Federal Court  Cour fédérale

Date: 20211209

Docket: IMM-5744-20

Citation: 2021 FC 1393

Ottawa, Ontario, December 9, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MYEONGOCK LIM
CHANGIL BAE
HYESEON LIM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of a senior immigration officer (the "Officer") dated July 20, 2020, to refuse their application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicants submit that the Officer's decision is unreasonable because the Officer minimized the Applicants' establishment in Canada by focusing on their misrepresentations and previous charges and failed to account for the hardship the Applicants would face in South Korea, in particular with respect to the best interest of the Applicants' children ("BIOC").

[3] For the reasons that follow, I find the Officer's decision is reasonable. I dismiss this application for judicial review.

II. **Facts**

A. *The Applicants*

[4] The Applicants are nationals of South Korea. This application includes the Principal Applicant, Myeongock Lim ("Ms. Lim"), her spouse, Changil Bae ("Mr. Bae"), and her 17-year-old daughter ("Hyeseon"). Ms. Lim and Mr. Bae also have a 6-year-old daughter ("Sophia") who was born in Canada and is a Canadian citizen.

[5] The Applicants provide significant details of Ms. Lim's history before her arrival in Canada. In summary, the H&C application outlines how Ms. Lim was forced to marry a man who raped her, and gave birth to her first daughter in 1995. Following an incident during which her then-husband also raped her sister, Ms. Lim and her sister moved to China, leaving behind her first daughter. Ms. Lim assumed a false identity in China to avoid repatriation to North Korea. She lived there for 5 years and had a daughter, Hyeseon.

[6] Ms. Lim and Hyeseon were repatriated to South Korea in 2007. In South Korea, Ms. Lim allegedly faced discrimination for her identifiable North Korean accent, and Hyeseon experienced harassment for being the child of a North Korean. While in South Korea, Ms. Lim was charged with defrauding the government of basic livelihood income payments.

[7] Ms. Lim and Hyeseon arrived in Canada on March 29, 2010 as visitors and soon thereafter adopted false identities. Under the alias Young Ju Lim, Ms. Lim obtained multiple work permits from August 4, 2010 to October 23, 2015.

[8] Ms. Lim also submitted a refugee claim to the Immigration and Refugee Board of Canada on the basis that she feared persecution in North Korea. On October 31, 2011, the Refugee Protection Division ("RPD") granted refugee protection to Ms. Lim and Hyeseon.

[9] Mr. Bae arrived in Canada on September 7, 2011 and initiated a refugee claim based on his fear of persecution from the North Korean regime. His claim was accepted on July 30, 2012.

[10] Ms. Lim and Mr. Bae met in 2012. Their daughter Sophia was born in 2015.

[11] The Applicants' fraudulent identities and misrepresentations were eventually discovered. On November 6, 2018, the RPD allowed the Minister's application to vacate Mr. Bae's refugee protection, and on April 23, 2019, Ms. Lim and Hyeseon's refugee protection was vacated on the grounds that they withheld material facts related to their identities.

B. *Decision Under Review*

[12] On May 22, 2019, the Applicants submitted their application for permanent residence within Canada on H&C grounds based on their establishment in Canada, the hardship associated with their return to South Korea and the BIOC with respect to Hyeseon and Sophia.

[13] On July 20, 2020, the Officer determined that the Applicants' circumstances did not warrant an exemption on H&C grounds, pursuant to subsection 25(1) of the *IRPA*.

[14] In the decision, the Officer considers the Applicants' history prior to their arrival to Canada. The Officer notes that while Mr. Bae's application states that he enlisted in the North Korean army in 1998 and was discharged due to illness, evidence of this was not provided. The Officer also notes how Mr. Bae fled to China in 2007 and was eventually sent back to South Korea, where he allegedly faced discrimination due to his North Korean accent and citizenship.

[15] The Officer assessed the hardship the Applicants would face in South Korea and the BIOC. The Officer further assessed the Applicants' establishment in Canada, considering the length of time the Applicants have spent in Canada, their employment history and their ties to the community. The Officer concluded that when considering the evidence as a whole, there was no sufficient basis to warrant an exemption on H&C grounds.

III. **Issue and Standard of Review**

[16] The only issue in this case is whether the Officer's decision is reasonable.

[17] It is common ground between the parties that the applicable standard of review for the issue above is reasonableness. I agree that the appropriate standard of review for H&C decisions is reasonableness (*Chen v Canada (Citizenship and Immigration),* 2019 FC 988 at para 24; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at paras 44-45; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16-17).

[18] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[19] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. **Analysis**

[20] An H&C exemption is a discretionary remedy. What warrants relief will vary depending on the facts and context of the case. In *Kanthasamy,* the Supreme Court defines H&C considerations as being "those facts, established by the evidence, which would excite in the reasonable [person] in a civilized community a desire to relieve the misfortune of another" (at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 at 350).

[21] This means that the decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy* at para 25, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 74-75) and that "there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy* at paras 12-13).

[22] The Applicants bear the onus of establishing that an H&C exemption is warranted (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45).

A. *Establishment in Canada*

[23] In their decision, the Officer noted that while neither Mr. Bae nor Ms. Lim have any immediate family in Canada, they have developed a supportive network in Canada and maintained good civil records. Positive weight was given to the Applicants' friendships, community involvement and letters of support. Despite this, the Officer stated:

> It is evident that the applicants have developed positive ties within their community. However, I observe that the majority of these ties have been developed under the use of false identity (demonstrated by the evidence presented to me) which has negatively affected this component of their application. Consequently, based on the totality of the evidence before me and what has been noted above, I have attributed low weight to the applicants' ties to their community as a positive component of this application.

[24] Additionally, while the Officer considered Mr. Bae's employment awards, the Officer gave little weight to the Applicants' employment history in Canada, noting inconsistencies between their application and reference letters from the Applicants' employers about the lengths of time the Applicants had spent at their workplaces. The Officer also noted that although their application states that the Applicants studied English, no evidence of this was provided. Overall, little weight was attributed to the Applicants' establishment in Canada because the Officer found that the Applicants' misrepresentation and use of false identities undermined their efforts to be self-sufficient, acquire new skills and positively affect their community.

[25] The Applicants submit that the Officer failed to address the underlying circumstances leading to Ms. Lim's non-compliance with the *IRPA*, in particular that she assumed her false identity out of fear in order to seek out safety for herself and her daughter and to avoid the harassment and prejudice that they faced in South Korea. The Applicants rely on *Phan v Canada (Citizenship and Immigration),* 2019 FC 435 ("*Phan*"), to submit that the jurisprudence establishes that misrepresentation cannot be used to negatively impact the weight attributed to establishment without first conducting a qualitative assessment of the establishment in the context of the hardship that would result from an applicant's removal from Canada. The applicant in *Phan* brought an appeal to the Immigration Appeal Division on H&C grounds

following a finding that she was inadmissible to Canada for misrepresentations made during her spousal sponsorship. At paragraph 36, this Court states:

> […] read in whole, the IAD's focus appears to have been to discount or dismiss the H&C factors primarily on the basis of the misrepresentation, rather than properly assessing each of those factors and then weighing them to determine if they served to establish H&C considerations that warrant special relief in light of all the circumstances of the case.

[26] I note that *Phan* also states that this Court has found that the establishment factor can be discounted because of misrepresentation, yet there remains a debate "as to the circumstances in which the IAD will commit a reviewable error if it "double counts" misrepresentation to reduce the weight of other factors" (*Phan* at para 36). In my view, the Officer in this case did not 'double count' the misrepresentation to reduce the weight in their analysis of other factors, such as the hardship the Applicants would face in South Korea or the BIOC analysis.

[27] The Respondent submits that this Court has held that it is not an error for an H&C decision-maker to consider an applicant's establishment against a misrepresentation and accord the establishment little weight (*Nguyen v Canada (Citizenship and Immigration),* 2017 FC 27 at paras 31-34). The Respondent contends that this is particularly apt when an applicant's establishment in Canada was facilitated by means of that same misrepresentation (*Zou v Canada (Citizenship and Immigration),* 2020 FC 368 at para 25).

[28] While I do not fully agree that one's level of community ties and establishment is necessarily weakened by the assumption of a false identity, I can appreciate that the Officer's

overall weighing of the evidence led to a reasonable conclusion that the Applicants' establishment in Canada was not sufficient to warrant the H&C exemption.

[29] The Officer also found that the Applicants' previous charges outside of Canada weighed against them in the assessment of their establishment:

> It is evident that the applicants have worked hard to establish themselves in Canada, however I am also alert to the violations committed by the co-applicant outside of Canada which have negatively affected this component of their application. More precisely, Mr. Bae was charged and convicted of a Violation of the road Traffic Act (in South Korea) for operating a vehicle while his blood alcohol content was 0.079% (for which a fine was paid). In addition, he was also charged for an offence of "causing bodily harm" and received a stay of execution due to the passing of the statute of limitations. Similarly, while there was suspension of prosecution, Myeongock Lim was accused of fraud after conspiring "to make false medical diagnosis certificates to be submitted to the [South Korean] government authorities, which would allow [her] to be designated as protected persons who [is] [recipient] of basic livelihood program and to defraud the government to receive living expenses from the government."

[30] The Applicants submit that it was unreasonable for the Officer to use charges and a conviction under South Korean law that are not equivalent to Canadian law as negative factors in the H&C considerations. The Applicants contend that Mr. Bae's 2011 impaired driving offence is not a criminal offence in Canadian law that would trigger immigration inadmissibility, and that the focus on this offence detracts from his overall accomplishments in Canada. Furthermore, Mr. Bae's 'causing bodily harm' charge received a stay of execution as a result of a statutory limitation, and the offence committed by Ms. Lim in 2010 in South Korea was poverty-related and was withdrawn for humanitarian factors.

[31] The Applicants submit that while withdrawn criminal charges may be taken into consideration to discern the meaning of other aspects of an immigration file, they cannot be used to point to an applicant's criminality within an H&C assessment (*Hutchinson v Canada (Citizenship and Immigration)*, 2018 FC 441 at paras 22-27).

[32] The Applicants contend that Mr. Bae has not been charged or convicted for any criminal behaviour in Canada and that it was not logical for the Officer to include his previous charge in their assessment of establishment, nor was it reasonable for the Officer to rely on the dropped charge against Ms. Lim to give little weight to her establishment in Canada. The Applicants submit that the Officer evaluated the application "mechanically" by weighing Ms. Lim's criminality without considering her particular circumstances (*Van Heest v Canada (Citizenship and Immigration)*, 2019 FC 161 at paras 23-24).

[33] During the hearing, counsel for the Respondent conceded that the Officer's decision is not without flaws, yet argued that, as a whole, the decision is reasonable (*Vavilov* at para 91). The Respondent's counsel agreed with the Applicants that the Officer's decision does refer to the foreign charges and erroneously states that some negative weight is assigned to the Applicants' establishment because of these charges. However, the Respondent contends that a review of the decision indicates that the Officer did not rely heavily on the criminal charges and the conviction in South Korea in refusing the application. In *Wong v Canada (Citizenship and Immigration)*, 2016 FC 1390 at paragraphs 18-19, this Court held that it is not an error for an officer to find that an applicant's history of convictions is not a positive factor in their H&C application.

[34] I agree with the Respondent that the Officer's decision contains some flaws. Nevertheless, I find it was appropriate for the Officer to determine that the Applicants' charges were not a positive factor in their H&C application. Overall, I find that the Officer weighed the charges alongside other factors, such as the misrepresentations and use of fraudulent identities, to ultimately come to a reasonable conclusion that the Applicants' establishment in Canada did not warrant an H&C exemption.

B. *Hardship upon return to South Korea*

[35] In their decision, the Officer found that there was "no objective and verifiable evidence" to suggest that the Applicants themselves would be discriminated against because of their accents, ties to North Korea or their citizenship upon their return to South Korea. The Officer further notes that the RPD previously determined that the Applicants are South Korean nationals and were found to have travelled to South Korea between June 2009 and March 2010. The Officer ultimately determined that while returning to South Korea would result in some upheaval for the Applicants, there was insufficient evidence that the Applicants would not receive some assistance from relatives nor was any evidence submitted to suggest that they would have difficulty finding employment in South Korea.

[36] The Applicants assert that the Officer failed to appropriately consider the third-party evidence of the discrimination against North Korean defectors who settle in South Korea, including evidence that North Korean refugees are often found out by their accent and appearance, which affects their ability to fit into South Korean society and access employment. The Applicants submit that the objective country condition evidence cited in the Officer's

reasons directly supports their allegations that they will face prejudice in South Korea, and yet the Officer failed to explain why that evidence was given less weight. The Applicants submit that this is an incorrect application of the law pursuant to *Cepeda-Guttierrez v Canada (Minister of Citizenship and Immigration),* 1998 CanLII 8667 (FC), insomuch as the Officer's burden to explain increases with the relevance of the evidence in question to the disputed facts (at para 17).

[37] The Applicants argue that their case is comparable to the situation in *Damian v Canada (Citizenship and Immigration),* 2019 FC 1158 ("*Damian*"), wherein this Court found it was unreasonable for the officer to discount evidence of country conditions provided in the application. I disagree. In *Damian,* the officer's reasoning and approach to evidence of adverse country conditions was found to be unreasonable because the officer expressly discounted the concerns of violence in Colombia for the reason that the impact on the applicant would be the same as that felt by others in Colombia (at para 31). At paragraph 32 of *Damian,* Justice McHaffie writes:

> […] the errors made by the officer in discounting the establishment evidence based on Ms. Damian's legal status and discounting the evidence of conditions in Colombia on the basis of its applicability to all Colombians were central to the officer's ultimate conclusion on the H&C application.

[38] Justice McHaffie also found that it was unreasonable for the officer to note that the applicant, who was a minor for the majority of the time she spent in Canada, had assumed establishment efforts based on what the officer dubbed a "wilful disregard of Canadian immigration law" (*Damian* at para 2). Unlike in *Damian,* the Officer in this case did not discount the Applicants' fears of discrimination in South Korea because the impact would be the

same as that faced by others in their situation, nor did the Officer fault Hyeseon or Sophia for the Applicants' misrepresentations.

[39] The Respondent submits that while the evidence in the record indicates that there is some societal discrimination, it was reasonable for the Officer to find that there is little indication that the Applicants themselves would face such hardship on a balance of probabilities. I agree. The Officer adequately considered the hardship the Applicants may face in South Korea due to their status as defectors and found that there was insufficient objective evidence that the Applicants would face discrimination to warrant an H&C exemption.

C. *BIOC Assessment*

[40] The Officer gave positive weight to the BIOC consideration, including Hyeseon's schooling, friendships and extracurricular activities in Canada, as well as to Sophia's awards and activities in her early childhood, yet ultimately found that it did not warrant an H&C exemption when weighed against the other factors. The Officer also determined that there was insufficient evidence that the children's needs would not be met by their parents if the family returned to South Korea together.

[41] The Applicants submit that the Officer did not undertake a proper analysis of the impact on the children's lives if the application was refused, as required by the jurisprudence of this Court (*Francois v Canada (Citizenship and Immigration)*, 2019 FC 748 at para 15). The Applicants state that Hyeseon and Sophia have never engaged in misrepresentation in relation to the Canadian immigration scheme, thus distinguishing their situation from cases such as *Singh v*

Canada (Citizenship and Immigration), 2013 FC 1075, where the child continued to lie about his identity to remain in Canada. I find this point immaterial, as the Officer's decision does not fault the children for the misrepresentations of their parents.

[42] The Applicants further submit that the Officer disregarded the disproportionate obstacles that Hyeseon will face in South Korea: Having been raised and educated in Canada since the age of six, Hyeseon is ill-prepared for the overly competitive scholastic environment and post-secondary rigours of South Korea, most significantly because she does not read or write Korean. The Applicants argue that while the Officer acknowledged that Hyeseon could only speak enough Korean to communicate with her parents, the Officer failed to explain how this lack of language skills led to the conclusion that Hyeseon would be able to flourish, with the help of her parents. The Applicants also submit that Hyeseon's North Korean accent would make her susceptible to bullying and harassment and limit her ability to access private tutorship to attain a competitive level for college admissions in South Korea.

[43] The Applicants rely on this Court's decision in *Kim v Canada (Citizenship and Immigration)*, 2007 FC 1088, wherein an officer failed to adequately consider a child's lack of ability to communicate in the language of the home country and the impact on the child's education. At paragraph 22, this Court states:

> [T]he immigration officer erred in not adequately considering the impact that removal to South Korea would have on the applicant child's immediate and long-term educational development. It would be exceedingly difficult for the applicant child to continue his educational development in a society where he is unable to effectively communicate. As such, the decision of the immigration officer is unreasonable and must be set aside.

[44] With respect to Sophia's best interest, the Applicants submit that Sophia should not be forced to move to South Korea where her access to a competitive education and extracurricular activities will be significantly reduced, and where she risks also facing bullying and harassment as the child of North Koreans. In *Lee* v *Canada (Citizenship and Immigration)*, 2020 FC 504 at paragraph 66, this Court found that the officer failed to account for the prevalence of bullying of foreign students in South Korean schools:

> The evidence that speaks to the passivity of teachers and the pervasiveness of the bullying of foreign students suggests that government policies and initiatives are not necessarily adequate at the operational level and that Seonwoo could face severe hardship in this regard.

[45] Overall, the Applicants concede that the children will adjust, but they will do so amidst undeserved hardship and the very real possibility of discrimination, bullying and struggle within the South Korean education system and surrounding culture.

[46] The BIOC assessment is an important factor in a decision, yet it is not determinative (*Franco v Canada (Citizenship and Immigration)*, 2021 FC 734 at para 19), and requires a highly contextual approach that is responsive to each child's age, capacity and maturity (*Kanthasamy* at para 35). While I sympathize with the children who face being relocated from an environment they have flourished in, I find that the Officer sufficiently considered the evidence provided, as well as the needs and capacity of both children, to come to a reasonable conclusion that the burdens Hyeseon or Sophia may face in South Korea and the hardships associated with leaving Canada do not warrant an H&C exemption in this case. I also find that the Officer did not fault

the children for the Applicants' misrepresentations, as is suggested in the Applicants' submissions.

V. **Conclusion**

[47] While the Officer's decision does contain some flaws, I do not find these to be sufficiently central or significant (*Vavilov* at para 100) and find that the Officer's decision overall is reasonable. The Officer adequately considered the evidence of the Applicants' establishment in Canada, their misrepresentations, the BIOC and the potential hardship they will face upon return to South Korea and determined that their circumstances did not warrant an exemption. I therefore dismiss this application for judicial review.

[48] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-5744-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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