Federal Court  Cour fédérale

Date: 20101026

Docket: IMM-742-10

Citation: 2010 FC 1048

Ottawa, Ontario, October 26, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JIN SU KIM, EUN SU KIM

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Jin Su Kim and Eun Su Kim are asking the Court to review and set aside the January 11, 2010 decision of a Member of the Immigration Appeal Division of the Immigration and Refugee Board, in which the Member denied their appeals of removal orders issued against them on June 15, 2005.

[2] For the reasons that follow, I am not persuaded that the Member made any of the errors alleged by the applicants and I find that the decision under review is reasonable as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Accordingly, their application must be dismissed.

Background

[3] Jin Su Kim was born on April 13, 1985, and Eun Su Kim was born on April 18, 1986. They are brothers. Both are citizens of South Korea. They came to Canada with their father and mother on April 14, 2001. The family settled in Calgary, intending to start a business. Their father qualified as a permanent resident under the entrepreneur class. Without notice, their father returned to Korea in September 2001 and the applicants' father and mother subsequently divorced. The applicants have not had contact with their father, or his family, since September 2001.

[4] Throughout their time in Canada, both applicants have attended school and have been employed although neither has completed secondary education or held employment that was not low-skilled and low-paying.

[5] On June 22, 2003, Jin Su Kim and a friend, while intoxicated, decided to retain the services of a prostitute which they learned would cost them $400. While using a bank machine, the two decided that they would not pay her for her services. After both men had sexual intercourse with the prostitute, Jin Su Kim pushed her, and the two drove away. They discovered her purse in their car, and adding insult to injury, they split her cash and disposed of the purse. On February 25, 2005,

Jin Su Kim pleaded guilty to assault and theft under $5,000. He was sentenced to 90 days in prison and was required to take alcohol abuse and anger management counselling.

[6] In June 2006, Jin Su Kim moved out of his mother's house. His mother rented him a two-bedroom apartment and he found a roommate, Victor Song. Mr. Song was a drug dealer Mr. Kim knew from Vancouver. His younger brother Eun Su Kim also moved in with his brother and Mr. Song. Apparently, one of their motivations for having Mr. Song move in was that he would provide the applicants with marijuana, which they consumed on a regular basis. Jin Su Kim also consumed cocaine on a frequent basis.

[7] In mid August 2006, the Calgary Police conducted a sting operation in which they purchased crack cocaine from Mr. Song. On the basis of this investigation, the police obtained a warrant and searched the applicants' apartment. They recovered a great deal of illegal substances and drug paraphernalia from the common areas of the apartment. They also found over $1,500 cash in the applicants' room. On March 3, 2009, the applicants both pleaded guilty to possessing proceeds of crime and were fined $1,000 each.

[8] On June 15, 2005, removal orders were issued against the applicants and their mother, Mrs. Kim, pursuant to subsection 41(b), *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, on the basis of the applicants' father's failure to fulfill the entrepreneurial conditions attached to the family permanent residence application. All three appealed their removal orders on June 29, 2005, pursuant to subsection 63(3) of the Act.

[9] Mrs. Kim, having completed the requisite training, opened a salon in 2006. Her appeal was allowed in 2008, but the hearing of the applicants' appeals was postponed at that time because of their scheduled criminal trials.

[10] Eun Su Kim was arrested on December 31, 2008. On August 25, 2008, four unknown individuals convinced Terrance Yip to attend a party. Instead, he was taken to a basement and assaulted. He was tortured over four days. His attackers forcibly seized two cars from him – a 2001 Acura CL and a 1999 Porsche Boxster. According to Eun Su Kim, he had asked a friend, Steve Jun, to borrow money to pay for his legal fees. Instead of cash, Mr. Jun gave Eun Su Kim a 2001 Acura and a 1999 Porsche, and told him to sell the vehicles. Eun Su Kim put the Porsche up for auction, but it was seized on November 7, 2008. He maintained possession of the Acura until January 8, 2008 when the police attended the applicants' residence and seized it. The charges against Eun Su Kim relating to these events were stayed in June 2009.

[11] The applicants' appeal hearings took place on July 21, 2009. At the time of the hearing, Jin Su Kim was engaged to Michelle Lee who was ordinarily resident in Vancouver as she was attending the University of British Columbia. The two subsequently married. On January 11, 2010, the Member dismissed the applicants' appeals.

Issues

[12] The following issues were addressed in the memoranda filed and the oral submissions made:

1. What are the appropriate standards of review?
2. Did the Member err in failing to consider rehabilitation?
3. In the alternative, did the Member err by focusing on proof of rehabilitation rather than the possibility of rehabilitation?
4. Were the Member's findings with respect to criminality and establishment in Canada reasonable?

Standards of Review

[13] The applicants submit that a failure to consider a factor in the test set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), as confirmed by *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, is an error of law reviewable on the standard of correctness. They rely on *Shaath v. Canada (Minister of Citizenship and Immigration*), 2009 FC 731, as the authority for this submission. The applicants submit that issues 2 and 3 are therefore to be reviewed on the standard of correctness while the standard of review for issue 4 is reasonableness.

[14] I am unable to accept that submission. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, held that the standard of review for decisions of the IAD on appeals of removal orders under the Act is the reasonableness standard. At para. 57, the Supreme Court noted:

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of ...

> sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself. As noted in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 380, a removal order
>
> > establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege. [emphasis added.]

