Federal Court  Cour fédérale

Date: 20110517

Docket: IMM-2276-10

Citation: 2011 FC 564

Ottawa, Ontario, May 17, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**SANG YUN PARK, KYUNG RAN KIM,
DU LE PARK AND A LUM PARK**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), for judicial review of a decision of a pre-removal risk assessment officer (the officer), dated January 28, 2010, wherein the officer refused the applicants' application under subsection 25(1) of the Act to have their application for permanent residence processed from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The applicants request an order setting aside the decision of the officer and remitting the matter back for redetermination by a different officer.

Background

[3] Sang Yun Park, Kyung Ran Kim and their daughters, Du Le Park and A Lum Park (the applicants) are citizens of the Democratic Republic of Korea (South Korea) who entered Canada as visitors on August 22, 2000 and did not leave.

[4] The applicants applied for refugee protection in Canada in March 2005 claiming to fear reprisals from loan sharks in South Korea from whom the female applicant, Kyung Ran Kim had borrowed money to run a business.

[5] The Refugee Protection Division of the Immigration and Refugee Board (the Board) denied the refugee claim finding the applicants' account of running a business and borrowing money not to be credible.

[6] The applicants made a pre-removal risk assessment (PRRA) application in August 2007 and an H&C application in September 2007. These applications were denied by the same officer and the H&C application forms the basis of this judicial review.

Board's Decision

[7] The officer determined that there were not sufficient H&C grounds to warrant an exemption from the requirements of the Act to apply for permanent residence from outside of Canada.

[8] The officer found that the applicants had not established that they would face any personalized risk if returned to South Korea. The officer noted that the Board did not believe that the female applicant had run a business and that the onus was on the applicants to reverse that negative credibility finding. The officer did not find that the documents submitted by the applicants in the PRRA and H&C applications demonstrated that the female applicant ran a business in South Korea.

[9] Regarding establishment in Canada, the officer found that the applicants had not shown that they were financially independent or that they had made efforts to integrate into Canadian society by taking English classes. The applicants' integration into their religious community is not sufficient alone to amount to usual, undeserved or disproportionate hardship if they were removed to South Korea.

[10] The officer then considered the best interests of the children, finding that it is only one factor and it cannot outweigh the others. The officer determined that the daughters had not integrated into Canadian society through "any social involvement" or by forming "a social circle". The officer found that since the parents speak little English, the daughters likely speak Korean at home and therefore would not be at a linguistic disadvantage in South Korea. The officer gave little weight to

a psychological report of A Lum as it was based on one session two years prior to the H&C application assessment. Concerning education, the eldest daughter has completed secondary school and is working to support the family. While two years of secondary school remain for the youngest daughter and corporal punishment exists in the Korean school system, the officer did not consider this to be sufficient in itself to prove that removal would be against the best interests of the youngest daughter.

Issues

[11] The parties agree that the standard of review is reasonableness. Findings of an officer deciding an H&C or PRRA application involve determinations of mixed fact and law and are afforded deference by this Court.

[12] As such, the only issue is whether the officer's decision is reasonable.

Applicants' Written Submissions

[13] The applicants submit that the officer erred in his assessment of their establishment. The officer wrongly discounted their work history for the period when they worked illegally in Canada. In addition, the officer misconstrued the facts in finding that the applicants pay for their daughters' tuition. This affected the finding that the applicants are not financially independent. Finally, the officer ignored documentary evidence of involvement in church and community.

[14] The applicants further submit that the officer was not alert, alive and sensitive to the best interests of the children. The officer was required to provide a contextual and future focused assessment of the children's interests but he failed to understand how the children's lives would change if they were removed to South Korea. The officer also ignored much of the documentary evidence in making his findings. He ignored many letters from the applicants' daughters' friends, teachers and members of their religious community. These letters indicated the girls had many friends and participated in activities at school and through the church. The officer's finding on the psychological evidence was capricious. There was no basis to conclude that A Lum's psychological state had improved and there was no mention of Du Le's psychological state despite evidence on nose bleeds. The officer further erred in accepting that attending school in Korea was not contrary to Du Le's best interests despite prevalence of corporal punishment. Finally, the officer fettered his discretion in stating that the best interests of the children cannot outweigh the other factors.

[15] The applicants also submit that the officer applied the wrong legal test by requiring the applicants to reverse the Board's credibility findings.

Respondent's Written Submissions

[16] The respondent submits that the findings of the officer were reasonable. The onus was on the applicants to adduce the information needed by the officer and it is not the Court's role to reweigh the evidence.

