Federal Court Cour fédérale

Date: 20220916

Docket: IMM-967-21

IMM-947-21

Citation: 2022 FC 1298

Ottawa, Ontario, September 16, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

SEONHEE KIM
JAEMIN SHIN
JIHUN SHIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Seonhee Kim (the Principal Applicant), her husband Jihun Shin (the Associate Applicant) and her son Jaemin Shin (the Minor Applicant), are citizens of North Korea who fled to South Korea prior to their arrival in Canada. They arrived in Canada in 2011, and were granted refugee status based on their fear of returning to North Korea. Their refugee status

was vacated in 2018, because they had failed to disclose that they had spent time in South Korea prior to coming to Canada.

[2] The Applicants' request for humanitarian and compassionate (H&C) relief, as well as a Pre-Removal Risk Assessment (PRRA) were both denied. The Applicants seek judicial review of these decisions. These matters were heard together because they both involve the same parties, although the decisions being challenged and the issues raised are distinct. These reasons will deal with both applications.

[3] For the reasons set out below, the application for judicial review of the H&C decision will be granted. The Officer failed to conduct the required analysis of the impact of a return to South Korea on one of the Applicants' children, and this was a key aspect of their request for H&C relief, The application for judicial review of the PRRA decision will be dismissed.

I. Background

[4] The Applicants are citizens of North Korea. They say they fled North Korea in 2007, travelling first to China, where they lived with the Associate Applicant's mother, and then to Mongolia, where they lived in a refugee camp for a year before going to South Korea in 2008. They have South Korean citizenship by virtue of a provision in that country's constitution that grants citizenship to all persons living on the Korean Peninsula.

[5] The Applicants came to Canada in March 2011 and made a refugee claim later that year. Acting on what they now acknowledge was poor advice, they concealed their identities and

failed to disclose that they had resided in South Korea prior to coming to Canada. Their refugee claim was granted. The Principal Applicant and Associate Applicant subsequently had two more children, Minsung Shin and Minho Shin, both of whom are Canadian citizens and thus not included in their claims.

[6] The Principal Applicant returned to South Korea in June 2014, along with her three children after a broker in South Korea told her that her brother and mother had been released from detention in North Korea. She said she went back to try to help them escape. The Associate Applicant remained in Canada, and only joined the Principal Applicant and their children in August 2014.

[7] The Principal Applicant says that, once she arrived in South Korea, she paid a second broker to assist her in her efforts to extricate her mother and brother from North Korea. The second broker helped her to contact an uncle living in North Korea who told her that her mother and brother had been moved to a prison camp for political prisoners, making it more difficult for them to escape. She said that the broker then told her that her mother and brother were ready to escape, and he asked for more money. When she told him that she had no more money, the broker threatened her and abducted her child, Minsung. She paid that broker a significant sum of money and her child was returned 48 hours later.

[8] The Principal Applicant says that the broker tried to kidnap the Minor Applicant (Jaemin), but he managed to escape although he injured himself and required hospital care.

[9] The Associate Applicant returned to Canada in 2017 and the Principal Applicant returned with the children in early 2018. When the Applicants' South Korean citizenship was revealed, their refugee status was vacated following a hearing. They were notified of that decision in June 2018.

[10] The Applicants submitted an application for permanent residence within Canada on humanitarian and compassionate grounds on November 6, 2018, based on their establishment in Canada, the adverse country conditions in South and North Korea, and the best interests of their three children.

[11] The Officer found they had a modest degree of establishment in Canada. Because they had travelled back to South Korea on passports issued by that country, the Officer assessed their claim based on the premise that they would be returning there. The Officer did not accept their claim that their profile made them vulnerable to being discovered by North Korean agents or spies in South Korea. Despite acknowledging that North Korean defectors face some discrimination in South Korea, the Officer concluded that this would not rise to the level of persecution and there were government support programs to assist defectors to integrate as well as avenues of redress available within South Korea.

[12] On the best interests of the children, the Officer found insufficient evidence to support the claim that their interests would be compromised by returning to South Korea. Acknowledging that the children were doing well in Canada, the Officer nevertheless concluded that there was insufficient evidence that their long-term academic development would suffer if

they returned to South Korea. The Officer also found insufficient evidence to support the Principal Applicant's claim that her mental health issues justified the granting of relief.

