Date: 20080411

Docket: IMM-4283-07

Citation: 2008 FC 467

Toronto, Ontario, April 11, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HA YOON SONG,
SEON OCK SHON,
HYE IN SONG [By her litigation guardian],
HYE WON SONG [By her litigation guardian]

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 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated September 6, 2007, wherein the Board determined that the applicants were not Convention refugees according to Section 96 of the Act, nor "persons in need of protection" according to Section 97 of the Act.

BACKGROUND

[2] The applicants, a husband, wife, and two young girls, all citizens of South Korea, claim a well founded fear of persecution and a risk to their lives at the hands of loan sharks in South Korea.

[3] The female applicant alleged that the loan sharks were using violence and sexual abuse to attempt to secure payment of a sum of money lent in May or June 2000. After marrying the female applicant in 2003, the male applicant alleged that he and his two daughters were also targeted and attacked in order to secure payment of his wife's loan.

[4] The applicants arrived in Canada on August 9, 2005 and claimed refugee protection on September 9 of the same year.

[5] In a decision dated September 6, 2007 the Board rejected the applicants' claims for protection because the applicants had failed to discharge the burden of proof that state protection is unavailable to them. As a functioning democracy, there existed a presumption that South Korea was capable of protecting its citizens which would require clear and convincing proof to be rebutted.

STANDARD OF REVIEW

[6] Recently, in the case of *Eler v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 334, my colleague Madam Justice Dawson examined the standard of review applicable to the issue

of state protection and concluded that in light of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the applicable standard is that of reasonableness.

[7] According to *Dunsmuir*, above, at para. 47, the analysis of the Board's decision on a standard or reasonableness 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."

ANALYSIS

[8] The determinative issue in the present case is the availability of adequate state protection in South Korea.

[9] The applicants submit that notwithstanding that South Korea is a constitutional democracy, maintains effective control of its security forces, and respects human rights, the police failed to provide protection after being approached, which resulted in the female applicant being sexually assaulted.

[10] In analyzing state protection the relevant standard is not perfection, which is unattainable in even the most developed democracies, but rather whether the available protection is adequate (*Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (QL); *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605, [1991] F.C.J. No.

341 (QL), at para. 21). The police failure to protect the female applicant, while significant, may not be in and of itself indicative of inadequate state protection, but rather of a local protection failure (*Di Nasso v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1354, [2003] F.C.J. No. 1793 (QL), at para. 12).

[11] Pursuant to (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pp. 724-725, absent "clear and convincing confirmation" of a state's inability to protect, it is presumed that a state is capable of protecting its own citizens. Further, the Supreme Court of Canada indicated that evidence of a state's inability to protect may include "testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize."

[12] Documentary evidence of country conditions may also provide evidence of a state's willingness or ability to protect its citizens by demonstrating both the existence and effectiveness of mechanisms of protection (*Lopez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1341, [2007] F.C.J. No. 1733 (QL), at para. 19). Further, where there is documentary evidence before the Board which contradicts its conclusions, the Board must provide reasons why it did not consider this evidence relevant or trustworthy (*Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, [2006] F.C.J. No. 1224 (QL), at para. 44; *Castillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, [2004] F.C.J. No. 43 (QL), at para. 9; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at para. 15). A failure to do so will result in a reviewable error.

[13] It is also well established that the burden of exhausting avenues of state protection increases with the level of democracy exhibited by the state in question (*Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532, at p. 534, [1996] F.C.J. No. 1376 (QL), at para. 5; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584 (QL), at para. 57).

[14] As correctly stated by the Board, South Korea is a functioning democracy and as such it is presumed to be capable of protecting its citizens. As indicated by my colleague Madam Justice Johanne Gauthier in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181 (QL), at para. 21 "In developed democracies such as the U.S. and Israel, it is clear from *Hinzman* (at paras. 46 and 57) that to rebut the presumption of state protection this evidence must include proof that an applicant has exhausted all recourses available to her or him." However, the situation is different for developing democracies whose position on the "spectrum of democracy" may dictate a weaker presumption, which is not the case with South Korea.

[15] I would add that the failure to refer to some documentary evidence regarding violence against women was not fatal to the decision given that it does not directly relate to the issue of state protection.

[16] In the same vein, I find the applicants' argument that the Board should have addressed the excerpt from the U.S. Department of State Report (March 8, 2006) indicating that corruption had not been eradicated from everyday life in South Korea unpersuasive. This excerpt does not stand

for the proposition that corruption prevails among South Korean authorities and does not constitute contradictory evidence which must be addressed pursuant to *Cepeda-Gutierrez*, above.

[17] While the applicants' attempts to secure police protection were unfruitful, in light of the documentary evidence which refers to the state's ability to protect against loan sharks and in light of the fact that they did not make any further attempts to seek protection, it was reasonable for the Board to conclude that the state was able to protect the applicants.

[18] As for the applicants' submission that the Board committed errors of fact, I find that there was no error in noting that the female applicant testified to having sought state protection on two occasions, January 2001 and November 2002, whereas in her amended narrative she referred only to one attempt at seeking state protection. While her narrative does indicate that she sought protection on both of those dates, the transcript of the hearing (Tribunal Record, pp. 354-356) reveals that the Board was actually concerned with the female applicant's testimony that she complained to the police twice in November 2002, both before and after the assault. This concern arose because in her amended narrative she only mentioned approaching the police once on that date.

[19] With respect to the male applicant, while the Board's statement that "the male claimant failed to seek state protection" may be ambiguous, given that the Board makes reference to him having approached the local police, I am satisfied that the Board was aware of this attempt, but was of the view that he had not done enough to rebut the presumption of state protection.

[20] Finally, the applicants submit that the Board erred by not analyzing the claims of the minor children individually, and imply that they should have been called to testify at the hearing. This argument is not persuasive as the claims of the minor children were linked to those of the adults. Further, the transcript of the hearing reveals that the applicants' counsel stated that he had no questions for the children.

[21] Accordingly, I find the Board's decision to reject the applicants' claims for protection to be reasonable.

JUDGMENT

THIS COURT ORDERS that the application for judicial review of the Board's decision is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4283-07
STYLE OF CAUSE:	HA YOON SONG, SEON OCK SHON, HYE IN SONG [By her litigation guardian], HYE WON SONG [By her litigation guardian] v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 10, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	APRIL 11, 2008

APPEARANCES:

Mr. Jegan N. Mohan	FOR THE APPLICANTS
Mr. Manuel Mendelzon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mohan & Mohan Barristers & Solicitors Scarborough, ON	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT