Federal Court  Cour fédérale

Date: 20181217

Docket: IMM-2182-18

Citation: 2018 FC 1274

Ottawa, Ontario, December 17, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CHANGSUK SHIN
SUYEON KIM
MINCHAE KIM
MINJUN KIM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of an Immigration Officer [the Officer], refusing the Applicants' application for permanent residence from within Canada on

humanitarian and compassionate [H&C] grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] As explained in more detail below, this application is allowed, because I have found that the Officer erred in analyzing the best interests of the affected children by failing to consider the effects on the children of the adult Applicants' risk of suicide if returned to their country of origin.

II. **Background**

[3] The adult male Applicant, Changsuk Shin, was born in North Korea in 1970. He was twice repatriated by China to North Korea, where he says he experienced torture and imprisonment. He eventually made his way to South Korea in 2002 and became a citizen there. In 2012, he entered Canada, along with his ex-wife and the child of his first marriage, who are not parties to this application. They made refugee claims under false identities, failing to disclose their South Korean citizenship. Their identities were discovered prior to their hearing and their claims were rejected in 2014.

[4] The adult female Applicant, Suyeon Kim, was born in North Korea in 1977. She escaped North Korea for China in 2003, but was deported back to North Korea in 2005 where she says she was also detained and tortured. She escaped again and arrived in South Korea in 2007. The minor Applicants are her eldest daughter, Minchae Kim, born in China in 2003, and her son, Minjun Kim, born in South Korea in 2009. Ms. Kim and the minor Applicants arrived in Canada in 2011. They also applied for refugee status with false identities, failing to disclose that they

were South Korean citizens. Their claim was accepted in 2012, and they applied for permanent residence later that year. That application was refused in December 2017, and they are currently the subjects of an application to vacate their refugee status.

[5] In 2015, Mr. Shin and Ms. Kim met in Canada and became common-law spouses. They have a child together, Zoe Lee, who was born in Canada in October 2016.

[6] In 2017, Mr. Shin was arrested by Canada Border Services Agency [CBSA]. On December 21, 2017, the family applied for permanent residence based on H&C considerations, and on April 25, 2018, the Officer rendered the decision that is the subject of this application for judicial review.

III. **Decision under Review**

[7] The following is a summary of the Officer's reasons for refusing the Applicants' H&C application, employing the principal headings that appear in the decision.

A. *Establishment in Canada*

[8] The Officer first considered Mr. Shin's establishment in Canada, taking into account letters of support he had submitted. However, the Officer observed that there was no evidence that Mr. Shin had stable long-term employment in Canada, or that he had completed any English or French classes, and that there were no personal support letters from friends or neighbours. Although noting that Mr. Shin had been diagnosed with Post-Traumatic Stress Disorder [PTSD]

and Major Depressive Disorder [MDD], which may have affected his level of establishment, the Officer gave Mr. Shin's establishment in Canada little weight in the H&C analysis.

[9] Turning to Ms. Kim's establishment, she had not provided evidence that she had been employed in Canada since her arrival or that she had completed any English or French language classes. She also had no letters of personal or community support. The Officer observed that, like Mr. Shin, Ms. Kim met the criteria for MDD and PTSD, and this may have hindered her establishment, but found that her negligible level of establishment was a negative consideration to be given some weight.

B. *Best Interests of the Children*

[10] The Officer noted that the minor Applicants had spent considerable portions of their youth in Canada, that most of their education had taken place here, and that they have adapted and are performing well in Canada. The Officer also recognized that, if they were to return to South Korea, they may be bullied or discriminated against because of their lack of fluency in Korean and their parents' North Korean ethnicity. Observing that Minchae was ostracized and bullied so severely in South Korea that she dropped out of school by grade two, the Officer found that it was in the minor Applicants' best interests that the H&C application be approved.

