

Federal Court



Cour fédérale

Date: 20120305

Docket: IMM-4491-11

Citation: 2012 FC 289

Toronto, Ontario, March 5, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

KUN YOUNG ALEX KIM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Immigration Officer dated July 5, 2011 wherein the Applicant's request for exemption from providing a valid foreign passport in support of an application for a Canadian permanent resident visa was denied. For the reasons that follow, I have dismissed this application.

[2] The Applicant is an adult male citizen of the Republic of Korea (South Korea). He entered Canada under a temporary resident visa in order to pursue a university education here. He pursued

his education and obtained a degree. His visa expired. He remains in Canada to this day. During his stay in Canada, he met a Canadian woman; he lives with her and has fathered two children by her. It is not disputed that they are in what may be considered to be in a common-law spousal relationship subject to what I will discuss further in these reasons.

[3] The Applicant applied for a permanent resident visa so as to remain in Canada. Section 50(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) provides that such an applicant must hold a passport that was issued by the country of which he is a citizen. Here the Applicant does hold a South Korean passport, but it has expired. The evidence is that to renew the passport, he must return to South Korea. The evidence also is that if he were to return to South Korea, he would immediately be required to enter the armed forces and perform two years of military service. Given that his common-law family is in Canada, and the fact that he has a good job in Canada, the Applicant is unwilling to return to South Korea for fear of being impressed into two years of military service.

[4] Returning to the *Regulations (IRPR)*, section 124 defines a spouse or common-law partner:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they

(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;

(b) have temporary resident status in Canada; and

124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :

a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;

b) il détient le statut de résident temporaire au Canada;

(c) are the subject of a sponsorship application.

c) une demande de parrainage a été déposée à son égard.

[5] Thus, in order to be a common-law partner within the meaning of the *IRPR Regulations*, a person must, among other things, have temporary resident status in Canada. The Applicant's temporary resident status has expired.

[6] Section 52(1)(a) of the *IRPR Regulations* requires that a person seeking a temporary resident visa must hold a foreign passport that is valid for the period authorized for their stay:

52. (1) In addition to the other requirements of these Regulations, a foreign national seeking to become a temporary resident must hold one of the following documents that is valid for the period authorized for their stay:

(a) a passport that was issued by the country of which the foreign national is a citizen or national, that does not prohibit travel to Canada and that the foreign national may use to enter the country of issue;

52. (1) En plus de remplir les autres exigences réglementaires, l'étranger qui cherche à devenir résident temporaire doit détenir l'un des documents suivants, valide pour la période de séjour autorisée :

a) un passeport qui lui a été délivré par le pays dont il est citoyen ou ressortissant, qui ne lui interdit pas de voyager au Canada et grâce auquel il peut entrer dans le pays de délivrance;

[7] The Applicant does not have a valid South Korean passport, only an expired one.

[8] The Minister of Citizenship and Immigration has published a set of Guidelines called IP8, which includes a statement to the effect that the Minister “may” consider an expired passport to “be appropriate”. The following Note appears in the section entitled “Lack of Status”:

*NOTE: If a valid passport or travel document is not acquired by the applicant by the time of grant of permanent residence, the applicant may be found inadmissible to Canada. Cases considered under this public policy are **not eligible** for a passport waiver. Persons seeking this waiver must apply through the regular H&C stream.*

As a general rule, CIC should accept only validly issued and non-expired passports for the purposes of the grant of permanent residence in R72. This having been said, the use of a passport which has expired during the processing of an application may be appropriate to fulfill the R72 requirements when no identity issues remain.

[9] In the present case, the Applicant retained solicitors who communicated with Citizenship and Immigration Canada. In a letter dated January 12, 2009, that department wrote to those solicitors indicating that, instead of a valid passport, it would be prepared to accept a “one way travel document from the South Korean authorities”.

[10] A letter from the consulate dated May 1, 2007 confirms that the Applicant has not served his army service and would have to return to South Korea and could only get a passport once he finished his two-year army service.

[11] A Statutory Declaration declared 13th January, 2009 from an articling student at the Applicant’s solicitor’s office states that he spoke with an employee of the South Korean consulate’s office in Vancouver and was advised that in order to obtain the “travel document”, the Applicant

(who lives in Edmonton) would have to attend at the consulate in Vancouver and provide, among other things, “a copy of the applicant’s flight itinerary; including a direct flight from Vancouver to [South Korea]”.

[12] It appears, therefore, that the Applicant could go to Vancouver, produce to the South Korean consulate a one-way ticket to South Korea, secure a “travel document” that would satisfy the Canadian authorities, and never, in fact, have to travel to South Korea. Thus, for the cost of a one-way ticket and a couple of days in Vancouver, the Applicant could have obtained a document that the Canadian authorities would accept.

[13] However, the Applicant apparently didn’t see it that way. His solicitors wrote to the Canadian authorities on January 19, 2009 stating, *inter alia*:

I am attaching some printouts from Expedia.ca indicating the costs involved in purchasing air tickets of the type and duration our client would require (please note that our search indicated that the only direct one-way ticket available is almost CAD\$2,500.00). This amount would be in addition to the costs of staying here in Vancouver, and any possible wage loss he might have to suffer. I hope that you’ll agree that what would amount to an expenditure in the end of almost \$3,000 is an inordinately high fee to pay in the circumstances (although it would still be preferable to 24 month’s enforced estrangement from his family, which is his only other option if you determine that he must provide a travel document from Korea in order to land).

*In light of this information on how expensive this process will likely be for our client, who is the sole wage-earner in his household, and to whom the requirements of the Korean consulate would be significantly onerous in this situation, I would ask that you please comment on your requirement that Mr. Kim acquire the one-way travel document, and possibly offer any other alternatives you may see for him. **Please note that, if necessary, we are ready to make***

submissions regarding a waiver of the R50/R72 passport requirement pursuant to s. 5.15 of CIC Operational Manual IP 8.

[14] There is further correspondence between these parties, but it does not appear that the Canadian officials addressed the request to provide other alternatives.

[15] In the decision under review, which is set out in a letter from Citizenship and Immigration Canada to the Applicant, in care of his solicitors, the Applicant was advised that his application for permanent residence under the spouse or common-law partner clause was refused. The Officer was not prepared to waive the requirement of a valid passport or travel document, or to accept an expired passport. The notes to the file state that the Officer was not satisfied “*that [the Applicant] was unable to acquire a valid passport or travel document, only that he has chosen not to comply with the requirements of his government in order to obtain one*”.

[16] I find this decision to be reasonable. It seems almost beyond understanding that the Applicant, fearing that a return to South Korea would mean two years’ military service, would not have seized upon the alternative of purchasing a one-way ticket to South Korea, never to use it, and spend a couple of days in Vancouver dealing with the consulate. The result of his decision has been to engage the Court and his lawyers and the department’s lawyers in a futile application for judicial review.

[17] The Applicant argues that an applicant for a *permanent* resident visa (section 50 of *IRPR*) needs only to produce a passport, unlike an applicant for a *temporary* resident visa (section 52 of *IRPR*) who must produce a *valid* visa. This is to overlook section 124 of *IRPR*, which deals with

common-law partner applications (such as this) which require that the applicant have temporary resident status in Canada (he does not). The Minister generously offered an alternative, a “travel document”, which could have readily been secured at a modest cost in time and money. The Applicant squandered that chance.

[18] Applicant’s Counsel has asked that I certify the following question:

Does a person applying for permanent residence under the Spouse or Common-law Partner in Canada class require a valid passport to become a permanent resident?

[19] Applicant’s Counsel and Respondent’s Counsel have both written letters to the Court, the Applicant in support of, the Respondent opposing a certified question. I agree with the Respondent. The facts of this case do not support the certification of a question. The facts here do not concern the issue as to whether a valid passport is required, the issue is whether the Minister, having waived the requirement of a valid passport, acted reasonably in respect of the issue of a travel document and the Applicant’s refusal or failure to supply one. In this respect the case is much like *Rakheja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 633 where the Court came to the same result as I have here. Accordingly, no question will be certified.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. No question is certified; and
3. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4491-11

STYLE OF CAUSE: KUN YOUNG ALEX KIM v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 29, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** HUGHES J.

DATED: March 5, 2012

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