

Federal Court



Cour fédérale

Date: 20110526

Docket: IMM-2459-10

Citation: 2011 FC 596

Ottawa, Ontario, this 26th day of May 2011

Before: The Honourable Mr. Justice Pinard

BETWEEN:

**KIM KOI ENG
WENG HOOI, KHOE**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Officer from Citizenship and Immigration Canada (the “Officer”), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, by Kim Koi Eng and Weng Hooi Khoe (the “applicants”). The

Officer refused the applicants' application from within Canada for permanent residence on humanitarian and compassionate grounds.

[2] The applicants are a married couple from Malaysia. Kim Koi Eng (the "principal applicant") was born on November 28, 1974, and Weng Hooi Khoe was born on December 5, 1981. They have a Canadian-born child, Louis Eng, born on September 24, 2009. The applicants are of Chinese ethnicity and grew up in the Taoist faith.

[3] The applicants arrived in Canada on April 24, 2002, and claimed refugee status on June 14, 2005. They also submitted an application for permanent residence from within Canada on humanitarian and compassionate grounds ("H&C") on July 8, 2005. Their refugee claim was refused on May 18, 2006. On September 3, 2009 they submitted an application for a Pre-Removal Risk Assessment ("PRRA").

[4] The principal applicant has been working as a carpenter at C-Wood Kitchens Inc. in Toronto since December 2005. His spouse also currently works at C-Wood Kitchens as an office clerk. The applicant's affidavit notes that the family has converted to Christianity in the last few years. They have purchased a home.

[5] The negative decision was issued on February 8, 2010. No interview was held.

[6] The standard of review applicable to an Officer's analysis of an H&C application is that of reasonableness, according to Justice Russel Zinn in *Gelaw et al. v. The Minister of Citizenship and*

Immigration, 2010 FC 1120 at para 14. The Officer's decision should therefore be accorded deference.

[7] In their so-called "Memorandum of Facts and Law" the applicants merely state, without arguments, three issues, the first one being related to the test for H&C grounds, the second to the question of risk opinion, and the third to the best interests of the child. In spite of the fact that before me, counsel for the applicants limited his oral argument to the question of the best interests of the child, I will deal with the three issues raised.

[8] First, the applicants submit that the Officer's discretion was fettered by using the "unusual and undeserved or disproportionate hardship" test in order to support his refusal. The Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 at para 23, clearly established that this is the acceptable test for an application on H&C grounds. The Court of Appeal cited the ministerial guidelines established for inland processing, and while noting that the Minister is not bound by the guidelines, emphasized that they are "of great assistance" to the Court (citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). This test was also cited by Justice Denis Pelletier in *Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906 at para 12. The Officer did not err by using this test as the basis for the analysis.

[9] Second, the applicants contend that the Officer erred by refusing to obtain a risk opinion regarding their claim that they will face unusual and underserved or disproportionate hardship. The question is not pertinent to this case. The Officer did not refuse to obtain a risk opinion regarding

the applicants; in fact the applicants were given a risk opinion on December 3, 2009. The Officer specifically noted that the applicants had received an opportunity to address those findings but did not submit any comments.

[10] Third and lastly, the applicants submit that the Officer never considered the best interests of the Canadian child. I find that this allegation is not supported by the record; the Officer explicitly considered the interests of the child.

[11] With respect to the Officer's note that there was no evidence that the child would be unable to accompany the parents should they be returned to Malaysia, other than the submissions of their counsel, it must be remembered that the granting of permanent residence on H&C grounds is discretionary. It is up to the applicants to show that their situation warrants this extraordinary remedy and to provide evidence in support of their application (*Serda v. The Minister of Citizenship and Immigration*, 2006 FC 356 at para 20). The applicants did not submit any further evidence regarding their assertion. In the absence of supporting evidence, I cannot find any error in the Officer's decision.

[12] At the hearing before me, counsel for the applicants attempted to raise an issue related to the best interests of the child based on facts and foreign law which were not before the Officer and which were not supported by evidence before me, other than the mere allegation made by the applicant Kim Koi Eng in paragraph 12 of his affidavit dated May 17, 2010. I agree with counsel for the respondents that this unsubstantiated allegation ought not to be considered in this application for judicial review.

[13] For the above-mentioned reasons, I am satisfied that the impugned decision is reasonable and the application for judicial review is dismissed. I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of a decision of an Officer from Citizenship and Immigration Canada, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, refusing the applicants' application from within Canada for permanent residence on humanitarian and compassionate grounds is dismissed.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-2459-10

STYLE OF CAUSE: KIM KOI ENG
WENG HOOI, KHOE
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 27, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** Pinard J.

DATED: May 26, 2011

APPEARANCES:

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Ms. Veronica Cham FOR THE RESPONDENTS

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