Federal Court Cour fédérale

Date: 20200501

Docket: IMM-1963-19

Citation: 2020 FC 581

Ottawa, Ontario, May 1, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KWANGJIN KIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a senior immigration officer (the "Officer") at Immigration, Refugees and Citizenship Canada ("IRCC") to deny the Applicant's application for permanent residence on humanitarian and compassionate grounds ("H&C") pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant is an orphan who escaped North Korea. The Applicant eventually arrived in South Korea, but determining that he could not withstand the harsh discrimination against North Korean defectors, the Applicant fled South Korea in 2012 and came to Canada, where he has since resided. Over the years, the Applicant has established several close friendships and family-like ties, completed ESL courses, attended church and public debates, and worked in several jobs, mainly in the restaurant industry.

[3] The Applicant fears returning to South Korea because he faced discrimination and hardship as a North Korean defector, and he fears arrest or abduction by North Korean agents or spies. Also, the Applicant's story was published in the Korea Times Daily, which the Applicant argues makes him more easily targetable by North Korean officials.

[4] By decision dated February 19, 2019, the Officer found that the Applicant submitted insufficient objective evidence to support his ties to Canada and his status as a high-profile defector, and therefore denied his application for permanent residence on H&C grounds.

[5] On application for judicial review, the Applicant submits that the Officer erred by failing to apply the correct legal test for assessing an H&C application. The Applicant also submits that the Officer's treatment of the evidence was unreasonable, especially with regard to the Korea Times Daily article and the discrimination against North Korean defectors in South Korea.

[6] For the reasons below, I find that the Officer's decision is unreasonable. The Officer failed to adequately consider the compassionate factors of the Applicant's circumstances required within an H&C assessment. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[7] Mr. Kwangjin Kim (the "Applicant") is a 33-year-old individual who was born in North Hamgyeong Province in North Korea. The Applicant's father died in an electrical accident when the Applicant was around four years old, and the Applicant's mother—traumatized by her husband's death—left home, abandoning her two young toddler sons.

[8] The Applicant and his younger brother went to live with their father's older sister. The Applicant's aunt had eight people to feed, including her own children. As food in North Korea was a constant struggle and famine was pervasive, the family perpetually struggled to get by. The Applicant's younger brother died of malnutrition at the age of six. The Applicant was only seven years old at the time.

[9] Following the death of Kim Il Song on July 8, 1994, the public food distribution system broke down, causing widespread malnutrition across North Korea, and what is now known as the "Arduous March" began. In April 1996, the Applicant's uncle died of malnutrition, and in June 1997, his aunt died of starvation. After losing his aunt in 1997, the Applicant had no choice but to live as a "Kotjebi"—an orphaned street child. The Applicant states, as a child living on the

streets, having lost his parents, younger brother, aunt and uncle, he found something to eat once every three days or even less at times, barely surviving in North Korea, amidst the cold and starvation.

[10] On November 9, 1998, the Applicant left for China with another Kotjebi by crossing the Tumen River into China. He took refuge in various churches, where he learned some Chinese. Out of fear of being arrested by Chinese police, the Applicant could not stay very long in each location.

[11] Eventually in January 1999, the Applicant found another church, where the pastor sheltered him. In March 1999, the Applicant was transferred to an orphanage in Beijing, where they had taken in Chinese and North Korean children. The Applicant states that, as the orphanage was dangerous, its operator, Mother Kim, divided the children there into smaller groups to live in general housing.

[12] On September 1, 1999, the Applicant entered elementary school in Beijing, where he had to change his name; he decided to change his surname from “Kim” to “Lee” and went by “Lee Kwangjin”. The Applicant was 14 years old at this time. The next year, the Applicant graduated from Grade One, but did not continue at the school.

[13] Missing his cousins who were still in North Korea, the Applicant attempted to return to North Korea in August 2000, but the river crossing from China was flooded and he could not get back. The Applicant lived the life of a “Kotjebi” in Beijing. Eventually, the Applicant was

apprehended by the Chinese police in Harbin, China, but was let go with a warning that if the police found him again, they would return him to North Korea.

[14] Subsequently, the Applicant returned to Beijing, where he lived with the help of various South Korean people, including a missionary who provided him with food and a place to sleep. From August through November 2001, the Applicant studied the Bible under a difficult daily routine.

[15] On November 18, 2001, the Applicant left Beijing for Weihai, China, eventually seeking out help from another South Korean church, where he lived and worked for about a year. One day, while working, the Applicant saw on the news that North Korean people were attempting to get into the American and German consulates in order to flee to South Korea.

[16] On November 1, 2002, the Applicant left Weihai, and arrived in Hekou, China, near the Vietnamese border. He attempted to cross into Vietnam in hopes of getting to South Korea, to no avail. The Applicant took a train back to Beijing in January 2003, where he found refuge in another South Korean church.

[17] In June 2003, the missionary from the church informed the Applicant that if he could enter the South Korean consulate as a North Korean, he could go to South Korea. The Applicant joined a group of other North Korean defectors, and on July 2, 2003, they forced their way into the South Korean consulate.

[18] On September 13, 2003, after undergoing a verification process to ensure that he was North Korean, the Applicant was formally deported from China to South Korea. In South Korea, the Applicant underwent further interrogations and was finally moved to a place called Hanawon, where he learned about South Korea for two months. On December 18, 2003, the Applicant graduated from the program at Hanawon. However, since the Applicant was a minor at the time, he was not allotted a house; instead, the Applicant was taken to a youth shelter.

[19] At the youth shelter, the Applicant lived with troubled South Korean teenagers who had run away from their families. The Applicant states that he experienced severe discrimination and verbal abuse as a North Korean defector. The other teenagers repeatedly hurled derogatory names at the Applicant, told him to "go back to [his] country", and told him that he was "eating up [their] tax money".

[20] Having been subject to repeated discrimination and abuse, the Applicant tried to flee to the United States with a few friends in October 2004, but he was refused entry in Vancouver because he was a minor. The Applicant was sent back to South Korea, where he returned to the shelter. The Applicant eventually moved in with an older friend that he had met at Hanawon, and completed his examinations for elementary school, middle school, and high school, earning his high school diploma. Later, the Applicant was contacted for a factory job, but was ultimately disqualified from the hiring process when they learned that he was a North Korean defector.

[21] In November 2006, the Applicant fled South Korea to Norway with the assistance of older friends. In Norway, the Applicant applied for refugee status and moved to a refugee

shelter. While living at the shelter for over a year and a half, he worked 7 months in a chicken factory. However, the Applicant's refugee claim was rejected. The Applicant was immediately deported back to South Korea.

[22] Upon his return to South Korea, the Applicant states that he experienced suicidal ideation. He wrote the following in his affidavit, describing his emotional state at the time:

> When I arrived in South Korea, I did not know anyone. I had not kept in touch with anyone. I was really lonely, and living was really difficult. I thought that if I died, I could go to a better world. So I really wanted to die.

[23] In time, the Applicant formed a hope that he could escape to Canada. On June 15, 2012, the Applicant arrived in Canada, and applied for refugee status on June 16, 2012. However, while the Applicant's refugee claim was in process, the Applicant's lawyer, Mirae Jo, was implicated in a fraud incident and disbarred. Due to this circumstance, and the fact that the Applicant did not have a permanent address, the Applicant did not receive the communications regarding his refugee hearing.

[24] In January 2018, the Applicant met another lawyer through the Canada Federation of North Korean Defectors. After receiving advice on inquiring about his immigration status and refugee claim, the Applicant contacted IRCC and discovered that his refugee claim had been declared abandoned.

[25] On March 8, 2018, Canada Border Services Agency ("CBSA") officers arrested the Applicant at his home. The Applicant was held in detention until March 19, 2018, while he retained his current counsel to help him regularize his status. The Ontario Minister of Seniors and Accessibility, Raymond Cho, was his guarantor and surety ("MPP Cho"). Furthermore, the Applicant's story was published in the Korea Times Daily, a resource that is widely circulated in Canada, South Korea, and available to the North Korean government.

[26] The Applicant submitted his Pre-Removal Risk Assessment ("PRRA") application on April 5, 2018, and submitted his H&C application in May 2018. His PRRA application was denied in February 2019.

[27] In support of the H&C application, the Applicant provided sworn evidence speaking to the innumerable hardships that he had experienced and would face in South Korea. In particular, the Applicant submitted that due to the lack of a support network, he would have to resort to living homeless for some time, with no prospect of when he might be able to find employment because of the discrimination against him as a North Korean defector. The Applicant expressed a fear of returning to South Korea and being tracked down by North Korean spies or agents because his story was widely publicized through the Korea Times Daily. The Applicant submitted that he would face significant hardship in South Korea as a result.

[28] The Applicant submitted that he had developed a strong establishment in Canada, forming very close ties, especially with MPP Cho, who had become a father figure for him. The Applicant noted that he attended and volunteered at Alpha Korean United Church, and that he

attended Queen's Park to watch debates. Moreover, the Applicant worked as a dishwasher, helper, and line cook to support himself and completed Level 5 in ESL. The Applicant also assisted fellow North Koreans in Toronto with translation to help them communicate with their own counsel.

B. *The Underlying Decision*

[29] By decision dated February 19, 2019, the Officer refused the Applicant's H&C application. This decision was communicated to the Applicant on March 25, 2019.

[30] Although the Officer accepted that the Applicant was a North Korean defector and that the Applicant had remained in Canada for over six years, the Officer found that there was insufficient evidence to support his establishment in Canada and assigned little weight to the Applicant's establishment. Specifically, the Officer found that:

a) The Applicant had not submitted any evidence of his employment in Canada;

b) The Applicant submitted insufficient evidence of his participation and completion of ESL classes;

c) The Applicant submitted insufficient evidence of his attendance, membership, or volunteer activities at the Alpha Korean United Church; and

d) The Applicant submitted insufficient evidence of his attendance at Queen's Park debates.

