Federal Court  Cour fédérale

Date: 20091014

Docket: IMM-3554-08

Citation: 2009 FC 1032

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

JI HYUN AN
ANDREW LEE, Jr.

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application is for judicial review of a decision of an Immigration Officer (the Officer) dated July 16, 2008 (the Decision) in which she denied the Applicants' application to apply for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

BACKGROUND

[2] The Applicants are a mother (the Mother) and her eleven year old son (the Son). The Son's father (the Father) is a Canadian citizen who applied for permanent residence through Canadian

Citizenship and Immigration in Seoul, South Korea. On the advice of his consultant, he did not declare that he had a wife and son.

[3] The Mother and Father met while studying in the United States. They married in South Korea in October 1996 and the Son was born in the United States on August 29, 1997. Between 1998 and 2000, the Mother and Son lived in both South Korea and the U.S. while the Father completed his studies. From July 2003 until October 2004, the Mother and Father were separated but, thereafter, their relationship was apparently re-established.

[4] The Mother has a B1/B2 U.S. visa which is valid from 2002 through 2012. It is a multiple entry visa which is intended for temporary visits. It does not guarantee a right of entry and does not permit the Mother to become a U.S. resident.

[5] The Father supports his wife and son in Canada and his evidence of March 31, 2008 indicates his wish to continue to live with them as a family.

THE ISSUES

[6] The Applicants say that the following errors were made in the negative H&C Decision:

(i) The Officer erred in determining that the Son was fluent in the Korean language;

(ii) The Officer erred in concluding that the Son would not face serious bullying in school as a Korean from abroad who did not understand Korean customs;

(iii) The Officer erred in finding that the Mother and Son could reside in the United States if the H&C application failed;

(iv) The Officer erred in concluding that the Mother and Son had spent so much time in South Korea and the U.S. that their return would only be a matter of "re-integration";

(v) The Officer failed to consider the emotional impact on the Son of the loss of his Father.

DISCUSSION

(i) The Son's Fluency

[7] The Mother's evidence disclosed that the Son could not speak Korean fluently. She said he spoke "some" Korean but not enough to follow a teacher's instructions. On the other hand, she also indicated that Korean was her Son's native tongue and her preferred language for an immigration interview. The Officer was aware that the Son had visited South Korea several times with his Mother and, on one occasion, had lived at his uncle's home in South Korea for nine months. During that time, he attended a Korean school.

[8] Contrary to the Applicants' allegation, the Officer did not conclude that the Son spoke Korean fluently. She did, however, appear to determine that language difficulties were not a negative factor in assessing the best interests of the Son. In my view, this conclusion was reasonable on the available evidence.

(ii) Bullying

[9] The Mother's evidence disclosed that she perceived that students who were Korean by birth, but who lived outside South Korea and returned to study, were bullied. She said that her Son had been so treated. However, she offered no evidence to corroborate the bullying and no documentary evidence to support her concerns. In these circumstances, the Officer's dismissal of her opinion was reasonable.

(iii) and (iv) The U.S. Visa and Re-integration

[10] The Officer spoke of the United States in the following terms:

> […] I am not satisfied that the applicant's son would be greatly and negatively affected if he were to leave Canada. The four pages of his U.S.A. passport that were selected and provided indicate travel between Canada and Korea in 2004, 2005, 2006 and 2007. Periods of lengthy separation also occurred prior to 2004. In addition the applicant's U.S. visa is valid until 2012 and her son is a U.S. citizen. There is no requirement that the applicant and her son, if required to leave Canada must return to Korea. The applicant has provided insufficient information to satisfy me that her son would suffer hardship that is unusual and undeserved or disproportionate should he and his mother be required to leave Canada.
>
> […]
>
> […] I am satisfied that should the applicant and her son be required to leave Canada, that her education and her previous salaried work experience combined with her husband's financial support would be sufficient to assist with their re-integration to her home country or to the U.S. where she holds a valid visa and her son is a citizen.
>
> [my emphasis]

[11] In my view, the Officer was clearly not satisfied that the Mother and Son would be obliged to go to South Korea when they left Canada. She clearly believed that they were entitled to go to the United States. This was an error because, as mentioned above, the Mother's visa is intended for temporary visits and guarantees her neither a right of entry nor a right to become a U.S. resident.

[12] This error was, in my view, material because it is impossible to say whether, if the Applicants' only possible destination had been South Korea, the Officer would have reached the same conclusion.

[13] As well, the Officer erred when she spoke of "their reintegration." The Son has not spent enough time in South Korea to have become integrated and so the concept of reintegration could not properly be applied to him.

(v) The Father

[14] The Officer was not satisfied that the Mother, Father and Son were, in fact, a close, interdependent family unit. In view of the parents' long separation and in view of the absence of any corroboration of the Father's evidence that he wishes to continue to live with and support his family, this was a reasonable conclusion.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application is hereby allowed and the entire application, with any new material the parties wish to file, is hereby referred back for re-determination by a different officer.

There is no question to be certified for appeal.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marvin Moses	FOR THE APPLICANTS
John Provart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marvin Moses Barrister and Solicitor Toronto, ON	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT