Date: 20080320

Docket: IMM-993-07

Citation: 2008 FC 368

Ottawa, Ontario, March 20, 2008

PRESENT: The Honourable Mr. Justice Shore

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

I. Introduction

[1] It must be emphasized that there is nothing about the Applicants' situation that suggests that it fits into the special category of cases where a positive decision might be made. The Applicants are simply would-be immigrants whose humanitarian and compassionate (H&C) application is primarily based on the existence of minor children and the fact they have been in Canada for a few years. If this were the standard upon which H&C applications had to be approved, virtually no

applications could be refused. It would also create a positive incentive for foreign nationals to completely ignore regular immigration procedures. For example, citizens of South Korea, a democratic and fairly well-off country, could travel to Canada, use the avenues available to them under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), or go underground, in order to stay in Canada for a few years and, then, demand that they be allowed to stay in Canada. It would, in effect, create a whole new immigration system, one that Parliament did not intend.

[2] In essence, positive H&C decisions are for circumstances sufficiently disproportionate or unjust, such, that the persons concerned should be allowed to apply for landing from within Canada, instead of returning home and joining a long queue in which many others have been waiting patiently. Seen in this light, it is clear that the whole issue regarding whether the children can return to Canada to study is less than material.

II. Judicial Procedure

[3] This is an application for judicial review, under subsection 72(1) of the IRPA, of a decision of an Immigration Officer, dated February 20, 2007, refusing the Applicants' application for an exemption on H&C grounds to allow them to apply for permanent residence from within Canada.

III. Background

[4] The Applicants, five citizens of South Korea, constituting a husband, wife and three children, filed an H&C application in 2004. By decision, dated February 20, 2007, an Immigration Officer considered and refused the application.

[5] In 2003, the Applicants made refugee claims based on problems the adult male Applicant had due to debts incurred in his business in South Korea, as a result of fraud committed by his former employee. This claim was refused by the Refugee Protection Division (RPD) in a decision, dated December 31, 2003.

[6] In September 2004, the Applicants filed an application for permanent residence in Canada on H&C grounds, attaching submissions and supporting documentation.

[7] In November 2006, on the request of the Respondent, the Applicants submitted an update to the H&C application, including updated submissions, forms and supporting documentation.

[8] By decision dated, February 20, 2007, a representative of the Minister of Citizenship and Immigration reviewed the circumstances of the Applicants' request and decided that an exemption, pursuant to subsection 25(1) of the IRPA, would not be granted and, consequently, refused the Applicants' H&C application.

[9] In order to establish that they or others would suffer "unusual and undeserved hardship" or "disproportionate hardship" if required to leave Canada to apply for permanent resident status from abroad, the Applicants alleged, among other things, that, since the three minor Applicants have been studying in Canada for some time, they would suffer undue hardship if required to return to study in South Korea and be forced to adapt to a new study environment.

[10] To establish that the minor Applicants have adapted to and are thriving in their Canadian school and educational environment, the Applicants submitted letters from a pastor, teachers, and other members of the community, including numerous certificates.

[11] They equally submitted information explaining the male Applicant's inability to operate a small business as he would not be granted the required credit due to the financial problems caused by his former employee.

[12] The Immigration Officer, reviewing the Applicants application for an exemption based on H&C factors, determined that the exemption would not be granted.

[13] The reasons provided by the Immigration Officer, justifying the refusal, were based on the fact that the Officer believed that the adult Applicants would be able to find employment in Korea. Furthermore, it was determined that the minor Applicants would, despite the period of adjustment, not face unusual and undeserved or disproportionate hardship as they become re-established into Korean society.

IV. Decision under review

[14] The Applicants contend that, in so finding, the Immigration Officer erred in a number of ways: rendering an unreasonable finding that the minor Applicants could return to Canada on study permits, rendering a finding based on no evidence, ignoring evidence, or improperly considering extrinsic evidence in breach of procedural fairness, by finding that the minor Applicants could study

in English in South Korea; rendering a finding based on no evidence, ignoring evidence, or improperly considering extrinsic evidence in breach of procedural fairness, by finding that English is widely spoken in South Korea; the Applicants also contend that the Immigration Officer rendered a finding in breach of natural justice due to incompetence of counsel by finding that the adult Applicants could return to South Korea to operate a small business.

[15] The Applicants have failed to raise any cogent arguments to suggest that the Immigration Officer erred in her decision. The Applicants are asking this Court to re-weigh the evidence that was before the Immigration Officer, but this is an insufficient ground upon which to seek judicial review.

[16] Nothing in the Applicants' situation suggests that it fits into the special category of cases where a positive decision might be made. The Applicants are simply would-be immigrants whose H&C application is primarily based on the existence of minor children and the fact that they have been in Canada for a few years.

V. Relevant legislation

H&C Framework

[17] Subsection 25(1) of the IRPA provides that the Minister may exempt a foreign national from any requirement of the Act if the Minister is "of the opinion that it is justified by humanitarian and compassionate [H&C] considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations":

Status and Authorization to Enter	**Statut et autorisation d'entrer**
Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
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.

[18] In determining whether subsection 25(1) applies, an Officer must determine whether the applicants, and in particular, any child, would suffer "unusual and undeserved hardship" or "disproportionate hardship" if the applicants were required to leave Canada to apply for permanent resident status from abroad. This is confirmed by, among other sources, the Immigration Inland Processing Manual, Chapter 5 (Manual IP5) at Section 5.1.

[19] The existence of an H&C review offers an individual special and additional consideration for an exemption from Canadian immigration laws, which are otherwise universally applied. The

decision of an immigration official not to recommend an exemption takes no right away from an individual.

VI. Issues

[20] (1) Was the Immigration Officer's conclusion as to the Applicants ability to find employment reasonable?

(2) Was the Immigration Officer's conclusion as to the minor Applicants ability to re-adapt to life and school in South Korea reasonable?

VII. Standard of Review

[21] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada ruled that the standard of review for H&C decisions is reasonableness. In arriving at this conclusion, the Court acknowledged that the Minister or her delegate should be entitled to considerable deference in the exercise of discretion:

> [59] …The decision- maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.
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> …
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> [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.

[22] In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraph 37, the Supreme Court of Canada clarified its decision in *Baker* by stressing that, in H&C applications, it is "the Minister who was obliged to give proper weight to the relevant factors and none other."

[23] The Federal Court of Appeal had the opportunity to consider *Suresh* in the context of an H&C matter. In *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (QL), the Court held:

> [11] In *Suresh*, the Supreme Court clearly indicates that Baker did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with Baker, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to reexamine the weight given to the different factors by the officers.

[24] The Federal Court of Appeal confirmed this proposition in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (QL), at paragraph 12. It held that it is not the function of the Court in judicial review proceedings to substitute its view on the merits of an H&C application for that of the statutory decision-maker, even though the application might well have merit.

[25] In *Owusu*, above, at paragraph 8, the Federal Court of Appeal, also, found that "since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril."

VIII. Analysis

(1) Was the Immigration Officer's conclusion as to the Applicants' ability to find employment reasonable?

[26] At page 2 of the Reasons, the Immigration Officer determined:

> The Applicant has not demonstrated that he and his wife would be unable to continue working in similar fields in Korea. The applicant has savings plus other investments here which he can use to become reintegrated in Korea. The applicant lists on his IMM5001, section G that he was employed in Korea from 1993 to 2002. The applicant was able to retain long term employment prior to coming here. I am not satisfied that he cannot do so once again.

[27] The Applicants contend, however, that they have been denied natural justice in their H&C application due to the incompetence of their counsel as, the latter, omitted to indicate in the H&C application the reason why it would be unreasonable to believe that the male Applicant would be able to operate a small business in South Korea. He notes that a failure of counsel to represent his or her client properly may amount to a breach of natural justice.

[28] In addition, the male Applicant alleges he cannot operate a small business in South Korea because he has debt problems there due to fraud committed by his former employee; and, therefore, he cannot obtain credit and faces possible prosecution.

[29] No breach of procedural fairness occurred due to the incompetence of the Applicants' representative. There is no evidence to indicate that the Applicants did not understand English or the documents they signed. Without this, the Applicants' argument that they did not understand what was written in their H&C application forms cannot stand.

[30] The evidence before the Court clearly indicates that the Principal Applicant and his wife, speak, read, and write in English sufficiently well, such that, they cannot blame their representative for any omissions or inaccuracies in their H&C submissions.

[31] The most recent submission letter, from the Applicants, is in English and appears to have been written in the Principal Applicant's or his spouse's own hand. The original H&C forms and the updated H&C forms indicate that the Principal Applicant and his spouse, speak, read, and write English. In their original application forms, the Principal Applicant and his spouse both indicated that they "… studied more than one year English as a full-time ESL student…" and were improving their "… English by various ways, such as reading English materials and going to English classes, etc.". In his updated form, the Principal Applicant repeated that he has studied ESL for more than one year and, in her updated form, the Principal female Applicant made the same repetition and added: "I can gain full-time jobs as I have the skills and the ability to work in an English speaking environment.". Moreover, the Principal female Applicant's volunteer work belies the suggestion (again, for which there is no evidence) that she does not understand English. As the Applicants understand English, they cannot blame their representative for any omissions or inaccuracies in their H&C submissions. (Application Record, pp. 17, 23, 29, 31, 37, 70, 72, 91, 96, 110, 112.)

[32] Moreover, the alleged negligence on the part of the representative was not material to the decision. Regarding the reference to the Applicants' fear of gangsters, this one-line allegation is found in the updated forms (not the original forms or submissions), and as the Immigration Officer simply found that it was a matter that could be dealt with by the police, the allegation did not operate against the Applicants. (Application Record, p. 8.)

[33] After recognizing that the Principal Applicant operates a construction business and buys and sells property and that his spouse is employed as a cleaner and a tax records employee, it is reiterated that the Immigration Officer, stated:

> The applicant has not demonstrated that he and his wife would be unable to continue working in similar fields in Korea. The applicant has savings plus other investments which he can use to become reintegrated in Korea. The applicant lists on his IMM5001, section G that he was employed in Korea from 1993-2002. The applicant was able to retain long term employment in Korea prior to coming here. I am not satisfied that he cannot do so once again.

(Reasons, p. 2.)

[34] The Immigration Officer was not satisfied that the Principal Applicant would not be able to continue as a businessman or obtain employment as an employee in Korea. Even if, as the Applicants allege, the Principal Applicant cannot operate a business in Korea because of past circumstances, there is no evidence, and it has not been alleged, that he cannot find a job. As such, the issue of whether the representative properly argued that the Principal Applicant could not start a business in Korea is immaterial to the overall decision.

[35] Lastly, it must be emphasized that the apparent reason for the Principal Applicant's troubles in Korea, is fraud, which he says was committed by a former employee but for which he is facing charges. The RPD did not believe the basis of the Principal Applicant's refugee claim and, in any event, found that he faced prosecution and "would not experience persecution, serious harm, risk to life or danger of torture upon his return".

[36] The fact that the Principal Applicant may not be able to operate a business in Korea, because of such past circumstances, cannot be the basis of a successful H&C application, especially when he and his wife are otherwise employable.

(2) Was the Immigration Officer's conclusion as to the children's ability to re-adapt to life and school in South Korea reasonable?

[37] The Immigration Officer considered whether the minor Applicants would suffer unusual and undeserved or disproportionate hardship if removed from their education in Canada and required to re-adapt to school in South Korea. The Immigration Officer concluded that they would not.

[38] The Immigration Officer, upon reviewing the Applicants' H&C application, concluded:

> I have considered the best interest of children and while there may be a period of adjustment I do not think they will experience unusual and undeserved or disproportionate hardship as they become re established into Korean society. There is also the option of returning to Canada on Study Permits and continuing their education in a Canadian environment.
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> …
>
> Based on the information reviewed I am not satisfied that the applicants will experience hardship which is unusual, undeserved or disproportionate of[sic] they are asked to leave Canada and apply for an immigrant visa from outside Canada in

> the normal manner. Request for a waiver of ss 11(1) of IRPA is refused. (Emphasis added).

(Reasons, p. 3.)

Study permits

[39] With respect to the minor Applicants ability to return to Canada on study permits, the Applicants state that this is a gross mischaracterization of the likelihood that the children will be issued study permits. In view of the fact that they are failed refugee claimants and it is highly unlikely that the children would be allowed to return, considering they are subject to a deportation order, the Minister's authorization would be required. Furthermore, even if the minor Applicants could obtain authorization to return to Canada, to be issued study permits, they must satisfy the Minister that they have the intention of returning to South Korea upon expiry of the permits, or otherwise required to leave Canada.

[40] Contrary to the Applicants' argument, the Immigration Officer did not make a patently unreasonable error in stating: "… [t]here is also the option of returning to Canada on Study Permits and continuing their education in a Canadian environment." (Reasons, p. 3.)