[15] Therefore, issue 2 is reviewable on the standard of reasonableness as is issue 3, as was done recently in *Martinez-Soto v. Canada (Citizenship and Immigration)*, 2008 FC 883.

Ribic Factors

[16] The applicants submit that their criminality was a decisive factor in the appeal decision and therefore assert that the Member ought to have considered the possibility of rehabilitation, which they say is a factor clearly set out in *Ribic* and approved in *Chieu*.

[17] The decision of the IAD in *Ribic* does not state that rehabilitation is to be considered in every case. What the IAD in *Ribic* stated, with respect to rehabilitation, is as follows:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the

> length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. [emphasis added]

[18] As is clear from the underlined passage, where the deportation is as a result of a failure to meet the conditions of admission, as it is in this case, the factor to be considered is not rehabilitation but the circumstances surrounding the failure to meet the admission conditions. Here, the Member was cognisant of that distinction. She recites the relevant factors and, as is proper as the basis of the removal order was not criminality, does not include either the seriousness of the offence that gave rise to the removal order or the possibility of rehabilitation. She describes the relevant factors as follows:

> The relevant factors to be considered in the exercise of the IAD's discretion in entrepreneurial appeals includes (*sic*):
>
> - The seriousness of the breach(es) leading to the removal order;
> - The remorsefulness of the appellants;
> - The length of time spent in Canada and the degree to which the appellants are established here;
> - The appellants' family in Canada and the impact to the family that the removal would cause;
> - The best interests of any child directly affected by the decision;
> - The support available to the appellants in the family and the community; and

- The degree of hardship that would likely be caused to the appellants by removal from Canada, including the conditions in the likely country of removal.

[19] The Member properly examined the circumstances leading to the removal order, properly found that it was the fault of the father, not of the applicants or their mother, and noted that the applicants were children at the time. Those were the relevant considerations in this case to be considered as potentially offsetting the breach of admission conditions.

[20] The applicants submit that the Member unduly focused her decision on their criminal records. They submit that this undue focus tainted her objectivity when considering the other *Ribic* factors. Counsel submitted that the Member, in focusing her examination on the criminality of the applicants, effectively treated their appeal as if the basis for the removal was their criminality and, having done so, she had to turn her mind to the possibility of rehabilitation.

[21] I am unable to agree with that submission. The Member makes it quite clear that she understands the basis for the removal order: failure to comply with the residency conditions. The focus of her analysis of the criminal records of the applicants is done within her examination of their establishment in Canada. Establishment in Canada entails not just an examination of the positive factors such as education, employment, property and family, it also entails an examination of negative factors. In that respect the fact that these applicants engaged in criminality, even after they were subject to removal orders, is a relevant consideration for the Member. In this context, the fact that an appellant might become rehabilitated in the future is, to my mind, quite irrelevant. It is his

present situation and circumstances that are relevant when examining his establishment, not what they could become if he is permitted to remain in Canada.

[22] The Member, in my view, was quite correct not to undertake an explicit analysis of the possibility of rehabilitation when considering the applicants' criminal records in relation to their establishment in Canada; however, the Member did consider their remorsefulness. That analysis was appropriate and was not unreasonable.

Proof Versus Possibility of Rehabilitation

[23] The applicants submit that the IAD was demanding proof that they were already rehabilitated when the Member ought to have been concerned with whether they were likely to be rehabilitated in the future.

[24] As has already been stated, in this case, the applicants' criminal records are not relevant to the appeal of the reason for the removal orders. Nonetheless, the Member did not impose a standard of full rehabilitation, but noted that:

> The appellants have had sufficient opportunities over the years to show that they <u>would be</u> law-abiding residents and contributing members of Canadian society. [emphasis added]

This illustrates that the Member was not focused on the applicants showing that they were fully rehabilitated; rather, the Member found that the evidence showed that they had failed to demonstrate that they could be law-abiding residents of Canada. In other words, the Member noted that the

applicants had not adequately demonstrated the possibility of rehabilitation. Given their criminal records, particularly after removal orders were issued, this finding is not unreasonable.

Reasonableness of the Findings on Criminality and Establishment

[25] As noted earlier, it is submitted that the Member unduly focused on the applicants' criminality, thereby tainting the remainder of her analysis. In particular, it is asserted that it was unreasonable to require Eun Su Kim to learn from the mistakes of his brother and his 2005 conviction. It is stated that none of the offences would have led to deportation under the Act, and the Member's determination that a short criminal history is a significant negative factor is unreasonable. Similarly, it is submitted that criminality should not have weighed so heavily in the Member's assessment of the applicants' establishment in Canada or their family ties.

[26] I agree with the respondent. The Member's decision was not based solely on criminality. When considering establishment in Canada the applicants' criminal history cannot be ignored. The submissions advanced by the applicants raise questions about the weight given to the evidence; this is no basis to overturn the Member's decision.

[27] The offences of the applicants involve assaulting and robbing a prostitute and possessing the proceeds of drug trafficking. These are serious matters and it was reasonable for the Member to take them into account when assessing the applicants' establishment in Canada, family ties, and community support. The Member's findings in these regards are not unreasonable.

[28] For these reasons this application is dismissed. Neither party proposed a question for certification. There is none on the facts before the Court.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Abdul W. M. Souraya	FOR THE APPLICANTS
Camille N. Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

PHOENIX LEGAL Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT