Federal Court Cour fédérale

Date: 20190301

Dockets: IMM-2525-18
IMM-2526-18
IMM-2527-18
IMM-2528-18

Citation: 2019 FC 246

Ottawa, Ontario, March 1, 2019

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-2525-18

BETWEEN:

SOOMIN MUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-2526-18

AND BETWEEN:

CHUNAI JANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-2527-18

AND BETWEEN:

JUNGWON MOON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-2528-18

JUNGSEO MOON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a delegate of the Minister of Citizenship and Immigration [Minister's Delegate or Delegate] dated May 22, 2018, who found that the Applicants are inadmissible for misrepresentation, pursuant to s 40(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and issued deportation orders against each of them.

Background

[2] The Applicants are a family of four who claimed to be citizens of North Korea. By a decision dated November 16, 2010, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada granted their claims for refugee protection. In 2011, the Minister of Citizenship and Immigration applied to have the RPD vacate its decision for reasons of misrepresentation pursuant to s 109 of the IRPA. It was alleged that the Applicants misrepresented material facts with respect to their identities, proper names, actual countries of citizenship, South Korean documents, and the amount of time they spent in South Korea. The RPD found that the Applicants were also citizens of South Korea, which they had failed to disclose at the original RPD hearing. By a decision dated December 11, 2017, the RPD vacated

its previous decision of November 16, 2010, which had granted the Applicants' refugee protection.

[3] As a result, the Applicants became the subject of s 44(1) inadmissibility reports for misrepresentation. On May 22, 2018, the Minister's Delegate determined that the Applicants were inadmissible to Canada pursuant to s 40(1)(c) of the IRPA, and, pursuant to s 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations], issued deportation orders against them.

Decision under review

[4] The decision under review is the decision of the Minister's Delegate dated May 22, 2018, which determined that the Applicants are inadmissible for misrepresentation pursuant to s 40(1)(c) of the IRPA and issued deportation orders against them as set out in the Minister's Delegate Reviews. These indicate that the Minister's Delegate considered the s 44(1) reports and supporting evidence and that the Applicants conceded the allegation of misrepresentation. The Delegate stated that he or she was satisfied, on the basis of the evidence, that the allegation was correct and, therefore, found that the Applicants were persons described in s 40(1)(c) of the IRPA. The Delegate also recorded, under the heading "additional notes", that counsel for the Applicants made a submission that the Applicants should be allowed to proceed with a refugee claim against South Korea, as they were not currently under a removal order (prior to the Minister's Delegate Review). The Minister's Delegate found that s 104(1)(d) applied in the situation and deportation orders were issued.

Issues

[5] The Applicants submit two issues on judicial review:

1. Did the Minister's Delegate err in exercising his or her discretion by ignoring evidence, misconstruing evidence, and fettering his or her discretion?

2. Were the Applicants denied fundamental and natural justice, and did the Minister's Delegate breach the Applicants' procedural fairness rights?

[6] Having reviewed the materials and submissions, I am of the view that the issue is more accurately framed as follows:

> Did the Minister's Delegate err by stating that s 104(1)(d) of the IRPA applies, and, if so, does this negate the decision finding that the Applicants are inadmissible for misrepresentation pursuant to s 40(1)(c) of the IRPA and the issuance of the deportation orders?

Standard of review

[7] The Applicants submit that the appropriate standard of review is correctness on the basis that it is the standard to be applied when reviewing purely jurisdictional decisions and decisions lacking procedural fairness or natural justice (*Dunsmuir v New Brunswick,* 2008 SCC 9). Further, this is demonstrated when applying the factors from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, given the absence of a privative clause; the limited expertise of the Minister's Delegate when it comes to deciding questions of law involving jurisdiction and presumptions of conformity with international treaties; the purpose of s 104(1)(d) being related to the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, Can TS 1969 No 6; and because the nature of the question relates solely to the determination of law.

[8] The Respondent submits that the standard of review applicable to all questions before a Minister's Delegate in a s 44(2) decision is reasonableness (*Valdez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 377 at para 18; *Finta v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1127 at para 31; *Iamkhong v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349 at paras 36-37). The Respondent agrees that a standard of correctness applies to questions of procedural fairness (*Bisla v Canada (Citizenship and Immigration)*, 2016 FC 1059 at para 11).

[9] Here, the decision under review is the Delegate's decision that the Applicants are inadmissible for misrepresentation pursuant to s 40(1)(c) of the IRPA. That decision is to be reviewed on the standard of reasonableness (*Agapi v Canada (Citizenship and Immigration)*, 2018 FC 923 at para 13; *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 11; *Li v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1151 at para 15; *Discua Melendez v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1131 at para 18).

[10] To the extent that a question of statutory interpretation arises, and for the reasons set out below I am not persuaded that it does, the Supreme Court of Canada has held that when an administrative tribunal interprets or applies its home statute there is a rebuttable presumption that the standard of review applicable to its decision is reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*; 2011 SCC 61 [*Alberta Teachers*], *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 32; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 25; *Wilson v*

British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47 at para 17; *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, 2015 SCC 45 at para 28; *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 35).

[11] Finally, inadequacy of reasons does not provide a stand-alone basis for quashing a decision on judicial review. The Supreme Court of Canada held that reasons are to be reviewed with the outcome as an organic exercise. The adequacy of reasons is therefore subsumed into the analysis of the reasonableness of the decision as a whole (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14 and 22 [*NL Nurses*]). It is only when reasons are required, but are not provided, that there may be a breach of procedural fairness (*NL Nurses* at para 22). The standard of correctness applies in judicial review of issues of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

Relevant Legislation

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Division 4 – Inadmissibility	**Section 4 - Interdictions de territoire**
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
…	[…]
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
…	[…]

Application

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

Division 5 – Loss of Status and Removal

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the

Application

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

Section 5 - Perte de statut et renvoi

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les

residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Part 2

Refugee Protection

Division 2 – Convention Refugees and Persons in Need of Protection

Partie 2

Protection des réfugiés

Section 2 - Réfugiés et personnes à protéger

Claim

99 (1) A claim for refugee protection may be made in or outside Canada.

…

Demande

99 (1) La demande d'asile peut être faite à l'étranger ou au Canada.

[…]

Claim inside Canada

(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

Demande faite au Canada

(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

Claim made inside Canada — not at port of entry

(3.1) A person who makes a claim for refugee protection inside Canada other than at a port of entry must provide the officer, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules.

Demande faite au Canada ailleurs qu'à un point d'entrée

(3.1) La personne se trouvant au Canada et qui demande l'asile ailleurs qu'à un point d'entrée est tenue de fournir à l'agent, dans les délais prévus par règlement et conformément aux règles de la Commission, les renseignements et documents — y compris ceux qui sont relatifs au fondement de la demande — exigés par ces règles.

Permanent resident

Résident permanent

(4) An application to become a permanent resident made by a protected person is governed by Part 1.

(4) La demande de résidence permanente faite au Canada par une personne protégée est régie par la partie 1.

Ineligibility

Irrecevabilité

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

101 (1) La demande est irrecevable dans les cas suivants :

(a) refugee protection has been conferred on the claimant under this Act;

a) l'asile a été conféré au demandeur au titre de la présente loi;

(b) a claim for refugee protection by the claimant has been rejected by the Board;

b) rejet antérieur de la demande d'asile par la Commission;

(c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)c) —, grande criminalité ou criminalité organisée.

Notice of ineligible claim

104 (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (d), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that

(a) the claim is ineligible under paragraphs 101(1)(a) to (e);

(b) the claim is ineligible under paragraph 101(1)(f);

(c) the claim was referred as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter and that the claim was not otherwise eligible to be referred to that Division; or

(d) the claim is not the first claim that was received by an officer in respect of the claimant.

Avis sur la recevabilité de la demande d'asile

104 (1) L'agent donne un avis portant, en ce qui touche une demande d'asile dont la Section de protection des réfugiés est saisie ou dans le cas visé à l'alinéa d) dont la Section de protection des réfugiés ou la Section d'appel des réfugiés sont ou ont été saisies, que :

a) il y a eu constat d'irrecevabilité au titre des alinéas 101(1)a) à e);

b) il y a eu constat d'irrecevabilité au seul titre de l'alinéa 101(1)f);

c) la demande n'étant pas recevable par ailleurs, la recevabilité résulte, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait;

d) la demande n'est pas la première reçue par un agent.

Termination and nullification

(2) A notice given under the following provisions has the following effects:

(a) if given under any of paragraphs (1)(a) to (c), it terminates pending proceedings in the Refugee Protection Division respecting the claim; and

(b) if given under paragraph (1)(d), it terminates

Classement et nullité

(2) L'avis a pour effet, s'il est donné au titre :

a) des alinéas (1)a) à c), de mettre fin à l'affaire en cours devant la Section de protection des réfugiés;

b) de l'alinéa (1)d), de mettre fin à l'affaire en cours et

proceedings in and nullifies any decision of the Refugee Protection Division or the Refugee Appeal Division respecting a claim other than the first claim.

d'annuler toute décision ne portant pas sur la demande initiale.

Vacation of refugee protection

109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

Demande d'annulation

109 (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

Rejection of application

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

Rejet de la demande

(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.

Allowance of application

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

Effet de la décision

(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

Subsection 44(2) of the Act — foreign nationals

228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of

Application du paragraphe 44(2) de la Loi : étrangers

228 (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le

a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be	cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :
…	[…]
(b) if the foreign national is inadmissible under paragraph 40(1)(c) of the Act on grounds of misrepresentation, a deportation order;	b) en cas d'interdiction de territoire de l'étranger pour fausses déclarations au titre de l'alinéa 40(1)c) de la Loi, l'expulsion;
Eligible claim for refugee protection	**Demande d'asile recevable**
(3) If a claim for refugee protection is made and the claim has been determined to be eligible to be referred to the Refugee Protection Division or no determination has been made, a departure order is the applicable removal order in the circumstances set out in any of subparagraphs (1)(c)(i) and (iii) to (v).	(3) Dans le cas d'une demande d'asile jugée recevable ou à l'égard de laquelle il n'a pas été statué sur la recevabilité, la mesure de renvoi à prendre dans les circonstances prévues aux sous-alinéas (1)c)(i), (iii), (iv) ou (v) est l'interdiction de séjour.

Preliminary Issue

[12] The Respondent brought a motion, pursuant to Rules 8 and 399 of the *Federal Courts Rules*, SOR/98-106, seeking to vary the Order of Justice Grammond, dated November 20, 2018, which required the Respondent to file any further affidavits by January 14, 2018. The Respondent seeks to vary that date to the date that an affidavit of Helene Chabot, Litigation

Analyst with the Department of Citizenship and Immigration, sworn on February 8, 2019, has been filed with the Registry.

[13] In support of this motion, the Respondent has filed the affidavit of Baljinder Rehal, paralegal with the Department of Justice. Mr. Rehal states that he assists Ms. Neeta Logsetty, who has carriage of this matter on behalf of the Respondent, and that Ms. Logsetty advised him that she only became aware of the information contained in the Chabot Affidavit on February 1, 2019. Ms. Logsetty then took immediate steps to put that information before the Court by way of the subject motion. In her affidavit, which is attached as an exhibit to the affidavit of Mr. Rehal, Ms. Chabot states that she has reviewed the records concerning the Applicants, as contained in the Global Case Management System and Canada Border Services Agency's primary enforcement case management system and the National Case Management System. Based on this review, she deposes, amongst other things, that on March 16, 2018 the Applicants made applications for permanent residence in Canada based on humanitarian and compassionate [H&C] grounds; that on May 22, 2018 deportation orders were issued against the Applicants; that between July 21, 2018 and September 4, 2018, the Applicant Soomin Mun made five applications to return to Canada from South Korea, which were all refused; and that the Applicants Jungwon Moon and Chunai Jang made pre-removal risk assessment [PRRA] applications in August 2018 alleging risk of persecution, and that they would face a risk to life, and a risk of cruel or inhumane treatment or punishment if returned to South Korea.

