

Federal Court



Cour fédérale

**Date: 20230616**

**Docket: IMM-7901-22**

**Citation: 2023 FC 850**

**Toronto, Ontario, June 16, 2023**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**JIYEON NA**

**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 [Officer], dated August 9, 2022 [the Decision], in which the Officer refused the Applicant's application, under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] As explained in greater detail below, this application is allowed in part, because the Officer failed to consider that the Applicant's request for permanent residence on H&C grounds was accompanied by an alternative request for the issuance of a Temporary Resident Permit [TRP]. My Judgment will refer the TRP request to a different officer for a decision. Otherwise, this application is dismissed in relation to its challenge of the Decision on the Applicant's H&C application, as the Applicant's arguments in support of that challenge do not undermine the reasonableness of the Decision.

## II. **Background**

[3] The Applicant is a 34-year-old citizen of South Korea. She initially arrived in Canada in December 2017 and was given temporary resident status as a visitor. She then obtained a study permit to improve her English in November 2018. Her study permit was extended in February 2019 and expired on November 30, 2019. During her time in Canada, the Applicant returned to South Korea two times to visit her family: once from October to November 2018 and a second time from July to August 2019.

[4] Upon the expiry of her study permit in November 2019, the Applicant remained in Canada without status. While she had submitted an application for a work permit in November 2019 (including receiving a favourable Labour Market Impact Assessment), her application was refused on March 30, 2020. The Applicant worked in Canada illegally during the period that she did not have status entitling her to do so.

[5] The Applicant's H&C application was received on October 25, 2021. In the event that her H&C application was denied, she requested the issuance of a TRP.

III. **Decision under Review**

[6] In assessing the merits of the H&C application, the Officer considered the Applicant's establishment in Canada and her concerns of hardship upon return to South Korea.

[7] With respect to establishment, the Officer noted that the Applicant had engaged in employment in an effort to be self-sufficient and that banking statements indicated that she possessed sound financial management. The Officer also noted that the Applicant has been active in her church and has developed many friendships, as evidenced by letters of character endorsement provided by her colleagues.

[8] However, the Officer also noted that the Applicant has not remained in Canada due to circumstances beyond her control, concluding that her assertions of establishment and integration into Canadian society are based on non-compliance with Canadian immigration law by remaining continuously and working in Canada without authorization.

[9] With respect to hardship, the Officer referred to the Applicant's submission that she had severed her social ties in South Korea, where she had not lived for almost 4 years. She explained that she does not have a job to return to in South Korea and cannot rely on her family for support in re-establishing herself in that country as they are struggling financially. Prior to coming to Canada, the Applicant worked at her mother's restaurant. However, the COVID-19 pandemic

affected the restaurant adversely. As it was going bankrupt, the Applicant would not have a waiting job waiting for her, and it would be difficult for her to find work in South Korea.

[10] The Officer acknowledged that the Applicant's life would be fundamentally changed and that she would find it difficult to resume life all over again in South Korea. However, the Officer noted that the Applicant had made a conscious choice to leave South Korea in 2017 and that her attachments to South Korea may have faded as a direct result of her personal decision. While the Officer acknowledged that the Applicant's return to South Korea would expose her to potential economic hardship due to the country's high unemployment, the Officer found that the process of re-integration and re-establishment when returning to a country whose economic conditions are less prosperous than those found in Canada is an ordinary consequence of return.

[11] Based on these analyses of establishment and hardship, the Officer concluded that relief under subsection 25(1) of the IRPA was not warranted. The Officer did not address the Applicant's alternative request for issuance of a TRP.

#### IV. **Issues and Standard of Review**

[12] The Applicant's submissions raise the following issues for the Court's consideration:

- A. Did the Officer fail to consider the Applicant's request for a TRP?
- B. Did the Officer fail to properly assess the Applicant's H&C factors?

[13] The parties agree (and I concur) that the standard of review applicable to these issues is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. **Analysis**

A. *Did the Officer fail to consider the Applicant's request for a TRP?*

[14] The Respondent concedes that it was an error for the Officer to fail to address the TRP request. Therefore, while the Respondent takes the position that the H&C analysis of the Decision is reasonable, the Respondent concedes that the TRP request should be sent back to be determined. As the Respondent notes, the Court has similarly addressed this sort of situation in *Li v Canada (Citizenship and Immigration)*, 2020 FC 754 [*Li*] at paras 10-11.

[15] On this basis, my Judgment will allow this aspect of the application for judicial review and refer the undetermined TRP request to a different officer for a decision. However, as in *Li* (see para 11), it remains necessary to consider the reasonableness of the H&C analysis in the Decision.

B. *Did the Officer fail to properly assess the Applicant's H&C factors?*

[16] While the Applicant's Memorandum of Fact and Law advanced arguments related to the Officer's assessment of the Applicant's establishment, her counsel's oral submissions also addressed the Officer's hardship analysis. In both components of the Applicant's argument, she submits that the Officer erred by focusing on her adverse immigration history (*i.e.*, time spent in Canada without status, failing to leave at the end of her authorized day, and working without authorization), holding her immigration status against her and using it to inappropriately discount

her positive H&C factors of establishment and hardship. The Applicant submits that the Officer failed to perform the required balancing of the positive factors against her legal noncompliance.

[17] In support of her position, the Applicant refers to Court to *Toussaint v Canada (Citizenship and Immigration)*, 2022 FC 1146 [*Toussaint*] at paragraph 22, which held that the H&C officer in that case had unreasonably focused and placed undue weight on the Applicant's regard for immigration laws. Similarly, in *Uddin v Canada (Citizenship and Immigration)*, 2016 FC 314 at paragraph 50, the Court found that an officer had failed to explain why the applicant's adverse immigration history outweighed the positive H&C factors.

[18] I agree with the Respondent's submission that those authorities turn on their particular facts. As acknowledged in *Toussaint*, it is not improper for an officer as part of the balancing exercise to assign negative weight to an applicant's unauthorized work and unauthorized stay in Canada (at para 22). Indeed, as explained by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at paragraph 19, it is permissible to take into consideration an applicant's failure to comply with the law including the fact that the H&C grounds the applicant claims are the result of their own actions.

[19] This is precisely the sort of analysis the Officer conducted in the case at hand, noting that the Applicant's disregard for Canadian immigration law contributed both to her establishment in Canada and the severance of her ties in South Korea that would result in hardship upon her return.

[20] I also note the Applicant's submission that the Officer should have taken into account the fact that H&C applications typically involve applicants who have failed to comply with the law. Again, I find no error in the Officer's analysis. The Court addressed similar arguments in *Campbell-Service v Canada (Citizenship and Immigration)*, 2022 FC 1050 at paragraphs 14-16. The fact that the jurisdiction under subsection 25(1) of IRPA contemplates that individuals will be without status does not make this an irrelevant consideration. Rather, it is reasonable for an officer to consider this factor and attribute negative weight to it, where the individual's presence in Canada without status was of their own choosing.

[21] As I read the Decision, the Officer was conscious of the evidence weighing in the Applicant's favour, in connection with establishment in Canada and hardship in returning to South Korea. However, after taking into account the negative impact of the Applicant's disregard of Canadian immigration law and the fact that the Applicant's choice to remain in Canada without status contributed to her establishment and hardship, the positive factors were not sufficient to warrant the granting relief. This analysis represents the sort of balancing exercise that the Officer was required to perform, and I find no basis for a conclusion that the Decision is unreasonable.

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

**JUDGMENT IN IMM-7901-22**

**THIS COURT'S JUDGMENT is that:**

1. The undetermined issue of the Applicant's request for a Temporary Resident Permit is remitted to a different officer for a decision.
2. Otherwise, this application is dismissed.
3. No question is certified for appeal.

"Richard F. Southcott"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7901-22

**STYLE OF CAUSE:** JIYEON NA v. THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 14, 2023

**JUDGMENT AND REASONS:** SOUTHCOTT J.

**DATED:** JUNE 16, 2023

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