Federal Court  Cour fédérale

Date: 20090522

Docket: IMM-5048-08

Citation: 2009 FC 506

Ottawa, Ontario, this 22nd day of May 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Mi Sook OH
Jie Eun (Zoe) SONG

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Minister of Citizenship and Immigration (the "Minister"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of a decision by the Immigration and Refugee Board's Refugee Protection Division (the "RPD"), dated October 17, 2008, wherein the respondents were found to be Convention refugees.

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[2] The respondents, Mi Sook Oh, and her daughter, Ji Eun (Zoe) Song, are citizens of South Korea. The facts of their case are somewhat unusual.

[3] The respondents entered Canada on April 20, 2007 and made a claim for refugee protection on September 12 of that year. Their hearing before the RPD took place over two days.

[4] On March 27, 2008, the first day of the hearing, the respondents were unrepresented. Mi Sook Oh was designated as her daughter's representative. She alleged that she was being persecuted by a renowned pastor of the Full Gospel Church who had "poisoned everyone against her". Towards the end of the hearing, when asked if she could provide additional information to the RPD, the respondent became very agitated. When her daughter tried to calm her down, she hit and pushed her.

[5] Following this episode, it was decided that the Ministry of Children and Family should be notified and a designated representative appointed over the minor child. The mother was identified as a vulnerable person and involuntarily hospitalized due to mental illness. She was advised to leave her daughter under the care of the Ministry of Children and Family so that she could be represented by counsel.

[6] While hospitalized in Canada, Mi Sook Oh was diagnosed with schizophrenia and chronic paranoid delusions, although she denies having a mental illness. She was appointed a designated representative who helped her obtain a lawyer.

[7] The Minister intervened upon resumption of the hearing on August 20, 2008, at which both respondents were represented by lawyers. In reasons dated October 17, 2008, the RPD determined that the respondents were Convention refugees.

[8] Considering the new issues arising subsequent to the manifestation of Mi Sook Oh's mental illness, the RPD states:

> [17] . . . The questions are, is there more than a mere possibility that these claimants would be persecuted should they return to Korea on the bases [*sic*] of a Convention ground? Does "those who are living with a mental illness or perceived to be living with a mental illness in South Korea" constitute a particular social group? Are the claimants Convention refugees? Another question is; are the claimants' predicaments ones that can be decided under Section 97(1)(a) and/or (b)?

[9] The RPD never gets to the section 97 analysis, concluding that the respondents meet the criteria of Convention refugees, under section 96 of the Act.

[10] With respect to credibility the RPD concludes that, because the trustworthiness of the respondent's testimony is substantially compromised by her condition, greater weight is to be placed on the objective elements of the claim. Her daughter's evidence, however, is given the full weight of sworn testimony. With respect to the latter's claim, the RPD determines that the minor claimant is the member of a particular social group, as the claimant's daughter, namely children of the mentally ill in Korea. The RPD finds on a balance of probabilities, based upon the sworn evidence of the minor claimant, that she was in state care in Korea, and in state care she lived in inadequate housing, did not receive emotional support at the facility, was not sent to school, and

was not informed of her mother's whereabouts. The RPD concludes that the child's basic human rights were violated and that this amounted to persecution.

[11] In her evaluation of the question of persecution, the RPD member examines the documentary evidence provided by the respondents, on the basis of which it finds "that violations of human rights do regularly occur within the mental health system in Korea". These include:

- Illegal and forced hospitalization
- Failure to properly conclude effectiveness of hospitalization
- Forgery of medical records
- Refusal to discharge patients from mental health facilities
- Unlawful separation and duress
- Unreasonable limitations on the freedom of correspondence
- Excessive CCTV installations in facilities
- Frequent violence

[12] The RPD then goes on to consider the availability of state protection, acknowledging the presumption that a state can protect its citizens. The Minister's submissions are summarized. At paragraph 44 of the decision, the RPD concludes that South Korea is making serious efforts to protect individuals with mental illness, but finds that its efforts are not sufficiently well-established to provide adequate protection to the respondent.

[13] Finally, the RPD considers the minor respondent's claim, and concludes that were she to be returned to Korea, she would likely be put in the care of the state, in the context of which she would face more than a mere possibility that her basic human rights would be violated, given the condition of facilities for children.

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[14] The Minister identifies only one issue in this review: Did the RPD err with respect to its application of the test for state protection?

[15] It is common ground that the appropriate standard of review for evaluating whether the RPD properly applied the test for state protection is reasonableness (*Chaves v. Canada (M.C.I.)*, (2005), 45 Imm.L.R. (3d) 58 (F.C.); *Nava v. Canada (M.C.I.)*, 2008 FC 706, [2008] F.C.J. No. 901 (QL)).

[16] The Minister argues that the RPD erred in the following way:

> . . . In concluding that state protection was not adequate because human rights violations occur against the mentally ill in Korea, Member French conflated the test existence [*sic*] of persecution with the assessment of the adequacy of state protection and consequently required and applied an incorrectly high standard of "perfect" state protection.

[17] I cannot agree. Contrary to the Minister's allegation, the RPD concludes by stating that the claimant had "met the onus on her by providing clear and convincing evidence that establishes on a balance of probabilities that the serious efforts to protect the rights of the mentally ill being made by the state in Korea fall short of providing her adequate protection".

[18] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada provides the following reminder, at pages 731-732:

> As explained earlier, international refugee law was meant to serve as a "substitute" for national protection where the latter was not provided. For this reason, the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. . . .

[19] A refugee claimant is therefore called upon to provide “clear and convincing confirmation of a state’s inability to protect” him or her (*Ward*, at page 724). In the absence of such evidence, the claim must fail in the face of the presumption that states are able to protect their citizens.

[20] Indeed, the concepts of persecution and state protection are expressly interconnected (see *Ward*, *supra*, at pages 721 and 722). I note that, in the present case, there has not been any issue raised in connection with the RPD’s findings on the well-foundedness of the respondents’ fear of persecution.

[21] Here, considering the particular circumstances of the case, I am satisfied that the RPD identified and applied the correct test for state protection. The RPD laid out the presumption of state protection and the onus to be met by the claimants, and evaluated the evidence in the record before it. Its conclusions fall within the range of “possible, acceptable outcomes which are defensible in respect of the facts and law”, and are entitled to deference (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

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[22] For these reasons, the application for judicial review will be dismissed.

JUDGMENT

The application for judicial review by the Minister of Citizenship and Immigration, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision by the Refugee Protection Division of the Immigration and Refugee Board, dated October 17, 2008, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5048-08
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Mi Sook OH, Jie Eun (Zoe) SONG
PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
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APPEARANCES:

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