Date: 20081003

Docket: IMM-4985-07

Citation: 2008 FC 1118

Ottawa, Ontario, October 3, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

YUN HEE LEE,
CHU JA PARK, and
JAE YANG LEE,
JAE BOK LEE, and
JAE PIL LEE,
by their litigation guardian,
YUN HEE LEE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family of South Korean citizens, who received a negative decision in relation to their application for permanent residence in Canada based on humanitarian and compassionate grounds. The applicants assert that this decision was unreasonable, in that the officer failed to properly consider the evidence regarding the family's establishment in Canada. The H&C

officer further erred, the applicants say, in failing to adequately assess the best interests of the family's three children.

[2] For the reasons that follow, I am not persuaded that the officer erred as alleged. As a consequence, the application for judicial review will be dismissed.

Background

[3] The applicants are failed refugee claimants, who have already had one application for an H&C exemption refused. The negative decision in relation to the applicants' first H&C application was upheld by Justice Shore, who concluded that nothing in the applicants' situation suggested that it fit within the special category of cases in which a positive decision might be made. In Justice Shore's view, the applicants were simply would-be immigrants whose H&C application was based on the existence of minor children and the fact that they had been in Canada for a few years: see *Lee v. Canada (Minister of Citizenship and Immigration)* 2008 FC 368, at para. 16.

[4] The applicants' second H&C application is based upon essentially the same factors as their first: namely, their establishment in Canada, and the best interests of the minor children. According to the applicants' counsel, the second H&C application was filed in order to correct the record, and to address gaps in the evidence provided in connection with the first H&C application. However, much of the material filed by the applicants in support of their second H&C application is the same material as was filed in connection with their first such application, although some additional information was provided to the officer with the second application.

[5] At the time that the decision under review was rendered, Mr. Lee had been in Canada for some five and a half years. The rest of the family had been in this country for four years. One child was almost 15, and the other children were 12-year-old twins.

[6] With respect to the issue of establishment, the applicants submit that Mr. Lee's home renovation business benefits not just the applicants, but also its employee, clients, subcontractors and potential investors.

[7] Mr. Lee has evidently been very involved with his church, and intends to use his expertise in construction to assist the church with a building project, for the benefit of all of the members of the congregation.

[8] According to the applicants, the construction industry in South Korea is very competitive, and Mr. Lee would not be able to generate the same level of income for his family as he does in Canada.

[9] As relates specifically to the best interests of the children, the applicants assert that it would be very difficult for the children to re-adapt to the highly competitive Korean school system. Moreover, the applicants say that the children's Korean language skills are limited, and that they would be particularly vulnerable to bullying, which is allegedly a serious problem in the South Korean school system.

Analysis

[10] It is common ground that a discretionary decision such as that in issue here is to be reviewed against the standard of reasonableness. That is, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

[11] In assessing an H&C application, section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, requires that the personal circumstances of applicants be considered in determining whether they will experience unusual, undeserved or disproportionate hardship if required to apply for landing from outside Canada.

[12] However, in order to justify the positive exercise of discretion, the hardship should be something other than that which is inherent in leaving the life that applicants have established for themselves in Canada: see *Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906, and *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, at para. 49.

[13] Insofar as the issue of establishment is concerned, the applicants argue that the H&C officer's decision in this case is unreasonable, as the officer failed to carry out any meaningful evaluation of the establishment factors. Instead, the applicants say that the officer chose to assign no weight whatsoever to the evidence of the applicants' establishment in Canada.

[14] A review of the officer's decision discloses that this is not what the officer did. What the officer actually said was that no weight would be given to the fact that the applicants had been in Canada for several years. The officer explained that all of the time spent by the applicants in Canada was taken up with pursuing the various avenues that the applicants have followed in trying to gain status in Canada.

[15] The officer explicitly recognized, however, that the applicants had formed ties and a measure of establishment during this period. At the same time, the officer also noted that the family had lived in Korea, spoke the language and had familial ties in that country. The officer therefore concluded that the length of the applicants' time in Canada, *by itself*, was not such that they would experience unusual, undeserved or disproportionate hardship if they were to return to Korea.

[16] The officer then went on to specifically address the establishment factors identified by the applicants in relation to the issue of hardship. These included the establishment of Mr. Lee's business, and the employment that the business provided to a Canadian citizen.

[17] In addressing these factors, the officer was not satisfied that the employee in question would not be able to obtain employment elsewhere. While it is true that the employee did provide a letter expressing the concern that he might have difficulties finding other employment due to his age, this evidence had to be considered in light of the applicants' own evidence as to the serious shortage of workers in the construction trades in Canada. In the circumstances, the officer's conclusion on this point was one that was reasonably available on the record.

[18] Insofar as the damage to investors in Mr.Lee's business was concerned, the officer noted that the letters provided by the applicants in this regard were nothing more than expressions of interest by potential investors, who would presumably be able to invest their money elsewhere.

[19] The officer also addressed the applicants' submission as to the competitiveness of the construction business in Korea, and the fact that Mr. Lee had been out of the country for five years, concluding that this was an insufficient basis for finding unusual, undeserved or disproportionate hardship.

[20] In this regard, the officer noted that Mr. Lee had chosen to give up his business and leave Korea. Given that he had been employed in the construction industry prior to leaving Korea, the officer was not persuaded that Mr. Lee would be unable to become re-employed if he were to return to Korea. Once again, these are conclusions that were reasonably open to the officer on the evidence.

[21] It is true that the officer did not address the consequences that Mr. Lee's departure would have for his church. This is, however, a relatively minor establishment factor, especially in light of the fact that there is no suggestion by church officials that it could not obtain construction expertise elsewhere. In my view, the failure of the officer to specifically address this factor does not, by itself, provide a sufficient basis upon which to set aside the officer's decision.

[22] Insofar as the best interests of the children are concerned, the applicants submit that the officer was not sufficiently alert, alive and sensitive to the children's needs. According to the applicants, the best interests of the children are served by having them remain in Canada, where they have settled into the Canadian school system.

[23] The best interests of children involved in an H&C application are a factor that must be examined and weighed by the officer. While it is an important factor, it is not, however, determinative: see, for example, *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125.

[24] Indeed, in most cases, the interests of the children will be best served by them remaining in Canada: see *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, at para. 6.

[25] In this case, the applicants say that it would be difficult for the children to reintegrate into the Korean school system because, even though the children can speak, read and write in the Korean language, their academic Korean language skills have not progressed. The applicants also submit that because the Korean school system is very different to the Canadian system, it would be difficult for the children to adjust.

[26] Moreover, the applicants say that the children would be particularly vulnerable to the intense peer pressure and ostracism that is prevalent in Korean schools. Finally, the applicants say that the children would suffer the loss of the family's financial stability if they were returned to Korea.

[27] Each of these factors was addressed in the officer's analysis. The officer was clearly well aware of the competitive environment in Korean schools, observing that no educational system is perfect. The officer also pointed out, however, that enrollment rates are very high in Korean schools, that a high percentage of children complete high school, and opportunities exist in that country for young people to pursue university studies.

[28] The officer also addressed the applicants' submission that the children had become accustomed to the Canadian school system, observing that they would nevertheless have the support of their parents as they make the transition back to the country of their birth. As the officer noted, this would be the same support that assisted the children in adjusting to life in Canada – a country where they had no friends or family, and where the children did not speak the language.

[29] The officer further observed that the children have previous experience with the school system in Korea, and that they also have an extended family network in that country to help them with the adjustment.

[30] The applicants also argued that the children would be at risk of corporal punishment in the Korean school system, which is evidently practiced in some, but not all Korean schools. This point

was not directly addressed in the H&C officer's decision. However, in the absence of evidence that the children would be forced to attend a school that actually utilizes corporal punishment, I am not persuaded that the failure of the officer to specifically address this point has the effect of rendering the decision unreasonable.

[31] As was noted earlier, while some additional evidence regarding the best interests of the children was adduced before the H&C officer in this case, essentially the same arguments were advanced by the applicants as had been put forward in the context of their first H&C application.

[32] As Justice Shore observed at paragraph 49 of his decision dismissing the application for judicial review of the first H&C decision, allegations regarding the difficulties that children may encounter in adjusting to a new school system can be advanced in virtually any case where children are returning to their homeland.

[33] In this case, the officer was aware of the arguments being advanced by the applicants in relation to the best interests of the children. These arguments were considered, and reasons were provided for the officer's conclusion that these considerations did not justify a favourable decision.

Conclusion

[34] Having regard to the exceptional nature of positive H&C decisions, and despite the very able submissions of their counsel, the applicants have not persuaded me that the officer's decision in

this case falls outside of the range of possible acceptable outcomes which are defensible in light of the facts and the law. As a consequence, the application for judicial review is dismissed.

Questions for Certification

[35] The applicants propose two questions for certification. The first is "whether establishment which is done without status can be considered in an H&C assessment". Given that the H&C officer clearly considered the establishment factors put forward by the applicants, the question does not arise in this case.

[36] The second question proposed for certification by the applicants is "whether it is appropriate for an officer to speculate about the availability of future opportunities to return to Canada in assessing the best interests of children". In my view, this is not an appropriate question for certification for two reasons.

[37] First of all, the officer specifically stated that no consideration was being given to this possibility, as the availability of a student visa was a matter that would have to be determined down the road by a visa officer. Secondly, to the extent that the matter was addressed at all in the officer's analysis, the officer simply observed that while it may be difficult for the children to obtain such a visa in the future, it was nevertheless an option that was potentially available to the applicants. This is a statement of fact, and not a matter of speculation.

[38] As a consequence, I decline to certify either of the proposed questions.

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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