Date: 20070802

Docket: IMM-4494-06

Citation: 2007 FC 812

Ottawa, Ontario, August 2, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

YOUNG HWAN KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer of the Canadian Embassy in Seoul, Korea dated June 23, 2006, which denied the applicant's application for a permanent resident visa under the skilled worker class.

BACKGROUND

[2] The applicant was assessed under subsection 75(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Based on the selection criteria set out in the Regulations, he was assessed 64 points, or 3 points short of the 67 point minimum requirement.

Accordingly, the immigration officer was not satisfied that the applicant would be able to become economically established in Canada.

[3] The applicant was assessed 5 points out of a possible 10 points under the "adaptability" criterion established under subsection 83(1) of the Regulations. The immigration officer stated in the decision letter under review that no points were assessed in respect of the applicant's claim under paragraph 83(1)(d) "for being related to a person living in Canada who is described in subsection (5)":

> Please note that no points were award for relatives in Canada since you have failed to show that your daughters are residing in Canada.
>
> [Emphasis added]

[4] The applicant argues that the immigration officer erred in not assessing 5 points for adaptability on the basis of his daughters' presence in Canada. According to the applicant, the immigration officer fettered her discretion by requiring that the applicant's daughters "reside" in Canada rather than "live" in Canada as required under the Regulations.

ISSUE

[5] At issue in this application for judicial review is whether the immigration officer erred in denying the applicant's application for a permanent resident visa under the skilled worker class.

RELEVANT LEGISLATION

[6] The legislation relevant to this application is the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. In

particular, the following provisions of the Regulations govern the assessment of the applicant's application for a permanent resident visa:

Class

75. (1) For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec. […]

Selection criteria

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:
(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,
(i) education, in accordance with section 78,
(ii) proficiency in the official languages of Canada, in accordance with section 79,
(iii) experience, in accordance with section 80,
(iv) age, in accordance with section 81,
(v) arranged employment, in accordance with section 82, and
(vi) adaptability, in accordance with section 83; and
(b) the skilled worker must
(i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or
(ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in

Catégorie

75. (1) Pour l'application du paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec. […]

Critères de sélection

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :
a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :
(i) les études, aux termes de l'article 78,
(ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,
(iii) l'expérience, aux termes de l'article 80,
(iv) l'âge, aux termes de l'article 81,
(v) l'exercice d'un emploi réservé, aux termes de l'article 82,
(vi) la capacité d'adaptation, aux termes de l'article 83;
b) le travailleur qualifié :
(i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille,
(ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).

Canada within the meaning of subsection 82(1).
[…]

Adaptability (10 points)

83. (1) A maximum of 10 points for adaptability shall be awarded to a skilled worker on the basis of any combination of the following elements:
(a) for the educational credentials of the skilled worker's accompanying spouse or accompanying common-law partner, 3, 4 or 5 points determined in accordance with subsection (2);
(b) for any previous period of study in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;
(c) for any previous period of work in Canada by the skilled worker or the skilled worker's spouse or common-law partner, 5 points;
(d) for being related to a person living in Canada who is described in subsection (5), 5 points; and
(e) for being awarded points for arranged employment in Canada under subsection 82(2), 5 points.

[…]

Family relationships in Canada

83. (5) For the purposes of paragraph (1)(d), a skilled worker shall be awarded 5 points if
(a) the skilled worker or the skilled worker's accompanying spouse or accompanying common-law partner is related by blood, marriage, common-law partnership or adoption to a person who is a Canadian citizen or permanent resident living in Canada and who is
(i) their father or mother,
(ii) the father or mother of their father or mother,
(iii) their child,
(iv) a child of their child,
(v) a child of their father or mother,
(vi) a child of the father or mother of their father or mother, other than their father or mother, or

[…]

Capacité d'adaptation (10 points)

83. (1) Un maximum de 10 points d'appréciation sont attribués au travailleur qualifié au titre de la capacité d'adaptation pour toute combinaison des éléments ci-après, selon le nombre indiqué :
a) pour les diplômes de l'époux ou du conjoint de fait, 3, 4 ou 5 points conformément au paragraphe (2);
b) pour des études antérieures faites par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;
c) pour du travail antérieur effectué par le travailleur qualifié ou son époux ou conjoint de fait au Canada, 5 points;
d) pour la présence au Canada de l'une ou l'autre des personnes visées au paragraphe (5), 5 points;
e) pour avoir obtenu des points pour un emploi réservé au Canada en vertu du paragraphe 82(2), 5 points.

[…]

Parenté au Canada

83. (5) Pour l'application de l'alinéa (1)d), le travailleur qualifié obtient 5 points dans les cas suivants :
a) l'une des personnes ci-après qui est un citoyen canadien ou un résident permanent et qui vit au Canada lui est unie par les liens du sang ou de l'adoption ou par mariage ou union de fait ou, dans le cas où il l'accompagne, est ainsi unie à son époux ou conjoint de fait :
(i) l'un de leurs parents,
(ii) l'un des parents de leurs parents,
(iii) leur enfant,
(iv) un enfant de leur enfant,
(v) un enfant de l'un de leurs parents,
(vi) un enfant de l'un des parents de l'un de leurs parents, autre que l'un de leurs parents,

(vii) a child of the child of their father or mother; or	(vii) un enfant de l'enfant de l'un de leurs parents;
(b) the skilled worker has a spouse or common-law partner who is not accompanying the skilled worker and is a Canadian citizen or permanent resident living in Canada.	b) son époux ou conjoint de fait ne l'accompagne pas et est citoyen canadien ou un résident permanent qui vit au Canada.

[Emphasis added]

STANDARD OF REVIEW

[7] The applicant's challenge to the immigration officer's decision stands or falls depending on the proper interpretation of paragraph 83(1)(d) of the Regulations and, in particular, whether the immigration officer erred in determining that the applicant's daughters did not "reside" in Canada. With respect to this issue of statutory interpretation, the Court will review the immigration officer's application of the law on a correctness standard. With respect to the immigration officer's application of the law to the facts of this case, the Court will apply a standard of reasonableness.

ANALYSIS

[8] The applicant applied for a permanent resident visa in May 2004. His first daughter was born in Canada on May 9, 1994. His second daughter was born in Canada on June 20, 1995. According to the applicant, his first daughter's residence record is as follows:

Canada	May 1994 – January 1996
Korea:	January 1996 – October 2001
Canada	October 2001 – December 2004
Korea:	January 2005 – May 15, 2006

Canada May 16, 2006 – date of decision

[9] At the time of his application, the applicant's first daughter lived in Canada. However, she returned to Korea for 17 months beginning in 2005. When the respondent's assessment of the applicant's application was started on May 31, 2006 and made on June 23, 2006, the applicant's daughter was in Canada.

[10] On February 28, 2006, the Canadian Embassy requested that the applicant provide copies of his daughters' passports and certificates of exit and entry issued by Korean immigration authorities. The respondent states that this information was requested to determine the whereabouts of the applicant's children. The respondent noted that the applicant and his wife had returned to Korea in December 2004 and speculated that his children no longer lived in Canada.

[11] The Embassy repeated its request for documentation on May 8, 2006. By letter dated May 7, 2006 and received by the Embassy on May 12, 2006, the applicant requested an extension until June 2006 to submit the requested documents. The immigration officer suspected that the applicant was attempting to delay the processing of his application and refused the applicant's request for an extension on May 15, 2006.

[12] On May 26, 2006, the Embassy contacted the applicant to inform him that he had ten days to provide the requested documents. The applicant's wife received the telephone call and informed the Embassy that the applicant was in Canada. The Embassy confirmed the applicant's presence in

Canada by referring to Citizenship and Immigration Canada's electronic database. According to the port of entry notes, the applicant was visiting Canada with one of his Canadian daughters to look for schools.

