Federal Court  Cour fédérale

Date: 20221121

Docket: IMM-1993-21

Citation: 2022 FC 1589

Ottawa, Ontario, November 21, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DONGHAE KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Court does not accept Mr. Kim's submission that he was denied procedural fairness leading to the decision of an Officer who denied his application for permanent residence as a member of the Family Class.

[2] The Applicant is a South Korean citizen. On July 18, 2019, he married a permanent resident in Canada. They then retained an immigration consultant [the Representative] to

represent them in their application for spousal sponsorship. On March 16, 2021, that application was refused.

[3] The Representative properly disclosed in the application that Mr. Kim had a record in South Korea of two criminal offences. The more relevant was his conviction on December 16, 1999, of Manifesting Intent to Offer a Bribe. The Representative explained that Mr. Kim paid the fine associated with this offence on December 1, 1999 and asserted that he "is deemed rehabilitated." That statement was not correct. He was not rehabilitated under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] The Canadian equivalent of the crime he committed in South Korea is "Bribery of officers" as set out in section 120 of the *Criminal Code*, RSC 1985, c C-46. It carries a maximum sentence of fourteen years.

[5] *IRPA* sets out the criteria for being inadmissible because of criminality. Paragraph 36(1)(c) of *IRPA* provides that one is inadmissible to Canada due to criminality if an offence was committed outside Canada that would constitute an offence in Canada punishable by a maximum term of imprisonment of at least 10 years. Therefore, Mr. Kim was inadmissible due to his criminality.

[6] One may be considered under *IRPA* to be rehabilitated if the offence was one whose maximum penalty was imprisonment of less than 10 years and the prescribed period has passed, or if one satisfies the Minister that they have been rehabilitated. It is admitted that neither

applied to Mr. Kim. The maximum penalty for the offence exceeds 10 years and he had not made an application to the Minister to be considered rehabilitated.

[7] Upon the application being refused, the Representative was informed and she acknowledged that she had not adequately represented Mr. Kim:

> In the application process for Mr. Kim, it was determined that he possessed a criminal record from South Korea. We believed that Mr. Kim had been deemed rehabilitated due to the nature of the crime committed and severity of it in comparison to Canadian Statutes. Due to this, we proceeded with his application, however, were informed that Mr. Kim has in fact not been rehabilitated. This was an error made on our end due to a misunderstanding.

[8] Mr. Kim submits that he was denied procedural fairness because of the Representative's incompetence, and because the Officer failed to inform him that he was inadmissible for criminality before the decision was made.

[9] The proper standard of review for questions of procedural fairness is correctness. Justice Pentney in *Kambasaya v Canada (Minister of Citizenship and Immigration)*, 2022 FC 31 at para 19, described the standard:

> Questions of procedural fairness require an approach resembling the correctness standard of review that inquires "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond", and at paragraph 54, "[a] reviewing court… asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed".

[10] In order to establish that the incompetence of counsel resulted in a breach of procedural fairness, an applicant must prove (1) that the alleged acts or omissions constituted incompetence, (2) there was a miscarriage of justice in that but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different, and (3) the representative has been given notice of the allegation and an opportunity to respond: see *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1189 at para 16.

[11] I am satisfied that but for the acts and omissions of the Representative, Mr. Kim would have applied to the Minister for a finding of rehabilitation. I am also satisfied that the Representative has been informed of the allegation of incompetence and given an opportunity to respond.

[12] The material question is what would probably have happened had the application for rehabilitation been made. Mr. Kim submits that the evidence establishes that his chances of convincing the Minister of his rehabilitation are more probable than not. He relies on the fact that he "has had no involvement with criminality since 1999."

[13] The Respondent submits that "there was no way to predict the outcome of that application." I agree.

[14] There is no evidence before the Court as to the factors the Minister may consider when assessing whether an applicant has been rehabilitated, or how frequently such requests are granted. The question is not what this Court would probably do if the application were within its

jurisdiction – the question is what the Minister would probably do based on the evidence before the Court. In the absence of any evidence going to that question, it would be mere speculation to make the finding the Applicant has requested based only on the length of his "clean record."

[15] It is noted that after the hearing, Mr. Kim's counsel informed the Court that he made an application for rehabilitation to the Minister last year, but has yet to receive a response. Had a positive response been received prior to Judgment, this factor would have been determined differently based on that evidence.

[16] Mr. Kim also submits that he was denied procedural fairness because before rendering the decision, the Officer failed to inform him that he was inadmissible for criminality and did not offer him an opportunity to correct that state of affairs.

[17] I do not accept that the fact Mr. Kim believed himself to be admissible is a material inconsistency in the record before the Officer that ought to have been put to him. Mr. Kim was well aware of his criminal convictions. They are outlined in his application. These are facts. There was no requirement on the Officer to inform the Applicant that he was in error in stating in his application that he was rehabilitated.

[18] This alleged procedural fairness ground is also rejected.

[19] No question was proposed for certification.

JUDGMENT in IMM-1993-21

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1993-21
STYLE OF CAUSE:	DONGHAE KIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY TELECONFERENCE
DATE OF HEARING:	OCTOBER 25, 2022
JUDGMENT AND REASONS:	ZINN J.
DATED:	NOVEMBER 21, 2022

APPEARANCES:

Cemone Morlese	FOR THE APPLICANT
Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT