Federal Court  Cour fédérale

Date: 20120830

Docket: IMM-6877-11

Citation: 2012 FC 1040

Toronto, Ontario, August 30, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JANOS DINDO, JONOSNE DINDO, BETTINA DINDO, DENES DINDO, JANOS DINDO JR.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Division) dismissing the applicants' Application to Re-Open their Refugee Protection Claims pursuant to Rule 55 of the *Refugee Protection Division Rules*, SOR/2002-228. At the hearing I advised the parties and their counsel that this application would be granted. These are my reasons for so doing.

[2] Rule 55 provides that "The Division must allow the application [to re-open] if it is established that there was a failure to observe a principle of natural justice [emphasis added]."

[3] In this case, the Division found that there was no failure to observe a principle of natural justice. Based on the submissions made to it, I am of the view that it was correct. However, as will be seen, the Record reveals that there was a different and more persuasive submission that ought to have been advanced.

[4] The Division sent the applicants a Notice to Appear for a Scheduling Conference on May 12, 2011. The notice was not returned and the applicants failed to appear. As a result, the Division then sent the applicants a Notice to Appear for an Abandonment of a Claim for Refugee Protection hearing on June 8, 2011. The notice was not returned and the applicants failed to appear. As a result, the Division declared the claims for protection abandoned and sent the applicants notice of that decision on July 5, 2011. The notice was not returned.

[5] Each of these three notices was mailed to the applicants at the address provided in their Personal Information Form (PIF), namely 105 West Park Lodge Avenue, #901, Toronto, Ontario.

[6] The applicants had been represented by a Consultant who prepared the PIF. The Record before the Court indicates that although the applicants signed the PIF, they had not read it. Accordingly, it may not have been accurate.

[7] The Consultant's services were ended by the applicants and a notice was sent to the Division on March 1, 2011, informing that he was no longer counsel of record. As a consequence, the three notices mailed to the applicants were not copied to him.

[8] The Record indicates that although the applicants retained new counsel on March 28, 2011, that counsel failed to advise the Division in writing of that fact until August 16, 2011, after the decision was rendered by the Division that the claims had been abandoned. The Record indicates that counsel asserts that he informed the Division orally that he represented these applicants. Rule 4(4) requires that such notice be in writing.

[9] In the application to re-open, the applicants submitted that they did not receive any of the three notices sent by the Division and an argument was made that the oral notice was sufficient and the Division erred in failing to inform new counsel of these hearing dates. The Court rejects that submission. The clear requirement is for a written notice. Counsel cannot rely on a mere statement made in another proceeding as constituting a notice that is binding on the Division.

[10] The argument made to the Division that the applicants failed to receive any of the three notices was merely a bald statement contained in a written submission. It was not contained, as would have been expected, in a written affidavit of the applicants. The Division on the reconsideration motion observed that "no explanation [had] been provided as to why the applicants did not appear, given that the last address is the West Lodge address."

[11] Accordingly, based on the information contained in the submissions made to the Division, I cannot find fault with its decision not to re-open the claims.

[12] However, when this application came on for hearing, Ms. Dragaitis, counsel for the respondent, informed the Court that she had discovered something that had been missed by all others; namely that the address to which the Division sent the notices, although the address of the applicants disclosed in the PIF (and which the applicants had not read) was not the address set out in other documents filed by the applicants. Specifically, the Notification of Contact Information filed with the Division by the applicants on October 19, 2009,specifies that their address is 105 West Park Lodge Avenue, #321, Toronto, Ontario. Further in the Applicants' Record before the Court is a copy of a complaint they filed with the Canadian Society of Immigration Consultants relating to their first counsel and it too indicates that their address is 105 West Park Lodge Avenue, #321, Toronto, Ontario.

[13] Counsel for the respondent, appropriately, informed the Court that as a consequence of this discovery she would not be making the submission contained in the written memorandum, that the submission made by the applicants that they had failed to receive the notices from the Division was "simply not credible" and that "a more probable explanation is that the Applicants were simply not diligent in pursuing their claim."

[14] Based on this new disclosure that the applicants may well have failed to receive the notices because they were mailed to an address where they did not live, this application must be allowed and the request to reopen remitted back to the Division. The applicants are at liberty to file new and additional information before that decision is rendered again and the Court expects that they will file

affidavit evidence attesting to their actual address at the relevant times and explain why they did not receive the notices previously sent by the Division.

[15] The Court commends Ms. Dragaitis for her diligence and conduct in bringing this to the Court's attention. Her conduct is in keeping with the best traditions of the legal profession.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is allowed and the decision of the Refugee Protection Division of the Immigration and Refugee Board dismissing the applicants' Application to Re-Open their Refugee Claims is set aside;

2. The applicants' Application to Re-Open their Refugee Claims shall be determined by a differently constituted panel of the Refugee Protection Division of the Immigration and Refugee Board; and

3. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6877-11
STYLE OF CAUSE:	JANOS DINDO, JONOSNE DINDO, BETTINA DINDO, DENES DINDO, JANOS DINDO JR. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 30, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	August 30, 2012

APPEARANCES:

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Christina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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