Federal Court Cour fédérale

Date: 20171013

Docket: IMM-1365-17

Citation: 2017 FC 913

Ottawa, Ontario, October 13, 2017

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

YOUNG-HUI HONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer (the Officer) dismissing the application for a Pre-Removal Risk Assessment (PRRA) by Young-Hui Hong (the Applicant) on the basis that she would not face personalized risk if she was removed to South Korea. The case is somewhat unusual, however, in that the parties do not agree on exactly what was decided by the Officer. It is in some respects a situation of duelling “clerical errors”.

[2] The Applicant claims that the Pre-Removal Risk Assessment (PRRA) decision covers both herself and her daughter, Hyoseon Hong. She claims that the fact that the PRRA application form she submitted includes information about the daughter in Box 15, reserved for listing family members, rather than the Box 14, which asks for details of dependent family members in Canada who are applying for a PRRA, is simply a "clerical or human error." The Applicant points to several documents from the Officer which refer to both her and her daughter, including the decision letter and form. The Applicant argues that the PRRA application of her daughter is entirely derivative of her claim, and that the Officer committed no error in dealing with them together. She contends, however, that the decision should be overturned, for reasons which will be explained below.

[3] The Respondent argues that the PRRA decision was properly made in regard to the Applicant, but that the Respondent's officials, including the Officer who decided the PRRA, committed an innocent and understandable error when they dealt with the application as though it covered both mother and daughter. This is the usual approach in these sorts of cases – minor children do not file separate applications in most cases, and the interests of the parent and child are often considered in the same decision.

[4] However, this is not a usual case. In addition to the question of the form referred to above, the Respondent points to an exchange of e-mails on this specific point between officials of the Respondent's Vancouver Backlog Reduction Office and the counsel who represented the Applicant at that time. Unlike a previous PRRA application filed in 2012, which indicated, in the appropriate box, that it was an application for both mother and daughter, this form indicated only

that it was filed for the Applicant. As noted above, the daughter is referred to in a separate section of the form which asks for information on other family members. In addition, upon receipt of the PRRA application, an official wrote to counsel for the Applicant asking for clarification whether the Applicant "would like to include her daughter (HONG, Hyoseon) on her subsequent PRRA application." In reply, the Applicant's counsel stated that the daughter had not initially been included due to some legal complications (which are described more fully below), and said that further information on this would follow. No such information was provided, and the eventual submissions filed by counsel for the Applicant focused virtually entirely upon her claim. There was only the briefest reference to her concerns for her daughter.

[5] The Respondent's position is that the PRRA intentionally excluded the daughter and was filed only on behalf of the Applicant. As became clear during the course of the hearing, this may be explained by the fact that when the PRRA was filed, there were criminal and family law proceedings underway and the daughter was in the temporary custody of the Children's Aid Society.

[6] However, somewhere along the way the Officer appears to have treated the application as covering both the Applicant and her daughter, and the decision refers to both in several places. It also includes the following: "Accordingly, I find that the minor applicant is not at risk pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*."

[7] The Respondent points to this as an error, and states that the Minister should not be bound by this mistake, because doing so would prejudice the interests of the child, who is still

entitled to a separate PRRA process and decision. The Respondent further submits that the decision in regard to the Applicant is otherwise valid and the application for judicial review should be dismissed.

I. BACKGROUND

[8] The Applicant, a citizen of both the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea), entered Canada in 2009 with her daughter. She made a claim for refugee protection using a different name and date of birth, and claiming to be a citizen only of North Korea. This claim was denied, on the basis of credibility concerns regarding the Applicant's evidence. She then filed her first application for a PRRA, on behalf of herself and her daughter. The Applicant continued to claim that she and her daughter were citizens only of North Korea, and that they would be at risk of mistreatment and persecution if returned to that country. This PRRA was granted in 2013.

[9] In 2015, when it was learned that the Applicant and her daughter were actually also citizens of South Korea, the original PRRA decision was vacated. The Applicant then became subject to removal, which triggered the subsequent PRRA application, filed in 2016. This PRRA focused on several claims: that the Applicant would face discrimination based on her North Korean background, that she would suffer because mental health supports in South Korea are inadequate and she would face a risk of involuntary hospitalization, and finally that she would be at risk from North Korean agents who seek out defectors in South Korea.

[10] The Officer reviewed the Applicant's immigration history, and then examined the evidence regarding each of the claims. The Officer essentially dismissed the latter two claims based on the evidence presented. In relation to the claim about her mental health condition, the Officer found that the evidence of a psychiatrist about the Applicant's mental health was largely based on her fear of being sent back to North Korea, and that there was no more recent evidence provided to support the claim that the Applicant was at risk of being hospitalized if returned to South Korea. The Officer went on to find that the evidence did not support a risk to the Applicant from North Korean agents, given that there are an estimated 25,000 defectors in South Korea, and the evidence showed that only two high profile defectors had been targeted for assassination by North Korean agents. The Officer found that the Applicant did not have a high profile and would not be at risk.

[11] On the question of discrimination and state protection, the Officer first set out the applicable legal tests, noting that South Korea is a democracy in full control of its territory and thus there is a presumption that the state will be capable of protecting its citizens, which can be rebutted by clear and convincing evidence of the state's inability to protect. The Officer also noted that "(t)he burden of proof that lies on the applicant is directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the applicant must have done to exhaust all the courses of action open to him or her."

[12] The Officer examined the issue of discrimination against North Koreans, and found that there is evidence of some discrimination, but also clear evidence that South Korea has taken steps to assist North Koreans to make a successful transition to life in the South, including by

creating a resettlement and training facility and by providing financial assistance. The Officer found that the law forbids discrimination based on race, gender, disability, sexual orientation and social status, and while there is evidence that there could be better enforcement of the law, it was noted that one of the criticisms that had been levelled against the National Human Rights Commission is that it "was overly focused on North Korean problems."

[13] The Officer found that the evidence was insufficient to rebut the presumption of state protection, and further that the examples of mistreatment experienced by the Applicant in the South did not rise to the level of persecution. This evidence included occasions when her accent or lack of language abilities gave rise to negative comments, and that she was isolated by South Korean members of the church she attended. The Officer found that this did not correspond to the type of discrimination that amounts to persecution, as described in the United Nations High Commissioner for Refugee's Handbook.

[14] The Officer rejected the PRRA application under both ss. 96 and 97 of *IRPA*. This is the decision which is challenged here.

II. ISSUES

[15] Three issues arise in this proceeding:

A. Was it an error for the Officer to treat the PRRA application as covering both the Applicant and her daughter? If so, what is the legal effect of this error?

B. Should the decision be set aside because the Officer denied procedural fairness to the minor applicant, Hyoseon Hong, by failing to obtain submissions from someone legally

authorized to represent her, given that she was then in the temporary custody of the Children's Aid authorities in Ontario?

C. Should the decision be set aside because the Officer erred in interpreting the country documentation?

III. ANALYSIS

A. *Was it an error for the PRRA decision to include the daughter?*

[16] The first question before me is: what is the actual decision under review? Was it a decision in respect of both the Applicant and her daughter? Or was it a decision in respect of an application on behalf of the Applicant only, in which the Officer mistakenly also included the daughter? If it is the latter, what is the legal effect of the mistake?

[17] As outlined above, the parties have completely different interpretations of what happened here; both claim "clerical errors" were made, but to opposite effect. The Applicant claims that the failure to include her daughter in the proper box of the PRRA application was an innocent human or clerical error, and that the Respondent's officials properly considered the two cases together since they are so inter-connected.

[18] The Applicant goes on to argue, however, that the Officer denied procedural fairness to the child, by relying on representations from counsel for the Applicant, rather than seeking out submissions from someone legally authorized to represent the daughter, who was then in the temporary custody of the Children's Aid Society. This error should render the entire decision

invalid, since under s. 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7, the Court only has jurisdiction in relation to "a decision" in an application for judicial review. Thus I have no jurisdiction to set aside only one part of the decision.

[19] The Respondent argues that the Officer made an innocent mistake in treating this as an application for a PRRA on behalf of both the Applicant and her daughter. It was perfectly clear from the e-mail exchange mentioned above that the Applicant intentionally did not include the daughter in the PRRA application. The Respondent also seeks to ensure that whatever the outcome of this proceeding, the rights of the daughter are preserved and protected, since their position is that she is still entitled to a separate PRRA process and decision.

[20] I should underline here that all parties agree that the officials should not be blamed for having made such a mistake, given the volume of cases, the unusual factual situation, and the somewhat complicated history of the Applicant's case. They agree that the situation of a non-Canadian child in the custody of provincial child welfare authorities at the time of a PRRA application falls into a "grey area". It is not clear whether a parent is legally authorized to file a PRRA application on behalf of a child for whom they do not have legal custody. For the reasons that follow, I do not need to resolve this question here.

[21] I find that the Officer erred in treating this as a PRRA application on behalf of both the Applicant and the daughter. The Applicant's argument rests on the various references to the daughter in the documentation. They point to a letter dated January 23, 2017, from the Officer to counsel for the Applicant, which includes the following subject line: "Re: Hong, Younghui aka

HONG, Jin Kyung and HONG, Hyoseon aka Kim, Seo Yun" (emphasis added). The first sentence of this letter states: "This refers to the application for a pre-removal risk assessment by the above-noted clients" (emphasis added). They also point to the decision letter and PRRA decision form completed by the Officer, both of which refer to the daughter.

[22] While it is true that there are several references to the daughter in the documentation, it is also true that the legal counsel who represented the Applicant at that time had expressly stated that the daughter was not included in the PRRA application. Counsel submitted the PRRA application on behalf of the Applicant on November 18, 2016. It should be noted that this form did not include the daughter in the appropriate box – and this stands in contrast to the previous PRRA application filed by the Applicant in 2012, which was expressly filed on behalf of both mother and daughter. On November 28, 2016, an official from the Respondent's Vancouver Backlog Reduction Office sent an e-mail to counsel for the Applicant, asking for clarification whether she "would like to include her daughter (HONG, Hyoseon) on her subsequent PRRA application." On November 30, 2016, counsel replied in the following way:

> We initially did not include Ms. Hong's daughter in the subsequent PRRA application as her daughter was not named or served with a PRRA. We have recently been retained and are currently in the process of obtaining the full file. This matter is complicated by ongoing criminal court and family court proceedings, and Ms. Hong's detention.
>
> As such we are not in a position to determine whether Ms. Hong's daughter will be included on her PRRA application at this time. We are endeavouring to obtain all the necessary and relevant information and will advise as soon as practicable.

[23] As noted above, in subsequent correspondence the Officer indicates that this is a joint PRRA application on behalf of both the Applicant and the daughter, and no one corrected this

mistake. The question before me is whether this constitutes an error, and if so, what is the legal effect of the mistake?

[24] The PRRA process is set out in Division 3 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] as well as the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. This process is designed to safeguard an integral component of refugee protection – the principle of non-refoulement, enshrined in s. 115 of *IRPA*. This is a core concept that underlies refugee protection. The purpose of the PRRA is not disputed. It is explained as follows in the Regulatory Impact Analysis Statement, Canada Gazette, Part II, Vol. 136, Extra (June 14, 2002), at page 274:

> The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of non-refoulement. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.
>
> See: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, para 10.

[25] The PRRA is a significant procedural protection for claimants, and a means for Canada to live up to its international obligations.

[26] In practice, notices of entitlement to submit a PRRA are sent by the Canada Border Services Agency (s. 160, *IRPR*). As noted earlier, in the usual case where there are adults and dependent children, the parents file on behalf of themselves and their children. Where the claimant is an unaccompanied minor, separate legal representation is usually provided and the

claim is filed directly on behalf of the child. Nowhere, however, does *IRPA* or *IRPR* permit an officer unilaterally to add or subtract individuals from the application, and no authority was cited for that proposition. Indeed, given the nature of the interests of the individuals involved in this process, it would be surprising that Parliament would have granted officers such powers.

[27] In this case, the Applicant essentially urges that I disregard the actual form she filed, as well as the statement of her legal counsel to the effect that the PRRA did not include the child. Instead, I am urged to look at the correspondence and decision document to find that the application was somehow transformed by the Officer into a joint one on behalf of both the Applicant and her daughter. Since there is nothing in the record to indicate that the Applicant or her counsel ever took such a step, I am asked to infer it from the correspondence and indications in the form, all of which were completed by the Respondent's officials, and in particular the Officer who decided the PRRA.

[28] To do so would be to recognize an extraordinary power or jurisdiction on the part of an Immigration Officer. This heretofore unknown power would have the effect of significantly affecting the rights of an applicant, here a minor child who was not then in the custody of the mother, and as such was entitled to separate legal representation to ensure her distinct and unique rights and interests were protected. I am not prepared to accede to such an extraordinary result.

[29] This is entirely different from the practice of treating similar applications from several family members together, or treating the joint application filed on behalf of parents and children together. The reference to decisions involving separate applications from family members which

were treated together has no application to the facts before me; see for example *Mofrad v Minister of Citizenship and Immigration*, 2012 FC 901.

[30] Furthermore, if an administrative power to "correct" or alter the PRRA application to add or subtract individuals from the application exists, fairness would demand that it only be done with consent of the individual affected. In this case, the email sent to counsel by the Respondent's official was seeking to clarify the Applicant's intention, and presumably had a positive response been provided the Respondent would then have treated the application as a joint one on behalf of both mother and daughter, as a matter of administrative practice.

[31] On the record before me, however, I find that the Applicant did not intend to file, and did not actually file, a PRRA application on behalf of her daughter in 2016. I observe that the vast bulk of the submissions filed in support of the PRRA relate only to the situation of the mother; there is but a passing reference to the mother's concerns for her daughter. I also observe that the decision of the Officer is also almost entirely focused on the claims of the mother. Only the final few paragraphs of a lengthy and detailed decision relate to the concerns expressed about the daughter.

[32] I find that the Officer's error was just that – an innocent mistake, lumping this case in with the many others they were no doubt dealing with at the time, and treating it as a joint application. I find that this is a legal nullity. It cannot bind the daughter, who is entitled to a separate PRRA process and decision if she wishes to pursue it, if at some point she becomes subject to removal.

[33] I also find that this error had no material impact on the rights of the Applicant in the context of her PRRA application and this application for judicial review. An error in regard to the daughter does not in itself constitute a reason to set aside the PRRA decision in respect of the Applicant. I have been unable to locate any decision directly on point, but there are several decisions where a clerical or factual mistake has been discovered, and the test which has been applied is whether the error was material to the outcome; or, put another way, whether the outcome would have been different if the error had not been made. See: *Canada (CIC) v Rahman*, 2013 FC 1274, at para 55; *Hussain v Canada (CIC)*, 2012 FC 1298, at para 53; *Romero v Canada (Citizenship and Immigration),* 2012 FC 265, at para 28; *Sakibayeva v Canada (Citizenship and Immigration),* 2007 FC 1045, at paras 13-14.

[34] Both parties acknowledge that this situation falls into a "grey area" which may have contributed to the mistake which occurred here. On the record before me, there remain many unanswered questions about how the PRRA application was transformed into a joint one, and why the mistake was not caught or corrected. What is clear to me is that no application was filed on behalf of the daughter, no submissions were made on her behalf by anyone legally authorized to make such submissions, and the mistaken references to her situation can have no legal effect. The Respondent has taken the position that the daughter is still entitled to a separate PRRA process, and nothing done by the Officer here has any impact on that. The findings of the Officer in regard to the daughter's case were made in error, without an application or submissions on her behalf. These findings should be treated as what they are – the product of an innocent mistake – which have no effect or impact.

[35] The Respondent indicates that the appropriate authorities have been advised of the daughter's immigration status and of the need to take steps to consider her interests not just in relation to child protection or custody matters, but also in regard to her immigration status. They have further undertaken to ensure that my decision in this matter is communicated to the appropriate provincial authorities. It is clear that the daughter is entitled to a PRRA prior to any removal from Canada, and that she should be given notice of this right and an opportunity to make submissions if she becomes subject to removal, as required by s. 112 of *IRPA*, and in accordance with s. 160, *IRPR*. The Respondent has acknowledged this and has undertaken to act accordingly. Nothing further is required to protect the daughter's interests at this stage.

B. *Was the daughter denied procedural fairness?*

[36] In light of my findings on the first issue, it is not necessary for me to deal with this issue. Both parties acknowledged that this case falls into a legal "grey area", and given that no application was filed on behalf of the daughter here, it is not appropriate that I deal further with any of the issues or arguments relating to this question. I will leave it to a case where the matter properly arises on the facts before the Court.

C. *Did the Officer misapprehend the evidence?*

[37] As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 57, it is not necessary to conduct a standard of review analysis where the matter is settled by case-law, and that is the situation here (see *Haq v Canada (Minister of Citizenship and Immigration)*, 2016 FC 370, at para 15; *Nguyen v Canada (Minister of Citizenship and*

Immigration), 2015 FC 59, at para 4). The decisions of this Court make clear that the standard of review that applies to the decisions of PRRA officers as a whole is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11; *Chen v Canada (Citizenship and Immigration)*, 2016 FC 702 at para 13) and deference is owed to a PRRA officer's assessment of the evidence (*Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at paras 9-10).

[38] The crux of the Applicant's argument is that the decision is unreasonable because it fundamentally mis-characterized her claim regarding discrimination against North Koreans in the South, and the inadequacy of state protection. The Applicant argues that the Officer committed a crucial error in reaching the negative decision regarding the risks to the Applicant, by mis-apprehending the basis of her claim as founded on a fear of discrimination based on "race" rather than "ethnicity", and failing to properly interpret the evidence of whether adequate state protection against such discrimination is available in South Korea.

[39] In her submissions on the PRRA application, the Applicant provided extensive evidence of discrimination against North Koreans when they moved to the South. This, it is claimed, is an issue of discrimination based on the ground of "ethnic origin". The Applicant argues that after the division of the country, the differences in culture, language, and lifestyle which have developed between people who live in the North and those who live in the South amount to the creation of different "ethnicities". And this is the basis of the mistreatment of people who have migrated from the North to the South.

[40] The Applicant's position hinges on an argument that the Officer erred in finding that the South Korean anti-discrimination laws were adequate, in light of the fact that there is no protection against discrimination based on "ethnic origin". In her PRRA submissions, the Applicant referred to an on-line article which states: "There is no anti-discrimination law in Korea and this discrimination is practically legal." The Officer finds that this is simply not true, citing a United States Department of State Report that indicates that "the law forbids discrimination based on race, gender, disability, sexual orientation and social status."

[41] The Officer then refers to evidence that the government of South Korea has taken many steps to support the transition of migrants from the North, including government programs and financial support. The Applicant's evidence was that she had benefitted from this transition support, including receiving education on how to adapt to life in South Korea, as well as money to assist her in settlement as well as housing. She used this money to travel to Canada.

[42] The Officer finds that North Koreans face some degree of discrimination in the South, but also notes that the difficulties they encounter are not solely attributable to discrimination. The evidence indicates there are a range of factors that contribute to this, including deficiencies in education, different work histories, and the overall challenge of adjustment. The Officer also finds that the government of South Korea has taken steps to support North Koreans in making this transition.

[43] In addition, the Officer refers to the evidence of the Applicant as to the types of mistreatment she experienced when she lived in South Korea, finding that none of these

instances were sufficient to rise to the level of persecution. After a review of the evidence, the Officer concludes: "…I find on a balance of probabilities that the applicant's evidence is insufficient to rebut the presumption of state protection."

[44] I find no error in the Officer's decision on this point. The Officer applied the appropriate legal tests regarding state protection and engaged with all of the evidence and arguments submitted by the Applicant. The decision of PRRA officers deserves deference as falling within their particular expertise regarding country conditions. I find that the decision of the Officer is reasonable, and falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law".

IV. CONCLUSION

[45] I therefore dismiss the application for judicial review. No certified question was submitted by the parties.

JUDGMENT in IMM-1365-17

THIS COURT'S JUDGMENT is that:

1. The decision in respect of the Pre-Removal Risk Assessment in relation to Hyoseon Hong was made in error, and is of no legal effect.

2. The application for judicial review is dismissed.

3. There is no question to be certified.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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