[14] The Respondent also submits that the relevant factors that must be considered in determining whether to grant leave to file a further affidavit have been met (*Pfizer Canada Inc. v*

Rhoxalpharma Inc., 2004 FC 1685 at para 16; *Fibremann Inc v Rocky Mountain Spring (Icewater 02) Inc*., 2005 FC 977 at para 12). Specifically, it is that the information is relevant and dispositive of the underlying application for judicial review. This is because the Applicants maintain that they are entitled to have their risks of persecution and harm in respect of South Korea considered in Canada. The Chabot Affidavit reveals that the Applicant Soomin Mun returned to South Korea and re-availed himself of South Korea's protection and that two of the other Applicants have submitted PRRA applications. The information is not prejudicial as it is already within the Applicants' knowledge, the information will assist the Court, and its admission is in the interest of justice.

[15] The Applicants oppose the motion. They submit that the information regarding their immigration status and the steps taken to regularize that status through applications for PRRAs or otherwise occurred subsequent to the Delegate making his or her decision and is not relevant to this judicial review.

[16] Given that the parties have approached this application for judicial review from very different perspectives as to the determinative issues and the relevant factors to consider in that regard – including whether the Applicants have been deprived of an assessment of any risk upon return to South Korea – and considering that there is no prejudice to the Applicants in the filing of the new affidavit evidence, I am satisfied that it is appropriate to admit the subject affidavit pursuant to Rule 312 (see *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at paras 4-6).

Did the Minister's Delegate err by stating that s 104(1)(d) of the IRPA applies, and, if so, does this negate the decision finding that the Applicants are inadmissible for misrepresentation pursuant to s 40(1)(c) of the IRPA and the issuance of the deportation orders?

Applicants' Position

[17] The Applicants submit that pursuant to s 99(3) of the IRPA, the Minister's Delegate was required to refer their refugee protection request, as against South Korea, for determination by an immigration officer. This is because this was the first time they claimed refugee protection from South Korea; their prior claim in 2010 sought protection against North Korea. As a result, the Applicants argue that the Minister's Delegate erred in refusing to exercise his or her discretion in reliance solely on s 104(1)(d) and the Applicants' prior refugee claim as against North Korea. They rely on Lorne Waldman, *Canadian Immigration and Refugee Law Practice*, 2d ed (Markham: LexisNexis, 2017), ch 9, § 9.55 and *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 199 at paras 7, 9 and 10, to argue that a Minister's Delegate cannot be barred from referring a matter for eligibility consideration solely because of a previous claim involving a different country and different circumstances. Further, that reference must be made to the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6 [Refugee Convention] when interpreting s 104(1)(d) of the IRPA, an exclusion clause (*Pushpanathan*; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68).

[18] The Applicants submit that the most logical and least restrictive interpretation of s 104(1)(d), and that which is most consistent with the Refugee Convention and the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, is that individuals are barred from bringing refugee claims only in relation to duplicate proceedings involving similar claims

of persecution against the same country that was the subject of the previous claims. They submit that this interpretation applies in the current situation, but that the Minister's Delegate failed to follow this approach. Furthermore, decision-makers must interpret implementing domestic legislation, such as the IRPA, in accordance with the foundational treaty obligations on which it is based. This presumption applies where the legislation is ambiguous such that the legislation is interpreted consistently with Canada's international obligations (*National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at para 43 [*National Corn Growers*]). The Applicants contend that the Articles 1(A)(2) and 1(C)(3) of the Refugee Convention anticipated that claimants may have more than one nationality and that dual claims could therefore be made, and more than one country risk assessment must take place. However, they were never afforded the opportunity to have their claims of persecution in relation to South Korea assessed, as the prior assessment by the RPD dealt exclusively with persecution faced in North Korea.

[19] The Applicants submit that the mere statement that s 104(1)(d) applies, without explanation as to why it applies, was a breach of the duty of procedural fairness as reasons were required in these circumstances (*NL Nurses* at para 22).

Respondent's Position

[20] The Respondent submits that the Minister's Delegate, having reviewed the s 44 reports and the basis for those reports, reasonably found that the Applicants are inadmissible pursuant to s 40(1)(c). No error arises from this finding. Further, the Minister's Delegate also considered the Applicants' expressed desire to make refugee claims against South Korea; however, s 104(1)(d) clearly prohibits a claim that is not the first one made by an applicant. The Respondent contends

that the Applicants are merely asking the Court to re-weigh the evidence (*Apolinario v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1287 at para 46).

[21] The Respondent also submits that, in accordance with ss 96 and 97 of the IRPA, a claimant's refugee claim may only be in relation to his or her stated country of nationality. The Applicants' alleged risk in South Korea cannot be assessed or considered by the RPD because the risk has already been considered against North Korea. The appropriate forum for the alleged risks in South Korea is a PRRA, which process serves to respect Canada's commitment to the principle of non-refoulement under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can TS 1987 No 36.

[22] The Respondent submits that the Delegate did not err in finding that, pursuant to s 104(1)(d), the Applicants' refugee claims against South Korea were ineligible to be referred to the RPD, and the decision was reasonable based on the evidence before the Delegate. Further, the record as a whole – which consists of the RPD's initial decision granting the Applicants' refugee claims, the RPD's subsequent decision vacating the Applicants' refugee status, the s 44 reports, the Minister's Delegate Review, and the deportation orders – indicates the basis upon which the Delegate arrived at his or her decision. The Respondent submits that the Applicants must show that the deficiency in reasons has caused prejudice to the exercise of their legal right to appeal and that it is not sufficient to simply argue that it is reasonable to expect reasons would be required but were not forthcoming.

Analysis

[23] In my view, it is first necessary to put the Delegate's decision in context.

[24] It is not in dispute that, when the RPD rendered its positive decision accepting the Applicants as Convention refugees, their claim was based solely on the claim that they were citizens of North Korea and would be at risk of persecution if returned to North Korea. The Applicants did not disclose that they also held South Korean citizenship and other material information pertaining to their identity and claim.

[25] Subsequently, the Minister brought an application, pursuant to s 109 of the IRPA, seeking to have the Applicants' Convention refugee status vacated for misrepresentation. At the vacation application stage, the RPD noted that because of the misrepresentation, when hearing the claim for refugee protection, it had been precluded from considering any issue of discrimination the Applicants might face in South Korea. That is, because the Applicants did not disclose that they held South Korean citizenship and did not seek protection against that country at the refuge protection hearing, the RPD did not have reason to and did not consider if the Applicants required protection from South Korea. The RPD concluded, in applying s 109, that there was a misrepresentation and that there was insufficient evidence before the RPD at the refugee determination hearing to justify conferral of refugee status as against South Korea.

[26] As a result, each of the Applicants became the subject of a s 44(1) inadmissibility report for misrepresentation. In those reports, the officer stated that in his or her opinion that the Applicants were inadmissible pursuant to s 40(1)(c) as, on the balance of probabilities, there

were grounds to believe that they are inadmissible for misrepresentation on a final determination to vacate the claim for refugee protection. The Minister's Delegate's Reviews state that, pursuant to s 44(1), the Delegate reviewed the s 44(1) reports and the supporting evidence for the purpose of determining whether the Applicants would be allowed to remain in Canada or if removal orders should be issued against them. The Delegate's Reviews indicate that the Applicants conceded the allegations of misrepresentations, which led to their refugee status being vacated, and that the Delegate was satisfied that they are persons described by s 40(1)(c). On the same date, May 22, 2018, pursuant to s 228 of the IRP Regulations, the Delegate issued the deportation orders, stating in each order that that this was because he or she was satisfied that the Applicants were inadmissible under s 40(1)(c) of the IRPA.

[27] In short, pursuant to s 44(2), the Delegate found that the s 44(1) reports were well founded and that the Applicants were, pursuant to s 40(1), inadmissible for misrepresentation. Accordingly, and pursuant to s 228(1)(b) of the IRP Regulations, and without necessity of referring the reports to the Immigration Division for an admissibility hearing, the Delegate issued the deportation orders. I note that in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 [*Cha*], the Federal Court of Appeal held, in the context s 228(1)(a) and a finding of inadmissibility due to criminality, that the delegate is expected to make a deportation order if he or she is of the opinion that the s 44 report is well founded. That is, where the immigration officer correctly found that all of the inadmissibility requirements had been met. The Federal Court of Appeal stated that immigration officers and delegates are simply on a fact-finding mission, no more, no less. However, although inadmissibility has been

determined, a foreign national can still seek a stay of the removal order on H&C considerations or in the course of a PRRA (*Cha* at paras 34, 35 and 48).