[31] Regarding the Applicant's ties in Canada, the Officer found that the Applicant submitted insufficient evidence that his relationships with MPP Cho and Ms. Hye Kyung Jo were "characterized by a degree of interdependency and reliance". While the "hardship of being physically separated from his friends in Canada will cause some dislocation", the Officer noted that insufficient evidence was provided to indicate the Applicant could not "maintain those friendships if he were to return to South Korea".

[32] In assessing the Applicant's hardship in South Korea, the Officer noted that although the Applicant resided in South Korea for "numerous years", there was insufficient objective evidence that he was harassed by North Korean agents or spies while in South Korea, or that he would be perceived as a high profile defector. The Officer further found there was insufficient objective evidence to establish that "the country conditions in South Korea are such that relocating and reestablishment could not be considered", and that while reintegration may be challenging, there was insufficient evidence that "it is unattainable".

[33] Despite the Applicant's submissions that North Koreans face widespread discrimination on a systemic basis in South Korea, including in employment and hiring, the Officer pointed to documentary evidence and found that the "North Korean Defector Resident Registration Certificate" provides emergency assistance and resettlement service to North Korean refugees. The Officer found that there was insufficient objective evidence to indicate the Applicant could

not have his “North Korean Defector Registration Certificate” reinstated, which currently states that his protection has been cancelled.

[34] Although the Officer acknowledged that “the country conditions regarding discrimination perpetrated against North Korean defectors remains an issue in South Korea”, having “balanced this factor” against government measures and the Applicant’s personal circumstances—that he resided in South Korea for a number of years, was able to obtain a South Korean passport, was able to move about freely including “travelling” to other countries, and was able to receive his high school diploma—the Officer ultimately concluded that the Applicant would have “the capability to seek redress in South Korea” and that the Applicant provided insufficient objective evidence to demonstrate hardship.

[35] Regarding the Applicant’s story that garnered media attention in the Korea Times Daily article, the Officer noted that the article made a reference to an individual named “Lee Sung-jin”, not “Kwangjin Kim”. The Officer found insufficient evidence that the Applicant was the person in this article.

[36] Overall, in performing a “global assessment of the H&C factors presented”, the Officer noted that they balanced the Applicant’s length of time and ties in Canada as well as “his claims of lack of support in South Korea” against the Applicant’s “minimal establishment in Canada”. Ultimately, the Officer was not satisfied that sufficient H&C grounds existed to grant the application.

III. **Preliminary Issue: Admissibility of Evidence**

[37] The Respondent submits that since the H&C Reasons were rendered on February 19, 2019, any documents submitted by the Applicant after that date should be struck from the record.

[38] Specifically, the Respondent submits the following documents be struck from the record: Tab 5 of the Application Record (which contains articles that were sent with a cover letter after February 19, 2019); Tab 8 of the Application Record containing the Applicant's Affidavit filed pursuant to his motion for stay of removal; and Tab 9 of the Application Record containing an affidavit filed pursuant to the Applicant's motion for stay of removal.

[39] Conversely, the Applicant contends that this update should be considered by the Court as having been before the decision-maker, since he received the decision on March 25, 2019, and submitted the additional materials on March 22, 2019. As such, the Applicant submits that Tabs 5 and 8 should be admissible. The Applicant cites *Chudal v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1073 (CanLII) [*Chudal*] at paragraphs 16 to 19, in which Justice Hughes found that an officer's decision is considered final at the first indication that the existence of the decision is communicated to the applicant, rather than on the date that the decision is rendered:

> [16] All of the above jurisprudence indicates that a PRRA Officer is to take into account all evidence that may effect the decision, and that all such evidence presented until the time that the decision is "final" is to be taken into account.
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> [17] As to when the decision is "final", the Respondent's counsel submitted two cases: *Tambwe-Lubemba v. Canada (MCI)* [2000] F.C.J. 1874 and *Avci v. Canada (MCI)* [2003] F.C.A. 359. Both cases deal with decisions of the Refugee Board, not a PRRA

> Officer, and both indicate that such a decision is "final" once it is signed and transmitted to the Registrar.
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> [18] In the case of a PRRA Officer's decision, the procedure is less formal than that of the Refugee Board. The PRRA Officer can receive submissions, require an oral hearing if so advised. A decision is made and transmitted to the local CBSA office to convey to the Applicant, often in conjunction with a removal order in the case of a negative decision so as to avoid the possibility that the individual may attempt to avoid removal. On occasion the PRRA Officer will advise the Applicant to submit materials before a certain date because on that date a decision will be made.
>
> [19] In the circumstances of a PRRA Officer's decision, the Officer has an obligation to receive all evidence which may affect the decision until the time that such decision is made. It is reasonable to consider that such decision is not made until it has been written and signed and notice of the decision, even if not its contents, has been delivered to the Applicant. Accordingly the decision at issue here was "made" as of 15 October, 2004, the date that its existence was communicated to the Applicant. In the case where the Applicant has been advised that a decision will be made on a future date, it is reasonable to consider that the decision is made on that future date.

[40] Since the decision was communicated to the Applicant on March 25, 2019, the Applicant maintains that the materials he sent on March 22, 2019 (Tab 5 of the Application Record) were properly before the Officer and should not be struck. I agree.

[41] As for Tab 8 of the Application Record containing the Applicant’s Affidavit filed pursuant to his motion for stay of removal, the Applicant contends that the affidavit largely reiterates the factual backdrop contained in the affidavit submitted in the H&C application, and that it should thus be maintained in the record. I agree.

[42] During the hearing, the Applicant conceded that Tab 9 may be struck from the record and I agree.

IV. **Issues and Standard of Review**

[43] The issues that arise on this judicial review are as follows:

A. Did the Officer err by failing to apply the correct legal test in assessing the Applicant's H&C application?

B. Did the Officer err in their treatment of the evidence?

[44] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of an immigration officer's decision on H&C applications under section 25 of the *IRPA: Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) at para 44 [*Kanthasamy*]; *Douti v Canada (Citizenship and Immigration)*, 2018 FC 1042 (CanLII) at para 4; *Chen v Canada (Citizenship and Immigration)*, 2019 FC 988 (CanLII) at para 24. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[45] On the issue of whether the Officer applied the correct legal test, the Applicant submits that it should be assessed under the correctness standard. However, given that *Vavilov* has narrowed the application of the correctness standard in favour of the presumption of

reasonableness, the correctness standard is now only applicable in three categories of questions: constitutional questions (*Vavilov* at paras 55-57); general questions of law of central importance to the legal system as a whole (*Vavilov* at paras 58-62); and questions related to jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 63-64). It does not appear that the question of applying the correct H&C test falls into any of these categories.

[46] Nonetheless, if the Officer applied an incorrect test in assessing the H&C application, the decision must be sent back for redetermination. As such, the result would remain the same regardless of the application of a reasonableness or correctness standard.

[47] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

V. **Analysis**

A. *Did the Officer err by failing to apply the correct legal test in assessing the Applicant's H&C application?*

[48] The Applicant submits that the Officer erred by failing to consider the H&C factors through a compassionate lens (*Salde v Canada (Citizenship and Immigration)*, 2019 FC 386

(CanLII) at paras 22-23; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 (CanLII); *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 (CanLII). The Applicant submits that the Officer only considered the Applicant's situation through a strict hardship lens contrary to the Supreme Court's instructions from *Kanthasamy*. Moreover, the Applicant argues that the Officer erred by applying a compartmentalized approach in assessing the H&C factors.

[49] The Applicant also cites *Yanchak v Canada (Citizenship and Immigration)*, 2019 FC 117 (CanLII) [*Yanchak*] at para 17, where the Court held that an officer erred by "failing to show any compassionate consideration that goes beyond the strict hardship lens". In that case, although the officer had acknowledged the harsh country conditions, they then "failed to consider whether returning the Applicant to a war-torn country might aggravate these mental health issues".

[50] The Respondent submits that the Officer did not apply a pure hardship lens. The Respondent takes the position that the Officer analyzed the hardship that the Applicant may face upon his return to South Korea because it was specifically argued that he would be subject to discrimination. The Officer found that the Applicant submitted "little information or evidence" regarding his previous harassment by North Korean agents, and that his "personal circumstances" counterbalanced the risk of hardship. Therefore, the Respondent maintains that the Officer applied the correct legal test in assessing the H&C application.

[51] The correct approach in determining an H&C application goes beyond the strict test of "unusual and undeserved or disproportionate hardship", but rather involves a consideration of "those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a

civilized community a desire to relieve the misfortunes of another, so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*" (*Kanthasamy* at para 13 citing *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1 at 350). As instructed by the Supreme Court of Canada, an H&C analysis must consider all relevant factors (*Kanthasamy* at para 25). The analysis cannot take place with a compartmentalized view on the compassionate factors.

[52] However, the Officer's reasons convey a lack of understanding of the correct legal test in assessing an H&C application under section 25(1) of the *IRPA*, throughout the entirety of the analysis. The Officer found that, despite having no family or support system in Korea, the Applicant provided insufficient objective evidence "to establish that his relocation and reestablishment could not be considered". In other words, as long as a mere possibility of the Applicant's reestablishment could be entertained, the Officer would appear to be satisfied that the Applicant would not meet the test for "unusual and undeserved or disproportionate hardship".

[53] This faulty analysis is quickly followed by another. While the Officer appears to acknowledge that reintegration may be challenging for the Applicant to re-establish himself in a country that he had not lived in for six years and where he has no family or friend support, there was insufficient evidence that it is "unattainable". Here, the Officer sets an impossible standard of "attainability"—an inappropriately elevated and incorrect standard is thrust upon the Applicant to establish in the assessment of his humanitarian and compassionate factors.