[13] Overall, the Officer was not satisfied that the Applicants' personal circumstances were sufficient to justify H&C relief, and thus refused their application.

[14] The Applicants also submitted a request for a Pre-Removal Risk Assessment (PRRA) based on the risks they would face as North Korean defectors both from North Korean spies operating in South Korea and from the general population in South Korea who may perceive them to be spies for North Korea. In addition, they argued that as North Korean defectors they would face discrimination amounting to persecution in South Korea. They also feared mistreatment and exclusion as a result of Minsung's disability.

[15] The Officer found insufficient evidence to support their claim that they would face a forward-looking risk from North Korean spies, based on their profiles. Noting that there was no evidence that the brokers made any further attempts to contact the Applicants since 2014, and there was otherwise insufficient evidence to support their claimed risk from North Korean Agents, the Officer found this aspect of their claim not substantiated. The Officer also concluded that the discrimination the Applicants might face on their return to South Korea did not rise to the level of persecution. In addition, the Officer noted that the PRRA application was restricted to the Applicants, and thus the claims regarding the risks faced by the Canadian-born son Minsung would not be addressed.

[16] Based on the overall assessment of the Applicants' claim, the Officer denied their PRRA request.

[17] The Applicants seek judicial review of both decisions.

II. Issues and Standard of Review

[18] Two issues arise in this case:

A. Is the H&C decision unreasonable because of the Officer's flawed assessment of the evidence, the inadequate analysis of the best interests of the children, and because the relevant country condition evidence on discrimination and state protection that contradicted the Officer's conclusions was ignored?

B. Is the PRRA decision unreasonable because the Officer erred in the treatment of evidence about discrimination constituting persecution and ignored relevant country condition evidence that contradicted the Officer's conclusions? Should the PRRA decision be set aside because the Applicants were denied procedural fairness?

[19] The first and second issues are to be assessed in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian*

Union of Postal Workers, 2019 SCC 67 [*Canada Post*] at para 2). The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

[20] Questions of procedural fairness require an approach resembling the correctness standard of review, in which a reviewing court asks, "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond." (see *Alvarenga Torres v Canada (Citizenship and Immigration),* 2021 FC 549 at para 30).

III. Analysis

A. *Is the H&C Decision Unreasonable?*

[21] The Applicants' challenge to the H&C decision rests on four principal grounds. They submit that the decision should be overturned because: the Officer's analysis of the evidence given by the Principal Applicant was flawed; key evidence relating to the best interests of the children was disregarded; the Officer erred in assessing the evidence of mental health relating to the Principal Applicant and Minsung; and the Officer failed to consider evidence about country conditions in South Korea showing that discrimination against North Korean defectors amounts to persecution. In addition, they say the Officer did not examine whether state protection

mechanisms were effective. Overall, they claim that the Officer failed to apply the correct approach in assessing the H&C considerations.

(i) *Evidence of hardship*

[22] The first prong of the Applicants' challenge focuses on the Officer's findings regarding their claims of hardship if forced to return to South Korea. They rely on the principle that the sworn statements of a refugee applicant should be presumed to be true, and that it is an error to focus on what documents do not say while discounting their actual contents. The Applicants submit that the Officer had no reason to question their affidavits, and unreasonably sought further details regarding their claims rather than focusing on the evidence they provided. They argue that the Officer's repeated statements that there is an insufficiency of evidence or scarcity of details on key points is unreasonable in light of the details they provided. They argue that the Principal Applicants' affidavit is thorough, detailed and comprehensive, and supported by similarly detailed evidence from the Associate Applicant as well as numerous supporting documents. They ask: what other evidence would have been sufficient for the Officer; what else was required?

[23] In essence, the Applicants submit that the Officer's finding of insufficient evidence is unreasonable because it reflects a failure to engage in any meaningful way with the evidence they provided. For example, the Officer's statement that "I find a scarcity of details to link the detention of [the Principal Applicant's mother and brother] to hardships for the applicants if they return to South Korea" ignores the abundant country condition evidence on the presence of North

Korean spies in South Korea and the North's efforts to punish defectors by imprisoning their family members.

