Federal Court  Cour fédérale

Date: 20100727

Docket: IMM-5190-09

Citation: 2010 FC 782

Ottawa, Ontario July 27, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HYUN JOO PARK

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision made on August 18, 2009 by a visa officer of the Immigration Section at the Canadian Consulate General in New York, New York, refusing the applicant's application for permanent residence status in Canada based on the inadmissibility of the applicant's spouse.

[2] The applicant was found inadmissible to Canada on the basis that her spouse was convicted in South Korea of the criminal offence of “drunken driving” which rendered him criminally inadmissible to Canada pursuant to paragraph 36(2)(b) of the IRPA. The accompanying family members, including the applicant, were therefore found inadmissible.

Background

[3] Dr. Hyun Joo Park, the applicant, applied for permanent residence in Canada in April 2008. Her accompanying family members include her husband, Dr. Song Hong Yeop, and their two daughters who are 18 and 12 years of age respectively.

[4] The applicant obtained a Ph.D. in 1996 at the University of Southern California and has been a postdoctoral fellow at the Research Institute – Program of Molecular Structure & Function, of the Hospital for Sick Children in Toronto. Dr. Park was also a visiting scientist at the Samuel Lunenfeld Research Institute of Mount Sinai Hospital in Toronto. The applicant currently holds a Research Associate position at the Hospital for Sick Children.

[5] In her position at the Hospital for Sick Children, Dr. Park has been working on novel approaches to the rescue of mutated CFTR, the primary defect in cystic fibrosis. There is no question that Dr. Park is a highly educated and capable scientist who would be an asset to Canada as a permanent resident.

[6] The applicant's husband, Dr. Hong-Yeop Song, also obtained a Ph.D. from the University of Southern California and visited the Department of Electrical and Computer Engineering at the University of Waterloo as a Research Professor from March 1, 2002 until February 28, 2003. He is now a professor at the Yonsei University in Seoul, South Korea.

[7] The applicant's husband, Dr. Song, was arrested for "drunk driving" in Seoul, on October 3, 2007. The case was disposed of on November 9, 2007 and he was sentence to pay a fine of W700,000 ($646.00). Dr. Song did not contest the charge and it appears to have been dealt with administratively by his acceptance and payment of the specified fine.

[8] There is no evidence on the record pertaining to Dr. Song's degree of impairment at the time of his arrest other than that his blood alcohol level was recorded as being sixty-five (65) milligrams of alcohol in one hundred millilitres of blood. It appears from the record that he was arrested at a police road block some distance from a restaurant where he had had dinner. There is no evidence that Dr. Song was stopped as a result of erratic driving or that he failed any physical tests to demonstrate impairment. The evidence also does not indicate whether his blood alcohol level exceeded a threshold required under Korean law sufficient to determine "drunken driving" or whether the charge was based on other evidence in addition to the blood alcohol reading.

Decision Under Review

[9] The visa officer's letter, dated August 18, 2009, constitutes her reasons for decision:

> Government of Canada / Consulate General of Canada
> Immigration Section

1251 Avenue of the Americas
New York, New York 10020-1175

Date: 18 August 2009
File no. B0536 04725

Mrs. Hyun J00 Park
2059 Buckhorn Ave.
Oakville, Ontario L6M 3V5 Canada

Dear Mrs. Park,

I have now completed the assessment of your application. I regret to inform you that your husband comes within the inadmissible class of persons described in paragraph 36(2)(b) of the Immigration and Refugee Protection Act.

Paragraph 36(2)(b) renders inadmissible a foreign national on grounds of criminality for having been convicted outside Canada of an offence that if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences, not arising out of a single occurrence that if committed in Canada, would constitute offences under an Act of Parliament.

Your husband Song Hong Yeop was arrested for drunk driving in Korea on October 3, 2007. The case was disposed of on November 9, 2007 and he was sentenced to pay a fine of W700,000. If committed in Canada, this offence would be punishable under sections 253(l)(a) & 255(1)(b) of the Criminal Code of Canada and would be punishable by a maximum term of imprisonment of at least five (5) years. He is inadmissible to Canada under section 36(2)(b) of the Act.

Subsection 42(a) of the Act states that a foreign national is inadmissible on grounds of an inadmissible family member if their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible. Your family member is inadmissible to Canada. As a result, you are also inadmissible.

Subsection 11(1) of the Act states that the visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. I am satisfied that your family member Song Hong Yeop is inadmissible for the reasons set out above. I am therefore refusing your application pursuant to subsection 11(1) and subsection 42(a) of the Act.

The Immigration and Refugee Protection Act contains provisions that provide for the rehabilitation of persons who have committed criminal offences outside Canada. In order to be considered for rehabilitation, at least five years must have elapsed since the completion of any sentence imposed or the payment of a fine. Based on documents in your file, it appears that your husband will be eligible to apply for rehabilitation on December 13, 2012. You may wish to submit a new application at that time.

> This inadmissibility also extends to any stay in Canada as a visitor. Your dependant, Song Hong Yeop, should therefore not attempt to enter Canada unless he is in possession of a Temporary Resident Permit. Thank you for your interest in Canada.
> Yours truly,
>
> M. Edmond
> Designated Immigration Officer

[10] The visa officer's CAIPS notes dated August 4, 2009 also constitute her reasons. In her notes, the visa officer found, based on the Summary Order of the Seoul Seobu District Court, Criminal Division; the findings of the Court; the statutory provisions (*Korean Road Traffic Act*); and the statements of the applicant's spouse describing the events (*Applicant's Record* at pp. 72-79); that Dr. Hong-Yeop Song was found guilty of an offence which, if committed in Canada, would constitute an indictable offence under paragraph 253(1)(a) of the *Criminal Code of Canada*; impaired driving.

Issues

[11] The issue is whether the visa officer erred in determining that the applicant's spouse was inadmissible on grounds of criminality pursuant to paragraph 36(2)(b) of the IRPA.

Analysis

[12] The determination of whether or not an offence committed abroad of which a foreign national has been convicted is equivalent to an offence under an Act of the Parliament of Canada is a question of law. Accordingly, such a question of law is reviewable upon the standard of

correctness: *Kharchi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1160, [2006] F.C.J. No. 1459, at para. 29.

[13] As was found in *Kharchi*, above, at para, 29:

> The foreign and Canadian laws in question must be interpreted to determine whether or not the two offences are equivalent, based on how the respective offences are constructed. In this context, an immigration officer does not have any special expertise. His or her interpretation of foreign and Canadian law must be correct (*Mugesera v. Canada (Minister of Citizenship and Immigration*), 2005 SCC 40, at paragraph 37 and 59). Failure to properly conduct an equivalency assessment is a fatal error which is reviewable by this Court (*Ngo v. Canada (Minister of Citizenship and Immigration*), 2005 FC 609, at paragraph 23).

[14] According to *Hill v. Canada (Minister of Employment and Immigration)*, (1987), 1 Imm. L.R. (2d) 1, [1987] F.C.J. No. 47, to determine that the offence at issue committed abroad would be an offence under an Act of Parliament if it had been committed in Canada, it must be established that the essential elements of both offences are equivalent. Equivalency can be verified in three ways, one of which is by comparing the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences: *Kharchi*, above, at para, 32.

[15] As was found by Justice de Montigny in *Qi v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 195, [2009] F.C.J. No. 264, at para. 24, “it is now well-settled that foreign criminal law may be proved without expert evidence in determining criminal inadmissibility in the immigration context. The decision-maker may rely on expert evidence if it is available, but may also rely on the foreign and domestic statutory provisions and the totality of the evidence, both oral and documentary: see, e.g., *Hill v. Canada (Minister of Employment and Immigration)* (1987), 73 N.R.

315, 1 Imm. L.R. (2d) 1 (F.C.A.); *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (F.C.A.)."

[16] I would add that no deference is due if the Court determines that an administrative decision-maker has failed to adhere to the principles of procedural fairness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28, at para.100. Such matters continue to fall within the supervising function of the Court on judicial review.

[17] In this case, the officer had articles 44 and 150 of the *Korean Road Traffic Act* before her as they had been submitted by the applicant and were referenced in the Korean court documents relating to Dr. Song's conviction. The visa officer compared the wording of these provisions in arriving at the conclusion that the offence at issue corresponded to paragraphs 253(1)(a) and 255(1)(b) of the *Criminal Code of Canada*. She did not have the benefit of expert opinion evidence as none was submitted by the applicant.

[18] The wording of the offence at article 44 of the *Korean Road Traffic Act* does not require any particular blood alcohol level to be established for a conviction. Similarly, in Canada, the offence of "impaired driving" at paragraph 253(l)(a) of the *Criminal Code*, does not require any particular blood alcohol reading. As long as the evidence establishes a degree of impairment, ranging from slight to great, the offence is made out: *R. v. Stellato*, (1993), 12 O.R. (3d) 90, [1993] O.J. No. 18, affirmed by the Supreme Court of Canada, [1994] 2 S.C.R. 478, [1994] S.C.J. No. 51.

[19] Evidence of the consumption of alcohol is insufficient in itself to constitute proof of impairment. There must be sufficient evidence to satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol: *R. v. Andrews*, (1996), 178 A.R. 182, [1996] A.J. No. 8 (Alta.C.A.). The presumption which arises when a driver's blood alcohol level exceeds eighty (80) milligrams of alcohol in one hundred (100) millilitres of blood is sufficient to constitute the offence set out in 253(1)(b) of the *Criminal Code of Canada* but is not proof of impairment for the purposes of paragraph 253 (1) (a).

[20] It cannot be assumed, therefore, that proof of a conviction for a foreign offence involving the breach of a statutory blood alcohol threshold will be equivalent to the Canadian offence of impaired driving in the absence of other evidence of impairment. I also leave for consideration in another case whether a foreign offence establishing a threshold lower than that fixed by the Parliament of Canada would be equivalent to the offence in Code paragraph 253 (1) (b).

[21] It may be, as counsel for the applicant argued, that the offence of which Dr. Song was convicted is treated more as an administrative than a criminal matter in Korea. But that was not established by the documentary evidence submitted to the officer. In my view, the officer did not err in conducting an equivalency analysis of the corresponding offences in Korea and Canada by a comparison of the wording in each statute. Based on the documentary evidence that was submitted, she was satisfied that the essential ingredients of the respective offences were established.

[22] The Court should not interfere with the officer's equivalency determination unless it finds that she has erred in law: *Steward v. Canada (Minister of Employment and Immigration)* (F.C.A.),

[1988] 3 F.C. 487, [1988] F.C.J. No. 321, at para. 12. *Hill v. Canada (Minister of Employment and Immigration)*, (1987), 1 Imm. L.R. (2d) 1, [1987] F.C.J. No. 47.

[23] I am unable to make such a finding based on the evidence that was submitted to the officer by the applicant and is before the Court. Accordingly, I must dismiss the application. No questions were proposed for certification.

[24] Based on the record, it appears that the applicant's spouse will be eligible to apply for rehabilitation on December 13, 2012, which will be five (5) years after the payment of the fine for impaired driving in South Korea. Dr. Park may wish to submit a new application for permanent residency at that time. In the interim, this may be a suitable case for the exercise of the Minister's discretion.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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