[54] As was noted by this Court in *Yanchak* at para 14 (emphasis in original):

> [14] As stated in *Stuurman v Canada (Citizenship and Immigration)*, 2018 FC 194 at paragraph 24 [*Stuurman*], it will be a reviewable error if a delegate of the Minister fails to apply the broader, equitable approach dictated by Kanthasamy:
>
> The Officer in this case unreasonably assessed the Applicants' length of time or establishment in Canada because, in my view, the Officer focused on the "expected" level of establishment and, consequently, failed to provide any explanation as to what would be an acceptable or adequate level of establishment. The Officer's assessment of the Applicants' level of establishment is perfunctory at best and, thus, unreasonable because it was considered through the lens of "unusual and undeserved or disproportionate hardship" and not, as Kanthasamy dictates, more broadly through the lens of an humanitarian and compassionate perspective that considers and gives weight "to all relevant humanitarian and compassionate considerations"…

[55] The correct legal test is not a strict hardships lens, but a broader one that considers the humanitarian and compassionate factors that is responsive to the facts of the case (*Kanthasamy* at para 25). The Officer failed to do so, and thus erred by applying an incorrect legal test.

B. *Did the Officer err in their treatment of the evidence?*

(1) **Establishment, Mental Health & Discrimination**

[56] The Applicant submits that the Officer failed to meaningfully engage with the evidence before them, basing most of the decision on a finding of insufficient evidence. The Applicant argues that he provided sworn evidence and proof of his status as a North Korean defector, both of which were accepted by the Officer. However, the Officer did not treat this evidence with the presumption of truthfulness required (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302.

[57] The Applicant cites *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 244 (CanLII) [*Navaratnam]* at para 9 for the proposition that it is an error for a decision-maker to focus exclusively on evidence that is not submitted, fail to perform a meaningful analysis of the written testimony, or dismiss evidence on the basis that other evidence would have been more desirable (Also see *Botros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1046 (CanLII) [*Botros*]). The Applicant further submits that an officer commits a reviewable error when they ignore evidence that contradicts their conclusion, and that an officer's burden to explain why they ignored the evidence increases proportionately with evidence that is more relevant to the disputed facts (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*] at para 17). This Court has repeatedly held that an officer errs where they fail to explain why they ignored or discounted an applicant's sworn evidence.

[58] Given that the Officer accepted that the Applicant was orphaned at a young age, had no social ties or support network in South Korea, was a North Korean defector, and that North Korean defectors face discrimination in South Korea, the Applicant argues that it was unreasonable for the Officer to conclude that he would not face hardship upon his return to South Korea. The Applicant submits that the Officer's rejection of the Applicant's sworn evidence on the "mere basis" that the Applicant lived in South Korea for several years, and received a passport and a basic education demonstrates that the Officer ignored relevant evidence.

[59] Specifically, the Applicant submits that the Officer failed to meaningfully engage with the underlying factors that forced the Applicant to flee South Korea and with the relevant

country conditions that demonstrated a pattern of discrimination against North Korean defectors. The Applicant points to a study by the Asia Pacific Journal of Public Health, wherein researchers found that North Korean defectors are shown to have higher rates of depression, anxiety, and suicidal ideation than South Koreans.

[60] The Respondent submits that the Officer reasonably found the Applicant provided insufficient evidence. The Respondent states that the Applicant provided no evidence aside from his own testimony to demonstrate his dependence on his close friends. The Respondent argues that the Officer thus reasonably concluded that the Applicant could still maintain his connections with his Canadian friends via "telephone, letters, social media outlets" should he be removed to South Korea.

[61] The Respondent notes that there is no evidence in the record to support the Applicant's alleged employment, ESL courses, or affiliation with the Alpha Korean United Church other than MPP Cho's letter of support. However, because this letter was written on April 17, 2018—less than a month after the Applicant was released from detention—the Respondent contends that it provides little foundation to prove the Applicant's integration into the church community.

[62] On this point, the Applicant asserts that the Respondent cannot supplement the Officer's reasons in their arguments, since the Respondent's proposed reason for discounting MPP Cho's letter was not offered by the Officer *(Aria v Canada (Citizenship and Immigration)*, 2013 FC 324 (CanLII), at para 24; *Xiao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195 (CanLII) at para 35). I agree.

[63] In the case at bar, the Officer failed to meaningfully engage with the evidence before them, specifically with regard to the Applicant's sworn testimony. While the Applicant certainly could have provided more evidence to support his assertions as the Officer suggests (i.e. a letter of support from his friend whom he lived with, or a letter from the pastor of his church), I find that such suggestions are speculative and unhelpful to the overall analysis of the evidence that was in fact before the Officer: a very detailed and lengthy affidavit from the Applicant, a defector's certificate proving that the Applicant was a North Korean defector, and a letter from a Member of Provincial Parliament supporting the Applicant's H&C application.

