Federal Court  Cour fédérale

Date: 20110310

Docket: IMM-4381-10

Citation: 2011 FC 293

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

IN HEE KANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Immigration Officer L. Harmon (the Officer) dated May 5, 2010, wherein the Officer refused Ms. Kang's application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, In Hee Kang, is a citizen of South Korea. She arrived in Canada in June of 2004 as a visitor.

[4] In May 2005, the Applicant initiated a refugee claim. She claimed that she fled Korea in 2003 because she had been harassed and threatened by loan sharks from whom she was forced to borrow money after her divorce. The Applicant claims that she was never able to attain financial security and became helplessly indebted. She began to fear that either her organs would be sold, or she would be sold to a brothel in order to satisfy her debt.

[5] The refugee claim was rejected in February 2007. The Immigration and Refugee Board drew a negative inference with respect to the Applicant's credibility as her testimony was found to contain several inconsistencies and embellishments.

[6] In March 2007, the Applicant submitted an application for permanent residence from within Canada based on Humanitarian and Compassionate considerations (H&C application).

[7] In July 2007, the Applicant submitted a Pre-Removal Risk Assessment (PRRA) application.

[8] In August 2007, the Applicant submitted a spousal sponsorship to support her H&C application. She had married her sponsor, Hamid Reza Mohseni, on July 1, 2007. Additional H&C submissions were submitted in May 2008.

[9] The Applicant's spousal sponsorship was withdrawn in March 2009. The relationship between the Applicant and her sponsor began to disintegrate after they separated in May 2008. Applicant's counsel provided further H&C submissions in March 2009 to address the dissolution of the relationship and subsequent divorce, which was finalized in February 2009.

[10] In June 2009, the Applicant made further H&C submissions, requesting specifically that the officer take into account Immigration Processing Manual 5. Sections of this manual address factors to consider when assessing an applicant's degree of establishment in Canada and the issue of family violence. The Applicant alleged that she suffered financial extortion at the hands of her ex-husband. During this period she claimed to have been fearful of him and humiliated by him.

[11] In December 2009, an H&C risk opinion was rendered by a PRRA officer. The opinion held that the Applicant would not be at risk if she were to return to Korea.

[12] The Applicant submitted materials rebutting the risk opinion, however, the PRRA officer maintained his assessment.

[13] The Applicant's H&C application was refused April 30, 2010. This was communicated to the Applicant by way of letter dated May 5, 2010.

B. *Impugned Decision*

[14] The Applicant's H&C application was based on establishment in Canada and risk of returning to the Republic of Korea.

[15] The Officer reviewed the H&C risk opinion and found that there were no errors or omissions in the report and that all evidence submitted had been adequately considered. The Officer found that the opinion was reasonable and was therefore satisfied that the Applicant would not face risk should she return to Korea. The Officer was not satisfied that the Applicant had provided sufficient evidence to establish that the hardship and risk associated with returning to Korea would amount to unusual and undeserved or disproportionate hardship.

[16] The Officer then reviewed the evidence submitted to demonstrate the Applicant's degree of establishment in Canada. The Officer found that the Applicant had integrated into the community. However, the Officer did not find that the Applicant had established that severing her ties to the community would constitute unusual and undeserved or disproportionate hardship.

[17] The Officer noted that the Applicant had lived in Korea until she was 50 and thus was familiar with the language, customs and culture of that country. Considering her educational background and experience, there was little evidence to suggest that she would be unable to re-establish herself in Korea, or that she would be without access to a support system.

II. Issues

[18] This application raises the following issues:

(a) Did the Respondent provide sufficient reasons?

(b) Did the Respondent err in failing to consider the manuals?

(c) Did the Respondent err in weighing the evidence?

III. Standard of Review

[19] The appropriate standard of review to apply to the findings of fact and assessment of evidence in an H&C decision is reasonableness. Judicial deference to the decision is appropriate where the decision demonstrates justification, transparency and intelligibility within the decision making process, and where the outcome falls within a range of possible, acceptable outcomes. (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 97).

[20] As for sufficiency of reasons, this is an issue of procedural fairness and is typically reviewable on a standard of correctness (*Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 ACWS (3d) 164 at para 9). However, there is some caselaw that suggests that because the primary function of reasons is to ensure that an administrative decision is justified, transparent and intelligible, adequacy of reasons is in fact reviewable against a standard more similar to reasonableness (*Nicolas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 452, 367 FTR 223 at para 11). Either way, the analytical framework remains the same.

IV. Argument and Analysis

A. *Did the Respondent Provide Sufficient Reasons?*

[21] The Applicant submits that the reasons for the Officer's decision are insufficient. The Applicant argues that the reasons fail to provide any meaningful analysis in that they are constituted by nothing more than a recitation of the facts followed by a conclusion. As such, they are not transparent or intelligible. The Applicant submits that they are boiler-plate rationales designed to immunize the decision from judicial scrutiny. The Applicant illustrates her argument by way of providing a side-by-side comparison with reasons issued by the same Officer on a different day in a different case – the *Csaba* reasons. The Applicant contends that it is clear that the Officer used a template.

[22] The Respondent submits that the Officer's reasons are sufficient and are not identical to the *Csaba* reasons. The Respondent argues that a review of the decision show that the Officer considered the H&C factors raised by the Applicant, and explained why they did not justify an exemption.

[23] The Applicant based her H&C application on two grounds – fear of returning to Korea and degree of establishment. In terms of the first ground, it is clear that the Officer placed great weight upon the PRRA officer's report. Without probative evidence to counter-balance the reasonable finding of the risk report, the Officer concluded that the Applicant failed to adduce sufficient

evidence to establish that the risk associated with returning to Korea amounted to unusual or undeserved hardship.

[24] With regards to the second ground, degree of establishment, the Officer considered all of the evidence and concluded that the Applicant failed to show that she would experience unusual and undeserved or disproportionate hardship. The Applicant cites *Adu*, above, in support of her submission that the reasons provided are insufficient in that they are a recitation of the facts followed by a conclusion. Having reviewed *Adu*, above, I am convinced that the present matter is distinguishable on the facts. In *Adu*, Justice Anne Mactavish noted that several of the cases cited by the Respondent were distinguishable from the case before her. The cases cited by the Respondent contained significantly more detailed reasons. Justice Mactavish explained at paras 17 and 18:

> [17] By way of example, in *Irimie*, the officer noted that the applicants had argued that their son would have difficulty adjusting to a new school if he was forced to return to his country of origin. The officer then explained why he or she was not persuaded by this argument, observing that the child had already adjusted well when he moved to Canada, and would be returning to a country where he had spent the majority of his life.
>
> [18] Similarly, in *Nazim*, the officer addressed the establishment factors identified by the applicant, but also went on to note that the applicant had no family residing in Canada, and still had family in Pakistan, factors that weighed against the granting of the application.

[25] Similarly, in the present matter the Officer did not merely conclude that the Applicant had failed to persuade him that she would suffer disproportionate hardship without performing some critical analysis. The Officer acknowledged that the Applicant owns and operates her own business, has worked very hard and purchased a house, is economically established, and has a good civil

record. The Applicant has also ensured that her professional growth remains a priority and in this regard has obtained numerous certificates. She has also established ties to her community.

[26] The Officer went on to note, however, that:

- The Applicant received due process in the refugee program and therefore a certain measure of establishment was expected to take place over the six years she had been in Canada. Though it was commendable that she had integrated herself into the community, she failed to establish that severing these ties would have such a negative impact that it would constitute disproportionate hardship.
- Having a good civil record is expected of all temporary and permanent residents and Canadian citizens.
- Prior to coming to Canada, the Applicant was established in Korea and received a formal education and was professionally self-employed. There was no evidence to indicate that the Applicant would be unable to re-establish herself in Korea.
- Although the Applicant had spent six years in Canada, and rebuilding her life in Korea would not be without difficulty, her entire extended family lives in Korea, and she lived in Korea until she was 50 years of age.
- The Applicant has gained several skills and experiences throughout her employment history which are transferable and will help her in finding employment.

[27] In *Adu*, above, the officer only pointed to the strengths of the applicant's application. In the present matter the Officer also pointed to factors weighing against the granting of an exemption. Based on the reasons, the Applicant is able to understand what factors the Officer considered, and

how they were weighed in coming to the conclusion. It is clear that the Officer came to a negative decision because there was a lack of sufficient evidence to persuade him to decide otherwise. The onus is on an applicant to submit sufficient evidence to convince the officer that an exemption under the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA) is warranted. I am satisfied that the reasons were adequate.

[28] As for the side-by-side comparison with the *Csaba* reasons, while generic portions of both decisions contain the same or similar wording, significant portions of each decision detailing the relevant facts and analysis thereof, are unique. As the Applicant submits, this does suggest that the Officer was making use of something like a template in composing his decision. However, I accept the Respondent's argument that there is nothing improper about an officer using a precedent that addresses the principles in an H&C application as a template. In fact, referring to the same principles in each case ensures consistency, predictability and transparency in the decision-making process. As long as it is evident that the Officer considered the relevant factors and explained their conclusions adequately, the literary quality or originality of the reasons is of little importance (*Vajda v Canada (Minister of Citizenship and Immigration*), 2006 FC 917, 150 ACWS (3d) 691 at para 8). I am satisfied that the Officer addressed all of the factors raised by the Applicant.

B. *Did the Respondent Err in Failing to Consider the Manuals?*

[29] The Applicant submits that the Officer erred in failing to consider relevant passages of the Inland Processing Manual for H&C claims made from within Canada. The Applicant specifically requested that the Officer refer to sections pertaining to determining the degree of establishment in

Canada and family violence in assessing her application, and she argues that there is no indication in the reasons that he did so.

