained to deal with this application. There was no other purpose served by requesting the transfer of the file unless Mr. Engel had assumed conduct of the matter. Although Mr. Engel faults the previous counsel for failing to warn him about the imminent filing deadline, nothing prevented him from making that enquiry at the time he requested the file.

[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. The failure to file the Application Record was not caused by an accident, by mistake, by fraud or by reason of matters arising subsequent to the issuance of the dismissal Order. Even if I had the authority to grant an extension, I would not do so here. Neither Mr. Engel nor Mr. Ali have explained why nothing was done to deal with the problem between Mr. Engel's receipt of the file on

September 26, 2012 and the filing of this motion on December 24, 2012. That alone constitutes a fatal evidentiary deficiency: see *Canada v Hennelly*, [1999] FCJ no 846 (FCA), 244 NR 399.

[7] For the foregoing reasons, these motions are dismissed.

**ORDER**

**THIS COURT ORDERS that** these motions are dismissed.

"R.L. Barnes"

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Judge

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

**DOCKET:** IMM-8714-12

**STYLE OF CAUSE:** ALI v CIC

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369**

**REASONS FOR JUDGMENT:** BARNES J.

**DATED:** April 4, 2013

**APPEARANCES:**

Bruce Engel

FOR THE APPLICANT

Orlagh O'Kelly

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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FOR THE RESPONDENT