Date: 20080318

Docket: IMM-1797-07

Citation: 2008 FC 360

Ottawa, Ontario, March 18, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ZAHRA MOAZENI
MAHYAR YOUSEFI
KAMYAR YOUSEFI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of the decision of a visa officer dated February 15, 2007, wherein Zahra Moazeni's two sons - Mahyar and Kamyar Yousefi - were found not to be "dependent children" as contemplated by section 2 of the *Immigration and Refugee Protection Regulations*.

[2] This decision was based on the visa officer's finding that the boys had not been continuously enrolled in, and attending, post-secondary educational institutions after they completed

high school. As a result, the two boys were removed from Zahra Moazeni's application for permanent residence.

[3] Approximately six weeks after receiving the February 15 decision, the applicants' counsel wrote to the Canadian embassy in Syria providing, amongst other things, additional information regarding the boys' educational history. Counsel asked that the boys be included in Ms. Moazeni's application for permanent residence.

[4] A second decision was then rendered in relation to this issue on May 23, 2007. This decision affirmed the original decision, but provided additional reasons for the finding that the boys were not "dependent children" within the meaning of the *Regulations*. No application for judicial review has been brought with respect to the May 23 decision.

[5] Although the issue was not initially raised by the parties, the Court invited the parties to make submissions as to whether the application for judicial review of the February 15 decision is moot, in light of the May 23 decision. In this regard, the parties were specifically asked to address the decision of the Federal Court of Appeal in *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, [2005] F.C.J. No. 398.

[6] Having considered the parties' submissions in this regard, this Court is of the view that the application for judicial review must be dismissed as moot.

Analysis

[7] In *Vidéotron*, the Federal Court of Appeal made it clear that where a decision has been rendered, which decision is subsequently reconsidered and affirmed, the losing party must seek judicial review of both decisions, and cannot simply seek judicial review of the first decision.

[8] As the Federal Court of Appeal observed, the two decisions are distinct. Even though the second decision affirms the result in the first decision, "it nevertheless replaces the other for the purposes of judicial review": *Vidéotron* at ¶12. As a consequence, the second decision must be challenged directly, and cannot be collaterally attacked through the first application for judicial review.

[9] The applicants argue that *Vidéotron* is distinguishable, in that there is no express statutory power in this case for a visa officer to reconsider a decision once it has been made.

[10] Be that as it may, the principles articulated by the Federal Court of Appeal in *Vidéotron* are equally applicable here. Indeed, a review of the facts in this case discloses that no practical purpose can be served by this application for judicial review. Even if the Court were to accept the applicants' argument that the visa officer erred in her interpretation of the *Regulations*, and quashed the February 15, 2007 decision on that basis, the May 23 decision would still stand.

[11] Moreover, the findings of fact made by the second officer as to the inadequacy of the evidence with respect to the boys' attendance at school in the period after they each reached 22 years of age have not been impugned, and are sufficient, by themselves, to disqualify the boys.

[12] I do not accept the applicants' argument that the principle of *functus officio* should operate so as to nullify the May decision, leaving the February 15 decision as the only lawful decision: see *Park v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 848.

[13] Moreover, having sought and obtained reconsideration of the February decision, it ill behooves the applicants to now criticize the Embassy staff for doing precisely what the applicants asked them to do.

[14] More fundamentally, however, the *functus* argument and the procedural fairness argument advanced by the applicants with respect to the May decision are collateral attacks on that decision. Having failed to challenge the May 23 decision by way of an application for judicial review, the second decision must be taken as final.

Conclusion

[15] For these reasons, the application for judicial review is dismissed. The applicants have proposed a number of questions for certification. In my view, the law in this area is well-settled, and as a result, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Cathryn Sawicki	FOR THE APPLICANTS
MS. Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GREEN AND SPIEGEL LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT