Federal Court  Cour fédérale

Date: 20210723

Docket: IMM-6669-20

Citation: 2021 FC 786

Ottawa, Ontario, July 23, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BONGKYUN PARK

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Immigration Division of the Immigration and Refugee Board of Canada [ID], dated December 16, 2020 [the Decision], which found that the Applicant is a foreign national who is inadmissible to Canada for misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c

27 [IRPA]. The Decision resulted from the Applicant failing to disclose criminality in the Republic of Korea [Korea] in his applications for an Electronic Travel Authorization [ETA] and Visitor Record [VR].

[2] As explained in more detail below, this application is allowed, because the ID did not engage with one of the Applicant's principal arguments, related to the innocent misrepresentation exception that can apply in cases involving inadmissibility due to misrepresentation.

II. **Background**

[3] The Applicant, Mr. Bongkyun Park, is a citizen of Korea. He first came to Canada as a visitor in September 2017 and applied for an extension to his visitor status in January 2018. He last entered Canada in October 2018, having been granted entry on a work permit valid until October 2019.

[4] On the ETA application in which the Applicant sought to come to Canada, and the VR application in which he requested an extension of his visitor status, the Applicant answered "No" to the question, "Have you ever committed, been arrested for or been charged with or convicted of any criminal offence in any country?"

[5] On March 3, 2019, the Canada Border Services Agency [CBSA] at the Vancouver International Mail Centre intercepted and seized documents that were sent to the Applicant from Korea. These documents included a Criminal (Investigation) Records Check Reply from the

Commissioner, General, Korean National Police Agency, dated February 27, 2019. This document lists the following five “criminal charges”:

A. Violation of Road Traffic Law, August 9, 1994;

B. Violation of The Road Traffic Act (Drunk Driving), April 20, 2005;

C. Violation of Punishment of Violences, etc. Act (At night. Joint Bodily Injury), July 16, 2005;

D. Violation of The Road Traffic Act (Drunk Driving), February 2, 2010; and

E. Violation of The Road Traffic Act (Drunk Driving), February 16, 2013.

[6] This document also indicates that the Applicant received fines for all of the Road Traffic Act offences and that the violation of the Punishment of Violences, etc. Act was disposed of by the Goyang Branch of the Uijeongbu District Prosecutor’s Office in a family protection case.

[7] After the CBSA seized the documents, it initiated a misrepresentation investigation against the Applicant. As part of the investigation, a CBSA officer interviewed the Applicant at his home with an interpreter. In that interview, the Applicant indicated that he hired third parties to complete his ETA and VR applications, and they completed the applications based on a criminal record check that he provided them that did not show any criminal offences. He also stated that the drunk driving offences were “just minor” and that he paid a fine in relation to those offences. With respect to the Punishment of Violences, etc. Act offence, he explained that he had an argument with his ex-wife and the police were called. He stated that the incident was a

family matter and that he was not fined. Rather, he was required to perform volunteer work at a hospital.

[8] On July 3, 2019, the CBSA officer completed a report under s 44(1) of IRPA, concluding that, on a balance of probabilities, the Applicant is inadmissible for misrepresentation pursuant to s 40(1)(a) of IRPA. The officer based this conclusion on the fact that the Applicant was convicted of three drunk driving violations in Korea but answered "No" to the question about prior criminal offences on his ETA and VR applications.

[9] The ID held an admissibility hearing for the Applicant on November 16, 2020. Following the hearing, the ID issued the Decision that is the subject of this judicial review, finding the Applicant inadmissible. As a result, the ID issued an exclusion order against the Applicant.

III. **Decision Under Review**

[10] The analysis in the ID's Decision identifies submissions made by the Applicant's counsel that the Applicant's misrepresentation was innocent. The Applicant's counsel explained that Korea has a variety of different types of criminal record checks that are issued by police. The criminal record check that the Applicant obtained for the ETA application was the criminal record check "for permission of foreign country immigration and stay". That criminal record check indicated that he had no criminal record.

[11] The ID found that there are certain criminal record checks that, by law in Korea, are not to be shared with foreign governments for the purposes of immigration, and domestically Korea

has a system where certain criminality is erased by the passage of time. The ID further noted that this is a point of contention between Korea and a number of countries including Canada. However, the ID explained that Canada requires that a person declare all past criminality in answering the question, “Have you ever committed, been arrested for or been charged with or convicted of any criminal offence in any country?” That question is not qualified in any way, though it leaves space for an applicant to provide details if they answer “Yes”. The ID found that, regardless of whether or not Korea considers a past criminal offence to have lapsed, disclosure of such an offence to immigration officials is required.

