Federal Court  Cour fédérale

Date: 20220915

Docket: IMM-6398-20

Citation: 2022 FC 1296

Ottawa, Ontario, September 15, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BAEKRYONG KANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [the Officer], dated July 30, 2020 [the Decision]. In the Decision, the Officer refused the Applicant's application for permanent residence under s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on humanitarian and compassionate [H&C] grounds. The Applicant had previously been granted refugee status, but that status was vacated when it was

discovered that he had misrepresented his personal and/or national identity. As a consequence of losing his refugee status, the Applicant submitted the H&C application that underlies the Decision.

[2] As explained in greater detail below, this application is allowed, because the Decision is unreasonable in that it fails to demonstrate how evidence related to the context of the Applicant's misrepresentation was considered.

II. **Background**

[3] The Applicant was born in North Korea. At the age of 17, he fled North Korea to China, where he reunited with his mother who had fled North Korea earlier. Two months later, the Applicant attempted to flee to South Korea via Mongolia. He was arrested and detained in a Mongolian refugee camp for a number of months, but he managed to leave and in October 2005 entered South Korea, where he was registered as a North Korean refugee and obtained South Korean citizenship.

[4] In July 2011, the Applicant entered Canada through the United States and made a refugee claim under an alias. In October 2012, the Refugee Protection Division [RPD] accepted his claim. However, in 2019, the Applicant's identity became known. Subsequently, the RPD found that he had misrepresented his personal and/or national identity. As a result, the Applicant's refugee status was vacated. After losing his status, the Applicant sought permanent residence on an H&C basis.

[5] In his H&C application, the Applicant explained that, since arriving in Canada, he has started a dry-walling business that employs four other people and has built up savings through his entrepreneurial activities. He also provided more than twenty letters of support from his girlfriend (now fiancée), friends, employees, colleagues, and business associates. The Applicant further provided evidence on the hardships he says he would face should he be forced to return to South Korea, including facing discrimination based on his North Korea ethnicity.

[6] Significant to the Applicant's arguments in support of this application for judicial review, he submits that his H&C application also provided context surrounding his use of an alias when seeking refugee protection. As will be explained in more detail below, he argues that it is relevant to the H&C analysis that he used an alias on the advice of his former lawyer, who has since been disbarred and criminally convicted. His H&C application included letters from other members of the North Korean community in Canada, including his mother, who state they had been represented by the same lawyer and were similarly advised to misrepresent themselves on their respective applications.

III. **Decision under Review**

[7] In assessing the merits of the H&C application, the Officer began with the Applicant's establishment. The Officer noted that the Applicant had made efforts to establish a new life in Canada, evidenced by his ownership a drywall business with employees, to which the Officer assigned moderate weight. The Officer noted that the Applicant also had prior employment as a board man but only attributed to this a small amount of weight due to a lack of evidence concerning the job. The Officer assigned some weight to the fact that the Applicant had savings

and assets, but little weight to the fact the Applicant pays taxes as this is expected of all Canadians.

[8] In terms of relationships, the Officer noted that both the Applicant's mother and fiancée were in Canada: the mother without status and the fiancée as a student. The Officer gave only a small amount of weight to these relationships, as neither has permanent resident status in Canada.

[9] The Officer noted that the Applicant has taken up Tae Kwon Do while in Canada and spends his free time volunteering for various opportunities at the Global Korean community church, as evidenced by letters of support from the Applicant's friends. However, the Officer assigned little weight to these activities, finding that the letters did not go into detail about the frequency at which the Applicant attended either activity. The Officer also observed that other letters from the Applicant's friends spoke little of their connection with the Applicant, focusing more on the Applicant's work as a businessperson or describing the actions of the Applicant's previous lawyer.

[10] The Officer concluded the analysis of establishment by finding that the Applicant's misrepresentation, through the use of a false identity to maintain his immigration status in disregard of Canada's immigration laws, "drastically takes away from his establishment".

[11] Turning to country conditions and assertions of hardship, the Officer found that the Applicant's personal profile had changed for the better, in that his experience running a drywall

business could be used upon his return to South Korea and, in the interim, he had a considerable amount of money that could be used to help his transition to life in South Korea.

[12] The Officer accepted the Applicant's evidence as to discrimination he would face in South Korea, finding that the Applicant would likely face lower forms of discrimination, such as street harassment, and that he may be more limited in his community-based activities. The Officer concluded that this amounted to some hardship. However, the Officer noted that, when the Applicant had lived in South Korea, he completed secondary school, worked for two years in a convenience store, and enrolled in postsecondary school. Combining those circumstances with the Applicant's work experience and savings attained in Canada, the Officer found that the Applicant would not face significant barriers to adjusting to life in South Korea.

[13] The Officer also noted that the Applicant provided little personalized information regarding discrimination he may have faced while in South Korea, noting that the Applicant is expected to bear the burden of proof in demonstrating how his personal profile makes him susceptible to a level of discrimination that amounts to significant hardship. Overall, the Officer assigned a small amount of hardship related to the discrimination submissions.

[14] Based on the country condition evidence, the Officer also rejected arguments related to a fear of conscription and a submission that the Applicant is likely to face prosecution due to his attempts to resettle outside Korea after receiving funds from the South Korean government to resettle there.

[15] The Officer was prepared to find some hardship attributable to the separation of the Applicant from his mother and fiancée should he be removed from Canada, but little weight was assigned to these circumstances, as neither woman had permanent residence in Canada and both were therefore expected to return to their country of origin at some point.

[16] Finally, the Officer was prepared to find hardship in the fact that the Applicant has subcontractors who would have to seek other sources of income should the Applicant be removed.

[17] Based on the above factors and analysis, summarized under the heading of a "Global Assessment", the Officer was not satisfied that the H&C considerations justified an exception under s 25(1) of the IRPA.

IV. **Issues**

[18] The Applicant submits that this application raises the following issues for consideration by the Court:

A. What is the applicable standard of review?

B. Did the Officer fail to address the Applicant's submissions and evidence with respect to his misrepresentation?

C. Did the Officer unreasonably assess establishment?

D. Did the Officer import the test from s 97 of IRPA when considering hardship?

E. Did the Decision lack the compassionate lens required by s 25 of IRPA?

V. **Analysis**

[19] While the Applicant raises a number of issues, including a dispute as to the standard of review applicable to one of the substantive issues, my decision to allow this application for judicial review turns on the first substantive issue articulated above - whether the Officer failed to address the Applicant's submissions and evidence with respect to his misrepresentation. The parties agree that the standard of reasonableness applies to the Court's consideration of this issue.

[20] The Applicant refers the Court to evidence and submissions included in his H&C application regarding the context surrounding his misrepresentation. Specifically, the Applicant asserts that his decision to use a false identity in claiming refugee status was made on the advice of his former lawyer, who gave comparable advice to other immigrants from North Korea, and who was subsequently disbarred and criminally convicted for other instances of dishonesty. The Applicant submits that this context is a potentially mitigating factor that the Officer was required to consider, and failed to consider, in assessing his H&C application.

[21] I agree with the Applicant's submission that the Decision does not demonstrate any meaningful consideration of this subject. As noted earlier in these Reasons, the H&C application included letters from the Applicant's mother and other North Korean immigrants, who it appears were all represented by the same lawyer as the Applicant. While the letters vary in their content, the thrust of each is that, on the advice of that lawyer, the author of the letter lied in some manner in pursuing immigration status in Canada. One of the letters refers to the Applicant similarly

being a “victim” of the lawyer. The Officer refers to the letters in the Decision, but only in the course of analysing the Applicant’s social connections in Canada, finding that the letters largely attest to the Applicant’s work as a businessperson or describe the actions of his former lawyer and therefore speak little of the authors’ connections to the Applicant.

[22] I also agree with the Applicant’s submission that his misrepresentation figured prominently in the Officer’s analysis of the Applicant’s establishment and overall weighing of the H&C considerations raised by his application. At the conclusion of the establishment analysis, in which the Officer afforded various degrees of weight to elements of the Applicant’s establishment, the Officer found that the misrepresentation drastically detracted from his establishment. Similarly, in the course of the global assessment of the H&C factors at the end of the Decision, the Officer acknowledged that the Applicant had positive elements of establishment but stated that, despite this, his establishment was found to have only some weight. Consistent with the Officer’s establishment analysis earlier in the Decision, I read this element of the global assessment as a reduction of the weight to be afforded to the Applicant’s establishment as a result of his misrepresentation.

[23] The Applicant has satisfied me that the Decision demonstrates a reviewable error of the sort identified by Justice Pentney in *Torres v Canada (Citizenship and Immigration)*, 2019 FC 150 at para 27:

> [27] I find that the Officer has not demonstrated how evidence on several essential H&C factors was considered. It is not clear whether the Officer discounted the evidence, ignored it, or considered it and simply did not find it outweighed other relevant evidence. It is not the Court’s role to re-weigh the evidence. It is, however, the Court’s role to determine whether the Officer’s

> decision is “intelligible” and “transparent” (*Dunsmuir*). A failure to make reference to evidence on crucial points, or to explain how it was weighed in the application of the H&C test, may lead to a conclusion that the decision fails to meet that standard. I find that to be the case here.

[24] In arriving at this conclusion, I have considered the Respondent’s argument that the Applicant’s submissions in support of his H&C application (which were written by counsel who is neither the disbarred lawyer nor the Applicant’s present counsel) did not expressly ask that the context of his misrepresentation be taken into account as an H&C consideration. This argument is not without merit, as the parameters of the analyses that H&C officers are required to perform are necessarily informed significantly by the manner in which applicants or their counsel frame their applications.

[25] However, those parameters are also informed by the evidence proffered in support of an H&C application. In the matter at hand, that evidence included the letters identifying the role of previous counsel in connection with misrepresentations made by the Applicant and others, as well as documentation confirming that the lawyer had been disbarred and sentenced to a term of imprisonment for other instances of dishonesty. Clearly this evidence was submitted as what the Applicant considered to be context relevant to his misrepresentation.

[26] Moreover, as the Decision demonstrates that the Officer considered the Applicant’s misrepresentation to be material to the H&C analysis, it was incumbent upon the Officer to consider the evidence of the context in which the representation was made. I emphasize that I make no comment on the extent to which that context mitigates the misrepresentation, if at all.

As the Applicant submits, it was the Officer's role to consider that question, and the reviewable error arises from the absence of any analysis on the point.

[27] As the Applicant has satisfied me that this application for judicial review must be allowed on the basis explained above, it is unnecessary for the Court to consider the other arguments raised in this application. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6398-20

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the Applicant's H&C application is returned to another officer for redetermination.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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