[13] On June 9, 2006, the immigration officer refused the applicant's application for a permanent resident visa based on non-compliance and insufficient points. The immigration officer was later advised that the Embassy received from the applicant the requested documents on June 7, 2006. Because the documents were submitted before the immigration officer's decision dated June 9, 2006, the immigration officer re-opened the applicant's file and reviewed the additional documents submitted.

[14] According to the certificate of entry and exit from the Korean immigration authorities, the applicant's daughters returned to Korea on December 30, 2004. One of the two daughters travelled with the applicant to Canada on May 16, 2006 to look for schools.

[15] The respondent argues that the immigration officer did not award additional points for relatives living in Canada under subsection 83(5) of the Regulations because he was not satisfied that they were living in Canada. In its written submissions, the respondent argued that the immigration officer took into account the fact that the applicant's daughters returned to Korea in December 2004 and had been living in Korea, they were not attending school in Canada, and that the applicant delayed submission of the documents until he went to Canada with one of his daughters to look for schools.

[16] The applicant referred to the respondent's Operating Procedures concerning federal skilled workers, which, although not binding on this Court, are useful as an interpretive aid in applying paragraph 83(1)(d) of the Regulations. The manual states in part:

> Points for […] relatives in Canada are awarded only once – either to the principal applicant or the spouse or common-law partner, but not to both. Pursuant to R77, these requirements and criteria must be met at the time the application is made, as well as at the time the visa is issued. Therefore […] if the applicant or their spouse or common-law partner completes further study, works in Canada, arranges employment in Canada, or gains relatives in Canada between application and assessment, and submits the necessary documentation, points must be awarded accordingly.
>
> [Emphasis added]

[17] There is no dispute that the applicant's daughters lived in Canada when he applied for a permanent resident visa. The only issue is whether the applicant had relatives living in Canada when his application was assessed.

[18] In the affidavit of the applicant before the Court sworn August 25, 2006, the applicant deposes in paragraphs 26, and 27:

> 26. My first daughter (Miriam M. Kim who is a Canadian citizen) came back to Canada on May 16th, 2006, and was living in Canada in June 2006 at the time when the officer made the decision, and would have been residing in Canada at the time the visa is issued (now shown to me and attached to this affidavit as Exhibit "M").
>
> 27. My daughter is still living in Canada as of August 25th, 2006.

[19] In my view, the immigration officer may have erred in concluding that the applicant's daughter did not live in Canada when the applicant's application was assessed. As a citizen of

Canada, the applicant's daughter has the right to enter and remain in Canada. The applicant states that his daughter returned to live in Canada on May 16, 2006. Based on the evidence before the immigration officer at the time of assessment the immigration officer believed the daughter was only in Canada until June 30, 2006. On these facts it was not unreasonable to conclude that the applicant's daughter was not living in Canada. It is clear that the applicant, who was accompanying his daughter to look for schools in Canada, was visiting Canada as a foreign national. However, the fact that the applicant's daughter was in Korea from December 2004 to May 16, 2006 and did not attend school in Canada during that period does not reasonably lead to the conclusion that she was not living in Canada when the applicant's application was assessed on June 23, 2006, especially in view of the evidence before the Court that the daughter did not leave Canada on June 30, 2006 as the visa officer assumed she would.

[20] The Court is of the view that the proper course is to have this application reassessed with the correct evidence about the daughter's time in Canada during this period. The Court is satisfied that a skilled worker applicant is entitled under paragraph 83(1)(d) to 5 points for being related to a person living in Canada which includes a minor daughter. The meaning of "living in Canada" obviously means more than a person who is visiting Canada for a temporary purpose. In this case the daughter has lived in Canada, has gone to school in Canada, and the visa officer needs to understand all of the facts with respect to her being in Canada at the time the application was assessed in order to determine whether she qualifies as a "Canadian citizen living in Canada" for the purposes of subparagraph 85(5)(a)(iii).

[21] For the reasons above, this application for judicial review is allowed. The applicant's application for a permanent resident visa is returned for reconsideration by a different immigration officer.

[22] Neither party proposes a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The applicant's application for a permanent resident visa is returned for reconsideration by a different immigration officer.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4494-06
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