

**Date: 20081120**

**Docket: IMM-5255-07**

**Citation: 2008 FC 1291**

**Ottawa, Ontario, November 20, 2008**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**JA OK KIM**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review, under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision dated October 15, 2007, by an immigration officer (the officer) at the Canadian Embassy in Korea, determining that the applicant did not meet the requirements for immigration to Canada as a permanent resident under the Self-employed Person Class, pursuant to the Act and the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227.

**I. Issue**

[2] The only issue in this case is whether the immigration officer erred by refusing the application for permanent residence.

[3] For the following reasons, the application for judicial review will be dismissed.

**II. Facts**

[4] The applicant is a well-known Korean actress who has been working in that profession since 1968. She submitted an application for permanent residence (APR) in the Self-employed Person Class on September 5, 2005.

[5] In support of her APR, she presented a business plan indicating that she intended to provide consulting services to those interested in her field, organize plays, perform at cultural events and export Canadian films and plays to Korea.

[6] At the interview, the applicant said that she planned to train actors and singers, contribute to cultural exchanges between Korea and Canada and establish a small theatre group. She also said that she wanted to teach aspiring second-generation Korean immigrant actors and give them advice about their skills and prospects for the future. She claimed that she would establish a drama school and that she would open a small office to teach.

[7] The applicant's son, Young Hawn Oh, currently attends secondary school and lives in Vancouver.

[8] The immigration officer met the applicant for an interview on September 12, 2007, and issued a decision on October 15, 2007.

### **III. Impugned decision**

[9] The officer determined that the applicant did not fall within the definition of a "self-employed person" as set out in subsection 88(1) of the Regulations. Subsection 100(2) of the Regulations provides that if a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application must be refused.

[10] The officer stated that, although the applicant said she was planning to train actors and singers, contribute to cultural exchanges between Korea and Canada and establish a small theatre group, she had never been involved in the marketing, management or operation of a business or in professional teaching. The officer noted that the applicant had only worked as an actress and singer.

[11] In addition, the officer took into consideration that, although the applicant said she wanted to collaborate with other people to set up and operate her drama school, she had not made any arrangements at that point to obtain the collaboration of business people.

[12] Last, the officer noted that the applicant was unable to communicate in English, which was an obstacle to her ability to be a self-employed person in Canada.

**IV. Relevant legislation**

[13] The relevant legislation can be found in Schedule A at the end of these reasons.

**V. Preliminary issue**

[14] The respondent raises a preliminary issue regarding the evidence provided by the applicant in support of her application for judicial review. The respondent notes that exhibit D-3 submitted in support of the applicant's affidavit is fresh evidence that was not before the immigration officer and cannot be considered by the Court, since the judicial review of a decision must be based only on the evidence that was before the decision-maker (*Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158, 157 A.C.W.S. (3d) 822). In addition, the exhibits in support of the applicant's affidavit are not sworn, contrary to the requirements of subsection 80(3) of the *Federal Courts Rules*, S.O.R./98-116.

[15] It is trite law that judicial review of a decision should proceed only on the basis of the evidence before the administrative decision-maker (*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45, 230 F.T.R. 110). Exhibit D-3 submitted in support of the applicant's affidavit is dated prior to the officer's decision. The Court will not consider this fresh evidence.

[16] As for the two other exhibits (D-1 and D-2) that were not sworn, these documents are in the record that the immigration officer provided, and, therefore, the issue of the documents not being sworn is no longer relevant.

## **VI. Analysis**

### *A. Standard of review*

[17] The Supreme Court of Canada recently stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that there are now only two standards of review: correctness and reasonableness.

[18] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47). The Court must not intervene as long as the officer's decision is reasonable, and the Court cannot substitute its own opinion on the sole ground that it could have come to a different conclusion. In my view, the appropriate standard of review for decisions by immigration officers is reasonableness.

*Did the immigration officer err by refusing the applicant's application for permanent residence under the Self-employed Person Class?*

[19] In making her decision under subsection 88(1) of the Regulations, the officer had to verify whether the applicant had experience, whether she had the intention and ability to be self-employed

and whether she could make a significant contribution to a specified economic activity in Canada, in this case, a cultural activity.

