Federal Court  Cour fédérale

Date: 20221018

Docket: IMM-3374-21

Citation: 2022 FC 1408

Toronto, Ontario, October 18, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

SEUNGHO KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (the "RAD") concerning the applicant's claims for protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The RAD determined that the applicant did not face a risk of persecution under section 96 or mistreatment under subsection 97(1) on a forward-looking basis.

[2] For the reasons below, the application is dismissed.

I. Facts and Events Leading to this Application

[3] The applicant is a citizen of the Republic of Korea. He based his claim for protection under the *IRPA* on suffering years of bullying at school in South Korea because he was born in China and his mother is from North Korea.

[4] The Refugee Protection Division (the "RPD") concluded that there was not more than a mere possibility that the applicant would be persecuted on a Convention ground and that it was unlikely he would be subjected personally to a risk to his life or a risk of cruel and unusual treatment or punishment or a danger of torture.

[5] The RPD concluded that the applicant has experienced discrimination but it did not reach the level of persecution. The panel found that the discrimination affected the quality of his existence in South Korea but did not threaten his fundamental rights.

[6] With respect to bullying in school, the RPD found that while bullying is a hateful and pervasive problem in the education system throughout the world, it is a "time-limited problem". The RPD found that the applicant was an adult in Canada and will be considered an adult in South Korea when he turns 19 years old. The panel found that the risk of bullying occurring in the future was less than a mere possibility given the applicant's age and the fact that he is not required to return to the school where the bullying occurred.

[7] The applicant appealed to the RAD. The RAD dismissed the appeal, concluding that the RPD was correct to find that the applicant was neither a Convention refugee nor a person in need of protection.

[8] The basis of the RAD's conclusion was an analysis of forward-looking risk. While the RAD acknowledged the applicant's disagreement with the RPD about whether past events constituted persecution, the RAD found it unnecessary to decide whether those past events met the definition of persecution.

[9] With respect to forward-looking risk, the RAD concluded that if the applicant were required to return to South Korea, he would not face more than a mere possibility of persecution under section 96 or, on a balance of probabilities, a risk of harm under section 97.

[10] The RAD found that the applicant would not be a high school student when he returns to South Korea. Rather, he will have completed his high school education in Canada and it would be unnecessary for him to return to high school in South Korea. The RAD found that he would be an adult, possibly attending university. There was a lack of information that school-aged bullying extends to adults in university.

[11] At the RPD hearing, the applicant testified that he was attending high school in Grade 11 in Canada. By the time of the appeal, the RAD found that the applicant was in Grade 12 with approximately two months left to complete his final year of high school. The RAD understood that the applicant would have sufficient time to complete his high school studies before being required to return to South Korea after its decision. It based its finding on an understanding that when the RAD decides that a claimant is not entitled to refugee protection, the claimant is not

necessarily required to leave Canada immediately owing to other factors that could occur before his departure, including a possible application to this Court for leave for judicial review and an application for a pre-removal risk assessment. Those processes take time and would provide the applicant with "more than sufficient time to complete the several weeks remaining in his Grade 12, and final year of high school education."

[12] Accordingly, the RAD found that if and when the applicant is required to return to South Korea, he will be a 20-year-old adult. Even if he were to enroll in university, he would not be entitled to *IRPA* protection because the evidence suggested that school bullying takes place in school-aged children. The RAD referred to a number of documents mentioned in the applicant's memorandum on appeal to the RAD concerning school bullying in the context of school-aged children and teens.

[13] The RAD therefore dismissed the appeal and confirmed the decision of the RPD.

II. Issues and Standard of Review

[14] The applicant raised two issues to challenge the reasonableness of the RAD's decision.

[15] First, the applicant submitted that the RAD misunderstood the legal test to assess risks under sections 96 and 97 on a forward-looking basis, engaged in speculation and took an erroneously narrow view of the basis for the applicant's claim for protection.

[16] Second, the applicant submitted that the RAD erred by not conducting an analysis under subsection 108(4) of the *IRPA* as to whether there were "compelling reasons" arising out of past

persecution and treatment of the applicant that were sufficient grounds for the applicant to refuse to avail himself of the protection of the state in South Korea.