[64] Despite the Officer's finding that there was insufficient evidence to show the Applicant's relationships with MPP Cho and Ms. Jo were one of "interdependency and reliance", MPP Cho's letter unambiguously reads: "Here in Canada [the Applicant] has a wide support network including myself – I have taken him as a son". In essence, the evidence indicates that the relationship between the Applicant and MPP Cho is like that of a father and son. If there is a lack of interdependency within what is akin to a familial relationship, I would be hard-pressed to find where that kind of "interdependency and reliance" may exist. Instead of addressing the evidence that is contradictory to the Officer's findings and explaining why MPP Cho's letter held little probative value or was irrelevant, the Officer instead minimized the relationship altogether by continually referring to it as a "friendship". The Officer blatantly discounted this evidence, which this Court has frequently held is a reviewable error (See *Navaratnam*, *Botros*, and *Cepeda-Gutierrez* above). There is no indication that the Officer considered the fact that MPP Cho considers the Applicant to be like an adopted son.

[65] Furthermore, it is puzzling to understand how the Officer found that the Applicant living with Ms. Jo—whom the Applicant considered to be "like a sister"—and her family was not a relationship "characterized by a degree of interdependency and reliance such that separation would result in hardship." The Applicant, orphaned at the age of 4, has essentially been homeless since his early teenage years. The Applicant has no family or friends in South Korea. He lost his family members through miserable deaths of starvation and malnutrition in North Korea. Now, the Applicant has housing, meals, and family-like companionships, all of which form a sense of interdependency and reliance. Pulling the Applicant away from a stable environment when he is able to work, participate in community and political affairs, and build relationships would undoubtedly cause hardship and trauma, as such stable experiences were inaccessible for the Applicant prior to his life in Canada. To do so to someone like the Applicant—who has lost his entire family, been unable to work or find housing in South Korea, and clearly traumatized by these experiences—would be cruel and unnecessary under the circumstances. Where is the consideration of compassion and sympathy, "which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another," (*Kanthasamy* at para 13)? It is certainly missing from the decision before me.

[66] On the issue of mental health conditions, although the Respondent submits that evidence is required to prove health conditions and that the Officer reasonably did not consider the Applicant's "bald assertions" that he holds "suicidal thoughts", I note that the Applicant's suicidal ideations were not presented as evidence of a specific mental health diagnosis, but submitted to paint a picture of extreme hardship from the difficult life that the Applicant led in South Korea as a North Korean defector. Moreover, I find that the case law cited by the

Respondent on this particular issue is unhelpful as they both concern orders regarding removals, not H&C applications (*Hernadi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 126350 (FC) at para 15; *Montenegro v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 609 (CanLII) at paras 12-13).

[67] In my view, the Officer erred by failing to consider the Applicant's hardship in relation to his mental health condition and high suicide rates in South Korea. The Applicant had provided evidence describing the hardships that he had faced in South Korea, and that he wanted to end his life due to such difficulties. As the Applicant points out, this was highly relevant evidence that the Officer ought to have considered in assessing whether the Applicant was facing hardship. The objective evidence in the record confirmed that defectors in South Korea face high rates of suicide. A study published in the Asia Pacific Journal of Public Health revealed that North Korean defectors are shown to have higher rates of depression, anxiety, and suicidal ideation than South Koreans. The authors found that those who have attempted to escape North Korea more than twice—like the Applicant—were at even a higher risk. Given that South Koreans already rank the highest in suicide rates of all the countries in the OECD, the Applicant's mental health conditions were highly relevant to the hardship analysis.

[68] Lastly, the Officer erred in their treatment of the Applicant's claims of harassment and discrimination due to his status as a defector. Despite having acknowledged that systemic discrimination against North Korean defectors is an issue well-documented in the country condition evidence, the Officer concludes that this can be "balanced" against the Applicant's personal circumstances, and that the Applicant would not have difficulty seeking redress because

he lived in South Korea for a number of years, was able to obtain a passport, and was able to complete his high school diploma. The Officer's reasoning is illogical and unjustified.

[69] The Applicant suffered an indiscriminate amount of hardship since the age of 3, was orphaned and left to fend for himself literally on the streets of a famine-stricken country that could not provide for children like him. Then, upon arriving in South Korea after a treacherous journey at the age of 17, the Applicant again suffered hardship by virtue of being a North Korean. He faced discrimination at the youth shelter, in his job searching process, and in his employment. In view of the Applicant's past experiences of continuous discrimination, and submissions of country condition evidence, the Officer failed to explain why the overwhelming objective evidence illustrating discrimination against North Korean defectors in South Korea was ignored or deemed irrelevant. Some excerpts from the Certified Tribunal Record ("CTR") have been reproduced below to illustrate the hardship and discrimination against North Koreans in South Korea:

- CTR Volume 4, p. 608: *The New York Times*, "Young North Korean Defectors Struggle in the South" (July 12, 2012)

> "I felt like someone from the 1970s who was put on a time machine and dropped in the 21st century," said Mr. Kim, 24, a senior majoring in Chinese language. He said many of his classmates shun him for his northern accent, and for his small stature likely caused by inadequate nutrition.

