Federal Court  Cour fédérale

**Date: 20230612**

**Docket: IMM-5256-22**

**Citation: 2023 FC 833**

**Ottawa, Ontario, June 12, 2022**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**KANGUK LEE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] dated May 9, 2022 [the Decision]. In the Decision, the RAD dismissed the Applicant's appeal from the decision of the Refugee Protection Division [RPD] of the IRB in which the RPD found that the Applicant is

neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because I find that the Applicant's arguments do not undermine the reasonableness of the Decision.

## II. Background

[3] The Applicant is a citizen of the Republic of Korea [South Korea]. He made a claim for refugee protection in Canada, fearing persecution on the basis of his conscientious objection to mandatory military service in South Korea. Specifically, he fears that if he returns to South Korea, he will face criminal charges and be jailed for evading the draft.

[4] The Applicant does not consider himself a religious person, but his upbringing in the Christian faith led in part to his refusal to engage in armed conflict. He explains that he participated in peaceful protests in South Korea in 2016 and 2017 that were repressed by the military. He says he witnessed the government claim that the protesters were North Korean forces and employ tanks and armoured vehicles against them. The Applicant was able to defer his conscription until 2019, at which point he had to start his military service. As a result, he fled to Canada on September 14, 2019, and made a claim for refugee protection shortly thereafter.

[5] The RPD refused the Applicant's claim. Although it found that he testified in a straightforward and credible manner, the RPD did not accept his evidence that there was an outstanding warrant for his arrest. The Applicant provided a document to the RPD titled

"Certificate of Complaint (Accusation) Receipt". However, the RPD found the document did not state a warrant had been issued for the Applicant's arrest.

[6] The RPD found that the law related to conscription in South Korea is one of general application and is not inherently persecutory and that the sanctions for violating the law do not amount to cruel and unusual treatment or punishment or torture. Rather, the RPD found that such sanctions imposed upon draft evaders represented a legitimate sanction imposed by a democratic state.

[7] The Applicant's claim included the argument that, if he were to perform an alternative to military service, it would be for a period of three years rather than the one year and ten months required for military service. The RPD found that, while the length of the alternative service is significantly longer, it does not amount to cruel and unusual treatment. Further, the RPD found there was no objective evidence to support the Applicant's claim that the alternative service program was comprised of dangerous work such as clearing mines.

[8] The RPD accepted that conscious objectors face discrimination in finding employment, but it found this does not amount to persecution or cruel and unusual punishment. The RPD also acknowledged that some people in South Korea may think negatively about the Applicant not serving in the military, which may impact his parents' relationships with others, but it found that it is not likely that the Applicant or his parents would be at risk of cruel and unusual treatment or punishment.

[9] The Applicant appealed the RPD's decision to the RAD, which resulted in the Decision that is the subject of this application for judicial review.

## III. Decision under Review

[10] Like the RPD, the RAD found that the conscription law in South Korea is not intrinsically persecutory but rather is an ordinary law of general application that benefits from the presumption of validity and neutrality. The Applicant had not established that freedom from conscription is internationally recognized as a basic or fundamental human right, especially when there is a well-known and ongoing security threat from a neighbouring totalitarian regime (North Korea).

[11] The RAD then considered whether, despite the presumptive validity of the conscription law, the Applicants' allegations supported a well-founded fear of persecution. The RAD considered relevant authorities and then canvassed the reasons for the Applicant's conscientious objection. The RAD noted that the Applicant says he opposes physical conflict. While linked to his religious upbringing, the dominant rationale for his objection revolves around his past participation in protests. The RAD noted the Applicant is not opposed to alternatives to military service, but he believes they will not be available to him because he was summoned for active service before they became available.

[12] The RAD concluded that the prosecution of the Applicant would be the result of his noncompliance with an ordinary law of general application and not his political and/or religious

beliefs. Although he may face social consequences when refusing to participate in the military, these did not rise to the level of persecution.

[13] The RAD found the RPD did not make a veiled credibility finding by preferring the objective country condition evidence in the IRB National Documentation Package [NDP] over the Applicant's testimony about the nature of the work done during alternative service. The RAD also found that the RPD did not err by not analyzing the risk of hazing in South Korea's military, because this was not a main feature of the Applicant's claim and the Applicant does not anticipate that he will ever participate in active military service. Further, the evidence only alludes to a few reports of hazing. Ultimately, the RAD found the Applicant does not face a serious possibility of persecution.

[14] The RAD then considered, pursuant to section 97 of the IRPA, whether the Applicant would be subject to cruel and unusual treatment or punishment for refusing the mandatory military service or participating in alternative service. The RAD found that the reasons for finding that the conscription law is not persecutory are largely applicable to a section 97 analysis. The RAD found that, under that law, those who refuse to complete their military service as required face a prison sentence of up to three years. In practice, the sentences are less than two years and vary between 18 and 21 months. Further, the country condition evidence indicated no significant reports of human rights concerns in South Korea's prisons and detention centres.

[15] The RAD ultimately found that neither the maximum three-year prison term nor the three-year period of alternative service is so excessive as to outrage the standards of decency.

While it may be unfair that the alternative service is longer in length, this does not rise of the level of gross disproportionality. The RAD also found therefore that whether the Applicant would be arrested upon his return to South Korea would not affect the outcome of its analysis.

[16] The RAD concluded that the evidence failed to demonstrate an objective basis for either the Applicant's fear or persecution or the alleged risk of section 97 harm.

## IV. Issues and Standard of Review

[17] The Applicant raises the following issues for the Court's determination:

A. Whether the RAD misinterpreted the law on conscientious objection and therefore fettered its discretion; and

B. Whether the RAD erred in assessing whether the Applicant faced persecution or cruel and unusual treatment as a conscientious objector.

[18] The Applicant does not make submissions on the applicable standard of review. The Respondent submits that the standard of review is reasonableness. I agree. In my view, the issues raised in this application do not rebut the presumptive reasonableness standard of review (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 25, 53).

## V. Analysis

### Whether the RAD misinterpreted the law on conscientious objection and therefore fettered its discretion

[19] As noted above, in the course of its analysis the RAD considered relevant authorities and then canvassed the reasons for the Applicant's conscientious objection. The first issue raised by the Applicant surrounds the manner in which the RAD reviewed the authorities.

[20] The RAD first quoted from the decision in *Musial v Minister of Employment and Immigration*, [1982] 1 FC 920 (CA), 1981 CanLII 4734 (FCA) [*Musial*] at 294, in which the Federal Court of Appeal stated:

> A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. In my opinion, therefore, the Board was right in assuming that a person who has violated the laws of his country of origin by evading military service, and merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.

[21] The RAD then quoted from *Ates v Canada (Minister of Citizenship in Immigration)*, 2005 FCA 322 [*Ates*], in which the Federal Court of Appeal answered in the negative the following certified question (at paras 1-2):

> In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?

[22] After canvassing the reasons for the Applicant's conscientious objection, the RAD stated that it was bound by the case law as set out above and concluded that the prosecution of the Applicant would be the result of his noncompliance with an ordinary law of general application and not his political and/or religious beliefs. The RAD then contrasted the Applicant's circumstances with those in, for example, *Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540, 1993 CanLII 2971 (FCA), in which the claimant's conscientious objection was directly tied to the Iranian military's use of chemical weapons,

which the RAD noted was a tactic widely condemned by the international community as being contrary to basic rules of human conduct.

[23] The Applicant argues that, in stating that it was bound by *Ates* and *Musial*, the RAD erred by failing to consider subsequent developments in the jurisprudence. He submits that neither *Ates* nor *Musial* stands for the proposition that prosecution of a conscientious objector can never constitute persecution on a Convention ground unless the military in question is engaging in actions that are condemned by the international community.

[24] The Applicant references subsequent jurisprudence and emphasizes in particular *Canada (Citizenship and Immigration) v Akgul*, 2015 FC 834 [*Akgul*], which confirmed that it is possible for repeat prosecutions for conscientious objection to rise to persecution and that an individual inquiry is always necessary (at para 8). For instance, in *Akgul*, the treatment that conscientious objectors received from the authorities included not simply repeated terms of imprisonment but also vicious assaults and inhumane treatment by authorities and others at their encouragement (at para 12).

[25] I agree with the Respondent's position that the RAD's review and subsequent application of the authorities does not demonstrate a misunderstanding of the jurisprudence. Certainly, in stating that it was bound by the appellate decisions in *Ates* and *Musial*, the RAD committed no error. Moreover, while the RAD did not reference the subsequent jurisprudence, its analysis is consistent with the requirement to conduct an individual inquiry. The Applicant did not present evidence of inhumane treatment of conscientious objectors of the sort that was at issue in *Akgul*.

The RAD considered the significant social consequences and employment obstacles, that the Applicant argued he would face as a result of refusing to participate in military service, but it concluded that the challenges the Applicant may face, even when viewed cumulatively, did not rise to the level of persecution under a Convention ground.

Whether the RAD erred in assessing whether the Applicant faced persecution or cruel and unusual treatment as a conscientious objector.

[26] The Applicant argues that the RAD erred by ignoring evidence that the alternative service scheme in South Korea may not actually be available to him, both because of the timing of the scheme's implementation and because it is available only to those whose conscientious objections are based on religious grounds. The Applicant submits that, as a result of this error, the RAD failed to consider that the Applicant may face repeated prosecution and imprisonment and therefore failed to consider whether such repetition, in combination with social stigma and loss of employment opportunities, amounted to persecution or cruel and unusual treatment.

[27] I find little merit to this argument. While the RAD considered the Applicant's submissions surrounding the alternative service scheme, its analysis clearly did not turn on a conclusion that the Applicant could avoid prosecution and imprisonment by accessing that scheme. Rather, the RAD considered the potential term of imprisonment (noting that the country condition evidence indicated there were no significant reports of human rights concerns in South Korea's prisons), as well as social consequences that included stigma and adverse employment implications, and concluded that cumulatively these circumstances did not amount to cruel or unusual treatment or punishment.

[28] It is also not possible to conclude that the RAD overlooked the possibility of repeated prosecutions and imprisonment. The RAD's references to the jurisprudence surrounding repeat prosecutions and imprisonment demonstrate that it was alive to this possibility.

## VI. Conclusion

[29] Having considered the Applicant's arguments, I find that they do not undermine the reasonableness of the Decision. This application for judicial review must therefore be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-5256-22**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5256-22 |
| **STYLE OF CAUSE:** | KANGUK LEE V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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| **JUDGMENT AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | JUNE 12, 2023 |

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