Federal Court  Cour fédérale

Date: 20160817

Docket: IMM-5009-15

Citation: 2016 FC 939

Ottawa, Ontario, August 17, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DEJAN BOROVIC, SLAVICA BOROVIC, DAMJAN BOROVIC, DARIJA BOROVIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants' application is for leave and judicial review of the decision of a Senior Immigration Officer [the Officer] dated October 16, 2015, wherein their request for reconsideration of the refusal of their application for permanent residence, dated December 20, 2013, was refused.

II. Background

[2] The Principal Applicant, Dejan Borovic, came to Canada on a work permit in April 2009. His wife, son and daughter followed in December 2010. They made a claim for refugee status on or around December 2011, based on Dejan Borovic's fear of persecution if they returned to Serbia because of his time spent in Germany during the Yugoslav wars.

[3] There has been no decision on the Applicants' refugee claim for over four years.

[4] The Applicants applied for permanent residence on humanitarian and compassionate [H&C] grounds on June 27, 2012. By decision dated December 20, 2013, that application was refused. Leave to challenge that refusal was granted by the Court. However, by Judgment dated April 24, 2015, this Court dismissed the judicial review, finding that the Applicants had failed to show that the H&C refusal was unreasonable (*Borovic v Canada (MCI)*, (24 April 2015), Toronto, IMM-197-14 (FC)).

[5] In October 2015, the Applicants sent a request for reconsideration of the H&C refusal. This request came six months after the Court dismissed the judicial review and 22 months after the refusal of the application for permanent residence.

[6] By decision dated October 16, 2015, the reconsideration request was refused. The Officer noted that the H&C application had previously been refused and that the Federal Court had

dismissed the judicial review application. The Officer considered the Applicants' request to reconsider, along with their additional submissions, and decided that the refusal stood.

III. Issue

[7] Did the Respondent err in law by failing to provide reasons in refusing the Applicants' request for reconsideration?

IV. Standard of Review

[8] The parties agree that the standard of review is reasonableness.

V. Analysis

[9] The Applicants' argument is that their request for reconsideration must be considered as a distinct decision from the actual decision on the H&C application, and that a "boiler plate" remark by an officer in refusing to exercise discretion to reconsider does not amount to reasonable reasons (*D'Errico v Canada (Minister of Human Resources and Skills Development)*, 2014 FCA 95; *Bhuiyan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 117).

[10] In other words, the statement of the Officer, in the refusal letter of October 15, 2015, that "after considering the request to reconsider and the additional submissions, the initial decision to refuse your H&C application remains unchanged", is insufficient.

[11] The Applicants also point the Court to the fact that the Respondent has failed to hear their refugee claim in a timely manner, and that the Applicants cannot access a new H&C application while the refugee claim is pending because of a change in the H&C application process that restricts parallel H&C and refugee protection applications. These issues are not relevant to the application before me.

[12] Finally, the Applicants point to the evidence concerning the best interests of the children and the continued settlement of the family as being relevant for the Officer to exercise his discretion to reconsider the refusal of the H&C application.

[13] However, as the Respondent rightfully argues, the unusual factors in this case are that not only was the H&C application refused by an officer in December 2013, but the judicial review of that refusal by Justice Diner of this Court, in April 2015, upheld the refusal and dismissed the judicial review.

[14] Accordingly, the Applicants now seek judicial review of the refusal to reconsider the original refusal, which was already deemed reasonable by this Court in the decision of April, 2015.

[15] There is no doubt that an immigration officer must consider his or her discretion in reviewing a reconsideration request, but absent a failure to recognize the existence of such a discretion by an officer, the officer is free to exercise that discretion to reconsider, or to refuse to do so. While the principle of *functus officio* does not bar a reconsideration of a negative H&C

determination (section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c-27), the officer's obligation is simply to consider, taking into account all relevant circumstances, whether to exercise that discretion to reconsider or not (*Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paras 5-6; *Rashed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 175 at paras 48-49).

[16] Given both the original negative decision of an officer on the Applicants' H&C application and the confirmation of that decision by this Court, it was reasonable for the Officer to refuse to exercise his discretion to reconsider.

[17] Moreover, there is no duty on the reviewing officer to consider new evidence, as long as the officer does in fact make a discretionary decision on whether to reopen the case or not (*Noor v Canada (Minister of Citizenship and Immigration)*, 2011 FC 308 at para 27).

[18] I also agree with the Respondent that a reconsideration request should not be used to reopen a final decision of this Court through reconsideration of an earlier officer's negative H&C decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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