

Date: 20090302

Docket: IMM-1521-08

Citation: 2009 FC 214

Ottawa, Ontario, March 2, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**SUN A KWAK,
YOUNG JOO CHA,
SEONGHO CHA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The prime argument in this judicial review of the decision of an officer not to permit an application for permanent residence from within Canada on humanitarian and compassionate grounds is that he applied the wrong test. It is submitted that he focused on state protection which is a constituent element of a refugee claim pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, but is not when the Minister is requested to waive or grant an exemption

from applicable criteria pursuant to section 25 of the Act. Although that submission is correct, I am satisfied in this case that the officer stated and applied the correct test.

[2] Ms. Kwak and her children fled South Korea and applied for refugee status in Canada based on abuse suffered by Ms. Kwak at the hands of her husband. That application was not successful. Likewise, the H&C application is based on Ms. Kwak's fear of her husband, and also upon stigma and discrimination in South Korea as a divorced woman and as a victim of abuse.

[3] The officer correctly stated the test as follows:

The purpose of this application process is to determine whether these applicants, in order to obtain permanent residence, should be exempt, on Humanitarian and Compassionate grounds, from the requirement of presenting their application from outside Canada and from the obligation to meet the requirements of a return to **South Korea** to present their application, they would suffer unusual and underserved or disproportionate hardship as per section 25 of IRPA. [Immigration Officer's emphasis.]

[4] Risk and hardship in South Korea were carefully considered. It would have been inappropriate for the officer to ignore risk and alleviation of that risk through state protection because the applicant's application included what had been before the Immigration and Refugee Board. In *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327, 39 Imm. L.R. (3d) 79, [2004] F.C.J. No. 1600 (QL), Madam Justice Gauthier pointed out that the consideration of undue, undeserved or disproportionate hardship in returning to one's homeland is more expansive than a risk of persecution under sections 96 and 97 of IRPA. However she noted that the risks raised (in that case a removal risk assessment) may be the same as those raised in an

H&C application. Although a situation may not constitute a risk under sections 96 and 97, a difficult situation an applicant might face is nevertheless a relevant consideration in an H&C application. However, in *Melchor* the officer focused entirely on state protection. That is not the case here.

[5] State protection was considered, but not unduly so, and not at the expense of other considerations. The officer analyzed the submissions with respect to stigma and discrimination as a divorced woman and as a victim of abuse. He was not persuaded that the documentation evidenced circumstances which would justify waiver of the normal rule that one must apply for permanent residence from without Canada. Indeed many of the documents presented appeared to be irrelevant as they dealt with the situation of Korean American women in the United States.

[6] Consideration was also given to Ms. Kwak's degree of establishment in Canada and to the best interest of the children. Among other things, it was noted that on return they would benefit from the possibility of re-establishing relationships with their grandparents and other family members.

[7] In conclusion, the decision was reasonable and should not be disturbed.

ORDER

THIS COURT ORDERS that:

1. The application is dismissed.
2. There is no serious question of general importance to certify.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1521-08

STYLE OF CAUSE: Sun A Kwak *et al.* v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 26, 2009

REASONS FOR ORDER: HARRINGTON J.

DATED: March 2, 2009

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