[11] Similarly, the Officer found that it was in Zoe's best interest that the application be approved. Given her young age, she could likely adapt to South Korean society and culture and had no significant social ties in Canada or health conditions that would require treatment in

Canada. However, the Officer found that Zoe could face bullying and discrimination similar to that which Minchae had experienced as a result of having North Korean parents in South Korea.

[12] The Officer gave considerable weight to the finding that it was in the best interests of the children [BIOC] that the H&C application be approved.

C. *Hardship in South Korea*

[13] The Officer found there was little evidence to support fears alleged by Mr. Shin, that he would be harassed and taken by North Korean spies in South Korea. However, the Officer accepted that there may be negative impacts on the adult Applicants' mental health, including a possible risk of suicide, if they were required to return to South Korea. Recognizing that mental health issues are stigmatized in South Korea and that there is discrimination against women and widespread societal discrimination against North Korean defectors in South Korea, the Officer found that the adult Applicants would likely suffer hardship if forced to return there and gave this consideration "ample weight."

D. *Adverse Immigration History*

[14] The adult Applicants had provided false names, dates of birth and places of birth in their refugee claims and deliberately concealed their South Korean citizenship, their lengthy previous residence in South Korea, and their route to Canada, in order to advance their refugee claims. The Officer noted that Mr. Shin had apologized for lying about his identity, explaining that he was afraid of being discovered by North Korean intelligence, which could have a negative

impact on his family still in North Korea, and that he was advised by the community to hide his South Korean citizenship. However, the Officer also observed that Mr. Shin was not forthcoming about his fraudulent identity until his refugee hearing.

[15] The Officer noted counsel's submissions that Ms. Kim came forward voluntarily with her and her children's true identities in the H&C application, but found that she likely would have had some suspicion that there was an issue with her permanent residence application when it had been pending for over half a decade. Regardless, the Officer observed that it took her over six-and-a-half years before deciding to come forward with her true identity.

[16] The Officer also noted counsel's submissions that the adult Applicants were following the advice of their brokers and community, and that they likely had traumatizing interactions with law enforcement and government officials in North Korea, South Korea and China, but found that the circumstances of their misrepresentation were entirely within their control. The Officer concluded that the Applicants' dishonesty about their identities to immigration was a serious and significant negative consideration, to be given substantial weight.

[17] In addition, Mr. Shin had failed to appear for an interview with CBSA in January 2015 and was the subject of an outstanding immigration warrant for a period of over two years before he was arrested. The Officer noted Mr. Shin's argument that he was dealing with his mental health issues when he lost contact with CBSA, but also that he had over two years to update his address or voluntarily present himself, and concluded that these actions were a serious negative

consideration which demonstrated Mr. Shin's failure to comply with law enforcement and his pattern of failing to obey immigration laws of Canada.

E. *Conclusion*

[18] The Officer found that the "crux" of the H&C decision was the Applicants' adverse immigration history. Even taking into account the BIOC affected, the Officer did not find the positive factors supporting an approval to outweigh the adult Applicants' low level of establishment in Canada and the serious and significant negative considerations arising from their flouting of Canada's immigration laws. The Officer therefore refused the application.

IV. **Issues and Standard of Review**

[19] The Applicants raise the following issues for the Court's consideration:

A. Whether the Officer erred in failing to be alert and sensitive to the best interests of the three children;

B. Whether the Officer erred in minimizing the Applicants' establishment in Canada; and

C. Whether the Officer's global assessment of the H&C considerations was unreasonable.

[20] The parties agree, and I concur, that the applicable standard of review is reasonableness.

V. **Analysis**

[21] My decision to allow this application for judicial review turns on the first issue raised by the Applicants, related to the Officer's consideration of the BIOC. Specifically, I agree with the Applicants' submission that the Officer failed to take into account a significant factor, identified in the evidence provided by the Applicants in support of their H&C application, relevant to the BIOC. Mr. Shin was assessed by a psychiatrist, Ms. Kim by a psychologist, and, while the reports of the two professionals differ, each diagnoses mental health conditions and a risk of suicide resulting from return to South Korea. The opinion of the psychiatrist who assessed Mr. Shin is particularly pointed, expressing concern that he will be at a high risk of committing suicide if required to return to South Korea.

[22] In their submissions in support of the H&C application, the Applicants raised the risk to the adult Applicants' mental health, and in particular their risk of suicide, as compromising their ability to parent their children and therefore as a factor to be taken into account in assessing the children's best interests. However, the Officer's decision does not demonstrate any consideration of this factor in this context.

[23] The Respondent submits that the Officer did not err in placing little weight on the psychiatric reports, as the reports were prepared at the request of counsel for purposes of the H&C application, based on one meeting with each of the adult Applicants, they do not prescribe medication or schedule therapy, and they are not supported by documentation about other regular mental health consultations. In response, the Applicants note that the H&C application included

an affidavit sworn by Mr. Shin which stated that he has been seeing a psychiatrist and a counsellor on a monthly basis, and taking medication, since 2013.

[24] More significantly, I agree with the Applicants' submission that the Officer accepted the conclusions in the psychiatric reports. This is not a case where the Officer gave the reports little weight because of the sort of factors identified in the Respondent's submissions. Rather, the Officer expressly accepted, based on the evidence, that there may be negative impacts on the adult Applicants' mental health, including a possible risk of suicide, if they have to return to South Korea. However, despite the Applicants' submissions on this point in support of the H&C application, the Officer failed to take these factors into account in assessing the impact upon the children if the family were returned to South Korea.

[25] The Respondent takes the position that this argument by the Applicants cannot give rise to a reviewable error in the Officer's assessment of the BIOC, as that assessment was favourable to the Applicants. The Officer found that it was in the children's best interests that the application be allowed and gave that factor considerable weight. The Respondent therefore submits that the Applicants are simply taking issue with the weight given by the Officer to this factor and that it is not the Court's role to reweigh the factors relevant to an H&C decision.

[26] I disagree with this characterization of the Applicants' argument. While the Respondent is of course correct that the Court cannot reweigh the factors considered by the Officer, the issue identified by the Applicants is the failure of the Officer to consider information relevant to the

BIOC. To the extent that such failure may affect the weight assigned to the BIOC, it is appropriate for the Court's consideration on judicial review.

[27] A similar error was identified by Justice McVeigh in the recent decision in *Montalvo v Canada (Citizenship and Immigration)*, 2018 FC 402 [*Montalvo*]. As in the present case, the officer considering the H&C decision that was under review in *Montalvo* found that it was in the children's best interests to remain in Canada with their parents and gave this factor significant weight. However, there was medical evidence in *Montalvo* to the effect that the mental health of the children's father would deteriorate if the family was removed to Mexico, and at paragraph 30 Justice McVeigh explained as follows that this was an important factor relevant to the BIOC that had not been analysed:

> [30] Given that there was evidence in the medical report (as seen above), an important BIOC factor was not analysed. Despite the finding the BIOC was a positive factor, the Officer failed to analyse the hardship the children would face if the family was deported to Mexico while their father suffers from PTSD. It is important for the Officer to give each factor the appropriate weight so that they can be reasonably balanced. Since the decision could be affected by giving these factors different weight, I find this decision is unreasonable.

[28] As in the present case, the BIOC factor in *Montalvo* favoured the applicants and was given considerable weight by the officer considering their H&C application. However, the Court recognized that such weight might differ as a result of consideration of the effect upon the children of the deterioration in their parent's mental health that could result from return to their country of origin.

[29] Similarly, I find the absence of such an analysis in the case at hand undermines the reasonableness of the decision and therefore represents a reviewable error. This application for judicial review must therefore be allowed, and it is unnecessary for the Court to consider the other arguments raised by the Applicants.

[30] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2182-18

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to a different officer for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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