[24] The Principal Applicant claimed that she received a threatening telephone call after her defection to South Korea, and that a South Korean detective who was monitoring her activities was aware of this because he had a wiretap on her phone line. The Applicants raise concerns regarding the Officer's statement that there was a "scarcity of details" regarding the detective and insufficient evidence of any follow-up or other repercussions after that call. They say the Officer failed to engage with the substantial details set out in the Principal Applicant's affidavit, or the supporting country condition evidence that confirms that South Korean officials are assigned to monitor North Korean defectors.

[25] I am not persuaded by these arguments. The Officer's detailed review and assessment of the evidence shows that careful attention was paid to the information, but on key points, it was found to be insufficient. The Officer was obviously cognizant of several key aspects of the Applicants' case; in particular, that the Principal Applicant's mother and brother were allegedly detained in 2008, and she says she was threatened by a North Korean agent in 2009, but there was no other evidence to indicate any ongoing interest by North Korean authorities. The Principal Applicant's assertion that a South Korean detective was monitoring her phone calls was not supported by any corroborating evidence, and was otherwise lacking in details to explain how she became aware of this. The general country condition evidence cannot overcome the lack of specifics in relation to the Principal Applicant; for example, how she became aware that she was being monitored, or any details regarding her interactions with the South Korean official.

[26] The decision relied on by the Applicants, *Kim v Canada (Citizenship and Immigration)* 2020 FC 581 [*Kim*] is not persuasive on this point, because in that case the Officer had specified the type of information that was expected but had not been produced. In this case, the Officer did not outline the type of evidence or details that were expected, but rather simply observed that on key points the affidavit evidence rested on assertions and general descriptions without providing sufficient details to support the claims that were made. Having reviewed the affidavit evidence and the Applicants' submissions to the Officer, this is a reasonable finding. The length of the affidavits does not overcome the general nature of the statements on several key points and the absence of details or corroborating evidence to fill in the gaps.

[27] The Officer was also aware that the Principal Applicant had returned to South Korea with her children in June 2014, and remained there until early 2018, and there were no other threats reported during that period. In light of this, the Officer's finding that there was insufficient evidence to support a forward-looking risk to the Applicants is reasonable.

(ii) *Best Interests of the Child analysis*

[28] According to the Applicants, the most serious problem with the Officer's decision relates to the best interests of the child analysis. They assert that the Officer ignored significant portions of the evidence, in particular regarding the school environment for the children, the evidence on the extent of discrimination against individuals of North Korean descent, and the likelihood of discrimination against Minsung because of his mental disability and mental health issues.

[29] In their H&C application, the Applicants submitted that the children would be returning to a school environment where they would face significant discrimination because of their North Korean origins, and be subject to suffocating pressure and bullying. In addition, they feared that Minsung would face severe disadvantages because of his disability. They cited an incident that occurred after they returned to South Korea, during which a teacher grabbed Minsung and threw him to the ground, arguing that this was an example of the extent of mistreatment they would experience.

[30] The Applicants argue that the Officer ignored the substantial country condition evidence detailing the harsh ridicule, bullying and violence faced by North Korean students in the South Korean education system, as well as the information on the high rates of suicide associated with the demanding nature of the system. The Officer found that there are supports available to mitigate the effects of discrimination, but failed to notice that there is no evidence that these measures address issues faced by children or students. The Applicants point out that there is no evidence of steps taken by South Korean authorities to prevent or ameliorate bullying, discrimination or the high suicide rate among students.

[31] The Officer acknowledged that North Korean students faced discrimination but also observed that reporting measures were in place to deal with this. In relation to the incident involving Minsung being thrown to the ground, the Officer noted that the Principal Applicant had complained to the director of the institution (there was a discrepancy in the evidence about whether this happened at a school or daycare) and received an apology before removing Minsung from the program. The Officer found that the evidence did not connect this incident to the child’s ethnicity, but the Applicants submit that the Officer ignored the Principal Applicant’s affidavit

evidence that the teacher disregarded her complaint about the incident because she was from North Korea and did not know how things work.

[32] The Applicants' argument that the Officer failed to give adequate consideration to Minsung's mental disability and the impact of a return to South Korea will be discussed in the next section. Although this forms part of their complaint about the best interests of the child analysis, they also connected it with the treatment of the evidence regarding the Principal Applicant's mental health issues, and therefore these will be dealt with together. As will become clear, I find this aspect of the decision to be unreasonable, for the reasons explained below.

[33] Overall, the Officer found insufficient evidence that the children's best interests would be compromised if they returned to South Korea. The Applicants contend that the Officer erred by failing to properly identify the children's best interests, and particularly by not assessing whether it was in the children's best interests to remain in Canada with their parents, especially because two of the children are Canadian citizens.

[34] Although the Applicants assert that the best interests of the child analysis is the most glaring failure in the Officer's decision, I am unable to find that any of these errors (except the Officer's treatment of Minsung's mental health) are sufficient to warrant overturning the decision. The Officer had previously discussed the existence of discrimination against people from North Korea and the measures taken by South Korea to address it, and it was not necessary to repeat this analysis. The Officer then turned to the Applicants' individual circumstances. The Officer's finding that the incident involving Minsung was not specifically connected to the child's ethnicity was based on the statement by the Principal Applicant that she had been told

that the problem was that they were new to the system and did not understand how things work. This corresponds to statements in the affidavit, and it was the Officer's role to interpret this evidence. The Officer's findings cannot be faulted, because they are rooted in the evidence, and the fact that someone else might have viewed things differently does not make the Officer's conclusions unreasonable.

[35] As for the analysis overall, the Officer noted the "children's historical circumstances", which in the context of this case must be understood to refer to the fact that they returned to live in South Korea with their mother. This also explains the Officer's finding that, "I find a scarcity of information to indicate that the children's academic development was adversely affected or that their safety was otherwise compromised in South Korea based on their parents' North Korean ethnicity." The Officer also noted that the children "would be returning to a place where they have previously resided, and they have the assistance of their parents, who speak the Korean language, are familiar with the aspects of Korean culture and can assist with the re-establishment process."

[36] The context for these statements by the Officer derives from the Principal Applicant's evidence that she returned to South Korea in 2014 to help her mother and brother escape from North Korea but soon after her arrival, she learned that this was not going to happen. The family then remained in South Korea for three years before returning to Canada. The Officer's findings regarding the children is based in part on the fact that the children stayed with their parents in South Korea during this period. This is a relevant consideration in assessing the children's best interests, and the Officer cannot be faulted for taking this into account.

(iii) *The evidence regarding mental health and disability*

[37] This branch of the Applicants' challenge concerns the Officer's treatment of the evidence regarding Minsung's intellectual disability and mental health issues, as well as the Principal Applicant's mental health concerns.

[38] Minsung was diagnosed with a mild intellectual disability in 2017 while he was in South Korea. This was supported by the report of Dr. McDowell who conducted an assessment in Canada. In their submissions to the Officer, the Applicants pointed out that Dr. McDowall's report attributed Minsung's symptoms to Post-Traumatic Distress, and also recommended that he should be allowed to stay in Canada with his family because he had improved both emotionally and in his overall wellbeing since his arrival, and "his returning to South Korea would prove detrimental to the level of recovery he has achieved so far."

[39] Based on this diagnosis, and the stigma against children with a mental disability as well as the lack of educational supports for such children in South Korea, the Applicants submitted that Minsung's mental health would deteriorate if he was forced to return to South Korea. They say he would be unable to attend a regular school and would be unlikely to obtain adequate support for his condition.

[40] The Officer accepted the medical diagnosis and referred to the two medical reports from South Korea and the more recent assessment done in Canada, including the recommendation for psychological counselling sessions. The Officer observed that Dr. McDowall's report attributed Minsung's systems to Post-Traumatic Distress, noting that the traumatic incident – the

kidnapping – occurred when Minsung was 34 months old, and that there was little evidence about how he would have learned of it unless his parents chose to tell him about what happened to him.

[41] The crux of the Officer's analysis on this question is contained in the following passage from the decision:

> I find a scarcity of objective documentary evidence to link either of these incidents to an adverse effect on Minsung's emotional well-being. I also find insufficient evidence to indicate any steps taken by the [Principal Applicant] to follow the recommendations made by the assessor. While I find the recent report carries some favourable weight, including taking into account that Minsung experiences (sic) some difficult times in South Korea, I do not find it has been established that his long-term development could be compromised by a return to South Korea such that it carries determinative weight.

