Federal Court  Cour fédérale

Date: 20110516

Docket: IMM-5223-10

Citation: 2011 FC 557

Ottawa, Ontario, May 16, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

YUKO UO
YUKA UO

applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. The facts

[1] The applicants, Ms. Uo and her ten-year-old daughter Yuka are from Japan. Ms. Uo married Naotake Uo, on August 1, 1990, and had two children with him, Rui and Yuka (who is the minor applicant). Ms. Uo suffered physical, emotional, and sexual abuse at the hands of her husband Mr.

Uo, who also abused their children. The applicants claim that Mr. Uo is a powerful man in Japanese society, as is his mother.

[2] In June 2004, after a dispute over the oldest daughter Rui, Mr. Uo beat Ms. Uo and locked her up at home. Ms Uo was able to escape with her youngest daughter, Yuka, and requested assistance from Yuka's school director, Mr. Marc-Andre Germain, a Canadian citizen living in Japan. Mr. Germain took them to a hotel and then relocated them to an apartment in Tokyo where they began a relationship.

[3] Mr. Uo discovered the location of the applicants and Ms. Uo's relationship with Mr. Germain, and began contacting and threatening Mr. Germain and Ms. Uo's relatives. Mr. Uo and four men entered the school while armed and kidnapped Yuka. Eventually, the police agreed to have Yuka returned to Ms. Uo on condition that she not presses charges against Mr. Uo. Mr. Germain had his personal effects taken and his dog killed.

[4] In November 2004, Mr. Germain and the applicants moved into an apartment in Tokyo and changed their cell phone numbers. Mr. Uo was able to call Ms. Uo anyway. Mr Uo also threatened Ms. Uo's clients, who then cancelled and affected Ms. Uo's ability to earn a living. Ms. Uo was forced to change jobs on three different occasions before leaving the country.

[5] Ms. Uo was denied support from a women's shelter in Tokyo, despite meeting a social worker, due to a lack of supporting evidence. She then hired a Japanese lawyer and applied for divorce, but the lawyer informed her that divorce was not yet possible, and mediation was also unsuccessful.

[6] On another occasion, Mr. Uo's mother attempted to kidnap Yuka.

[7] The applicants returned to the family home in January 2005 to collect some clothing, but Ms. Uo was beaten by Mr. Uo's mother in the presence of the police.

[8] Ms. Uo sought more legal assistance from the Tokyo Law Association; however, a lawyer from the association refused to help the applicants because Ms. Uo was romantically involved with Mr. Germain.

[9] Mr. Germain was attacked by armed men in public, several times in September 2005, despite his attempts to seek police protection.

[10] The applicants and Mr. Germain left Japan for Canada, on December 15, 2005, with a temporary resident visa that expired on June 14, 2006. On May 31, 2006, the applicants had the visas extended until March 18, 2007, so a sponsorship application could be filed by Mr. Germain.

[11] However, Ms. Uo's relationship with Mr. Germain ended, and the applicants sought refugee protection on November 21, 2006. The Immigration and Refugee Board's Refugee Protection Division (RPD) found that the applicants were credible but due to availability of state protection, denied the applicants' claims on September 2008, noting that "This is without doubt a purely humanitarian issue." The applicants sought judicial review of this decision but this was dismissed on February 4, 2009.

[12] The applicants applied for a Pre-Removal Risk Assessment (PRRA) and for permanent residence from within Canada on humanitarian and compassionate grounds (H&C). In their H&C application, the applicants submitted that they would be at risk in Japan at the hands of Mr. Uo, and that the police could not protect them. They also submitted that they had significantly established themselves in Canada, and that it was in the best interests of the child Yuka to remain in Canada.

[13] Both applications were rejected, but the applicants have only sought judicial review of the H&C decision.

II. Decision under review

[14] In a letter dated May 31, 2010, the PRRA's officer refused the applicants' H&C application for permanent residence from within Canada on humanitarian and compassionate grounds.

[15] The officer looked at the applicants' establishment in Canada. The officer noted that Ms. Uo had no family in Canada and that her eldest daughter, parents, and brother were in Japan.

[16] The officer noted that Ms. Uo had not worked much since arriving in Canada, although she continuously attempted to find work and had set up her own housekeeping business. The officer found little proof regarding her income to show that she was capable of supporting herself and her daughter, but noted that this was not a determining factor in the analysis. The officer also noted that

Ms. Uo had taken French courses, and volunteered for various community organizations. Letters in her file indicated that she had established links in the community.

[17] The officer found that Ms. Uo's efforts to be financially independent, her English skills, French classes, social engagement and network of friends were positive elements but were insufficient to justify her request. The officer therefore found that Ms. Uo was not established enough in Canada that the requirement to apply for permanent residence from outside of Canada would cause unusual and undeserved or disproportionate hardship by reason of her established link in Canada.

[18] The officer acknowledged Ms. Uo's claim that if returned to Japan she would be financially destitute and in a precarious situation due to workplace discrimination against single mothers, but found that single mothers were increasingly becoming present in Japanese society; thanks to pressure from rights groups. The officer found that Ms. Uo's training and experience made it likely she would find work in Japan.

[19] The officer found that she would not require psychological support, and even if she did require it, such social support systems existed in Japan. The officer found that with her past experience in setting up her own business, her English skills and resourcefulness would allow her to overcome any difficulties she might face.

[20] In looking at the best interests of the child, the officer noted that Yuka had taken part in the Quebec school system and had a good relationship with her classmates. The officer found however

that the applicants had not established that the differences between the Canadian and Japanese school system were unusual or disproportionate in the circumstances or were against the best interests of the child.

[21] The officer noted that a letter by Yuka indicated she did not want to return to Japan and was afraid of her father. However, the officer found that she had proved her ability to adapt in coming to Canada, that Japan was her country of nationality, and that there was an absence of evidence to establish her fears or psychological suffering from her father's violence when he had kidnapped her when she was four years old.

[22] In examining the risks faced by the applicants in returning to Japan, the officer acknowledged that the fact that the applicants had been victims of domestic violence at the hands of Mr. Uo was not at issue. Instead, the main issue was whether the risks constituted unusual and disproportionate difficulties in the circumstance.

[23] The officer noted that the abuse experienced by the applicants occurred in Yokohama, and that evidence did not indicate that the applicants would face problems outside of this area. The officer found that the evidence did not establish that the applicants had sought to relocate in an area other than Yokohama. The officer found that the evidence of the measures taken by the authorities indicated the presence of police protection, and was satisfied that the applicants would be able to obtain protection from authorities in other cities.

[24] As such, the officer concluded that the requirement to leave Canada to obtain permanent residence would not constitute unusual and undeserved hardship. The officer therefore refused the applicants' application.

III. Relevant legislation

Immigration and Refugee Protection Act, 2001, c 27, s 25 [*IRPA]*:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, 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 se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, 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.

IV. Issues

[25] The applicants frame the issues as follows:

> (1) Did the PRRA officer breach the rules of procedural fairness by failing to conduct an interview with the applicants?
>
> (2) Did the officer properly consider hardship factors through the lens of the H&C program?
>
> (3) Did the PRRA officer fail to be alive, alert and sensitive to the best interests of the child Yuka?

V. Submissions of the parties

A. Standard of review

[26] The respondent submits that the application for judicial review should be dismissed because the officer's decision was reasonable. The applicants, however, submit that not all issues should be reviewed on a standard of reasonableness. The applicants point out that matters of procedural fairness are not owed any deference. The applicants cite *Aslam v Canada (Minister of Citizenship and Immigration*), 2004 FC 514, a pre-*Dunsmuir* case finding procedural fairness to be a question of law. The applicants also submit that the issue of whether the officer applied the proper test in her

H&C decision is also a question of law to which the standard of correctness applies: *Pinter v Canada (Minister of Citizenship and Immigration*) 2005 FC 296 [*Pinter*].

[27] Although the cases cited by the applicants pre-date *Dunsmuir v New Brunswick* 2008 SCC 9, they are correct in stating that the applicable standard of review for these two issues is correctness; however, the standard of review for H&C decisions, in terms of application of the tests to the facts, is reasonableness: *Jung v Canada (Minister of Citizenship and Immigration)* 2009 FC 678 at paras 19 and 20.

(1) Did the PRRA officer breach the rules of procedural fairness by failing to conduct an interview with the applicants?

[28] The applicants acknowledge that, while there is no automatic right to an interview before an H&C decision, officers may be required to hold one at times, particularly when an officer makes an adverse credibility finding. The applicants cite *Alwan v Canada (Minister of Citizenship and Immigration*), 2008 FC 37, a judicial review of an H&C decision where Justice MacTavish found that had the officer made a negative credibility finding (which he had not), it could have triggered a duty on the officer to conduct an interview.

[29] The applicants claim that the officer made two important credibility findings:

1. The first is that the threat against the applicants exists only in Yokohama. The applicants filed evidence that they had relocated to Tokyo, and that Mr. Uo had

located them there and continued to threaten them, which was accepted by the RPD. Despite this, the officer had found that the applicants had never tried to live outside Yokohama and that Mr. Uo would not look for them outside of Yokohama. The applicants argue that the officer cannot overturn the RPD's finding that the applicant was credible without at least holding an oral hearing.

2. The applicants contend that the officer made a second negative credibility finding regarding the applicants' ability to obtain state protection. Ms. Uo testified to her difficulty in obtaining state protection. She claims this is illustrated by the fact that the police agreed Mr. Uo would not be charged in the kidnapping of his daughter and also by the refusal of legal aid office to handle her divorce. Despite this, the officer still found that state protection would be available to the applicants in Japan. The applicants submit that before reaching this negative credibility finding, the officer should have held an interview with the applicants.

[30] The respondent points out that the RPD had not expressly found the applicants credible, but rather accepted their allegations at face value because credibility did not impact the finding of state protection in Japan. Furthermore, while the officer explicitly noted the Immigration and Refugee Board's [IRB] finding that the Ms. Uo had lived and worked in Tokyo, other documents on file indicated that she never left Yokohama. Either way, respondent submits that the officer's decision did not turn on whether the applicants tried to live elsewhere, but whether they tried to obtain protection in another city which is different from the applicants' personal credibility. The respondent points out that where credibility is not central to an officer's decision, a hearing does not

need to be held: *Lewis v Canada (Minister of Citizenship and Immigration*), 2007 FC 778 at para 17.

[31] The respondent points out that there is a presumption that a state is capable of protecting its citizens, and a claimant must first exhaust all possible avenues available in his or her country before seeking international protection: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. The respondent then cites a number of cases that outline the principles for state protection; however, the Court notes that most of them are RPD decisions determining refugee status under s 96 and 97 of *IRPA*.

[32] The respondent states that in the applicants' case, even the local police did not refuse to intervene and provide solutions. Instead, both the officer and the IRB found that the objective documentary evidence clearly showed that the Japanese authorities could provide effective protection to the applicants, and that they had an obligation to make an effort to avail themselves of this protection. The respondent submits that Ms. Uo had herself declared under oath that she "had been unable to obtain local police protection" but "could have probably obtained protection in another city, such as Okinawa, Hokkaido or Tokyo." The applicants therefore did not demonstrate hardship.

[33] In their memorandum of reply, the applicants submit that the H&C process applies different standards than in the refugee protection program. A finding of state protection by the RPD is not determinative of an H&C decision. The applicants state that even if this was not a credibility finding, it is clear the officer ignored all the evidence before her concerning state protection.

(2) Did the officer properly consider hardship factors through the lens of the H&C program?

[34] The applicants outline the factors that the officer must consider in making an H&C decision, which warrants a lower threshold than a PRRA decision. The applicants cite *Pinter*, where Chief Justice Lutfy noted the difference between the two types of decisions at paragraphs 3 and 4:

> [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 ss 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.

[35] The applicants submit that the officer did not properly consider several issues according to this threshold.

[36] The applicants argue that the officer erred in her consideration of the issue of state protection. The RPD had noted the difficulty that the applicants experienced in accessing state protection, but found that state protection was effective according to the standards of s 96 of *IRPA*. The applicants submit that hardship factors that fall short of the threshold in the s 96 and s 97 refugee context are not precluded from being considered under the H&C considerations in the s 25

context. The applicants submit that the challenge of women who are victims of domestic violence in accessing government assistance is a hardship fact in itself, and that country condition documents support this. The applicants cite *Melchor v Canada (Minister of Citizenship and Immigration*), 2004 FC 1327 [*Melchor*], an application for judicial review of an H&C decision where Justice Gauthier wrote, at paragraphs 20 and 21:

> [20] As indicated in the PRRA decision, the situation in Mexico may not amount to a risk under sections 96 and 97 because there was an internal flight alternative and state protection was available against actual mistreatment. But this does not mean that the difficult situation the applicants would face even in larger cities should not be assessed or neglected at all.
>
> [21] I am not satisfied that the officer applied her mind to this subtle difference between what she had to do in evaluating the H & C application as opposed to what she had done in reviewing the PRRA. As she said it herself, the situation that the applicants will face upon their return was a crucial factor in assessing their H & C application. I, therefore, find that the decision in that respect was not reasonable and that this decision is material and it should be set aside.

[37] The applicants also submit that in arriving at her conclusion about Ms. Uo's prospects for employment in Japan, the officer should have addressed the fact that Ms. Uo had been forced to change jobs on several occasions because Mr. Uo had tracked her down and disrupted her ability to work. The applicants state that this shows that Ms. Uo will suffer hardship in trying to find work, despite the fact that she is a hard-working individual.

[38] In addition, the applicants argue that they presented evidence of a lifetime of abuse and threats that continued even since leaving Japan. The officer, however, described this abuse as occurring over a period of time limited to just before the applicants left Japan. The applicants submit that this finding was made contrary to the evidence, and is egregious considering the

scientific literature on domestic violence submitted on the long-term impact of abuse and the high level of fear suffered by victims. The applicants say that this demonstrates that the officer did not properly consider this hardship factor.

[39] The applicants note that the officer did acknowledge the applicants' establishment in Canada, the difficulty faced by single mothers in Japan, and Ms. Uo's psychological trauma and fear in returning to Japan. The applicants argue that while the officer found each element alone was not enough to find sufficient hardship, she never turned her mind to whether the accumulation of these factors would constitute undue or disproportionate hardship, which constituted a reviewable error: *Liyanage v Canada (Minister of Citizenship and Immigration*), 2005 FC 1045 at para 45 [*Liyanage*].

[40] As such, the applicants submit that the officer did not properly consider the hardship factors in making her decision.

[41] The respondent takes the position that the officer was aware of the test to be applied: the officer asked whether the applicants would suffer unusual, undeserved or disproportionate hardship if they were not exempted from the usual requirement to apply for a visa from outside Canada. Furthermore, the officer did consider the hardships named by the applicants, specifically turning her mind to the issue of state protection, finding work in Japan as a single mother, the abuse she suffered and the current threats. In considering these issues, the officer found that they did not constitute hardships. In another argument, the respondent suggests that the applicants' problem is actually one of criminality, and that a lack of personal security does not necessarily equate undue,

undeserved or disproportionate hardship: *Mooker v Canada (Minister of Citizenship and Immigration*), 2008 FC 518 at para 23. The respondent argues that the applicants were required to show they would be personally at risk in Japan, but instead there was nothing about the applicants that would raise their risk beyond that of the rest of the population: *Maichibi v Canada (Minister of Citizenship and Immigration*), 2008 FC 138 at para 21.

[42] The applicants reply to this argument by pointing out that domestic violence is not the same as criminality.

(3) Did the PRRA officer fail to be alive, alert and sensitive to the best interests of the child Yuka?

[43] The applicants submit that the officer failed in considering the best interests of the child, Yuka. In making an H&C decision, an officer must be alert, alive, and sensitive to the best interests of the child, which must be identified, defined, and given substantial weight: *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475.

[44] By dismissing Yuka's fear of returning to Japan, the applicants submit that the officer failed at her duty to be alive, alert, and sensitive to the best interests of the child.

[45] The respondent's position is that the officer conducted a thorough detailed analysis of Yuka's interests, noting that the applicants do not challenge any of the officer's specific findings.

[46] In general, the respondent submits that the officer's decision was reasonable, as it is clear that the officer conducted a thorough and comprehensive analysis of the grounds raised by the applicants, based on all the evidence before her. The respondent further argues that it is not in the Court's place to re-weigh the evidence before an administrative tribunal to come to a different conclusion: *Islam v Canada (Minister of Citizenship and Immigration*), 2005 FC 1422 at para 11.

V. Analysis

[47] In *Nazim v Canada (Minister of Immigration and Citizenship*), 2005 FC 125, Justice Rouleau provides a useful summary of the H&C process, at paragraph 15:

> [15] The humanitarian and compassionate process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home country and whether undue hardship would likely result from removal. The onus is on the applicant to satisfy the officer about a particular situation that exists in their country and that their personal circumstances in relation to that situation make them worthy of positive discretion.