[41] This statement was in the nature of an *obiter* comment and not material to the decision. They explain that, prior to the impugned statement, the Immigration Officer indicated that she considered the best interest of the children and "… while there may be a period of adjustment I do not think they will experience unusual and undeserved or disproportionate hardship as they become re established into Korean society." That was the key finding, and the additional statement about the

children possibly returning to Canada on study permits was immaterial to the overall decision. As such, it does not raise a serious issue. (Reasons, p. 8.)

[42] The Applicants contend that this conclusion was intrinsic to the Immigration Officer's reasons for finding that the minor Applicants will not suffer sufficient hardship if removed.

[43] The impugned statement was a statement of fact. The Applicants do not deny that the children could return to Canada on study permits. They simply say that it might be difficult for the children to return because they failed to leave Canada in a timely fashion (which resulted in the departure order becoming a deportation order (ss. 224(2) of the IRPA) and, therefore, need written authorization to return to Canada (ss. 52(1) of the IRPA and ss. 226(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). They also say that obtaining study permits would be difficult, because, given their status as failed refugee claimants and failed H&C Applicants, it would be difficult for the children to prove that they would leave Canada at the end of the authorized period, which is the test that all temporary visa applicants must meet. The fact that it might not be easy for the children to study in Canada in the future does not undermine the Immigration Officer's finding. The Immigration Officer did not indicate that obtaining study permits would be easy; rather, she simply noted, correctly, that it was an option.

[44] Two additional points should be emphasized. First, obtaining study permits is not easy for most students who desire to study in Canada. Second, the Applicants' argument forces us to re-focus on what H&C applications are about. In essence, positive H&C decisions are for

circumstances sufficiently disproportionate or unjust, such that the persons concerned should be allowed to apply for landing from within Canada, instead of returning home and joining a long queue in which many others have been waiting patiently. Seen in this light, it is clear that the whole issue regarding whether the children can return to Canada to study is less than material.

[45] The Applicants argue that the H&C Officer erred in finding that the children could study in English in South Korea and that English is widely spoken in South Korea. Both of these arguments can be addressed together.

[46] It should be emphasized that the three children were born in Korea and that their mother tongue is Korean. This is stated explicitly on the H&C application and was recognized in a letter from a family friend who noted that the children's "… English has also improved a lot and they have adapted well at school." (Application Record, p. 69.)

[47] Moreover, while the Applicants submitted that it would be difficult for the children to readjust to life and school back in Korea, they never indicated or provided evidence to indicate that the inability to be schooled or to communicate in English in the broader society would create unusual or disproportionate hardship. In their original application forms (September 9, 2004), the Applicants indicated:

> First, our three sons would face many troubles if we were to return to Republic of Korea. They have been in Canada since Jan. of 2002, and they are studying now. They would stop their study if we were to return to South Korea. It is very hard for them to change their study environment.

(Application Record, p. 110.)

[48] In their updated forms (November 12, 2006), the Applicants indicated:

> Secondly, my children's best interests will be damaged if they are sent back to R. Korea. Our three sons will face tremendous difficulties in dealing with their studies and daily life. Their education will be delayed. They will have to spend more time to learn Korean courses.

(Application Record, p. 37.)

[49] Notably, these allegations can be made in any case where there are children going back to their homeland. Moreover, there is no evidence to suggest that the Applicants were putting forward, as a basis for undue hardship, the lack of English schooling or English communication in the broader Korean community. Indeed, the Applicants concede, at paragraph 43 of their Memorandum, that the availability of English schooling was not really the concern. Consequently, the findings with which the Applicants take issue do not raise a serious issue.

[50] Lastly, it should be noted that the Applicants recognize that English is a required subject in Korea and that English schooling is available. That the Applicants suggest that they cannot afford English schooling does not impugn the Immigration Officer's finding that it is available.

VIII. Conclusion

[51] Although pleaded in the most erudite manner by counsel for the Applicants, based on the foregoing, this Court finds that the Applicants will not experience hardship which is unusual, undeserved or disproportionate upon return to Korea where they can apply for immigrant visas from outside of Canada, in the normal manner. Consequently, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-993-07
STYLE OF CAUSE:	**YUN HEE LEE, CHU JA PARK, and JAE YANG LEE, JAE BOK LEE, and JAE PIL LEE By their litigation guardian, YUN HEE LEE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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DATED:	March 20, 2008

APPEARANCES:

Mr. Daniel Kingwell	FOR THE APPLICANTS
Mr. John Provart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAMANN & ASSOCIATES Toronto, Ontario	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT