Federal Court  Cour fédérale

Date: 20210604

Docket: IMM-6332-19

Citation: 2021 FC 530

Toronto, Ontario, June 4, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

GRABIEL GARCIA DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicant filed a motion in writing for an Order under Rule 397(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, to correct perceived errors or omissions in the Court's Judgment and Reasons on judicial review in *Garcia Diaz v Canada (Minister of Citizenship and Immigration)*, 2021 FC 321.

[2] For the reasons that follow, the motion is allowed in part.

[3] Rule 397 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
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> (*a*) the order does not accord with any reasons given for it; or
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> (*b*) a matter that should have been dealt with has been overlooked or accidentally omitted.
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> (2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

[4] In *Canada v. MacDonald*, 2021 FCA 6, the Federal Court of Appeal held that the power in Rule 397 to reconsider orders and judgments in order to deal with any mistakes, omissions, or matters overlooked is "much narrower than it sounds". Specifically, the Court "cannot rethink the matter and reverse itself" (at para 17). In an earlier case, the Federal Court of Appeal stated that the reconsideration power in Rule 397 is not the same as a court's power on an appeal. The reconsideration power is "more limited – to correct small oversights, such as an inconsistency between the order and the reasons (Rule 397(1)(a)), the failure of the Court to deal with something that was put to it (Rule 397(1)(b)), and clerical mistakes, errors or omissions in the order (Rule 397(2))": *Yeager v. Day*, 2013 FCA 258, at para 9. See also *Taker v. Canada (Attorney General)*, 2012 FCA 83, at para 4; *Cowessess First Nation No. 73 v. Pelletier et al.*, 2017 FC 859 (Diner J.), at para 16.

[5] Justice LeBlanc, when he was a member of this Court, set out the following principles applicable to motions under Rule 397(1)(*b*) in *Naboulsi v. Canada (Citizenship and Immigration)*, 2020 FC 357:

> [7] The following principles pertaining to motions for reconsideration must be kept in mind. First, the filing of a motion

> for reconsideration does not provide an alternative method of appeal or an occasion to reargue or relitigate the matter (*Benipal v Canada (Minister of Citizenship and Immigration),* 2002 FCT 1302 at para 8).
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> [8] Second, the failure of the Court to deal in its reasons with a point pleaded and argued by the parties does not fall within the scope of Rule 397(1)(*b*). An argument raised by a party does not constitute a matter overlooked or omitted pursuant to the terms of Rule 397(1)(b) (*Balasingam v Canada (Minister of Employment and Immigration),* [1994] FCJ No 448).
>
> [9] A "matter", as it is to be understood pursuant to Rule 397(1)(*b*) is related to the remedies sought by the moving party. It is not related to an argument that was raised before the Court (*Lee v Canada (Minister of Citizenship and Immigration),* 2003 FC 867; *Haque v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 1141).
>
> [10] The Applicants do not argue that I failed to deal with the remedy they asked, but that I rather failed to address a point they argued. This does not fall within the scope of Rule 397(1)(b*).*

[6] In the *Lee* decision mentioned immediately above, Heneghan J. stated:

> [3] Rule 397(1)(*b*) is a technical rule, designed to address situations where a matter that should have been addressed was overlooked or accidentally omitted. In my opinion, that is not the situation here.
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> [4] The Applicant is now arguing that a point raised in argument during the hearing of his application for judicial review was not addressed in the Reasons for Order filed on June 19, 2003. In *Haque v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. 1141 (T.D.), Justice Pelletier (as he then was) said as follows at paragraph 5 and 6:
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> > ...However, I disagree that Rule 397 applies to this situation. My view is that "matter", as used in Rule 397, means an element of the relief sought as opposed to an argument raised before the court. In other words, the Court has failed to deal with some part of the relief sought and an application to reconsider seeks to have the Court address the issue of the relief sought. To permit what are intended to be final orders, from which there is no appeal without the

> certification of a serious question of general importance, to be opened up because an argument has not been dealt with undermines the finality of the decision. Furthermore, I would not wish to impose on the Court the obligation of dealing with every argument made without regard for its significance or its merit.
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> In saying this, I am referring to the legal obligation upon a judge preparing reasons. I am not speaking of good practice. Good practice generally includes acknowledging the arguments made by the parties so that they know they have been heard. The wisdom of such a course of action is proved by this application. But there are many reasons why a judge might not deal with all arguments made to the Court. Relevance, significance, lack of merit are among them. Oversight is another. To hold that some of those reasons are sufficient to justify reconsideration while others are not is to invite inquiries into all instances of failure to refer to arguments made. This undermines the finality of decisions made. For that reason, the application for reconsideration is dismissed.

See *Lee v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 867, at paras 3-4. This passage was also accepted and adopted in *Samaroo v. Canada (Citizenship and Immigration)*, 2007 FC 431 (Barnes J.).

[7] On the present motion, the applicant proposed three corrections to the Reasons on the judicial review. The proposed corrections concerned one factual statement, a characterization of one of the applicant's arguments in a sentence in the Reasons, and the Court's failure to state why the applicant filed certain evidence with his application for permanent residence.

[8] The respondent agreed with the first correction but opposed the others.

[9] I will deal with each proposed correction in turn. Before doing so, I note that the applicant's motion did not seek any change to the Court's Judgment, only to the Reasons given for the Judgment. The Federal Court of Appeal has held that Rule 397 deals with correcting a judgment or order and not the reasons given: *Sanofi-Aventis v. Apotex*, 2013 FCA 209, at para 6. This interpretation is consistent with the chapeau language of Rule 397(1), which refers to a reconsideration of the "terms" of an "order". Rule 2 defines an "order" non-exhaustively to "include" a judgment but does not refer expressly to reasons. In addition, the *Federal Courts Rules* distinguish between an order and the reasons for that order: see e.g. Rules 392-395 and Rule 397(1)(*a*).

[10] With that said, I recognize that the parties did not make submissions on the interpretation of the chapeau language in Rule 397(1). In view of this Court's decisions interpreting the language in Rule 397(1)(*b*), I can determine this motion on a narrower basis that also addresses the merits of the parties' submissions. Doing so will avoid the delay and legal expense associated with obtaining additional written representations from the parties.

[11] The applicant's first proposed correction concerns the sentence in paragraph 2 of the Reasons that states that the applicant's mother, Margalis Diaz Rodriguez, "is a permanent resident of Canada and has lived here since 2004." The evidence is that Ms Diaz Rodriguez is, in fact, a citizen of Canada. The respondent agreed that a change to the Reasons is appropriate.

[12] I agree with the parties that this inadvertent error should not remain in the Reasons. Given the limits of Rule 397(1)(*b*) as set out in *Naboulsi*, *Lee* and *Haque*, the sentence in

paragraph 2 of the Reasons will be corrected under Rule 397(2) and Rule 4 to read: “She is also a citizen of Canada and has lived here since 2004.”

[13] The second proposed correction concerned paragraph 68 of the Reasons, which reads:

> [68] The applicant’s argument was based on the proposition that an officer is only required to conduct a BIOC [best interests of the child] assessment if it is sufficiently raised in the application: *Owusu*, at para 5. The applicant’s submission is essentially a proposed corollary, that if the BIOC are not raised expressly by the applicant’s submissions in the application, the officer *may not* conduct the BIOC assessment, or at least could not do so in this case without giving the applicant an opportunity to make additional submissions.
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> [Emphasis added.]

[14] The applicant submitted that at the hearing of the judicial review, the applicant advised the Court that the applicant did not argue that the officer “may not conduct” the BIOC assessment. Rather, that argument was improperly attributed to him in the respondent’s written submissions.

[15] The respondent opposed the second proposed change to the Reasons, arguing that paragraph 68 contained no material mischaracterization of the applicant’s arguments. The respondent submitted that the applicant’s position on this motion was reflected elsewhere in the Reasons, for example at paragraph 66, which reads:

> [66] The applicant submitted that he did not raise the BIOC in his application and therefore, as a matter of law, before the officer could conduct a BIOC assessment, the officer had to provide him with another opportunity to make submissions on that issue.

The respondent also noted that the same position is reflected in paragraph 68 itself, because immediately after the phrase "the officer may not conduct" the BIOC assessment, the Reasons state "…or at least could not do so in this case without giving the applicant an opportunity to make additional submissions".

[16] In reply, the applicant appeared to narrow the correction request, to focus on a correction of the attribution of the allegedly misstated argument to the applicant.

[17] In my view, the proposed change should not be made under Rule 397(1)(*b*). The request does not relate to a "matter" as described in *Naboulsi* (at paras 8-9), *Lee* (at para 4) and *Haque* (at para 5). Given the principle of finality, the Court also has no power under Rule 397(1)(*b*) to revisit, revise, or supplement its reasoning on the merits: *Taker*, at para 5; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 176 (Stratas JA), at para 36; *Bayer Inc. v Fresenius Kabi Canada Ltd.*, 2016 FC 970 (Brown J.), at para 7. On this reconsideration motion, the substance of the applicant's position is that he did not make a specific argument on the merits of the judicial review application and that the Court accepted the respondent's (mis)characterization of his argument – in other words, I did not properly characterize the applicant's submission in the second sentence of paragraph 68 by using the phrase "may not consider". However, as the respondent's position on this motion made clear, the Court could not consider the applicant's substantive position about that phrase without analyzing the entire sentence, the other places in the Reasons where the applicant's position or submissions had already been set out (including paras 4-5, 55-56, 59, 61 and 66), and whether the applicant's submission was, as paragraph 68 states, "essentially a proposed corollary" to a proposition in *Owusu v. Canada (Minister of*

Citizenship and Immigration), 2004 FCA 38, [2004] 2 FCR 635. In my view, to do such an analysis, and revise the Reasons accordingly, would expand the Court's limited power under Rule 397(1)(*b*) beyond its permitted scope.

[18] The applicant's third proposed change concerned the references in paragraphs 78-79 of the Reasons to evidence of a custody agreement and a declaration from the mother of the applicant's son confirming that the applicant had fulfilled his parental responsibilities as set out in a court-issued custody order. The applicant submitted that the Reasons should be amended to clarify that, under Immigration, Refugees and Citizenship Canada ("IRCC")'s checklist for permanent residence applications, the applicant was required to file the custody agreement and the statement from the child's mother about compliance with the custody agreement. The applicant's explanation for this proposed amendment was "the significant impact this decision will have on applicants for permanent residence with non-accompanying dependants who seek an exemption under section 25 of the *Immigration and Refugee Protection Act*". In his written reply representations, the applicant submitted:

> … the Applicant does not argue that the Court's reasons are incorrect or misleading. The Applicant simply asks that the Court remedy a material omission given the precedential nature of this case and its implications for many others who may need to request H&C [humanitarian and compassionate] consideration but will not realize that the forms submitted in their sponsorship applications will now contribute to a presumption that they have raised [the] BIOC of a non-accompanying child and disqualify them from receiving notice that it may be a concern and could be weighed against their application.
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> [Emphasis added.]

[19] Initially, the parties both believed that the applicant made no reference to the IRCC checklist at the hearing. However, after the filing of the parties' submissions on this motion, the applicant's counsel discovered, from listening to more of the audio recording of the hearing, that counsel did refer to the checklist during oral submissions. Unfortunately, at that same moment at the hearing, the respondent's counsel experienced a technical difficulty on his videoconference link which may have caused participants in the videoconference not to hear or make note of the evidence. Applicant's counsel properly advised the Court of this new information and the applicant amended his written representations on this motion to reflect it. The respondent also made additional submissions.

[20] The respondent's position was that the Court's Reasons at paragraphs 75 to 79 were neither incorrect nor misleading when considering the evidence submitted with the applicant's application for permanent residence and for H&C relief. The respondent submitted that paragraph 79 acknowledged the applicant's submission about the checklist:

> [79] On the evidentiary record, I conclude that the BIOC was raised sufficiently in the materials before the officer to raise the legal issue of the BIOC of the applicant's child in Cuba, and how the applicant's move from Cuba to Canada as a permanent resident would affect the interests of the child. By filing that evidence about his child and his relationship to his child in his application for a visa and alternatively for H&C relief under subs. 25(1), the applicant must be taken to have understood that the best interests of his child were relevant to the H&C application.
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> [Emphasis added.]

The respondent therefore submitted that the Reasons require no correction.

[21] In my view, the third proposed change falls outside Rule 397(1)(*b*). First, the concern that a point made during argument was not specifically addressed in the Court's reasons does not provide a basis for a correction under Rule 397(1)(*b*): *Naboulsi*, at paras 8 and 10; *Lee*, at para 4; *Haque*, at para 5. Second, both parties submitted that the Reasons are not incorrect or misleading, and again there is no "matter" under Rule 397(1)(*b*) (as described already) that has been overlooked or omitted.

[22] The remaining question is whether, as the applicant submitted, Rule 397 permits the Reasons to be amended due to their potential impact on future decisions and for counsel's advice to individuals applying for permanent residence from outside Canada.

[23] The applicant did not refer to any decision in which this Court or the Federal Court of Appeal has made a change to a Judgment or Reasons under Rule 397 due to the "precedential nature" of the outcome or reasoning. In my view, if there is no error or omission to correct, the Judgment accords with the reasons given for it and there is no "matter" under Rule 397(1)(*b*), the importance of the reasoning as a precedent (or its distinguishability in a future matter) is something for an appeal court and for counsel to address on a future judicial review application and in advising their clients. It is not properly the subject of a motion to correct the Court's reasons under Rule 397(1)(*b*). Rather than relying on a change to the Reasons, a future applicant for permanent residence may seek to distinguish the judicial review decision in this proceeding, on the basis of evidence that the future applicant filed a custody agreement and child's parent's statement only to comply with the IRCC checklist and did not file any other submissions or evidence related to the child's best interests.

[24] The applicant’s motion is therefore allowed in part. Neither party requested costs.

ORDER in IMM-6332-19

THIS COURT ORDERS that:

1. The applicant's motion is granted in part. The fourth sentence of paragraph 2 of the Court's reasons dated April 13, 2021 is amended to read: "She is also a citizen of Canada and has lived here since 2004."
2. The motion is otherwise dismissed.
3. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6332-19
STYLE OF CAUSE:	GRABIEL GARCIA DIAZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	IN WRITING
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	JUNE 4, 2021

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