[48] Regarding the first question whether procedural fairness required the officer to provide an interview, the Court agrees with the respondent. The finding of available state protection is not necessarily a finding of credibility. The officer was entitled to take the conflicting evidence before her, including the applicants' testimony, weigh them, and reach a conclusion about whether state protection was available to her. It is not clear to the Court what an interview would have changed in terms of weighing the evidence. As such, the Court does not find that procedural fairness was breached in this manner.

[49] What is important to consider, however, is the manner in which the officer used her finding of state protection. It is important to note that the decision under review was not an RPD decision on refugee protection, but rather a decision on whether the applicants should be exempt on humanitarian and compassionate grounds.

[50] As pointed out by the applicants, the H&C context requires a much lower threshold, one of unusual and undeserved or disproportionate hardship. The fact that the RPD found there was adequate state protection to preclude the applicants from refugee protection does not signify automatically that there is also adequate state protection in the H&C context such that it would preclude hardship. The question is then, what bearing do the RPD's findings have in an H&C decision? *Melchor* suggests that even if a claimant does not face a risk under ss 96 and 97 because of available state protection, an officer must still assess the difficult situation the claimant might face in the context of an H&C decision. The Court also finds it useful to refer to the case *Liyanage*, above cited by the applicants, which looked at the relationship between a PRRA decision and an H&C decision, where Chief Justice Lutfy wrote, at paragraphs 41 and 44:

> [41] In my view, the immigration officer could adopt the factual conclusions in her PRRA decision to the analysis she was making in the H&C application. However, it was important that she apply those facts to the test of unusual and undeserved or disproportionate hardship, a lower threshold than the test of risk to life or cruel and unusual punishment which was relevant to the PRRA decision.
>
> [44] This analysis does not provide the immigration officer's assessment of the relevant facts against the threshold of unusual and undeserved or disproportionate hardship. She erred, in my respectful view, in linking her PRRA decision to "...the context of risk on this H&C application." She was required to assess all the facts in the context of the relevant test for an application for humanitarian and compassionate consideration. She failed to do so. In my view, this constitutes an error of law which requires the Court's intervention.

[51] Subsequent jurisprudence suggests that in as much as the officer examines the issue of state protection from the perspective of whether there was disproportionate hardship, there is no error: *Youkhanna v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 187 at para 4.

[52] The officer did examine the issue of state protection from the H&C perspective, and provided reasons for her conclusion. As for the other hardship factors pointed out by the applicants, such as Ms. Uo’s prospects of employment in Japan as a single mother, the applicants are asking the Court to re-weigh the evidence that was before the officer. The officer explicitly notes the applicants’ concerns, but concludes otherwise, providing reasons for her conclusion, including the fact that the applicant is resourceful and hard-working, and perceptions about single mothers in Japanese society have begun to change.

[53] The Court disagrees with the respondent's lining of argument that the applicants' faced only a risk of criminality that was equally faced by the rest of the population. This unusual line of logic not only ignores the gender-based nature of the applicants' violence but also the facts of the case which showed that the applicants feared a personalized risk from Mr. Uo who specifically targeted them.

[54] Where the Court has difficulty with the officer's reasonableness is whether she adequately considered the best interests of the child, Yuka, when she concluded that it was not contrary to the child's best interests to return to Japan, noting that there was an absence of a psychological report to establish any sequels and fear from the violence when her father kidnapped her in October 2004. Given that the officer did not dispute that this incident and the other incidents of abuse occurred, the Court fails to see why the officer would have required further corroborative evidence in form of a medical report or other. The officer had before her a letter from the child explaining that she did not want to return to Japan because she was afraid of her abusive father. The officer had accepted that the applicants feared the abuse and threats from Mr. Uo. Nowhere in the decision does the officer explain why she believed it would be in the best interests of the child to return to face a father that had abused and kidnapped her. Instead, the officer concludes that the child had proved her ability to adapt, and that Japan was her country of nationality. None of these reasons address the basic and fundamental concerns outlined in Yuka's letter. These should have been properly addressed by the officer and they were not. Therefore, this Court finds that such a conclusion does not demonstrate that the officer was alert, alive, and sensitive to the best interests of the child. Instead, when reading the officer's reasons, the Court concludes that the officer was skirting around the issue of domestic violence, which lies at the heart of the applicants' case.

[55] For theses reasons the Court will allow the application.

[56] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the matter is referred to another immigration officer for re-determination.

2. No question of general importance is certified.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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	Applicants
	and
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	Respondent
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