[20] The applicant essentially alleges that the officer erred in assessing the facts and that she disregarded part of the evidence that was before her by finding that the applicant had not demonstrated that she could create her own employment in Canada and make a significant contribution to economic activities.

[21] The applicant submits that the officer made a series of errors in her decision. First, the officer did not take into account the diversity and scope of the applicant's professional achievements. Second, the immigration officer only considered one aspect of the applicant's business plan, i.e., "Establishing an acting school and/or make a theatre group". Third, the officer put undue emphasis on the [TRANSLATION] "management experience" criterion and disregarded the applicant's management experience. Fourth, the officer prematurely required co-operation agreements with third parties to bring her project to fruition. Last, the officer did not consider that the applicant could benefit from the fact that her son, who lives in Vancouver, knows English.

[22] The respondent points out that the applicant did not submit an APR under the Self-employed Person Class to come and pursue her profession as an actress in Canada. The business plan that the applicant submitted in support of her APR as well as her interview with the immigration officer showed that she primarily intended to set up a drama school.

[23] At her interview, the applicant acknowledged that she had no professional teaching experience other than providing informal advice to junior actors who worked with her. In addition, the officer noted that the applicant had never been involved in the marketing, management or operation of a business or in professional teaching.

[24] The respondent argues that the applicant cannot criticize the officer for taking into account the fact that she had no management experience. This was an important factor since the applicant was planning to start up her own business. The officer did not put undue emphasis on this factor but properly considered it, given that the definition of self-employed person encompasses the notion of experience.

[25] In addition to the fact that the applicant had no experience in professional teaching and that she had never owned or managed a business, the officer noted that the applicant stated at her interview that she would collaborate with people in her field because it would be difficult for her to be a self-employed person in Canada; however, she had not begun any discussions and/or made any arrangements to obtain such collaboration. According to the respondent, the lack of a co-operation agreement was a relevant factor in assessing the seriousness of the applicant's intentions as well as her ability to turn her projects into reality and to create her own employment.

[26] Nor can the applicant fault the officer for considering her language proficiency. There is no evidence that the applicant provided information to the officer about her son's knowledge of English and the assistance that he could give her. In fact, the applicant's total lack of proficiency in

English was a relevant consideration because it would affect her ability to create her own employment in Canada.

[27] In *Ying v. Canada (Minister of Citizenship and Immigration)*, (1997) 74 A.C.W.S. (3d) 1055, 41 Imm. L.R. (2d) 129 (F.C.T.D.), in referring to previous cases, the Court found that the definition of a “self-employed person” has two parts: the intention and ability to establish or buy a business, and the likelihood of this business providing a significant contribution to Canada. In *Yang v. Canada (Minister of Employment and Immigration)*, (1989) 27 F.T.R. 74, 14 A.C.W.S. (3d) 363 (F.C.T.D.), the Court stated the following:

. . . The analysis appears to me to require consideration of three questions. First, is the applicant an accomplished musician (in which international recognition ought to be of great assistance)? second, can he teach? third, can he be self-employed as a teacher? It is obvious that the applicant was successful in the first two and by inference at least, partially successful in the third. His only failure in respect to the third issue is the lack of actual experience as a self-employed teacher. By placing undue emphasis on the lack of experience as a self-employed teacher, the visa officer allowed that partial failure on the third issue to override success on the other two, an interpretation that made it almost impossible for this applicant to succeed. Accordingly, there has been a fundamental breach of the duty of fairness to this applicant which is sufficient to warrant the relief sought.

[28] In this case, I am satisfied that the applicant is an accomplished actress who meets the first criterion in *Ying*.



[29] On the other hand, in my view, the reasons given by the immigration officer for concluding that the applicant would not be able to successfully operate her proposed business (a drama school) are justified by the evidence that was before the officer. The applicant's business plan was not sufficiently specific or concrete. The fact that the applicant had not conducted prior research in Canada coupled with the fact that she did not speak either of the two official languages convinced the officer that the applicant did not meet the criteria for the definition of "self-employed person".

[30] This decision is reasonable. The intervention of the Court is not necessary.

[31] The parties did not propose the certification of a serious question of general importance. The docket does not contain any.

**JUDGMENT**

**THE COURT ORDERS** that the application for judicial review is dismissed. No question is certified.

“Michel Beaudry”

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Judge

Certified true translation  
Mary Jo Egan, LLB

## Schedule A

### Relevant Legislation

*Immigration and Refugee Protection Regulations, S.O.R./2002-227 (Regulations), at subsection 88(1): definition of self-employed person:*

**“self-employed person”**

means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

**« travailleur autonome »**

Étranger qui a l'expérience utile et qui a l'intention et est en mesure de créer son propre emploi au Canada et de contribuer de manière importante à des activités économiques déterminées au Canada.

Subsection 88(1) of the Regulations: definition of relevant experience:

**“relevant experience”** , in respect of

(a) a self-employed person, other than a self-employed person selected by a province, means a minimum of two years of experience, during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application, consisting of

(i) in respect of cultural activities,

(A) two one-year periods of experience in self-employment in cultural activities,

(B) two one-year periods of experience in participation at a world class level in cultural activities, or

(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B),

**« expérience utile »**

a) S'agissant d'un travailleur autonome autre qu'un travailleur autonome sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci, composée:

(i) relativement à des activités culturelles:

(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités culturelles,

(B) soit de deux périodes d'un an d'expérience dans la participation à des activités culturelles à l'échelle internationale,

(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

(ii) in respect of athletics,

(ii) relativement à des activités sportives:

(A) two one-year periods of experience in self-employment in athletics,

(A) soit de deux périodes d'un an d'expérience dans un travail autonome relatif à des activités sportives,

(B) two one-year periods of experience in participation at a world class level in athletics, or

(B) soit de deux périodes d'un an d'expérience dans la participation à des activités sportives à l'échelle internationale,

(C) a combination of a one-year period of experience described in clause (A) and a one-year period of experience described in clause (B), and

(C) soit d'un an d'expérience au titre de la division (A) et d'un an d'expérience au titre de la division (B),

(iii) in respect of the purchase and management of a farm, two one-year periods of experience in the management of a farm; and

(iii) relativement à l'achat et à la gestion d'une ferme, de deux périodes d'un an d'expérience dans la gestion d'une ferme;

(b) a self-employed person selected by a province, has the meaning provided by the laws of the province.

b) s'agissant d'un travailleur autonome sélectionné par une province, s'entend de l'expérience évaluée conformément au droit provincial.

Subsection 88(1) of the Regulations: definition of specified economic activities:

“**specified economic activities**”, in respect of

« **activités économiques déterminées** »

(a) a self-employed person, other than a self-employed person selected by a province, means cultural activities, athletics or the purchase and management of a farm; and

a) S'agissant d'un travailleur autonome, autre qu'un travailleur autonome sélectionné par une province, s'entend, d'une part, des activités culturelles et sportives et, d'autre part, de l'achat et de la gestion d'une ferme;

(b) a self-employed person selected by a province, has the meaning provided by the laws of the province.

b) s'agissant d'un travailleur autonome sélectionné par une province, s'entend au sens du droit provincial.

Subsection 100 of the Regulations:

**100.** (1) For the purposes of subsection 12(2) of the Act, the self-employed persons class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada and who are self-employed persons within the meaning of subsection 88(1).

(2) If a foreign national who applies as a member of the self-employed persons class is not a self-employed person within the meaning of subsection 88(1), the application shall be refused and no further assessment is required.

**100.** (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs autonomes est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada et qui sont des travailleurs autonomes au sens du paragraphe 88(1).

(2) Si le demandeur au titre de la catégorie des travailleurs autonomes n'est pas un travailleur autonome au sens du paragraphe 88(1), l'agent met fin à l'examen de la demande et la rejette.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5255-07

**STYLE OF CAUSE:** **JA OK KIM**  
**and**  
**MINISTER OF CITIZENSHIP AND**  
**IMMIGRATION**

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** October 30, 2008

**REASONS FOR JUDGMENT**  
**AND JUDGMENT BY:** Mr. Justice Beaudry

**DATED:** November 20, 2008

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