[12] The ID therefore dismissed the Applicant’s argument that he was confused in answering the question due to Korea’s multiple types of criminal record checks. It noted that the question that was asked on the ETA and VR applications was not, “Would a criminal record check reveal past criminality?”

[13] The ID also concluded that the Applicant could not rely on the innocent misrepresentation exception, which applies where an individual honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the individual’s control. The ID explained that the Applicant knew he had convictions for drunk driving and family violence, whether or not they showed up on a criminal record check. The ID also stated that the fact he did not think they were serious matters did not excuse the requirement that he disclose them.

[14] The ID found that it was apparent that the incidents listed in the criminal record check document seized by CBSA were criminal offences. The ID arrived at this conclusion because the offences were described as “criminal offences” in the translated criminal record and in the dispositions made by district courts. Additionally, the Road Traffic Act makes drunk driving a penal offence with the potential for imprisonment. Therefore, the ID found that, even though the Applicant received only fines for his drunk driving incidents, they were charges with convictions.

[15] With respect to the incident under the Punishment of Violences, etc. Act, the ID acknowledged that it may have been treated as a family court matter, but it found that the incident involved some aspect of violence, as well as a trial and a sentence with the imposition of penalties on the Applicant. The ID, therefore, found that the incident had the “hallmarks” of a criminal offence: a prosecutor, a trial, and the imposition of a sentence.

[16] The ID noted that, while a misrepresentation must be in respect of a relevant matter to make someone inadmissible, criminality is always a relevant matter, because it can make a person inadmissible under s 36 of IRPA. The ID found that the Applicant’s failure to disclose the criminal offences prevented the officer considering his ETA and VR applications from inquiring further whether he was potentially inadmissible to Canada. The ID concluded that the Applicant is a foreign national who directly misrepresented material facts relating to a relevant matter that could have induced an error in the administration of IRPA and an exclusion order should therefore be issued against him pursuant to s 229(1)(h) of IRPA.

IV. **Issues**

[17] The Applicant articulates the issues in this application for judicial review as follows:

A. Did the ID fail to provide an intelligible reason for the Decision?

B. Did the ID fail to consider the totality of the evidence?

C. Did the ID err in fact and law in the misrepresentation assessment?

D. Did the ID violate procedural fairness?

E. Did the ID fail to apply the presumption of truth and benefit of the doubt?

F. Did the ID breach s 15(1) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (UK), 1982, c 11?

[18] I also note that the Applicant claims costs in this application.

V. **Analysis**

[19] As identified above, the Applicant has raised a number of issues, and there is considerable overlap among the arguments he has advanced under many of the issues. My decision to allow this application for judicial review turns on his argument that the ID erred in its treatment of the innocent misrepresentation exception. The standard of reasonableness applies to

the Court's review of this aspect of the Decision (see, e.g., *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 [*Appiah*]).

[20] As explained in *Appiah*, the innocent misrepresentation exception applies only in narrow circumstances where the applicant both honestly and reasonably believed they were not making a misrepresentation (at para 18):

> 18. The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the applicant honestly and reasonably believed he was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the applicant's control, and the applicant was unaware of the misrepresentation (*Wang* at paragraph 17; *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at paragraph 22; *Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345). Some cases have applied the exception if the information given in error could be corrected by reviewing other documents submitted as part of the application, suggesting that there was no intention to mislead: *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421 at paragraph 16; *Berlin v Canada (Citizenship and Immigration)*, 2011 FC 1117 at paragraphs 18-20. Courts have not allowed this exception where the applicant knew about the information, but contended that he honestly and reasonably did not know it was material to the application; such information is within the applicant's control and it is the applicant's duty to accurately complete the application: *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at paragraphs 31-34; *Diwalpitiye v Canada (Citizenship and Immigration)*, 2012 FC 885; *Oloumi* at paragraph 39; *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at paragraph 18; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at paragraph 10.

