Federal Court  Cour fédérale

Date: 20090706

Docket: IMM-5054-08

Citation: 2009 FC 701

Ottawa, Ontario, July 6, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EUI HANG CHO
SEONG HO PARK
JUN HO PARK
JI HO PARK

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board (Board), dated October 17, 2008 (Decision) refusing the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant, Eui Cho, and her sons Seong (16 years old), Jun (20 years old) and Ji (10 years old) are citizens of the Republic of Korea. The Principal Applicant claims that if she and her sons return to Korea they will be in danger from her abusive husband.

[3] The Principal Applicant was married in 1987. Her husband abused alcohol and became physically and verbally abusive. The Principal Applicant never went to the police in Korea to report the violence. She also did not consider divorce, as she feared she would lose her children in divorce proceedings because in Korea the father of the children is allegedly always awarded custody (a view the Principal Applicant formed from watching television and reading the newspapers).

[4] On December 26, 2001, the Principal Applicant came to Canada with her sons so they could attend school. They arrived at Pearson International Airport in Toronto.

[5] Since that time, the Principal Applicant's husband has, on occasion, come to Canada and has resided with the Applicants. During these visits the husband has continued his abuse. The Principal Applicant last lived together with her husband at the end of June 2006. The last time she was physically assaulted by him was in July of 2006, before he departed for Korea. The physical abuse suffered by the Principal Applicant was confirmed at the Refugee hearing by her eldest son Jun.

[6] In July 2006, the Principal Applicant made a claim for refugee protection when further extensions of her sons' student visas were refused.

[7] In August 2008, the Principal Applicant received a telephone call from her husband in which he asked her to go back to Korea because he missed the children. The Principal Applicant also says she received a death threat from her husband.

DECISION UNDER REVIEW

[8] The Board found that the Applicants were not Convention refugees or persons in need of protection.

[9] The Board designated Jun to be the Designated Representative for his younger brothers.

[10] The Board accepted the certified copies of the Applicants' valid Korean passports and found that they were citizens of the Republic of Korea.

[11] The Board considered the Principal Applicant under the social group of women who are victims of domestic violence, which is a Convention ground: *Canada (Attorney Genera) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*). The Board found that the three male Applicants had established a connection to a Convention ground by being part of the Principal Applicant's family. The Board applied the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.

[12] The Board was satisfied that all of the Applicants were “chronic victims of physical and emotional abuse at the hands of a husband and father who appears to have a substantial issue with alcohol.” The Board concluded, however, that there was sufficient state protection in their own country and that while the Principal Applicant was in Korea “she took no steps to avail herself of the protection of her own state.”

[13] The Board cited *Ward* for the principle that refugee protection can only be properly sought after an applicant has first sought the protection of their own state. There is an underlying presumption that a state can protect its citizens, which may only be rebutted by clear and convincing proof to the contrary. When an applicant has not approached their own state for protection, in circumstances where it is objectively unreasonable for them not to have done so, the claim fails.

[14] The Board also cited *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 3 (F.C.) (*Carrillo*) for the rule that responsibility toward a refugee lies with the state of which the refugee is a citizen. Evidence that an applicant uses to rebut a presumption of state protection must be “relevant, reliable and convincing evidence, which satisfies the decision maker, on a balance of probabilities, that state protection is inadequate.” *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (*Villafranca*) held that the protection offered by a state to its citizens need not be perfect, but the state must undertake serious efforts to protect its citizens. In *N.K. v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.) (*Kadenko*) it was held that an applicant must do more then show that they went

to see some members of the police force and their efforts were unsuccessful. The burden of proof rests on an applicant and is directly proportional to the level of democracy in the state in question.

[15] The Board concluded that the evidence provided by the Applicants was "not …high quality evidence, which is relevant, reliable and convincing, which would allow [the Board] to conclude, on a balance of probabilities, that the claimant has rebutted the presumption of state protection."

[16] The Board noted that Korea is a constitutional democracy that maintains effective control of its security forces and is considered disciplined and non-corrupt. Rape is still a serious problem and, although there is no specific statute that defines spousal rape as illegal, the courts have established a precedent of protecting spouses in such cases. In August of 2004, the criminal court in Seoul convicted a man of sexual assault after he attempted to have sex with his wife without her consent.

[17] Violence against women is still a problem in Korea, with nearly fifty percent of all women being victims of domestic violence. The Korean Government has passed the *Special Act of the Punishment of Domestic Violence* which defines domestic violence as a serious crime. The legislation requires police to respond immediately to reports of domestic violence and the police are "generally responsive." The legislation also requires the police to take victims who are willing to go to a protection facility or to a hospital if the victim requires treatment. The police are required to inform victims of their options, such as temporary measures against the perpetrator, or the assistance of a prosecutor for temporary measures if they think the violence could recur.

[18] The Board noted that the government of Korea has established “some” shelters for battered women and has increased the number of childcare facilities. Women’s rights groups have found that these measures have fallen “far short of effectively dealing with the problem.” During 2007, the government built five new shelters for victims of domestic violence for a total of 97 for a country of 48 million. The Board also noted evidence that suggested women in Korea who are victims of domestic violence are more likely to receive societal criticism rather than protection and to suffer feelings of shame, disgust, mortification and guilt rather than being provided with appropriate support because of “enforcement officials’ chauvinism and inadequate sensitivity.”

[19] The Board felt that although the situation for victims of domestic abuse in Korea is not perfect (protection orders are hard to enforce as victims must report again and again when a protection order is violated), the Government of Korea has put in place both a legislative and law enforcement framework to protect women who are victims of domestic violence and that, “[c]hauvinistic attitudes and lack of sensitivity aside, the police are willing and actually do enforce the law to give victims effective and meaningful protection…the government in Korea is certainly undertaking serious efforts…to protect the victims of domestic violence.”

[20] The Board concluded that the Principal Applicant had failed to rebut the presumption of state protection and had not taken sufficient steps to avail herself of the protection available to her in Korea. The Board also concluded that “Jun Ho is a legal adult, and I can see no reason why he would have to submit to his father’s discipline or abuse either here or in Korea. Although they are still minors, I have seen no evidence that would allow me to find that Seong Ho Park and Ji Ho Park

would be in danger, or that they would not be afforded protection by their own state, should they return to Korea."

[21] The Board ruled that the Applicants are not Convention refugees and, because of the availability of state protection, a separate assessment of the claims under section 97(1) would "result in the same negative outcome."

ISSUES

[22] The Applicants submit the following issue on this application:

1) Is the Board's finding that there is adequate state protection in the Republic of Korea for victims of domestic abuse reasonable?

STATUTORY PROVISIONS

[23] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[24] The Respondent submits that the standard of review applicable to the issue of state protection is reasonableness: *Song v. Canada (Minister of Citizenship and Immigration)* 2008 FC 467 and *Eler v. Canada (Minister of Citizenship and Immigration)* 2008 FC 334.

[25] The Respondent stresses that this Court should not intervene unless the Decision does not fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law. The Respondent submits that the Court ought not to intervene in this case, as the standard is a deferential one: *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraphs 47, 53, 55 and 62 (*Dunsmuir*); *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12; *Mwaura v. Canada (Minister of Citizenship and Immigration)* 2008 FC 748 at paragraphs 10-11 and *Muszynski v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1075 at paragraphs 7-8.

[26] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[27] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[28] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issue on this application to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARUGMENTS

The Applicants

State Protection

[29] The Applicants submit that the question in not the existence of initiatives by the Korean government to address the issue of domestic violence, but the effectiveness of those initiatives. The Applicants cite *Erdogu v. Canada (Minister of Citizenship and Immigration)* 2008 FC 407 at paragraph 28 which cites *Elcock v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 1438 at paragraph 15 for the proposition that "[t]he ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework."

[30] The Applicants state that the evidence before the Board shows that, while there is a legislative framework in existence in Korea, it is not effectively implemented. The Applicants summarize the evidence on effectiveness of the various state initiatives and legislative mechanisms available to protect women who are victims of domestic violence as follows:

1) Female victims are more likely to receive social criticism rather than protection;
2) Women are not provided with appropriate support because of law enforcement officials' chauvinism and inadequate sensitivity;
3) Protection orders are hard to enforce;
4) Measures to deal with domestic violence fall far short of effectively dealing with the problem.

[31] The Applicants submit that the Board found in its reasons that the evidence relied upon by the Applicants was not of high quality despite its being from reliable sources such as the U.S. State Department and the United Nations Committee on the Elimination of Discrimination against Women. The Applicants say that this evidence is clear and convincing and, on a balance of probabilities, the only "reasonable determination is that effective state protection is not forthcoming in Korea for women who are victims of domestic abuse."

[32] The Applicants also submit that while the Board noted that the police are generally responsive to reports of domestic violence, the police must respond effectively, which is not what the evidence illustrates; particularly in light of the chauvinism and inadequate sensitivity shown by law enforcement officials.

[33] The Applicants conclude that the Board's findings on state protection are unreasonable and unsupported by the evidence.

[34] The Applicants further submit that a refugee claimant does not need to approach the state for protection to be able to rebut the presumption of state protection when (based on an objective analysis) the evidence is that state protection is not reasonably forthcoming: *Ward.* The Applicants say that because the Korean government does not effectively deal with domestic violence problems, state protection would not have been reasonably forthcoming in this case, so there was no point in the Applicants approaching the state of Korea to demonstrate that protection was not effective: *Ward.*

[35] The Applicants say that, while the Board cites evidence, the Board's ultimate finding must be supported by the evidence and it is not in this case.

The Respondent

[36] The Respondent cites the tests for state protection in *Ward, Villafranca* and *Carrillo.* The Respondent also notes that the Federal Court has held that requiring a state's ability to protect to be effective is an unattainable standard and the proper test for state protection is a determination of whether it is adequate. Requiring otherwise would improperly shift the onus to the Board to establish the existence of state protection: *Samuel v. Canada (Minister of Citizenship and Immigration)* 2008 FC 762 at paragraphs 10 and 13; *Flores v. Canada (Minister of Citizenship and*

Immigration 2008 FC 723 at paragraphs 9-11 and *Mendez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 584 at paragraph 23.

[37] The Respondent says that the Applicants' evidence does not establish that the authorities in Korea would have been unable or unwilling to provide adequate protection to them.

Board did Not Ignore Evidence

[38] The Respondent points out that almost every source that the Applicants say was ignored by the Board was referred to by the Board in its assessment. The Board clearly understood that domestic violence remains a problem in Korea, but was not convinced that the evidence established, on a balance of probabilities, an absence of adequate protection.

Board Weighing of Evidence Not in Error

[39] The Respondent submits that the Board's comments about the quality of the evidence required were not related to the independence or reliability of its sources. The use of the term "clear and convincing evidence" is meant to illustrate that the task of proving the absence of state protection is a difficult one, and that a certain amount of cogent evidence will be required before a trier of fact is satisfied that a fact is more likely than not. The fact that the evidence is from a reliable and independent source alone does not establish that it is clear and convincing evidence of the state's inability to protect; that is a question for the trier of fact to determine on the basis of all the

evidence before him or her. The Board noted and weighted all of the evidence regarding the problem of domestic violence against evidence that legislative and law enforcement measures to combat domestic violence were enforced. The Board then concluded that adequate protection was available. See: *Carrillo.*

Applicant Failed to Approach State for Protection

[40] The Respondent cites *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 which confirms that the burden of attempting to show that an applicant should not be required to exhaust all avenues of available domestic recourse is a heavy one. *Hinzman* was followed in *Song*, where the Court held that South Korea is not a developing democracy and an applicant's evidence must include proof that they exhausted all avenues of domestic recourse. The Respondent says that it was reasonable for the Board to conclude that the Applicant had not exhausted all avenues of recourse.

ANALYSIS

[41] The Applicants say that the evidence before the Board revealed that state protection in Korea was not adequate. They say that the Officer failed to deal with that evidence by questioning its quality and by relying upon a mere framework of legislative protection for victims of domestic violence that is not effective.

[42] In my view, a full reading of the Decision reveals that the Applicants are wrong in this regard. In both the Decision and in the transcript to the hearing, the Officer reveals that his concern is to ascertain the actual effectiveness of state protection in Korea. He fully acknowledges that the evidence relied upon by the Applicants reveals that very real problems exist and that societal attitudes towards domestic violence in Korea still need to be addressed. But the Officer is quite clear that "the police are willing and actually do enforce the law to give victims effective and meaningful protection."

[43] Notwithstanding the Applicants' evidence, there was ample evidence before the Officer to support his conclusions that police protection for the Applicants is effective and meaningful and that they had not overcome the presumption of state protection. The Officer specifically refers to the evidence of the sociologist, who was contacted, but it is clear from the Decision as a whole that he also relied upon supportive evidence in the DOS report which said that the police generally were responsive.

[44] In my view, then, this was a case where the Officer weighed the evidence before him, fully acknowledged the problems revealed in the Applicants' evidence, but finally decided that there was sufficient evidence to show "effective and meaningful protection" for the Applicants in Korea. The Applicants had made no effort to avail themselves of this protection and so had not rebutted the usual presumption. Other conclusions may have been possible on the evidence as a whole, but there is nothing unreasonable about the Officer's Decision.

[45] The Applicants have raised a concern about specific wording used by the Officer when referring to their evidence and an indication that it lacked the “quality” needed to rebut the presumption of state protection. The Applicants point out that their evidence came from reputable and reliable sources and was of no less a quality than the evidence that supported the Officer’s conclusions.

[46] I have reviewed that particular portion of the reasons carefully against the Decision as a whole and I cannot say that it renders the Decision unreasonable. In my view, the Officer is merely attempting to summarize the case law and governing jurisprudence and, albeit in a rather clumsy way, he is saying that the Applicants’ evidence, in the end, is not sufficient to rebut the presumption of state protection.

[47] I say this because the Decision as a whole makes it clear that the Officer took the Applicants’ evidence very seriously, weighed it and considered it and fully acknowledged the problems that still remain in Korea as regards dealing with domestic violence.

[48] But the crucial issue for the Officer was whether there was evidence to show that victims of domestic violence receive “effective and meaningful protection.” Despite continuing problems, he concluded that such protection does exist. This was not an unreasonable conclusion, particularly when the Applicants had made no effort to seek state protection in either Korea or Canada from the violence perpetrated by the father.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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