[17] The standard of review of the RAD's decision is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

III. Analysis

A. *Forward-Looking Risk*

[18] The applicant submitted that the RAD misunderstood the legal test for forward-looking risk under section 96. The applicant contended that instead of assessing whether the applicant faced a risk of persecution at the time of its decision, the RAD assessed whether the applicant would face a risk sometime in the future when he would no longer be in high school. According to the applicant, the RAD's decision was unintelligible because it chose a date in the future (two months after the decision, when the applicant would have finished high school) as the reference point for its forward-looking risk assessment, contrary to the case law that requires the

assessment to be made on the date of decision. The applicant argued that the correct approach is to examine whether, at the time of the hearing or when a claim is being decided, the applicant faces a risk in the country of origin. The applicant referred to *Yusuf v Canada (M.E.I.)* (1995), 179 NR 11 (FCA) and additional cases that are mentioned below.

[19] I do not agree with the applicant's position. The RAD did not err in law as alleged. The question before the RAD was whether the applicant would face a forward-looking risk if he returned to his country of origin. It did not misstate the law on this issue. Inherently, its determination involved an assessment of whether the applicant would, upon his return to South Korea at a time after the RAD's decision, suffer from persecution or treatment from which he should be protected by the *IRPA*. The RAD made no error in determining that, as a result of the passage of time, the applicant would no longer be a high school student by the time he returned to South Korea. Indeed, the RPD made the same determination. The applicant did not point to any contradictory evidence about the applicant's education status in the record before the RAD or the RPD.

[20] The applicant's submissions were partially dependent on a linguistic nuance. In some decisions, the Court has stated that the determination of a forward-looking risk must be done as of the date of decision, the date of the hearing or "today": see eg *Pazmandi v Canada (Citizenship and Immigration)*, 2020 FC 1094, at para 38, quoting *Mileva v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 398 (FCA); *Barrios Trigoso v Canada (Citizenship and Immigration)*, 2011 FC 991, at paras 14 and 40; *Nzayisenga v Canada (Citizenship and Immigration)*, 2012 FC 1103, at para 29. On this basis, the applicant submitted that if the

applicant were in South Korea on the date of the RAD's decision, he would have still been in high school for two more months. With that in mind, the applicant's submission was that two months of persecution is not permissible. In effect, this argument suggested that the applicant must be treated as though he were in South Korea as of the date of decision. On the other hand, there are Court decisions that refer to the forward-looking analysis as considering whether the individual would suffer from persecution if the claimant is returned to the country of origin. This phraseology accounts for the possibility that the applicant will not be returned as of the date of decision, but will (or may) be returned some time after the decision.

[21] In my view, any alleged reviewable error or error of law must be considered as a matter of substance and should not turn on a turn of phrase used in one decision or another. The Federal Court of Appeal stated in *Mileva:*

> The question raised by a claim to refugee status is not whether the claimant had reason to fear persecution in the past, but rather whether he now, at the time his claim is being decided, has good grounds to fear persecution in the future.

[22] In substance, the question is whether the RAD's decision lawfully determined whether the applicant had grounds to fear *persecution in the future* if he were to return to South Korea. In my view, the RAD did not make a reviewable error. It did not misstate the law, nor can I find that in the application of the test for forward-looking risk to the passage of time until the applicant has completed high school, the RAD made a reviewable error. Its understanding of the evidence did not involve an improper prediction or speculation. It was a conclusion open to the RAD based on the evidence in the record and the ordinary passage of time. While I do not dismiss outright the applicant's position that the RAD should not have considered whether the

applicant might seek judicial review of its own decision or seek a PRRA, I find that doing so did not vitiate its determination of forward-looking risk as alleged by the applicant.

[23] To support his position on forward-looking risk, the applicant also submitted that the RAD only narrowly considered the applicant's risk of persecution related to bullying at school, whereas the evidentiary record supported a broader approach. According to the applicant, the record contained country condition evidence showing that in South Korean society generally, individuals with the applicant's characteristics as a Chinese-born person with a North Korean parent were subject to widespread mistreatment and discrimination. The applicant also noted that at the RPD hearing, he testified that he was fearful of people in general treating him in a discriminatory manner in South Korea, not just young people of a school age.

[24] The respondent submitted that the applicant's arguments to the RAD, and to the RPD, were focused on bullying at school. His claim was based on his past mistreatment as a student while in South Korea from approximately Grade 3 to Grade 9, and the effects of that mistreatment and bullying on him (including considerable mental health challenges). In addition, the respondent submitted that the country condition evidence only referred to discrimination, distinct from persecution. As wrong and unfortunate as that discrimination is, the respondent submitted that it is legally distinct from persecution and therefore was not material to the determination of the appeal.

[25] In my view, the respondent is correct that the applicant's position was based on his experiences of being bullied and mistreated by other students. Although there was mention of

broader discriminatory treatment in South Korean society, it was not the basis of his appeal to the RAD. I find no reviewable error in the RAD's determination in this case.