[17] The respondent submits that the establishment findings were reasonable. The officer was entitled to give little positive weight to the period that the applicants worked illegally in Canada since they were not in Canada due to circumstances beyond their control. Likewise, the officer's finding that applicants were not making ends meet was based on their own submissions and was reasonable. Finally, the officer clearly considered the applicants' involvement with their church but did not find it sufficient to amount to unusual or undue hardship if removed to South Korea.

[18] The respondent submits that the officer was alert, alive and sensitive to the interest of the children, even A Lum who is not a child but is 24 years old. The officer employed the correct test for the best interests of the child, namely, that the best interests of the child is an important but not determinative factor. The officer did not err in finding that the daughters had limited integration in Canada as the only evidence on this issue centered on their schooling. The psychological report submitted by the applicants was two years old and it was not an error to give this little weight. Similarly, any evidence that Du Le was traumatized because of the events with loan sharks was reasonably given little weight because the officer did not find the events regarding the loan sharks to be credible. The officer also clearly considered differences in the education systems.

[19] Finally, the respondent submits that the officer was entitled to rely on the negative credibility findings of the Board in reaching his conclusion.

Analysis and Decision

[20] **Issue**

Was the officer's decision reasonable?

The officer reached a decision on the best interests of the children without regard to the evidence before him. The officer stated that the applicant daughters:

> …have not shown, through letters or other documents, that over the course of their nine years on Canadian soil, they have become integrated into Canadian society, be it through any social involvement or by demonstrating that they have formed a social circle.

[21] This analysis was determinative for the officer on the best interests of the children. He stated that:

> …considering the limited integration that the applicants' daughters have shown, I conclude that it has not been demonstrated satisfactorily that it would be contrary to their best interests to return to South Korea with their parents.

[22] However, in contrast to the officer's conclusion, the applicants point to numerous letters which were before the officer showing the daughter's social involvement. Among others, the applicants submitted the following letters:

- A letter from Hae-Jun Lee indicating that she has been friends with A Lum for seven years. The letter mentions a camping trip together and that A Lum teaches at her church (applicants' application record, page 195);

- A letter from Astra Hagoplan, the mother of a friend of Du Le, noting that Du Le and her daughter are very close friends and spend a lot of time together (applicants' application record, page 215);
- A letter from Hwa-Hyun Rhee calling Du Le one of her best friends (applicants' application record, page 194);
- Letters from the principal and a teacher of Seneca Hill Private School which the girls attended stating that both girls were actively involved in extra-curricular activities (applicants' application record, pages 198 and 199);
- A letter from a neighbour of the family which describes Du Le as "hanging out with many friends" (applicants' application record, page 169);
- A letter from a member of Global Village Presbyterian Church indicating that A Lum teaches at the church and that Du Le is very sociable and has lots of good friends at school and church (applicants' application record, page 182);
- Another letter from a member of Global Village Presbyterian Church noting that A Lum teaches at the church and Du Le's friends love her (applicants' application record, page 184);
- A letter from Super Freshmart about A Lum's employment and commendable skills as an employee (applicants' application record, page 193); and
- A letter from a senior Pastor of Global Village Presbyterian Church noting that both daughters attend bible classes and are members of the church choir (applicants' application record, page 270).

[23] An officer considering an H&C application need not refer to all of the documentary evidence before him, provided the decision takes into account any evidence which contradicts its conclusion. Where there is important material evidence that contradicts a factual finding of the officer which is not referred to, this Court can assume that the officer reached his conclusion without regard to the material before him (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No. 1425 (FCTD) (QL) at paragraphs 14 to 17; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA) (QL)).

[24] There was extensive evidence provided by the applicants which contradicts the officer's finding that the daughters had no social circle or social involvement and which was not integrated into the decision.

[25] I agree with the respondent that the best interests of the children are one factor in H&C applications to be weighed against the other relevant factors by the officer and that this Court should not engage in reweighing the evidence (see *Kisansa v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189).

[26] I do not know what decision the officer would have reached had he considered all of the evidence. That decision is for the officer to make, not me.

[27] As stated by the Federal Court of Appeal in *Kisana* above, at paragraph 24:

> . . . an officer is required to examine the best interests of the child "with care" and weigh them against other factors.

[28] For this reason, the officer's decision is not transparent, intelligible and justified as required by the reasonableness standard of review (see *Dunsmuir v New Brunswick*, 2009 SCC 9, [2009] 1 SCR 190 at paragraph 47).

[29] As a result, the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[30] I need not deal with the applicants' arguments with respect to the need for an interview and establishment in Canada.

[31] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[32] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont

country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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