[42] The Applicants submit that this analysis is contrary to the jurisprudence that requires an Officer to consider the impact on a child's mental health of a return to the country of origin (citing *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582; *Esahak –Shammas v Canada (Citizenship and Immigration)*, 2018 FC 461, and *Sanabria v Canada (Citizenship and Immigration)*, 2020 FC 1076 [*Sanabria*]). They submit that the Officer failed to properly engage with Dr. McDowall's report, which explicitly stated that a return to South Korea "would prove detrimental to the level of recovery [Minsung] has achieved so far. Consequences could include not only reversion back to his previously impaired psychological functioning, but in fact result in worsening of those symptoms."

[43] They also submit that the Officer erred in failing to give due consideration to the country condition evidence showing that South Korea does not have a well-developed concept of mental illness, that suicide prevention measures are lacking and mental illness is stigmatized there. In addition, the Applicants contend that the Officer was wrong to require evidence of whether Minsung had taken steps to follow the treatment recommendations made by Dr. McDowall.

[44] Regarding the Principal Applicant, the Officer acknowledged that she had been diagnosed with recognized mental health conditions and had attempted suicide while she was in North Korea. The Officer also acknowledged that she was receiving counselling at a mental health association in Canada. Despite these findings, the Officer concluded that the evidence did not establish whether she had sought treatment for suicidal ideation, or whether she would be able to access treatment if returned to South Korea.

[45] The Applicants argue that these findings are flawed. Having accepted the diagnoses of the Principal Applicant and Minsung, the Officer erred by requiring additional evidence about whether they will be able to access treatment in South Korea or whether they had sought or obtained treatment in Canada. They contend that the Officer failed to consider how a return to South Korea would affect their mental health, and that these are the same errors that the Supreme Court of Canada cautioned against in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 54.

[46] I agree with the Applicants on one aspect of this. The Officer failed to conduct the type of careful analysis of the impact on Minsung’s mental health of a return to South Korea that is

called for by the governing case law. I am unable to agree, however, with the assertion that the Officer unreasonably failed to give adequate weight to the impact on the Principal Applicant.

[47] Dealing first with the argument relating to the Principal Applicant, I would simply note that there is scant evidence in the record to substantiate her situation or the impact on her mental health of a return to South Korea. Although the Principal Applicant's affidavit states that she has received certain diagnoses and was receiving treatment, there is no other evidence to elaborate on these points or to provide the type of details that would support a finding in her favour. The Officer reasonably assessed this aspect of the claim in light of the evidence and submissions.

[48] However, the Officer's discussion of the impact of a return to South Korea on Minsung is lacking in several key respects. The guiding principles are well-established, and have recently been summarized by Justice McHaffie in *Sanabria* at paragraph 1:

> When a child's mental health is at stake in an application based on humanitarian and compassionate (H&C) considerations, it is essential that the assessment of the application take into account, in an understanding and sensitive manner, the potential consequences that the removal would have on his or her mental health.

[49] The Officer's analysis falls short in several ways. First, the evidence shows that Minsung had been diagnosed with both developmental delays and symptoms of Post-Traumatic Distress. The Officer accepted the diagnosis. However, the Officer then immediately appears to cast doubt on it by noting that the trauma Minsung endured happened when he was 34 months old. The Officer stated that "(t)here is little evidence to indicate how the child would remember this incident or the assault unless the parents chose to share such historical circumstances." There is

no basis in the medical evidence to question the symptoms that Minsung exhibited during the assessment and the Officer accepted the diagnosis.

[50] It is unreasonable to diminish the weight of this by questioning the cause of Minsung's distress, without calling into question the credibility of the Principal Applicant's evidence and the veracity of the Doctor's report. If the Officer had a basis to do either of these things, it is not explained in the decision or otherwise evident from the record. In this regard, I find that the Officer committed the same error as that commented upon in *Sanabria*:

> [39] This last point leads to the second problem with the H&C Officer's analysis. The H&C Officer put an unreasonable emphasis on the *causes* of Kevin's stress instead of considering their *effects* and, above all, Kevin's best interest. In addition to the passage reproduced above, the H&C Officer concluded that [TRANSLATION] "it is reasonable to think that Kevin was affected by his parents' choice" (referring to the move from Colombia and their separation) and that he "is concerned about his immigration status and the separation of his parents". Having recognized Kevin's mental health issues, the H&C Officer did not indicate why this analysis of the sources of the problems was an important factor for him. In any case, whether a child is suffering from mental health difficulties because of decisions made by his or her parents or from a source external to the family is not a reason to ignore them or treat them as less important with regard to the BIOC. (emphasis in the original)

[51] The second major difficulty with the Officer's analysis relates to the finding that it was not established that Minsung's "long-term development could be compromised by a return to South Korea…" This finding was made without any discussion of the following statement in Dr. McDowall's report:

> The results of the current assessment align with the profile of a child who has suffered from a history of severe traumatic experiences. The symptoms relating to significant levels of emotional difficulties, depression, generalized anxiety, separation fears, and delayed development of appropriate communicative and adaptive skills, reportedly began following his traumatic experiences.

> Given that Minsung has been improving both emotionally and with regards to overall well-being since returning to Canada, as reported by himself and his mother, it is highly likely that his returning to South Korea would prove detrimental to the level of recovery he has achieved so far. Consequences could include not only reversion back to his previously impaired psychological functioning, but in fact result in worsening of those symptoms.

[52] The Officer's finding maybe understandable when viewed in the context of the entirety of the evidence in the record, including for example: the doctor's report indicates that the nature and scope of the assessment was limited because of Minsung's inability to communicate in English (given that many of the diagnostic tools relied on some degree of fluency in the language); the assessment was based on a single visit, and mainly relied on the narrative recounted by the Principal Applicant; and the Principal Applicant had not advised Minsung's school of his difficulties or taken any other steps to obtain assistance for him in Canada. All of these factors may have been relevant considerations in assessing the weight to be given to this aspect of the claim. However, none of this is explained in the Officer's decision, and in this regard the outcome is not justified.

[53] In addition, the Officer does not refer to any basis in the evidence for questioning Minsung's memory of the kidnapping or its ongoing impact on him. If the Officer had any basis to assess the degree to which a child might remember or be affected by a very traumatic experience when they were almost three years old, it is not evident in the record. This comment appears to be pure speculation by the Officer.

[54] Overall, the Officer's analysis of this aspect of the claim falls short of what *Vavilov* demands, in particular given the care and attention that is called for when assessing the best interests of a child in the context of an H&C claim (*Kanthasamy*).

[55] Given that the best interests of the child claim is one of the central planks of the Applicant's claim for H&C relief, and forms a key basis for their application for judicial review, this is a sufficiently serious flaw to make the entire decision unreasonable (*Vavilov*, para 100). In some respects, I find this case to be comparable to the situation in *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582, where the Officer's flawed best interests of the child analysis was found to be sufficient to overturn the decision.

[56] Because the issue of country condition evidence and state protection was canvassed by the parties in their submissions, I will address it briefly in the next section.

(iv) *Country condition evidence and state protection*

[57] The Applicants challenge the Officer's treatment of the country condition evidence on four grounds. First, they say the Officer disregarded their detailed sworn evidence about their

experience of discrimination in South Korea, including job discrimination and receiving unequal pay because of their North Korean origins. Similar errors were found to be sufficient to overturn an H&C decision in *Kim*. The Applicants submit that the Officer failed to consider their situation as returnees to South Korea, noting that a document produced by the Immigration and Refugee Board explicitly states that returnees are stripped of the benefits otherwise accorded to North Koreans who arrive in South Korea, and that they face discrimination in employment and in society more generally because of their North Korean accents. They point to other evidence that was ignored, or not explained by the Officer, including an incomplete reference to a document regarding the work of United Nations agencies in the country. They say that the Officer's reliance on extrinsic evidence that was not disclosed to them was unreasonable.

[58] Next, the Applicants submit that the Officer erred in the state protection analysis by relying on the availability of mechanisms to report discrimination without assessing the adequacy of these avenues of redress. The law requires a finding that state protection mechanisms are both available and effective and the Officer's failure to consider this makes the decision unreasonable. In light of the Principal Applicant's targeting by North Korean spies, the kidnapping of their children and their experience of discrimination while they lived in South Korea, the Officer's failure to consider the probability of hardship makes the decision unreasonable. The Applicants submit that the Officer made a similar error to those which were found to be sufficient to overturn the decisions in *Ocampo v Canada (Citizenship and Immigration)*, 2015 FC 1290 and *Nwaeme v Canada (Citizenship and Immigration)*, 2017 FC 705, as well as in the *Kim* decision.

[59] I am not persuaded by the Applicant's arguments on these points. The Officer reviewed the evidence, considered the context for the assessment and explained the reasoning that led to the conclusion that the hardship factor was not sufficient to justify H&C relief. That is all that was required.

[60] On the issue of discrimination and the Applicants' treatment when they were in South Korea, the Officer acknowledged the evidence of discrimination against people from the North, but also noted the efforts that South Korea had taken to combat this and to provide avenues of relief. The Officer noted evidence showing systemic discrimination against people of North Korean origin, but also pointed to the evidence showing measures to support defectors and to help them settle, and cited evidence as to the overall level of satisfaction of North Korean defectors living in the South. Based on all of this, the Officer's conclusion that the Applicants had not demonstrated that they would face discrimination rising to the level of persecution is reasonable.

[61] On the issue of state protection, the Officer recounted the Applicants' narrative that they had received menacing phone calls, but also mentioned that these calls had not been repeated nor followed up with any further threats or any other actions that could support a fear of persecution. The Officer noted that the Applicants were not well known as defectors, and they had lived and worked in South Korea previously. All of this is supported in the evidence. The fact that the Applicants urge that certain aspects of the evidence should be weighed differently does not make the decision unreasonable. It is not the role of a reviewing Court to re-weigh the evidence.

[62] Each case will turn on its particular facts, and I find that the *Kim* case is distinguishable from the case before me in several important respects, including the media coverage of the applicant's personal story, and the possibility that his defection had thereby come to the attention of North Korean authorities.

[63] Overall, I am not persuaded that the Officer's assessment of this aspect of the case is unreasonable.

(v) *Conclusion on H&C Decision*

[64] Because of the flaws in the Officer's assessment of the impact of a return to South Korea on Minsung's mental health, and in view of the centrality of the best interests of the child analysis to the overall assessment of the Applicants' H&C claim, I find the decision to be unreasonable.

B. *Is the PRRA Decision Unreasonable?*

[65] The Applicants claimed that they would face persecution in South Korea as returning defectors and because of Minsung's mental disability. They feared both the North Korean regime, and mistreatment at the hands of South Koreans who may perceive them to be spies.

[66] The Officer assessed the PRRA claim on the basis that the Applicants would be returning to South Korea because of the provisions in South Korean laws that treated defectors as nationals of that country.

[67] Regarding the risks from North Korean spies or agents, the Officer found that the Applicants had not demonstrated how the North Korean regime would learn that they had returned to South Korea, and they were not individuals with a high profile who were likely to receive attention from the authorities. The Officer found insufficient evidence to support the claim that a South Korean detective had monitored the menacing phone call the Principal Applicant said she received in 2009, and in any event, there was no evidence of any follow up phone calls or other threats during the Applicants' stay in South Korea. The kidnapping incidents involving the children were not considered independently, since the PRRA application was filed by the Principal and Associate Applicants. The Officer also noted that these incidents related to extortion attempts rather than any Convention ground, and that there had been no further threats or kidnapping attempts following the 2014 incidents until the Applicants' departure from South Korea in early 2018.

[68] Acknowledging that the Applicants experienced discrimination in South Korea because of their North Korean origins, the Officer concluded that the evidence did not demonstrate that the cumulative impact of these instances amounted to persecution. Overall, the Officer found that the Applicants had not established that they faced more than a mere possibility of persecution or that they were at risk of torture or likely to face a risk to life of cruel or unusual treatment or punishment. The Officer did not consider the evidence about Minsung's disability and mental health issues, because he was not included in the Applicants' PRRA.

[69] Based on the overall assessment of the matter, the Officer dismissed the Applicants' PRRA claim.

[70] The Applicants argue that the Officer's decision is unjustified and unintelligible because it fails to engage with the Principal Applicant's sworn testimony and the country condition evidence about the risks from the North Korean regime and the general level of discrimination in South Korea against individuals like them. They submit that the Officer denied them procedural fairness by making veiled credibility findings without giving them the opportunity to respond. This was their first risk assessment based on their actual personalized histories, since the earlier refugee claim had not considered their risks in South Korea. In light of this, the Officer had a duty to consider their risks in light of their unique circumstances and the country condition evidence showing the risks from North Korean spies.

[71] The Applicants submit that they were at risk because of the previous threats, because the mother and brother of the Principal Applicant were held in detention after the Applicants defected, and in light of the evidence that North Korean operatives had infiltrated a South Korean database containing the names of defectors. This evidence shows they met the profile of those who are targeted, and the Officer failed to engage with this evidence.

[72] In addition, the Applicants contend that the Officer ignored the risks associated with mental health, noting the history of trauma and prior suicide attempts by the Principal Applicant, as well as the country condition evidence showing the extreme mistreatment of people with mental illness in South Korea, including the risks faced by children. The Officer did not mention this evidence in the decision, which amounts to a reviewable error because it was central to their claim.

[73] Further, the Applicants point to the evidence of discrimination that they say cumulatively rises to the level of persecution, including the harassment and disparaging comments they faced on a daily basis because of their origins, as well as their difficulty finding employment and the differential treatment they experienced once they found jobs. This included working longer hours but receiving less pay than their South Korean counterparts. The Officer did not analyze this evidence, but simply found that the discrimination they faced did not amount to persecution. They argue this is an unreasonable and unjustified conclusion in the face of the evidence.

[74] I am not persuaded by these arguments.

[75] There was no denial of procedural fairness because the Officer did not make veiled credibility findings. Instead, the Officer examined the Applicants' evidence but on several counts found it to be insufficient because it lacked pertinent details. There is no indication that the Officer called the Applicants' credibility into question, and there was therefore no requirement for the Officer to give them an opportunity to respond. The onus was on the Applicants to support their claim with evidence at a convincing level of particularity; they were obliged to put their best foot forward, and the Officer's findings reflect a careful assessment of their evidence and submissions.

[76] This is evident in the Officer's consideration of the Applicants' claims regarding their risks from North Korean spies. The Officer assessed their evidence, noted several crucial gaps, and then compared the Applicants' situation to the country condition evidence that showed that some defectors face risks from North Korean operatives based on a profile that the Applicants did not share. This is a reasonable conclusion based on the evidence.

[77] Similarly, the Officer analyzed the level of discrimination that defectors face in the South, and reviewed the Applicants' personal narratives on this point. The conclusion that the discrimination did not rise to the level of persecution was open to the Officer to make on the evidence, and the decision makes clear that the evidence was considered in its totality and the Officer considered the cumulative impact of the various incidents of mistreatment the Applicants recounted. The Officer's conclusions on this point are clearly explained and rooted in the evidence.

[78] Finally, the Officer did not err in refusing to consider the submissions regarding Minsung's mental disability and mental health issues, or in failing to assess the Principal Applicant's claim that she faced a risk of harm because of the treatment of persons with mental illness in South Korea. I agree with the Respondent that the Officer analyzed the claim as it was submitted, noting that Minsung – who was born in Canada - was not included in it. The Officer cannot be faulted for failing to engage in a more thorough assessment of the Principal Applicant's claim on this ground because the Applicants' submissions in support of their PRRA did not provide a basis for it.

[79] Overall, the Officer's assessment of the PRRA was reasonable.

IV. Conclusion

[80] For the reasons set out above, the application for judicial review of the H&C decision (Court File Number: IMM-967-21) will be granted, because the Officer's assessment of the impact on Minsung of returning to South Korea was unreasonable. The Officer's assessment

rests in part on unsupported speculation, and also fails to engage with the medical evidence in the record. The matter will be remitted back for reconsideration by a different Officer.

[81] The application for judicial review of the PRRA decision (Court File Number: IMM-947-21) will be dismissed.

[82] The parties did not propose a question of general importance in either case, and I agree that none arises.

[83] A copy of these reasons will be placed in both Court files.

JUDGMENT in IMM-967-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the Officer's decision on the Humanitarian and Compassionate application is granted.

2. The matter is remitted back for reconsideration by a different Officer.

3. There is no question of general importance for certification.

JUDGMENT in IMM-947-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the Officer's decision on the Pre-Removal Risk Assessment is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-967-21 IMM-947-21
STYLE OF CAUSE:	SEONHEE KIM, JAEMIN SHIN, JIHUN SHIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 25, 2021
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	SEPTEMBER 16, 2022

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