Date: 20010202
Docket: IMM-434-00
Citation: 2001 FCT 7

BETWEEN:

CHUNG JA LEE, JIHYUN LEE, JINA LEE & JAE HONG KIM

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HANSEN J.

INTRODUCTION

[1] This is an application for judicial review of the January 11, 2000 decision of a Citizenship and Immigration Counsellor pursuant to subsection 114(2) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("Act") denying the applicants an exemption from the requirement to apply for permanent residence from outside Canada.

BACKGROUND

[2] The principal applicant is a twice-widowed mother of three children, aged 22, 20, and 12. All are citizens of South Korea. They arrived in Canada on September 2, 1994 as visitors, seeking respite from her abusive second husband, who has since died. Their visitor's visas were valid until December 2, 1995.

[3] Although the family neither applied for nor received extensions to their visitors visas, they remained in the country beyond their expiration. As a result, on May 1, 1996, the Minister commenced the process of removing them from Canada.

[4] At that time, the applicant made a Convention refugee claim on behalf of herself and her three children, but that application was denied on September 11, 1998. The applicant made no Post Determination Refugee Claim submissions, but on November 6, 1998, applied for exemption from the requirement to apply for permanent residence from outside Canada on humanitarian and compassionate grounds. This application was denied on January 11, 2000, and the applicant now seeks judicial review of that negative decision.

[5] The applicant submits that she and her family are now settled in Canada; she has had a job since 1998, first at Gaia Foods, then at Sandwich Village, and her daughters are full-time students who also have part-time jobs. Along with their mother, the girls sing in the Korean Lutheran Church Choir. Her son is a primary school student and a goalie on his local hockey team.

[6] The applicant submits that returning to South Korea would cause her significant hardship, since it is a superstitious society, and as a twice widowed woman, she would be considered “unlucky”. She states this status would cause her to be shunned and would negatively affect her daughters’ marriage prospects. She further states her second husband died in debt, and if she were to return, she may have to pay back the money owed by her late husband, failing which, she could be subject to a jail sentence.

[7] In support of her application, the applicant submitted an article hand copied from an internet site belonging to the Women’s Studies Department at Shin-La University, which speaks of the social status of widowed and divorced women in South Korea.. The applicant submitted no evidence as to any debt left by her former husband.

THE DECISION UNDER REVIEW

[8] The counsellor found these circumstances did not warrant an exemption, since the applicant’s and her family’s employment, school, and social ties to Canada were not sufficient evidence of establishment so as to cause any or too much hardship if they were required to apply for landing from outside Canada. He also considered that the applicants have close relatives living in South Korea, that they need no longer fear abuse from her deceased husband, that they have no close relationship with their two relatives living in Canada, and that, even taking into account the article submitted, there is no conclusive evidence that as a widow, the principal claimant will face stigma or discrimination, let

alone a more severe sanction in South Korea. Further, there was no evidence of any outstanding debt for which the applicant might be found liable.

STANDARD OF REVIEW

[9] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 62, Madam Justice L'Heureux-Dubé addresses the standard of review when the Court is asked to consider challenges to humanitarian and compassionate decisions such as this one:

> ... I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court-Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

[10] At paragraph 63, *Baker, supra* refers to the Supreme Court of Canada decision in *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, where Iaccobucci J. explains this standard as follows:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination...

[11] In this case, then, this Court must satisfy itself that the counsellor's decision can sustain its scrutiny for a defect or defects

that would render the decision unreasonable, and therefore subject to intervention.

DISCUSSION

[12] This matter turns on the central issue of whether in assessing the applicants' application, the counsellor applied an appropriate standard of undue hardship.

[13] In reaching the decision, the counsellor considered the guidelines in the Inland Processing Manual and the applicants' personal circumstances with respect to family, employment, school, and social ties to Canada, as well as the article the applicant submitted regarding the status of divorced and widowed women in South Korea. In light of these submissions, the counsellor considered the risks the applicants would face if required to apply for landing from South Korea.

[14] Undue hardship involves a high threshold and inconvenience itself is not enough. As a starting point for considering this threshold, the respondent refers to the Inland Processing Manual ("Manual") as follows:

> The following definitions are not meant as “hard and fast” rules; rather, they are an attempt to provide guidance to decision makers when they exercise their discretion in determining whether sufficient H & C considerations exist to warrant the requested exemption from A9(1).

Unusual and undeserved hardship

The hardship (of having to apply for an immigrant visa from outside Canada) that the applicant would face should be, in most cases, unusual. In other words, a hardship not anticipated by the Act or Regulations, and

The hardship (of having to apply for an immigrant visa from outside Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person’s control.

Disproportionate hardship

> Humanitarian and compassionate grounds may exist in cases that would not meet the “unusual and undeserved” criteria but where the hardship (of having to apply for an immigrant visa from outside Canada) would have a disproportionate impact on the applicant due to his or her personal circumstances.(Citizenship and Immigration, Inland Processing Manual, page 13)

[15] Counsel for the applicants and the respondent cite the above definitions of the standard of hardship.

[16] The respondent further submits that when the claimed hardship is based on alleged personalized risk in the home country, the risk must be identifiable, personal, grave and likely to occur. The Manual states:

> Positive consideration may be warranted for persons who would face an objectively identifiable personalized risk if removed from Canada. The risk may be to the applicant's life or it may involve severe sanctions such as unwarranted imprisonment or inhumane treatment such as torture. There are varying degrees of risk. Generally, the risk should be greater than a mere possibility and yet may be less than a 'balance of probabilities'.

[17] Counsel for the applicants submits her case falls squarely within the parameters described in the Manual for several reasons: the discrimination facing her is unusual by virtue of her unusual status as a twice-widowed woman in a very suspicious society; the discrimination arises out of circumstances beyond her control; and the requirement that she and her family return to South Korea would have a disproportionate impact.

[18] The respondent states that in the end, the counsellor considered the evidence and the circumstances against the meaning of undue hardship, arriving at the conclusion the applicants do not face a situation that would constitute undue hardship. The respondent relies on *Espena v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 188 (F.C.T.D.) for the principle that this finding is entitled to the Court's deference.

CONCLUSION

[19] In the result, and after a careful review of the impugned decision and the parties' submissions, I am unpersuaded the counsellor's finding is unreasonable. The counsellor considered the evidence, weighed it against the meaning of undue hardship, and exercised discretion accordingly.

[20] While this Court acknowledges that upon her return to South Korea, the applicant and her daughters may well be faced with unpleasant social repercussions as a result of her having been twice-widowed, the counsellor has concluded and it is not for this Court to substitute its own decision, that they would not face undue hardship.

[21] While this Court is sympathetic to the applicants' situation and impressed by counsel's passionate advancement of their position, I see no grounds upon which this Court could overturn the counsellor's decision. In my view, the counsellor has exercised his discretion reasonably, taking into account all the relevant circumstances.

[22] The counsellor's negative decision neither prohibits nor precludes the applicant and her children from returning to Canada. They are being asked to comply with the statutory requirement that they apply for permanent resident status from outside the country. It may be less than convenient, but at the same time, in the words of Lemieux J. at paragraph 39, in *Mayburov v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 953:

> ...a H&C application in this context cannot be a back door when the front door has, after all legal remedies have been exhausted, been denied in accordance with Canadian law.

[23] For these reasons, the application for judicial review is dismissed.

"Dolores M. Hansen"
J.F.C.C.

OTTAWA, ONTARIO
February 2, 2001