[28] In this matter, it is clear and undisputed that the Applicants made misrepresentations that justified the vacating of their refugee status and the issuance of deportation orders. No error is alleged or arises in this regard. And, in my view, this was the determinative finding of the Delegate.

[29] However, the Applicants assert that before the Delegate they submitted that they should be allowed to make a refugee claim against South Korea as, at the time of that submission, they were not yet under removal orders. Based on the entry in the Delegate's Review, under "additional notes", stating that s 104(1)(d) applies, they submit that the Delegate erred in law in refusing to permit them to make a new refugee claim.

[30] In effect, the Applicants seek to divorce their request to make a new refugee claim as against South Korea from the finding of misrepresentation, and the resultant inadmissibility finding and issuance of the deportation orders. They base this on the premise that to return them to South Korea, without any consideration of risks that they now assert, is contrary to Canada's obligations as to refugee protection.

[31] In my view, s 96 of the IRPA contemplates a circumstance where a person seeking refugee protection may have more than one country of nationality. When considering if a claimant is a refugee under s 96, the RPD must consider if the claimant is a person who has a

well-founded fear of persecution, based on the Convention grounds, who is "outside *each of their countries of nationality* and is unable or, by reason of that fear, unwilling to avail themselves of the protection *of each of those countries*". Thus, there was nothing to prevent the Applicants from disclosing their dual citizenship when they made their refugee claims and seeking protection as against both North Korea and South Korea. Refugee claimants with multiple nationalities must prove that none of their countries of nationality will protect them (*Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175). The Applicants' misrepresentation when they made their claim for protection, by failing to disclose their South Korean citizenship before the RPD, meant that they did not meet that onus, as is clear from the RPD's reasons for the vacation.

[32] That leaves s 104(1)(d). While s 101 of the IRPA deals with claims that are ineligible to be referred to the RPD, s 104 is essentially a notice provision. Under a 104(1)(a), an officer can give notice that a claim is ineligible because: refugee protection has been conferred pursuant to the IRPA or has been rejected by the RPD; a prior claim was deemed to be ineligible to be referred to the RPD or was withdrawn or abandoned; the claimant has been recognized as a Convention refugee by another country and can be returned to that country; or, the claimant came from a country of designated origin (s 101(1)(a)-(e)). Under s 104(b), an officer can give notice that the claim is ineligible because the claimant has been deemed to be inadmissible on security grounds, for violating human rights, serious criminality or other stated grounds (s 101(1)(f)). Pursuant to s 104(c) an officer can give notice that he or she has determined that the claim was originally referred as a result of the claimant directly or indirectly misrepresenting or withholding material facts relating to a relevant matter and that the claim was not otherwise

eligible to be referred to the RPD (s 101(1)(a)). In either of these circumstances, the notice serves to terminate *any* pending RPD proceedings respecting the claim.

[33] As to s 104(1)(d), an officer may, with respect to a claim that is before or has been determined by the RPD, give notice that the claim is not the first claim that was received by an officer in respect of the claimant. The effect of that notice is to terminate proceedings in and nullifies any decision of the RPD (or Refugee Appeal Division) respecting a claim, other than the first claim. Thus, s 104(1)(d) gives an officer the discretion to give notice that the officer has determined that this is not the first claim made by the claimants. If the officer exercises that discretion, the giving of the notice will serve to terminate or render null any second or other new proceeding brought by the same claimants before the RPD, other than their first claim for protection.

[34] There is no evidence in the record before me that the Applicants made a second claim to the RPD, seeking protection as against South Korea, after they received notice of the vacation decision on December 11, 2017. Thus, in the absence of any pending claim and given that the Applicants first claim had been vacated for misrepresentation, the Delegate's reference to the discretionary notice provision in s 104(1)(d) would seem somewhat misplaced. That said, the Delegate was aware that the proposed new claim by the Applicants would not be their first claim. Thus, pursuant to s 104(1)(d), the contemplated new claim would be futile, if notice of the first claim were given.

[35] When appearing before me, counsel for the Applicants submitted, as I understood it, that once the Applicants requested that they be permitted to make a new claim to the RPD, the Delegate should have adjourned the proceeding and made a determination, pursuant to s 101(1)(b), that their claims were ineligible to be referred to the RPD. Once that ineligibility finding was made, which they concede was inevitable in these circumstances, the Delegate should then have resumed the hearing and found them to be inadmissible for misrepresentation pursuant to s 40(1)(c) and issued the deportation orders. They also submitted that there was no point in them making a new claim after the vacation decision had been made, but before the inadmissibility for misrepresentation determination by the Delegate, because it would not have been accepted by the RPD due to their prior claim.

[36] Given that the Applicants conceded the misrepresentation, that they do not contest the reasonableness of the Delegate's decision that they are inadmissible for misrepresentation, and given that they acknowledge that a new claim as against South Korea would be ineligible and would not permitted if brought before the RPD I have difficulty with their view that the reference to s 104(1)(d) applying as found in the additional notes of the Delegate's Review is a sufficient basis upon which to find that the Delegate committed a reviewable error. And, given their submissions, even if it were, I do not see how the outcome would change if I were to quash the decision on this basis and return it to a different decision maker. To order a new hearing would be an exercise in futility (*Cha* at para 67). In that regard, the remedial discretion of courts on judicial review was addressed by the Federal Court of Appeal in *Maple Lodge Farms Ltd. v Canada (Food Inspection Agency)*, 2017 FCA 45 [*Maple Lodge Farms*]:

> [51] *MiningWatch Canada* encourages reviewing courts at the remedial stage, among other things, to consider whether quashing

> the administrative decision-maker's decision and remitting it to the administrative decision-maker for redetermination would serve any practical or legal purpose. Where the reviewing court concludes that in any redetermination the administrative decision-maker could not reasonably reach a different outcome on the facts and the law, the decision should not be quashed: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24. This well-established principle resonates well with the modern-day need that pointless proceedings be avoided and decision-making resources be allocated to where they serve some use: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[37] In *Maple Lodge Farms*, the Federal Court of Appeal found that the tribunal's previous findings of fact were separate from and unaffected by its legal error and, therefore, applying the law to the facts, the tribunal could only reasonably reach one conclusion on re-determination. The Federal Court of Appeal therefore exercised its remedial discretion against quashing the decision and remitting the matter for redetermination.

[38] Similarly, here, the finding that the Applicants are inadmissible for misrepresentation is separate from and unaffected by any legal error arising from the Delegate's reference to s 104(1)(d). In my view, on a redetermination of this matter, a delegate could not reasonably reach a different outcome on the facts and law when exercising his or her limited s 44(2) discretion. Accordingly, in these circumstances, no purpose would be served by quashing the decision and returning it to be re-determined by another delegate. Therefore, I am exercising my discretion and declining to do so.

[39] In essence, the Applicants request that the Court embark on an exercise of statutory interpretation in circumstances where one is not required. In that regard, the Applicants submit

that because of the Delegate's interpretation of s 104(1)(d), which they take to be that only claims from the same country can be "first claims" pursuant to that provision, it is important for this Court to intervene not on their behalf, but on behalf of other applicants who come to Court with clean hands and without a finding of misrepresentation. I do not find this submission to be persuasive. And, as noted above, in these circumstances nothing turns on the reference to s 104(1)(d) applying as it is clear that s 101(1)(b) makes a second claim by the Applicants ineligible for referral to the RPD, as they concede.

[40] As to the Applicants' claim that they have been denied an opportunity to have their risks upon return to South Korea assessed and that this in is in contravention of Canada's obligations at international law, the Federal Court of Appeal has considered the role of a PRRA in that context in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, stating:

> [9] Subsection 112(1) reads in relevant part as follows:
>
> | | |
> |---|---|
> | 112. (1) A person in Canada […] may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force […] | 112. (1) La personne se trouvant au Canada […] peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet […] |
>
> [10] The purpose of section 112 of the IRPA 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 | La justification, au niveau des politiques, de l'examen des risques avant renvoi se trouve dans les engagements nationaux et internationaux du Canada en faveur du principe de non refoulement. En vertu |

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.	de ce principe, les demandeurs ne peuvent être renvoyés du Canada dans un pays où ils risqueraient d'être persécutés, torturés, tués ou soumis à des traitements ou peines cruels ou inusités. Ces engagements exigent que les risques soient examinés avant le renvoi.

[41] Such an application for protection can be made even if the claimants are subject to a removal order, and the result of a successful PRRA application is the granting of refugee protection, unless there are issues of inadmissibility due to serious criminality or other matters set out in s 115(3). Inadmissibility due to misrepresentation is not one of those exceptions. Thus, there is no merit to the Applicant's assertion before me that a PRRA offers a lesser form of protection. Nor was any evidence submitted to support the stated view that it is more difficult to succeed on a PRRA than it is on a ss 96 or 97 application. And again, it was open to the Applicants to declare their dual citizenship when they appeared before the RPD and to seek protection against both North and South Korea. Instead they misrepresented their citizenship status.

[42] Thus, the fact that deportation orders have been issued against the Applicants does not preclude them from seeking a PRRA at which their alleged risk of return to South Korea can be assessed. The affidavit filed by the Respondent confirms that the male Principle Applicant returned to South Korea to pursue a business opportunity. By doing so he has re-availed himself of that country, although he has also unsuccessfully sought to return to Canada. Further, two of the other Applicants have filed PRRA applications. The affidavit does not speak to the status of the third Applicant, but nor have the Applicants filed any evidence to suggest that that claimant was not offered a PRRA. Given this, I also cannot conclude that the Delegate's reference to the applicability

of s 104(1)(d) deprived the Applicants of the opportunity to have the alleged risks as against South Korea assessed.

[43] In conclusion, even if the Minister's Delegate erred in referencing s 104(1)(d) of the IRPA as applicable, nothing turns on that error in these circumstances as any second claim for protection brought by the Applicants against South Korea was, pursuant to s 101(1)(b), not eligible to be referred to the RPD. The Applicants were also fully apprised as to why the Minister's Delegate found them to be inadmissible for misrepresentation, which they conceded. There was no failure to provide adequate reasons in support of that decision. Further, the Applicants' risks, as alleged against South Korea, can be assessed by way of PRRA applications.

Certified Question

[44] The Applicants submit the following question for certification:

> Should section 104(1)(d) of the IRPA be interpreted to preclude a person from making a second claim of asylum, when this second claim involves a different country of persecution that has not been put forth previously, while taking into consideration Canada's obligations under international law and the United Nations Convention Relating to the Status of Refugees?

[45] The Respondent opposes the proposed question as it is not dispositive of the case and not relevant to the factual circumstances of this case.

[46] The Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, revisited the criteria that must be met for certification of a proposed question:

> [46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (F.C.A.) at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 (F.C.A.) at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 (F.C.A.) at paras. 15, 35).

[47] Here, the interpretation of s 104(1)(d) of the IRPA is an issue that need not be decided and, therefore, it cannot properly ground a certified question.

JUDGMENT IN IMM-2525-18, IMM- 2526-18, IMM- 2527-18 and IMM- 2528-18

THIS COURT'S JUDGMENT is that:

1. The Respondent's motion to admit the affidavit of Helene Chabot, sworn on February 8, 2019, is granted;
2. This application for judicial review is dismissed;
3. The question proposed by the Applicants is not certified; and
4. A copy of these reasons shall be placed in the files of each of IMM- 2526-18, IMM-2527-18 and IMM- 2528-18.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2525-18 IMM-2526-18 IMM-2527-18 IMM-2528-18
STYLE OF CAUSE:	SOOMIN MUN v MCI CHUNAI JANG v MCI JUNGWON MOON V MCI JUNGSEO MOON V MCI
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	MARCH 1, 2019

APPEARANCES:

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Neeta Logsetty	FOR THE RESPONDENT

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