Date: 20070215

Docket: IMM-4820-06

Citation: 2007-FC-1135

Ottawa, Ontario, February 15, 2007

PRESENT:

BETWEEN:

ROMAN ARMANDO VAZQUEZ LOPEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

ORDER

This is a motion for reconsideration pursuant to rule 397(1) of the *Federal Court Rules,* seeking reconsideration of an order rendered on December 6, 2006;

UPON being satisfied that rule 397 (1) reads:

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	**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

ground that	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.

UPON being satisfied that the suggestion by the applicant that when a judge grant a stay of deportation pending a decision on the application for leave and judicial review on the basis that there is a serious issue, the judge that assesses the application for leave has his hands tied by the decision on the stay, should be rejected.

UPON being satisfied that the findings made by a motion judge in granting a stay cannot be determinative as to the merits of the underlying judicial review application;

UPON being satisfied that the threshold of "serious issue" in a stay application is significantly lower than what must be made out on the judicial review, see *Maximenko and Haghighi*:

> 23 The decision of Justice Lemieux on the stay application referred to earlier ([2002] F.C.J. No. 183, 2002 FCT 147) is not dispositive of the issues of state protection and IFA.

24 The Officer had before her new and more recent facts which were not presented to Justice Lemieux. These facts included the more recent 2002 DOS Report, evidence of police efforts to investigate domestic violence and evidence of a viable IFA in Moldova.

25 Justice Lemieux's finding of irreparable harm must be considered in the context of his finding that a serious issue had been made out. This finding is not determinative of the issues in this judicial review.

26 The threshold of "serious issue" is significantly lower than what must be made out on the judicial review. The findings in a stay application cannot be used as a form of res judicata or issue estoppel on the hearing of the matter on its merits.

27 This decision deals with and dismisses the merits of the legal issue raised. Consequently, the finding of irreparable harm considered by Justice Lemieux must fall away.

Maximenko and Sollicitor General [2004] A.C.F. no 262, 2004 CF 504, IMM-5043-03, March 31, 2004 (Phelan J.)

9 The Applicants submit that *res judicata* consists of action estoppel and issue estoppel, and that issue estoppel applies in this case. The Applicants submit that the issue before me and the expanded nature of the "serious issue to be tried" test before Justice Dawson are the same, in light of the reasoning in *Wang v. Canada* (*Minister of Citizenship and Immigration*), [2001] 3 F.C. 682 (T.D.). Thus, they argue that Justice Dawson made a final determination of the application and that, therefore, *res judicata* or issue estoppel applies. For the reasons that follow, I do not agree. (…)

16 The Applicants rely on this conclusion in *Wang* in support of their submission that the determination of the question in dispute has been finally determined. However, in *Wang*, Justice Pelletier was clear about the role of the interlocutory motion vis-à-vis the hearing of the application when he commented at para. 9.

> [t]his is not to say that the issues are the same in the motion for a stay as they are in the application for judicial review... . The examination of the merits which occurs on the motion for a stay is markedly different than that

> which occurs at the hearing of the application for judicial review.
>
> (…)
>
> 19 In summary, the task before Justice Dawson was to determine whether the Applicants satisfied the tri-partite test and not to determine whether the Enforcement Officer had erred. Thus, the issue before this Court differs from that before Justice Dawson and the doctrines of *res judicata* or issue estoppel do not apply.
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> *Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372 (Snider J.)

UPON being satisfied that when assessing a file to determine whether leave should be granted, the judge has no obligation to provide written reasons to justify the decision to grant or deny the leave;

UPON being satisfied that the suggestion by the applicant that the judge had "accidentally omitted in his analysis, the existence of Justice Martineau's order when deciding that leave should not be granted" is pure speculation;

UPON being satisfied that the applicant failed to provide evidence that the order does not accord with any reasons given for it;

UPON being satisfied that the applicant failed to provide evidence that a matter that should have been dealt with has been overlooked or accidentally omitted;

UPON being satisfied that the well-established jurisprudence has always held that rule 397(1) does not allow a right to appeal by the back door an order that is not subject to appeal;

UPON being satisfied that the applicant cannot use rule 397(1) to reargue his case, see *Grant v. Canada (M.C.I.)*:

> 5 The applicant's submission seeks to persuade the Court that the leave and judicial review application should be reconsidered, essentially because the applicant's case for judicial review is so compelling that dismissal of the application for leave to proceed, particularly without reasons expressed, is simply not understandable. In sum the applicant invites a review de novo of the application already considered by Mr. Justice Dubé, in effect an appeal of his determination on its merits.
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> 6 Any judge having made an Order has exhausted his authority to deal with the application on its merits. He may not thereafter reconsider the matter so disposed of except within the very narrow exceptions provided by Rules 397 and 399. Apart from those the judge has no authority to vary his Order. No other judge, except one sitting on an appeal from the original judgment, has authority to vary an Order. If it were otherwise there would be no certainty in the law's application, and no end to litigation.
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> *Grant v. Canada (M.C.I.)* [2001] FCT 1342

See also Blanchard J. in *Cedeno v. Canada*:

> 9 It is noted that Rule 397 does not provide the applicant with a method of appeal. It is not for me to determine whether the Minister would have decided differently if the adjudicator's decision had been before the Minister. Rather, the issue before me is whether there was some matter the Court overlooked in reaching its decision and if so determine if the overlooked matter changes its decision.
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> *Cedeno v. M.C.I.* [2000] FCJ 2117

THIS COURT ORDERS:

This motion to reconsider is dismissed.

"Pierre Blais"

Judge