B. ***IRPA Subsection 108(4)***

[26] The applicant's second argument was that the RAD made a reviewable error by failing to conduct a "compelling reasons" assessment under subsection 108(4) of the *IRPA*. The applicant submitted that the RAD was obligated to conduct such an analysis, whether or not the applicant has explicitly invoked that provision. The applicant also submitted that the RAD implicitly accepted that he was mistreated and persecuted.

[27] The applicant did not raise an issue about subsection 108(4) before the RAD. The respondent's written submissions mentioned that it was not raised as a ground of appeal. The record reveals that the applicant made no submissions to the RAD on the issue. The respondent referred to *Ogunjinmi v Canada (Citizenship and Immigration)*, 2021 FC 109, at para 21. The applicant submitted that the issue could not have been raised before the RAD because the RPD found no past persecution, and the RAD had a duty to consider subsection 108(4).

[28] Although I find the respondent's position more attractive than the applicant's on this issue, I will not comment on it further. The applicant's position cannot be sustained on its merits.

[29] Section 108 of the *IRPA* concerns the cessation or loss of refugee status: see *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (CA). Paragraph 108(1)(*e*) provides that a claim for refugee protection shall be rejected if the reasons for which the person

sought refugee protection have ceased to exist. Subsection 108(4) provides for an exception to that paragraph if there are "compelling reasons" for the refugee claimant to refuse to avail themselves of the protection of their country despite these changed circumstances.

[30] The Federal Court of Appeal held in *Yamba* that there is an obligation to consider whether there are compelling reasons "in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but [there] has been a change of country conditions": *Yamba v Canada (Minister of Citizenship and Immigration)* (2000), 254 NR 388 (FCA), at para 6. This Court has stated that it is a requirement (or condition precedent) for the application of subsection 108(4) that the individual claimant would have once qualified as either a Convention refugee or person in need of protection: *Lozano Caceres v Canada (Citizenship and Immigration)*, 2022 FC 179, at para 34; *Pazmandi*, at paras 48-50; *Krishan v Canada (Citizenship and Immigration)*, 2018 FC 1203, at paras 76–77; *Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648, at paras 27–28; *Obstoj*, at para 14.

[31] In *Pazmandi*, at paragraph 49, McHaffie J referred with apparent approval to the following passage from *Contreras Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343, at para 21:

> It is clear from the wording of subsection 108(4) that it is not aimed at creating a broad obligation for the RPD to assess the existence of "compelling reasons" in every refugee claim. If a refugee claimant is neither a refugee nor a person in need of protection because the conditions of the general definition of section 96 and 97 of the IRPA are not met, then no "compelling reasons" assessment need be performed by the RPD. It is only necessary where the rejection of the claim is based on 108(1)(e).

[32] In the present case, the RPD determined that the applicant's claim did not qualify for protection under *IRPA* section 96 and subsection 97(1). The RPD found that the applicant faced treatment in South Korea that amounted to discrimination, but not persecution. For its part, the RAD acknowledged that the applicant disagreed with the RPD's findings but determined that it was unnecessary to decide whether past events suffered by the applicant met the definition of persecution, owing to its finding concerning a lack of forward-looking risk. As such, the RAD did not make an implicit finding that the applicant was persecuted, as the applicant argued, and did not disturb the RPD's conclusion on that issue. The applicant therefore does not meet a precondition for subsection 108(4) to apply. In addition, it may be noted that the RAD made no reference to section 108 and did not reject the applicant's claim on the basis that the reasons that he sought refugee protection had ceased to exist under paragraph 108(1)(*e*). Indeed, that allegation would have been inconsistent with the position on forward-looking risk before the RAD.

[33] Finally, the applicant maintained that the evidence was capable of establishing that he experienced past persecution, particularly considering cumulatively the eight years of bullying he suffered. However, the question before this Court on judicial review is not whether the evidence could give rise to a finding of persecution. It is whether the RAD made a reviewable error by failing to consider at all whether compelling reasons existed under subsection 108(4). Given the RPD's conclusion that the applicant's circumstances did not amount to persecution and the lack of any explicit or implicit finding by the RAD, I conclude that the RAD's failure to consider subsection 108(4) respected the legal and factual constraints operating on its decision.

[34] Accordingly, the RAD did not make a reviewable error by failing to consider the application of subsection 108(4).

IV. Conclusion

[35] The application is therefore dismissed. Neither party proposed a question for certification.

JUDGMENT in IMM-3374-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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