- CTR Volume 3, p. 558-560: *ABC News*, "After fleeing North Korea, some defectors want to go back to life under Kim Jong-un" (December 14, 2017)

> South Korea is not what he expected and he desperately misses his family… "There's no hope living here. I've experienced so much

> harassment and I'm treated like a second-class citizen." …He is unemployed and claims when he did work as a labourer he was paid much less than fellow workers, or not at all. He said he suffers from the stigma of coming from the North, saying most South Koreans see him as backward or stupid.
>
> […]
>
> Eight hundred defectors known to have arrived in South Korea are unaccounted for.

- CTR Volume 3, p. 562: *VOA News*, "South Korea Criticized Over Treatment of North Korean Defectors" (December 14, 2017)

> A 2014 United Nations Commission of Inquiry report on human rights in North Korea documented cases of sending families of defectors, including children, to prison camps as a form of collective punishment for alleged anti-state offenses. Detainees, human rights groups say, face deplorable conditions, killings, rape, beatings and torture by guards, and forced labor in dangerous and sometimes deadly conditions.

- CTR Volume 3, p. 576: *Global News*, "Meet Ellie Cha, the North Korean defector working on Parliament Hill" (November 5, 2017)

> Her father had difficulty finding work as an older man, her mother sank into depression and Ellie and her brother had problems fitting into their new lives. "Even in South Korea, we have to overcome lots of challenges," she said. "Such discrimination, such bias, and to adapt to a completely different society, social system."

- CTR Volume 1, p. 153: *Freedom House*, "South Korea"

> South Korea lacks a comprehensive antidiscrimination law. The country's few ethnic minorities encounter legal and societal discrimination. Residents who are not ethnic Koreans face extreme difficulties obtaining citizenship, which is based on parentage. Children of foreign-born residents in South Korea suffer from systemic exclusion from the education and medical systems. There

> are about 31,000 North Korean defectors in South Korea. Defectors are eligible for citizenship, but they can face months of detention and interrogations upon arrival, and some have reported abuse in custody and societal discrimination.

- CTR Volume 3, p. 547: *Newsweek*, "North Korea Officials Infiltrated South Korea to Intimidate Defectors" (October 31, 2017)

> North Korean spies infiltrated South Korea to threaten people who had fled the hermit kingdom, South Korea's Unification Minister said Tuesday, raising questions about how well the U.S. ally can protect those seeking sanctuary.
>
> […]
>
> But Tuesday's admission demonstrates that South Korea is unable to sufficiently protect North Korean defectors who have sought refuge in the south and who continue to face persecution from the brutal North Korean regime.
>
> South Korean Minister Cho Myoung-Gyonto said his country would work to increase protections for defectors in the south, including by putting more limits on who can access the database holding defectors' personal information. The minister said North Korean spies and hackers may have infiltrated the database to steal the personal data of North Koreans who had escaped.

[70] With over four volumes of evidence in the record, it was incongruous for the Officer to simply conclude that there was "insufficient objective evidence" that the Applicant would face hardship in South Korea as a North Korean defector.

(2) **The Korea Times Daily Article**

[71] The Applicant submits that the Officer erred in finding that the Korea Times Daily article did not support the Applicant's return to South Korea as a well-known defector. The Applicant

submits that the media coverage of his story in the Korea Times Daily has made him well-known as a defector of North Korea, and thus that he would face hardship at the hands of North Korean spies and agents in the South who are known to forcibly return defectors to the North to face punishment. The evidence shows that defectors have been known to disappear after they are deported to South Korea.

[72] The Officer had found there was insufficient evidence that the Applicant will be perceived as the same person named in the article because it identifies an individual named "Lee Sung-Jin" and not the Applicant. The Applicant submits that the Officer unreasonably ignored the evidence to support that the article was in fact referring to the same person—the Applicant.

[73] In my view, the Officer's treatment of the Korea Times Daily article is unreasonable, as the Officer failed to properly consider the evidence that supported the identification of the Applicant.

[74] First, in granting the stay of the Applicant's removal, Justice Diner held the following about the same Korea Times Daily article, which the Applicant had submitted as evidence that he is a well-known defector and at a higher risk of being captured and returned to North Korea (emphasis added):

> That evidence includes a recent article in the Korean Times entitled "Surprising Release of a Detained North Korean Defector" which -- while disputed by the Respondent on account of a name that does not exactly match -- appears in all other respects to be about the Applicant, including details of a letter pledging support to him by a current Ontario Member of Parliament and Cabinet

> Minister, which letter is mentioned in the H&C decision, and is included in the Stay motion record before the Court.

[75] Second, the Applicant had provided sworn evidence that this article was about him and that he would be perceived to be a well-known defector. The Applicant's H&C application forms listed "Seong Jin Lee" as his alias name. The only difference in the name between "Seong Jin Lee" and "Sung-Jin Lee" is the anglicized spelling "Seong"—however, in Korean, both names would be spelt exactly the same and are in fact, the same name.

[76] Third, the evidence also included a letter of support by MPP Cho who relayed the Applicant's story and confirmed that the Applicant had been detained. MPP Cho and his plea that he would "adopt a son" were also included in the Korea Times Daily article.

[77] Fourth, the article identifies the current counsel representing the Applicant on the H&C application before me. Moreover, as held by Justice Diner, the facts of the article appear—in all other aspects but the name—to be about the Applicant.

[78] Thus, the Officer failed to explain why the various pieces of evidence were ignored or given no weight, despite the fact that the evidence was highly relevant and contradicted the Officer's finding that there was simply "insufficient evidence" that the Applicant and the named individual in the article were the same person (*Cepeda-Gutierrez* at para 17).

VI. **Certified Question**

[79] At the hearing, the Respondent proposed the following question for certification:

> Whether at judicial review, the Federal Court may admit evidence (going to the reasonableness of the decision) that was not before the administrative decision maker.

[80] The Applicant opposes certification and takes the position that this question is not appropriate for certification because the Respondent does not meet the test. First, the Applicant submits that the question does not transcend the interests of the parties, as the Respondent raises an issue that has been clearly decided. Second, the Applicant submits that the proposed question is not dispositive of the matter, as the Applicant's argument on the incorrect application of the legal test can stand alone, even without the H&C update that was filed with IRCC.

[81] The Federal Court of Appeal set forth the requirements to certify a serious question of general importance permitting an appeal under paragraph 74(d) of the *IRPA* in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 (CanLII) [*Lewis*] and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 (CanLII) [*Lunyamila*]. In addition to being dispositive of the appeal, the question "must transcend the interests of the parties and must raise an issue of broad significance or general importance" (*Lewis* at para 36; *Lunyamila* at para 46).

[82] I find that the question fails to meet the threshold for certification, as the question neither transcends the interests of the parties nor raises an issue of broad significance or general importance.

[83] It is trite law that the Court cannot admit evidence that was not before the administrative decision-maker, subject to recognized exceptions to the general rule. Despite having recognized this well established jurisprudence, the Respondent seeks to certify this question.

[84] As discussed in the Preliminary Issue section, Tabs 5 and 8 were maintained in the record for the reasons already stated. As the Applicant pointed out, this is not a case where a party is seeking to adduce new evidence on judicial review that was not before the tribunal. Contrary to the cases relied on by the Respondent where the Court dealt with the admissibility of new evidence on judicial review that was clearly and quite visibly not before the officer (*Dayebga v Canada (Citizenship and Immigration)*, 2013 FC 842 (CanLII) at para 25; *Kyere v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 120 (CanLII) at paras 14-16), the present case deals with evidence that was properly before the Officer as the decision had not been communicated to the Applicant until March 25, 2019.

[85] This Court has consistently held that an officer has an obligation to consider all evidence that may affect the determination even after the officer has written the decision, so long as the evidence is received before the applicant is notified that the decision has been made, or before the date on which the applicant has been told a decision will be made: *Chudal* at paras 13-16;

Avouampo v Canada (Citizenship and Immigration), 2014 FC 1239 (CanLII) at para 21; *Ayikeze v Canada (Citizenship and Immigration)*, 2012 FC 1395 (CanLII) at para 16.

[86] As such, the Court declines to certify the proposed question.

VII. **Conclusion**

[87] The Officer erred by failing to apply the correct legal test in assessing the H&C application. The Officer erred by considering the Applicant's situation through a strict hardship lens contrary to the Supreme Court's instructions from *Kanthasamy*.

[88] Furthermore, the Officer failed to meaningfully engage with the underlying factors that forced the Applicant to flee South Korea and with the relevant country conditions that demonstrated a pattern of discrimination against North Korean defectors. Also, the Officer failed to consider the Applicant's hardship in relation to his mental health condition and high suicide rates in South Korea. Moreover, the Officer erred in their treatment of the Applicant's claims of harassment and discrimination due to his status as a defector. The Officer unreasonably discounted key evidence about the Applicant's conditions, and failed to justify why certain pieces of evidence were ignored or discounted (including the Applicant's affidavit, the letter from MPP Cho, the Asia Pacific Journal of Public Health study, as well as the country condition evidence), all of which render the decision unreasonable.

[89] Accordingly, this application for judicial review is granted.

[90] Lastly, I would dismiss the Respondent's request to certify a question as I do not believe that this matter raises a serious question of general importance within the meaning of paragraph 74(d) of the *IRPA*.

JUDGMENT in IMM-1963-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sumeya Mulla	FOR THE APPLICANT
Suzanne M. Bruce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT