Date: 20080129

Docket: IMM-345-07

Citation: 2008 FC 116

BETWEEN:

SHIN KI KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] These are the Reasons for my decision rendered from the bench in which the judicial review was granted. The decision under review is a negative H&C decision. The first negative H&C decision in this case had been overturned on review and sent back for reconsideration. (*Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1357)

II. FACTS

[2] Pastor Kim, a citizen of South Korea, came to Canada in 1991 with his wife and two infant children, Ji Woong (now 22) and Ji Myung (now 18). Pastor Kim is a Presbyterian minister and currently works at the Milal Mission, an organization which provides support to physically and intellectually-challenged youth in the Korean community.

[3] Ji Woong is a developmentally-challenged young man; his brother is not. Both have lived almost all their lives in Canada.

[4] The Applicant had filed both an application for permanent residence and an H&C application, both of which were decided by the same officer. Although Pastor Kim qualified for permanent residence under the skilled worker category, the permanent residence application was denied on the basis of Ji Woong's medical inadmissibility.

[5] With regard to the H&C application, it was denied on the grounds of insufficient evidence as to the plans for the long-term care of the developmentally-challenged Ji Woong and on the grounds that Ji Myung had not established that he could not speak enough Korean and thus would not have been able to function at all in South Korea.

III. ANALYSIS

[6] With respect to Ji Woong, a psychologist's report had been filed detailing the extent of his disability and considering some aspects of long-term prognosis and care. That report was not contained in the Certified Tribunal Record and the Respondent admitted that it had never been reviewed by the officer deciding this matter. It was sent to Ottawa's Medical Services who sent a report – at least that Medical Services report was in the Record.

[7] The Respondent says that the psychologist's report did not have to be considered by the officer; it was sufficient that Medical Services considered it and confirmed medical inadmissibility.

[8] The psychologist's report is a key piece of evidence. It addresses more than immediate issues and its discussion about future care dovetails somewhat into the functions of the Milal Mission. It is not sufficient for the officer to ignore the report on the basis that someone else (e.g. Medical Services) would deal or had dealt with it. The officer did not consider the nature and extent to which Ji Woong would draw on Canadian social services now or in the future.

[9] The Applicant has been in Canada for 14 years under visa status. Since at least 2001, the Respondent knew of the developmentally-challenged child and yet continued to renew the visas at least four times. There was no evidence that the Applicant had misled the Respondent, either before or after 2001, so the suggestion by the Respondent that the Applicant was here under questionable status is at best unfounded.

[10] With respect to the “best interests of the child”, regarding Ji Myung, if he is returned to South Korea, he has an insufficient grasp of Korean to enter university or to obtain a job other than manual or menial labour. While the facts in Justice Kelen’s decision dealing with another Kim family are different (*Kim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1088), the principle established there of requiring the officer to consider language difficulties is applicable here. The officer was dismissive of the language problems which Ji Myung would face.

[11] For these two reasons - failure to consider the psychologist’s report and failure to properly consider language issues - this judicial review is granted.

[12] The Applicant cannot make out a case that the officer performed a hurried review of the seven-volume file in one day. The evidence does not support such an allegation.

[13] The Applicant cannot establish an error in the Respondent’s failure to grant general discretionary relief under s. 25 and “any other provisions of law”. It was incumbent on the Applicant to establish which discretionary power is to be engaged and to provide reasons and evidence to support the requested grant of Ministerial discretion.

IV. CONCLUSION

[14] The judicial review is granted, the Respondent's decision quashed and the applications remitted to a new officer for a fresh decision on a new or amended application. This is the second successful judicial review. The Court expects that any new or revised applications will be treated on a reasonably expeditious basis outside the usual processing delays. This will be a term of the judgment upon which the Applicant may enforce. There is no question for certification.

"Michael L. Phelan"
Judge

Ottawa, Ontario
January 29, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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