[30] Paragraph 11.3 of the manual outlines the factors officers should consider in determining an applicant's degree of establishment:

> - does the applicant have a history of stable employment?
> - is there a pattern of sound financial management?
> - has the applicant integrated into the community through involvement in community organizations, voluntary services or other activities?
> - has the applicant undertaken any professional, linguistic or other studies that show integration into Canadian society?
> - does the applicant and their family members have a good civil record in Canada? (e.g. no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse)

[31] The passage of the manual detailing considerations relating to family violence is found at paragraph 12.7:

> **12.7. Family violence**
>
> Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation to remain in Canada; this could put them in a situation of hardship.
>
> Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship. Officers should consider the following factors:
>
> > • information indicating there was abuse such as police incident reports, charges or convictions,

> reports from shelters for abused women, medical reports, etc.;
>
> • whether there is a degree of establishment in Canada (see Section 11.3);
>
> • the hardship that would result if the applicant had to leave Canada;
>
> • the laws, customs and culture in the applicant's country of origin;
>
> • the support of relatives and friends in the applicant's home country; and
>
> • whether the applicant has a child in Canada or/and is pregnant.

[32] The Respondent argues that a review of the reasons shows that the Officer considered all five elements listed in the manual in assessing the Applicant's degree of establishment. Indeed, from my review of the reasons, this is so. The Officer clearly considered: history of stable employment, pattern of sound financial management, integration into the community, professional study, and good civil record in Canada.

[33] As for the family violence section, there is no trace of any of the elements listed in the manual in the Officer's reasons. The Respondent submits that this is because the Applicant's allegations with respect to the dissolution of her marriage involved no violence. The Applicant claimed that her husband forced her to support him financially. When the Applicant had enough, she separated from him and divorced him even though she knew that meant that he would withdraw his sponsorship. I do find it strange that there was no mention in the reasons of the Applicant's submissions regarding her relationship with her former husband. However, I am persuaded by the Respondent's submissions on this point. The Respondent argues that the Officer was under no

obligation to consider factors that were not supported by the Applicant's own allegations or evidence. The Applicant did not present any evidence that there was actual violence, such as convictions, police reports, or reports from shelters for abused women, as suggested by the manual. Accordingly, the Officer could not consider information that did not exist. The Officer clearly did consider the degree of establishment, the hardship the Applicant would endure if she had to leave, and the support available to her in Korea. The Officer also noted that since the Applicant lived in Korea until she was 50 years old, she was familiar with the language, customs and culture of that country.

[34] In any case, as Justice Yves de Montigny reiterated in *Lee v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1152 at para 29:

> [29] […] Moreover, it has been held time and again that guidelines are not law, are not binding on the Minister or his agents, and do not create any legal entitlement in applicants who believe they have satisfied them (*Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 457, 2002 FCA 125). While they can be of assistance to the Court, they cannot fetter the discretion of an officer.

[35] I do not find that on this ground, the Court should intervene to disturb a decision that is, on its face, reasonable.

C. *Did the Respondent Err in Weighing the Evidence?*

[36] The Applicant submits that the Officer erred in attributing little weight to the letters of support and reference from friends "as they were written by persons who are not necessarily unbiased or a disinterested party in the outcome of this application," (Certified Tribunal Record

(CTR) at pg 5). The Applicant takes the position that the Officer was wrong to diminish the probative value of the letters only because they were written by friends and acquaintances.

[37] The Respondent submits that while caselaw does suggest that it may be an error to dismiss such evidence out of hand for being authored by interested parties, caselaw also suggests that an officer does not err by at least considering this factor in assessing the total weight of the evidence (*Jiang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 794, 180 ACWS (3d) 8 paras 15-17; *Sayed v Canada (Minister of Citizenship and Immigration)*, 2010 FC 796 at para 21; *Obeng v Canada (Minister of Citizenship and Immigration)*, 2009 FC 61 at paras 31-33; *Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 386).

[38] The Officer considered the documents. He did not reject them outright. This is clear when he states at pg 5 of the CTR:

> I accept that the applicant has integrated into the community and it is commendable that a certain level of establishment has taken place. I acknowledge that the applicant has made ties to her local community in Canada.

[39] The Officer decided to assign little weight to the letters. As per Justice Russel Zinn in *Sayed*, above, at para 21:

> [21] In *Augusto v. Canada (Solicitor General)*, 2005 FC 673 at para. 9, Justice Layden-Stevenson (as she then was) held that "[i]n the absence of having failed to consider relevant factors or having relied upon irrelevant ones, the weighing of the evidence lies within the purview of the officer conducting the assessment and does not normally give rise to judicial review." Put another way, the weighing of the evidence is a question of fact, entitled to a high level of deference, and reviewable on the reasonableness standard.

[40] I do not find that the Officer was in error for assigning little weight to letters written by friends of the Applicant. The Officer considered them, but did not find that they were of sufficient probative value to demonstrate that the Applicant would suffer disproportionate hardship if required to leave Canada. Absent showing that the Officer acted in a perverse or capricious manner or disregarded evidence before him, judicial intervention is not warranted in this matter.

V. Conclusion

[41] No question was proposed for certification and none arises.

[42] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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