Date: 20071022

Docket: IMM-5738-06

Citation: 2007 FC 1088

Ottawa, Ontario, October 22, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

MI SOOK KIM
BORA OH
YOON HWAN OH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an immigration officer's decision dated October 5, 2006, which denied the applicants' application on humanitarian and compassionate grounds to process their permanent residence application from within Canada.

FACTS

[2] The principal applicant, Mi Sook Kim, is a 48 year old citizen of South Korea. Her two children, Bora Oh, age 24, and Yoon Hwan ("Roy") Oh, age 14, are also citizens of South Korea. The principal applicant is divorced from the children's father.

[3] The applicants arrived in Canada in November 1996 on visitor visas to visit the principal applicant's parents, who are both Canadian citizens. In April 1997, the applicants obtained work and study permits from an immigration consultant. The principal applicant began working at a coffee shop owned by her brother, while the children began attending school. Immigration officials later determined that the work and study permits were fraudulently obtained. The applicants submit that they were not aware that the documents were fraudulent and that they had no reason to distrust the immigration consultant.

[4] In April 1997, the applicants filed an application for permanent residence at a U.S. visa post. That application was refused on December 8, 1998.

[5] In February 1999, the principal applicant opened a business in Toronto, which provided massage and aromatherapy services. She operated this business until the summer of 2000 when she was charged with operating a common bawdy house in contravention of the *Criminal Code*, R.S.C. 1985, c. C-46. The principal applicant pled guilty and received a conditional discharge with six months probation and was required to make a $250 charitable donation.

[6] On January 19, 2000, prior to the principal applicant's arrest, the applicants filed an application for landing in Canada on humanitarian and compassionate grounds. The application was refused on August 21, 2001. On October 2, 2001, the applicants filed an application for leave and judicial review of that decision. Leave was granted on February 20, 2002. The judicial review was dismissed: see *Oh v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 161, [2003] F.C.J. No. 245 (QL).

The applicants' current status in Canada

[7] On March 5, 2001, a deportation order was issued against the applicants. An appeal of that order to the Immigration Appeal Division of the Immigration and Refugee Board was denied. On May 22, 2006, after her application for a Pre-Removal Risk Assessment (PRRA) was refused, the applicant Bora Oh was removed to South Korea. She returned to Canada four months later on September 8, 2006. The principal applicant and her son filed PRRA applications on February 23, 2006, but these applications were refused. The Canadian Border Services Agency has deferred the removal of the principal applicant and her son until a final decision is reached in this application.

Decision under review

[8] In December 2004, the applicants submitted another application on humanitarian and compassionate grounds (the H&C application). That application, which seeks an exemption from the requirement that permanent resident visa applications must be filed from outside Canada, was received by Citizenship and Immigration Canada on April 13, 2005.

[9] On October 5, 2006, the applicants' H&C application was denied. The immigration officer decided that the applicants would not be subject to "unusual, undeserved or disproportionate" hardship by being required to apply for permanent residence at a visa post outside Canada.

RELEVANT LEGISLATION

[10] The legislation and provisions relevant to this application are subsections 11(1) and 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which state:

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

[…]

Humanitarian and compassionate considerations

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

[…]

Séjour pour motif d'ordre humanitaire

25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

ISSUE

[11] The issue is whether the immigration officer erred in refusing the applicants' application for an exemption on humanitarian and compassionate grounds.

STANDARD OF REVIEW

[12] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada established that reasonableness is the appropriate standard of review to be used for H&C application decisions. As the Court stated at paragraph 62:

> **¶ 62** … I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.
>
> [Emphasis added.]

An officer's decision is unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the officer from the evidence before him or her to the conclusion at which they arrived. As such, a decision is reasoanble if it is supported by a tenable explanation, even if that

explanation is not one the reviewing court finds compelling: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.

ANALYSIS

Issue: Did the immigration officer err in refusing the applicants' application for an exemption on humanitarian and compassionate grounds?

[13] The applicants argue that the immigration officer erred by not properly accounting for the best interests of the principal applicant's son when considering their H&C application. The applicants rely on the Supreme Court of Canada decision in *Baker*, above, which requires that immigration officers be "alert, alive and sensitive" to the children's best interest when considering an H&C application. As the Court stated at paragraph 75:

> **¶ 75** … The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.
>
> [Emphasis added.]

[14] The applicants argue that the immigration officer was not alert, alive and sensitive to the many difficulties that the principal applicant's son would face if sent back to South Korea after spending eleven years in Canada. In support of this argument, the applicants refer to a psychological

report by Dr. Peter Mallouh, who conducted clinical interviews and observations on the applicant child on August 29, 2005. Dr. Mallouh states that returning the child to South Korea would represent “a very stressful event” that could lead to “psychological conditions such as adjustment or anxiety disorder or even depression.” Further, Dr. Mallouh suggests that such conditions could have “far-reaching consequences” affecting his “cognitive development and future academic achievement.”

[15] The applicants also argue that the immigration officer was not alert, alive and sensitive to the language difficulties that the applicant child would face if returned to South Korea. The applicant child has been in Canada since the age of four. In two separate letters to immigration officials, the child states that he cannot speak Korean well and that he has no ability to read or write Korean. The applicants argue that the immigration officer’s failure to consider adequately these language barriers constitutes a “serious error” justifying the intervention of this Court.

[16] The respondent, however, submits that the immigration officer did consider all of the relevant evidence respecting the best interests of the child. The respondent states that it was open to the immigration officer to assess all the relevant factors and determine the weight to be accorded those factors, and that it is not for this Court to “re-examine the weight assigned to this factor by the Immigration Officer.”

[17] It is clear from the record that the immigration officer considered the statements contained in Dr. Mallouh’s psychological report concerning the stress the applicant child may face in returning

to South Korea. The officer states what while the "[i]nitial adjustment to a new environment may be stressful," the child's age and the fact that he would be returning as a "family unit" would offset against any such detriment. I believe that such a conclusion is reasonable on the evidence.

[18] However, the immigration officer failed to consider the language difficulties that the child would face upon return to South Korea. The applicant child first arrived in Canada at the age of four and, since that time, has integrated into Canadian society and learned English as his primary language. The applicant child stated that he "cannot speak Korean well," and that he cannot "read or write Korean." Nowhere in the decision does the immigration officer address the impact that these language and communication barriers may have on the applicant child's immediate and long-term educational development.

[19] Further, when the immigration officer states that the applicant child "is still young and is at an age where [children] generally have a higher level of adaptability," I take this to refer to the applicant child's ability to adapt to the stress caused by leaving the friends and extended family that he has in Canada, and not to refer to his ability to re-integrate into the South Korean education system. In relation to education, the immigration officer states merely that a return to South Korea will not prohibit the applicant child from being able to continue his education in Canada upon acquiring a student visa. In my opinion, this consideration fails to address the significant and profound challenges that the applicant child will face as an adolescent in a high school education system where he is unable to communicate with the non-English-speaking population or write the language.

[20] Mr. Justice McKeown made a similar finding in *Gurunathan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1155, 212 F.T.R. 309, where he stated at paragraph 7 that the failure of an immigration officer to account for a child's inability to speak the home state's language is an error:

> ¶ 7 … In my view, I do not have to choose between these approaches in this case, since under either approach the failure of the Officer to take into account the children's inability to speak the Tamil language is an error. It is certainly something that should have been taken into account in considering the best interests of the children. The Immigration Officer looked at the risks to the children and, since their risk was the same as the parents' risk, concluded that there would be no risk to the children. However, an analysis of the best interests of the children requires an officer to look at more than just the risk to the children….
>
> [Emphasis added.]

[21] The respondent argues that even though an immigration officer has an obligation to consider the best interests of a directly-affected child when making an H&C decision, that obligation does not require that the interest of the child outweigh all other factors considered on the application. In support of this contention, the respondent points to *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, where Mr. Justice Décary states at paragraph 6:

> **¶ 6** To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial – such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.
>
> [Emphasis added.]

[22] While I agree that the best interests of the child are not determinative as to whether the H&C application should be granted, in this case the immigration officer erred in not adequately considering the impact that removal to South Korea would have on the applicant child's immediate and long-term educational development. It would be exceedingly difficult for the applicant child to continue his educational development in a society where he is unable to effectively communicate. As such, the decision of the immigration officer is unreasonable and must be set aside.

[23] The applicants also argue that the immigration officer failed to provide adequate reasons based on the evidence with respect to the decisions regarding the principal applicant and her daughter. They state that with respect to the applicant daughter, the immigration officer merely "summarized what had happened to her" and then concluded that the daughter's return to Korea would not represent undeserved hardship. The applicants submit that the immigration officer erred by not providing any analysis as to how the conclusion was reached.

[24] Despite having already found that the immigration officer's decision must be set aside, I agree with the applicants' argument on this ground as well. In *Bajraktarevic v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 123, 52 Imm. L.R. (3d) 5, Mr. Justice Beaudry found that the simple restatement of considered factors followed by a conclusion does not constitute a proper assessment of an application. As he succinctly states at paragraphs 18-20:

> **¶ 18** Despite the respondent's counsel's capable submissions to the contrary, I find that the Officer's reasons were clearly insufficient, and that a simple restatement of the considered factors followed by a conclusion cannot be deemed to constitute proper assessment and analysis of an application.

> **¶ 19** In *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565 (F.C.), Justice MacTavish wrote at paragraph 14:
>
> > In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.
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> **¶ 20** Justice Russell came to a similar conclusion *in Jasim v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1017 (F.C.), where he found that a summary restatement of the factors considered by an Officer followed by a conclusion did not constitute sufficient analysis, and that the Officer had committed a reviewable error in failing to provide reasons for her refusal of the applicant's application.
>
> [Emphasis added.]

[25] In my opinion, the immigration officer in this case did not review the positive factors in favour of granting the application. In this case, the officer merely stated that the applicant daughter completed her high school studies and commenced university in Canada, and then briefly reviewed her May 2006 removal from Canada. While the officer admits that the applicant daughter "may have established [a] certain degree of ties to this country," no mention is made of any hardship that would be suffered if she were removed to South Korea and forced to discontinue her university studies in Canada. Such a conclusion is unreasonable and, as a result, the officer's decision must be set aside.

[26] With respect to the principal applicant, the applicants argue that the immigration officer erred in concluding that she was of an employable age and that her entrepreneurial ability would be an asset for resettlement in South Korea. I am not persuaded that the officer's decision was unreasonable in this regard; however, based on the fact that the officer erred in failing to consider the best interests of the applicant child, and erred in failing to provide a proper assessment of the applicant daughter's application, I conclude that the officer was unreasonable in assessing the applicants' H&C application, necessitating that the decision be set aside.

CERTIFIED QUESTION

[27] Neither party proposed a question for certification on appeal. The Court agrees that this case does not raise such a question so that no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed. The H&C decision is set aside, and the matter is referred to another H&C officer for re-determination. No question is certified.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5738-06
STYLE OF CAUSE:	**MI SOOK KIM ET AL. and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 16, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Kelen J.
DATED:	October 22, 2007

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