Date: 20080521

Docket: IMM-4222-07

Citation: 2008 FC 632

Ottawa, Ontario, May 21, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

WAN SOO KIM, MI KYUNG LEE; DA HYUN KIM;
JU YOUNG KIM; HANNAH KIM

Applicants

And

THE MINISTER OF CITIZENSHIP &
IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act) for judicial review of a decision of a humanitarian and compassionate (H&C) officer (the officer) dated September 24, 2007, which denied the applicants' application for permanent residence from within Canada on H&C grounds.

[2] The applicants requested that the decision be set aside and the matter referred back to a new H&C officer for redetermination.

Background

[3] Wan Soo Kim (father), Mi Kyung Lee (mother), Da Hyun Kim (daughter), and Ju Young Kim (daughter) (collectively the applicants) are all citizens of South Korea. The father and mother have a third daughter, Hannah Kim, but she is a Canadian citizen having been born in Canada.

[4] The applicants came to Canada in 2002. They applied for refugee protection, but their application was rejected in July 2004. Subsequently, their application for leave for judicial review to the Federal Court was rejected in May 2005. The applicants then made the within request for special consideration to remain in Canada based on H&C grounds. The application was first referred to local immigration officials in Oshawa, Ontario, and was given a favourable consideration at the "first level" of assessment. However, the application was then forwarded to immigration officials at national headquarters on March 15, 2007 for a final determination. In a decision dated September 24, 2007, the officer denied the applicants' application.

Officer's Decision

[5] The officer first considered the applicants' establishment in Canada. The officer acknowledged the documentary evidence provided by the applicants in support of their

establishment. The officer noted that the applicants were active participants in their church community and agreed that this formed an important part of their spiritual lives. However, the officer also stated that there was no indication that the applicants could not engage in such activities in South Korea. The officer acknowledged that the applicants were not in receipt of social assistance and that the father was gainfully employed, earning sufficient money to provide for the care, accommodation and maintenance of his family. The officer considered that the applicants had purchased a home and that they volunteered about 20 hours a month. The officer accepted that the applicants were established in Canada, but also stated that this did not, in and of itself, form sufficient grounds to justify the granting of an exemption.

[6] The officer then considered the best interests of the children involved. The officer stated that the children were enjoying their education in the Ontario school system, but noted that there was no indication that being educated in South Korea would place them at a disadvantage. The officer agreed that the two younger children had no experience with the South Korean education system, but found that this was a result of the father's decision to leave South Korea. The officer disagreed with the applicants' submission that the children would have to overcome great barriers to be able to assimilate back into the extraordinarily different South Korean culture after being so long in Canada. The officer suggested that there would undoubtedly be a period of adjustment, but this was normal under the circumstances.

[7] The officer also considered the circumstances of the Canadian born child, Hannah, who was found at a young age to have a heart condition known as "atrioventrical septal defect". The officer

noted that the condition had required surgical intervention in 2005, and that she was discharged from the hospital with no other illnesses and was not on medication. The officer further noted that while all the evidence indicated that Hannah was "doing very well from the cardiac perspective", there was a possibility of further need for medical treatment. The officer then went on to consider the availability of medical services for Hannah in South Korea. The officer noted that Canadian officials in the Canadian Embassy in Seoul were contacted and had indicated that medical services in South Korea were "top notch", but treatment was more expensive. The officer then stated that they had reviewed a number of websites with information on the issue, noting the following information:

- a reference in the U.S. Department of State publication entitled "Country Reports on Human Rights Practices – 2006" for South Korea indicating that "high quality health care was available to children";
- a website "Publmed.gov" outlining a number of advances in health care in South Korea over a period of time;
- the U.S. Consular information sheet indicating that "hospitals in South Korea are generally well-equipped with state-of-the-art diagnostic and therapeutic equipment … Western style medical facilities are available in major urban areas of Seoul, Busan, Daegu and a few other larger cities"; and
- a publication from the U.S. Library of Congress concerning South Korea and issues surrounding health and social welfare indicating that the number of health care professionals has increased dramatically over the past number of years as has the number of hospitals.

[8] In conclusion, the officer was satisfied, that the level of care available to Hannah in South Korea was sufficient.

[9] The officer also considered whether the applicants would face unusual, underserved or disproportionate hardship. The officer noted that this was "intimately tied to [the principal applicant's] fear to return to South Korea as a result of his being a victim of a money lending (fraud) scheme." The officer noted that the principal applicant claimed that if returned to South Korea, he would not be able to secure employment due to the high level of unemployment. The officer found that if true, this was a risk faced by all persons of the principal applicant's age and was not a personalized risk.

[10] The officer went on to consider the issues surrounding criminality noting that the principal applicant had been convicted of the following offences in South Korea:

- a "traffic road law violation" which is the equivalent to the offence under section 225 of the *Criminal Code of Canada* – driving while impaired;
- two other "traffic road law violations", one of which was the equivalent to section 259 of the *Criminal Code of Canada* – driving while disqualified; and
- a charge of "falsifying private documents, fraud, exercising falsified private documents" which is the equivalent to section 380 of the *Criminal Code of Canada* – fraud over $5000.

[11] The officer noted that these convictions rendered the principal applicant inadmissible to Canada as per subsections 36(1) and 36(2) of the Act. The officer also stated that it was clear that

the principal applicant had deliberately failed to advise immigration officials and had concealed that he was a criminal. The officer further noted that the principal applicant had four and a half years to disclose this information and knew that he was indeed required to do so during several of his immigration applications and declarations. Moreover, the officer noted that the principal applicant's wife also knew of her husband's convictions and did nothing.

[12] In conclusion, the officer found that while there may have been some grounds to indicate that some H&C considerations were present, the decision to be made was "whether the possible existence of these H&C grounds [justified] the granting of the requested exemption." In the officer's opinion, having considered the entirety of the evidence, there were insufficient grounds present to justify granting an exemption. The officer stated that "part of this decision [was] related to the deliberate pattern of misrepresentation demonstrated by both the principal applicant and his wife to circumvent the principal applicant's criminality." The officer acknowledged that the family had spent a number of years becoming established in Canada. Moreover, the officer stated that they were satisfied that medical care was available for Hannah and that the applicants had family in South Korea who could provide care and guidance during the readjustment period. The officer also acknowledged the principal applicant's fear of the "loan shark", but found on a balance of probabilities that there was insufficient reason to believe that the family was at risk of death, torture or to cruel and unusual treatment.

[13] In closing the officer noted that there was a note on the file indicating that local immigration officials would have refused the application had the principal applicant's criminal history been

known prior to the positive assessment at the “first level”. The officer acknowledged this comment, but stated that no notice was taken of it and that it did not in any manner influence either the content or the conclusion of the application.

Issues

[14] The applicants submitted the following issues for consideration:

1. Did the officer err in law by failing to apply the proper test in determining the existence of H&C reasons to grant the application for permanent residence pursuant to section 25 of the Act?

2. Did the officer breach the principles of procedural fairness by failing to provide the applicant with proper reasons for the decision?

3. Did the officer breach procedural fairness in failing to provide the applicants with an opportunity to disabuse their concerns?

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in law in failing to apply the proper legal test in considering whether the applicants would face undue, undeserved or disproportionate hardship?

3. Did the officer breach procedural fairness in failing to provide adequate reasons for the findings on establishment in Canada and the best interests of the children?

4. Did the officer breach procedural fairness in failing to provide the applicants with the opportunity to respond to documentary evidence relied on by the officer in rendering the decision?

Applicants' Submissions

[16] The applicants submitted that the officer clearly applied the wrong test in determining that the applicants would not face a risk if returned to South Korea. The applicants argued that the test for risk applied under sections 96 and 97 of the Act is not the same as in H&C decisions. It was submitted that one could be found not to be in need of protection pursuant to sections 96 and 97, but could still be found likely to be subjected to undue, disproportionate, and undeserved hardship due to the risk. The applicants relied on *Melchor* v. *Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1600 to illustrate that the test applied under sections 96 and 97 is indeed a higher standard than that applied in section 25 applications. The applicants submitted that the officer applied the wrong test and as a result, the decision should be set aside.

[17] The second argument raised by the applicants was that the officer breached procedural fairness in failing to provide proper reasons for two findings, namely, the officer's findings on establishment in Canada, and the best interests of the children. The applicants drew the Court's attention to passages from the Supreme Court of Canada's decision in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 as to the importance of the provision of reasons. Moreover, the applicants also drew the Court's attention to passages from the decision in *Raudales*

v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 532 which spoke to the requirement of adequate reasons. The applicants submitted that in the decision, the officer merely listed the evidence and then stated a conclusion without providing adequate reasons.

[18] And finally, the applicants submitted that the officer breached procedural fairness by relying on extrinsic evidence in considering the availability of health care for Hannah in South Korea. The applicants submitted that none of the information and documentation relied upon was brought to the attention of the applicants prior to rendering the final decision. It is trite law that in the circumstances it was an error not to provide the applicants with an opportunity to reply to the evidence (*Azarpajooh* v. *Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 333; *Chou* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 819; *Haghighi* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 854; *Huang* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 43).

Respondent's Submissions

[19] The respondent began their submissions summarizing some general principles regarding H&C applications. The respondent submitted that a decision made on H&C grounds is an exception and discretionary measure (*Legault* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125). H&C applications offer applicants special and additional consideration for an exemption from immigration laws and are only granted when the hardship caused is unusual and undeserved or disproportionate. Such decisions cannot be used as a "back door when the front door has, after all

legal remedies have been exhausted, been denied in accordance with Canadian law" (*Mayburov* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 953 at paragraph 39). The respondent also submitted that the appropriate standard of review for H&C decisions is reasonableness (Baker, above). As such, H&C decisions should not be interfered with as long as there are some reasons that can stand up to a somewhat probing examination (*Doudkina* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 858).

[20] The respondent submitted that the officer's decision was adequately reasoned and that the applicants are simply in disagreement with the officer's overall conclusion. The respondent submitted that the officer considered all the evidence submitted by the applicants and came to a reasonable conclusion that the Court should not interfere with. The respondent argued that it is clear from the reasons that the officer recognized the degree of establishment and the best interests of the children, but balanced these factors against the criminal history and misrepresentation and in the end found that applying from abroad would not amount to unusual, undeserved or disproportionate hardship.

[21] The respondent also submitted that the officer did not err by assessing risk using the same criteria as in the PRRA assessment. The officer considered the risk factor appropriately. "The onus rests on the applicant to satisfy the officer that, in his/her personal and particular circumstances, the hardship of having to obtain a permanent resident visa outside of Canada in the normal manner would either be unusual and undeserved, or disproportionate" (*Rafieyan* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 727 at paragraph 40, citing *Owusu* v. *Canada (Minister of*

Citizenship and Immigration), 2004 FCA 38 and *Pinter* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 296). No error is committed when the officer relies on the same set of factual findings in assessing an H&C and a PRRA application, provided that these facts are applied against the appropriate test for each context *(Liyanage* v. *Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1293; *Ramirez* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1763).

[22] And lastly, the respondent submitted that the officer committed no reviewable error in relying on documentation concerning the availability of medical care in South Korea. It was submitted that the Federal Court of Appeal has held that publicly available documents, such as US Department of State Country Reports do not amount to extrinsic evidence (*Mancia* v. *Canada (Minister of Citizenship and Immigraiton)*, [1998] F.C.J. No. 565 (FCA)).

Applicants' Reply

[23] The applicants agreed that the appropriate standard of review for the officer's overall decision is reasonableness (*Baker*, above). However, it was submitted that the appropriate standard of review for questions of law and procedural fairness is correctness (*Pushpnathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982). The applicants reiterated that reasons cannot be said to be fulsome simply because they recite and enumerate the parties' submissions and render a conclusion; adequate reasons must contain an explanation as to how the decision was arrived at. Moreover, the applicants submitted that the test for risk for an H&C

decision is “unusual, undeserved and disproportionate hardship”; however, the officer concluded that “on a balance of probabilities, there is no reason to believe that Mr. Kim will be subject to a risk to his life, torture and unusual treatment or punishment”. The applicants submitted that the officer incorrectly applied the legal test for risk under sections 96 and 97 of the Act, not the lower standard in section 25. And finally, the applicants submitted that the information obtained through a “GOOGLE” search and the information from the employees at the Canadian Embassy in Seoul clearly does not constitute “publicly available documents”.

Analysis and Decision

[24] **Issue 1**

What is the appropriate standard of review?

Both parties agreed that the appropriate standard of review for H&C decisions is reasonableness based on the authority of *Baker*, above. While I agree with this submission, the applicants are not challenging the officer’s overall decision. The applicants have raised three arguments, one of which is a question of law and two of which are questions of procedural fairness. Therefore, in my opinion, the appropriate standard of review for all the issues raised is correctness.

[25] **Issue 2**

Did the officer err in law in failing to apply the proper legal test in considering whether the applicants would face undue, undeserved or disproportionate hardship?

The applicants submitted that the officer erred in applying the incorrect legal test when assessing risk under section 25 of the Act. The respondent submitted that it was open to the officer to rely on the factual findings as in the PRRA application. The relevant portion of the officer's decision reads as follows:

> I acknowledge that Mr. Kim has expressed a fear of return to South Korea due to the actions of a "loan shark" who also was a participant in the scheme that led to his conviction for fraud. To assess this fear, I have completed a risk assessment (attached) and I find that on a balance of probabilities, there is insufficient reason to believe that he or his family would be at risk of death, torture or to cruel and unusual treatment or punishment.

[26] The relevant portion of the attached risk assessment reads as follows:

> In conclusion, I find that the actions of the criminal element which have threatened Mr. Kim and family do not rise to the level of a well-founded fear of persecution. Further, I find that based on a balance of probabilities, there is no reason to believe that Mr. Kim will be subject to a risk to his life, to torture or to cruel and unusual treatment or punishment.

[27] In *Ramirez*, above at paragraphs 42 and 43, Justice de Montigny of this Court explored the correct legal test for hardship under section 25 of the Act and stated the following:

> [42] It is beyond dispute that the concept of "hardship" in an H&C application and the "risk" contemplated in a PRRA are not equivalent and must be assessed according to a different standard. As explained by Chief Justice Allan Lutfy in *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296:
>
> > [3] In an application for humanitarian and compassionate consideration under section 25 of the *Immigration and Refugee Protection Act* (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or

> disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> [4] In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment. [Emphasis Added]

> [43] Now, it is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H&C and a PRRA application, provided that these facts are analyzed through the right analytical prism. This is precisely where the officer's assessment in the present case falls short. While she did assess the risk factors the applicants submitted, she did not assess them against the appropriate standard.

[28] While the present case is somewhat different in that the officer did not determine a PRRA application, I am of the opinion that the principal articulated above still applies.

[29] The above reproduced sections of the officer’s reasons clearly show that the officer applied the standard of whether on a balance of probabilities the applicants would be subject to a risk to their life or to a risk of cruel and unusual treatment. This is not the appropriate standard for risk in a

section 25 decision. The correct test is whether the risk amounts to unusual and undeserved or disproportionate hardship. This was an error of law, and as such, I would allow the judicial review on this ground.

[30] I need not deal with the other issues raised by the applicants because of my finding on Issue 2.

[31] The application for judicial review is therefore allowed and the matter is referred to a different H&C officer for redetermination.

[32] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different H&C officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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.	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.
36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36.(1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
. . .	. . .
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

FEDERAL COURT

SOLICITORS OF RECORD

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