[21] The Decision notes the Applicant's position that, if he made a misrepresentation, it was an innocent one, because of confusion created by the different types of criminal record checks issued by Korean police agencies and because he did not consider the relevant offences to be

criminal offences. In its ensuing analysis, the ID canvasses the evidence identifying that Korea has a system whereby certain criminality in the past is erased by the passage of time, described as “lapsed” criminal records. The ID then reasons that, regardless of whether Korea considers a past criminal offence to have lapsed, the particular question posed to immigration applicants requires that such an offence be disclosed. The ID succinctly expresses its reasoning by explaining that the question posed is not, “Would a criminal record reveal past criminality?”

[22] I find this reasoning sound and reasonable, in disposing of any argument that the fact the Applicant’s offences had lapsed had absolved him of responsibility for his misrepresentation. That is, to the extent he was arguing that he honestly and reasonably believed that he was not required to disclose these offences because they had lapsed, the ID reasonably concluded that the innocent misrepresentation exception did not apply.

[23] However, I understand the Applicant’s innocent misrepresentation argument both before the ID and before this Court, at least in significant measure, to be based not on the lapse of his offences but rather on his alleged understanding that those offences were not criminal in nature. Noting that the particular criminal record check document the Applicant had received from the Korean government at the relevant time did not reference the offences in question, the Applicant’s counsel submitted to the ID that the Applicant believed at that time that the offences were not criminal offences. As I understand the Applicant’s argument, it is that he honestly believed the offences were not criminal in nature and that such belief was reasonable, because it was supported by the document issued by the Korean government that showed he had no criminal record.

[24] I express no opinion on whether these facts support application of the innocent misrepresentation exception. Rather, my decision to allow this application for judicial review results from the ID not having engaged with the Applicant's argument that he honestly and reasonably believed that he had not committed any offences that were criminal in nature. Following the analysis canvassed above related to the lapse of convictions, the ID concludes that the Applicant cannot rely on the innocent misrepresentation exception, because he knew he had convictions for drunk driving and family violence regardless of whether they showed up in a criminal record check. The ID states that the fact the Applicant did not think these were serious matters does not excuse the requirement that he disclose them. However, the ID provides no analysis of whether the Applicant held the alleged honest belief that the offences were not criminal in nature or whether the absence of those offences in the criminal record check received by the Applicant made such a belief reasonable.

[25] The ID proceeds to assess whether the offences are criminal in nature and concludes that they are, based in part on the description of the offences as criminal in the criminal record check that had been seized by CBSA. However, again, this analysis does not consider what the Applicant believed about the nature of the offences or the reasonableness of that belief when he made the misrepresentation, which was before the criminal record check that identified the offences was sent to him.

[26] At the hearing of this application, in response to the Applicant's innocent misrepresentation argument, the Respondent referred the Court to statements made by the Applicant, when CBSA interviewed him following seizure of the criminal record check that

revealed the offences in question. When asked if he had ever been arrested, charged or convicted of any criminal offences anywhere in the world, the Applicant identified his drinking and driving violation. I understand the Respondent to be arguing that this evidence, and other statements made to the CBSA during that interview, demonstrate the Applicant understood that the relevant offences were criminal in nature. However, this reasoning offered by the Respondent is not found in the ID's Decision and therefore does not represent a basis for the Court to conclude that the ID's treatment of the innocent misrepresentation argument was reasonable.

[27] In *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, the Supreme Court explains that the principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties (para 127). As the ID did not address one of the Applicant's key arguments, the Decision is unreasonable, and I must allow this application for judicial review. It is therefore unnecessary for the Court to consider the other issues raised by the Applicant.

[28] Neither party proposed any question for certification for appeal and none is stated.

VI. **Costs**

[29] As previously noted, the Applicant seeks an award of costs. He recognizes that costs are awarded in judicial review applications involving decisions under IRPA only in exceptional circumstances. However, he submits that such circumstances exist in this case, because of emotional and financial suffering he has experienced due to the ID's unreasonable Decision.

[30] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that no costs shall be awarded unless there are special reasons to do so. I agree with the Respondent's submission that the threshold for an award of costs for special reasons is a high one (see, e.g., *Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 at paras 35-41). In my view, the circumstances of this case, including the basis of the Court's decision to allow the application for judicial review, raise no such special reasons or even a credible basis to assert a claim for costs.

JUDGMENT IN IMM-6669-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is returned to another member of the Immigration Division of the Immigration and Refugee Board of Canada for re-determination.

2. No question is certified for appeal.

3. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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