Federal Court  Cour fédérale

Date: 20150819

Docket: IMM-3539-14

Citation: 2015 FC 122

Ottawa, Ontario, August 19, 2015

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

CHAKHAN KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

(Reasons given orally on January 28, 2015)

[1] In a decision dated March 27, 2014 [the Decision], the Applicant's application for permanent residence as a skilled federal worker was refused because a Visa Officer [the Officer] decided (i) that the Applicant and her husband were inadmissible for two years because they had made a material misrepresentation; and (ii) that because the Applicant's husband was found to be criminally inadmissible, both the Applicant and her husband were permanently inadmissible.

This application for judicial review of the Decision was made pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. The Background

[2] The Applicant's husband had the following two criminal convictions in South Korea [together the Convictions]:

> December 19, 1988: Convicted of turnover of a car by professional negligence [the First Conviction] and fined 200,000 won, under the South Korea Criminal Act, articles 189 and 187, and 69 and 70.
>
> November 20, 1998: Convicted of driving with a cancelled driver's license [the Second Conviction] and fined 500,000 won under the Road Traffic Act, articles 40 and 109, and the Criminal Act articles 69 and 70.

[3] However, on their application for permanent residence, both the Principal Applicant and her husband answered "no" to the questions asking about whether either of them had ever been convicted of a criminal offence [the Non-Disclosure].

[4] The visa office in Los Angeles obtained a South Korean Police Clearance Certificate from the Applicant. It disclosed the Convictions. Thereafter, on January 6, 2014, the Officer emailed the Applicant asking for documents concerning the Convictions and for an explanation for the Non-Disclosure [the Fairness Letter]. The material portion of the Fairness Letter reads as follows:

> Dear Applicant,
>
> This concerns your application for permanent residence in Canada. Upon review of your case, the following documents for Sewoon Choi are required:
>
> 1. Explanation for non-disclosure of convictions listed in Korean Criminal History Information Record on your immigration application.
>
> 2. Court documents clearly showing all charges, verdict, and sentence imposed.
>
> 3. Official documents clearly showing date of completion for each sentence imposed.
>
> 4. Copy of the South Korea statute (actual wording of the law) under which you were charged and convicted.
>
> 5. Detailed written explanation of the events and circumstances surrounding and leading to the offences.

[5] In reply, the Applicant provided a brief explanation for the Non-Disclosure saying that the Convictions had lapsed and that they answered the questions incorrectly because they misunderstood them.

II. The Decision

[6] The Officer reviewed the Convictions and considered whether there were Canadian equivalents for the offences described in the Korean law. In performing this analysis, the Officer compared the offences and concluded that sections 249(1) and (4) of the Canadian *Criminal Code*, RSC, 1985, c C-46 [the Criminal Code], are equivalent to the offences in Korea. The Officer therefore concluded that under paragraph 36(2)(*b*) of the IRPA, the Applicant's husband

was criminally inadmissible. The Officer also decided that both the Applicant and her husband had misrepresented his criminal record by failing to disclose the Convictions.

III. The Issues

[7] There are three issues. The first is procedural fairness, the second is whether the equivalency analysis was reasonable, and the third is whether the Officer should have concluded that the Applicant's husband was deemed to have been rehabilitated.

A. *Procedural Fairness*

[8] The Applicant says that when the Officer wrote the Fairness Letter, he or she was required to explain that, if the concerns about the Non-Disclosure and the Convictions were not resolved, inadmissibility could result. In other words, the Applicant's complaint is that she was not told of the potential seriousness of the Officer's concerns. On the other hand, the Respondent says that since the Applicant was told of the Officer's concerns and given the opportunity to explain the Non-Disclosure, the requirements of procedural fairness were met.

[9] Given that the duty of fairness in this context is low (see *Obeta v Canada (MCI)*, 2012 FC 1542 at paragraph 15 and *Wang v Canada (MCI)*, 2006 FC 1298 at paragraph 20), it is my view that, in the context of an application seeking to be admitted to Canada, it was not necessary for the Officer to state that his concerns could result in the Applicant's inadmissibility. On the facts of this case it would have been obvious to the Applicant that concerns could impact

admissibility. For all these reasons, I have found no breach of the requirements of procedural fairness.

B. *Was the equivalency analysis reasonable?*

[10] Regarding the First Conviction, the Officer equated article 187 of the South Korean Criminal Act to section 249(1) of the Criminal Code. Those provisions read as follows:

> **Article 187 –** A person, who overturns, buries, crashes or destroys a train, electric car, automobile, vessel or aircraft in which persons are actually present, shall be punished by imprisonment for life or not less than three years.

249. (1) Every one commits an offence who operates	**249. (1)** Commet une infraction quiconque conduit, selon le cas :
(*a*) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;	*a*) un véhicule à moteur d'une façon dangereuse pour le public, eu égard aux circonstances, y compris la nature et l'état du lieu, l'utilisation qui en est faite ainsi que l'intensité de la circulation à ce moment ou raisonnablement prévisible dans ce lieu;

[11] Regarding the Second Conviction, the Officer's notes equated article 40 of the South Korean Road Traffic Act to section 249(4) of the Criminal Code. However, this was a typo. It is clear that the Officer intended to refer to section 259(4) of the Criminal Code. The provisions state:

Article 40 – Any body shall not drive an automobile etc. without getting a driving license from the Commissioner of a District Police Agency (including the case where the validity of the driving license is suspended) pursuant to the provisions of Article 68.

259. (4) Every offender who operates a motor vehicle, vessel or aircraft or any railway equipment in Canada while disqualified from doing so, other than an offender who is registered in an alcohol ignition interlock device program established under the law of the province in which the offender resides and who complies with the conditions of the program,	**259. (4)** À moins d'être inscrit à un programme d'utilisation d'antidémarreurs avec éthylomètre institué sous le régime juridique de la province où il réside et d'en respecter les conditions, quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire au Canada pendant qu'il lui est interdit de le faire est coupable :
(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or	*a*) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;
(*b*) is guilty of an offence punishable on summary conviction.	*b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[12] It is of note that the offences in the Criminal Code are hybrid in the sense that they may be prosecuted by indictment or on summary conviction. However, section 36(3)(*a*) of the IRPA says that such offences are deemed to be indictable. That section reads as follows:

36. (3) The following provisions govern subsections (1) and (2):	**36. (3)** Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(*a*) an offence that may be prosecuted either summarily or	*a*) l'infraction punissable par mise en accusation ou par

by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

[13] The Officer's notes show that he or she considered the elements of each offence and in my view the analysis satisfies the first methodology set out by the Federal Court of Appeal in *Hill v Canada (MEI)* (1987), 73 NR 315 at page 320, where the Court said that equivalency between offences can be determined in three ways. The relevant passage states:

> [...] first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[14] Finally, the Applicant suggests that expert evidence was required, but in my view that is not the case. The language of the South Korean statutes is clear and counsel for the Applicant could not identify any wording that required an expert opinion.

C. *Deemed Rehabilitation*

[15] The Applicant says that her husband is deemed to be rehabilitated and that the Decision was unreasonable because the Officer failed to address that issue. Section 36(2)(*b*) of the IRPA is the basis for the finding of criminal inadmissibility. It reads as follows:

36. (2) A foreign national is inadmissible on grounds of criminality for	**36. (2)** Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

[16] In this case, the second part of the provision applies since the Applicant's husband was convicted in South Korea of two unrelated offences that, if committed in Canada, would have constituted two offences under the Criminal Code.

[17] Section 36(3)(*c*) of the IRPA deals with deemed rehabilitation and it provides as follows:

36. (3) The following provisions govern subsections (1) and (2):	**36. (3)** Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(*c*) the matters referred to in	*c*) les faits visés aux alinéas

paragraphs (1) (b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	(1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

[18] Section 18 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, describes who can be members of the class of persons deemed to be rehabilitated. The provisions dealing with those persons convicted outside Canada provide as follows:

18. (2) The following persons are members of the class of persons deemed to have been rehabilitated:	**18. (2)** Font partie de la catégorie des personnes présumées réadaptées les personnes suivantes :
(*a*) persons who have been convicted outside Canada of no more than one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,	*a*) la personne déclarée coupable, à l'extérieur du Canada, d'au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :
[…]	[…]
(*b*) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, if all of the following conditions apply, namely,	*b*) la personne déclarée coupable, à l'extérieur du Canada, de deux infractions ou plus qui, commises au Canada, constitueraient des infractions à une loi fédérale punissables par procédure sommaire si les conditions suivantes sont réunies :
[…]	[…]

[19] Based on these provisions, it is my conclusion that since the Applicant's husband did not meet the criteria of section 18 because he was convicted of two indictable offences outside Canada, the Officer was not required to consider whether the Applicant's husband was deemed rehabilitated.

[20] For all these reasons, the application will be dismissed.

IV. Certified Question

[21] Neither counsel proposed a certified question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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