Federal Court  Cour fédérale

Date: 20100212

Docket: IMM-4200-09

Citation: 2010 FC 149

Ottawa, Ontario, February 12, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JAE WOOK KIM
HYUN WOOK KIM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] "Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with tenderness and respect, as equals. They should be allowed to grow into whoever they were meant to be - The unknown person inside each of them is the hope for the future." – Janusz Korczak.

[2] To be "alive, alert and sensitive" to the best interests of a child requires an amalgam of considerations. It calls for a voice for the voiceless, a response to the personality of a child, whose fragile and sensitive nature requires a comprehensive understanding of what it means to nurture a

child by considering the “best interests” of the child (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[3] Each branch of government has its particular role in that voice for the voiceless. Each has its responsibility, however, each within its specific jurisdiction, to consider the “best interests” of the child of today to enable the future life of the adult of tomorrow.

[4] In the case of *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 F.C.R. 664 Justice Yves de Montigny held that “the consideration of the best interests of the child is not an all or nothing exercise, but should be seen as a continuum. While a full-fledged analysis is required in the context of a humanitarian and compassionate (H&C) grounds application, a less thorough examination may be sufficient when other types of decisions are made” (*Munar* at para. 38).

[5] As considered by Justice de Montigny in *Munar*, above, the consideration of the best interests of the child must be read in the context of each specific decision to be rendered and differences may ensue, depending on the context as to whether it be a Refugee Protection Division (RPD) decision or an H&C decision.

[6] Turning to the context before the Court, it is noted that section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is <u>not discretionary</u>, but instead prescribes a certain test which <u>must</u> be met by a claimant. The IRPA does not permit the section 96 test to be

compromised even if it is in the best interests of the child to remain in Canada. It is clear that the best interests of the child cannot substantively influence the answer with regard to whether a child is a refugee, but the best interests of the child are central to the procedure by which to reach a decision.

[7] The *Guidelines for Child Refugee Claimants* (Chairperson's Guidelines Refugee Protection Division. Guideline 3: Child Refugee Claimants effective September 30, 1996) (Guidelines) direct the RPD to take the best interests of the child into consideration in a procedural, not a substantive, manner. The Guidelines state "[**i]n determining the procedure to be followed when considering the refugee claim of a child, the CRDD [now the RPD] should give primary consideration to the 'best interests of the child'**" (Guidelines at p. 2). The majority of the Guidelines are devoted to ensuring the procedures used by the RPD are in the best interests of the child.

[8] The Court notes that Article 3(1) of the *Convention on the Rights of the Child* (CRC) does not stipulate how the best interests of the child are to be considered. Article 3(1) of the CRC states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[9] It is clear that Article 3(1) of the CRC does not state that the best interests of the child are to be a substantive consideration of every decision which affects children. The Court concludes that there is more than one manner by which decision-makers may consider the best interests of the child. Section 96 of the IRPA takes the best interests of the child into account because of the specific procedural and evidentiary considerations in the Guidelines. It is recognized that procedural and evidentiary considerations may be different for other determinations outside of the refugee

framework; the key is to ensure that the best interests of the child are considered in context, within the framework of the determination to be made by a tribunal or entity deciding the case, dependent on its particular jurisdiction and legal purpose as set out in legislation.

II. Introduction

[10] This is an application under subsection 72(1) of the IRPA to commence judicial review of a July 29, 2009 decision of the RPD refusing to grant the Applicants, Hyun Wook Kim ("Michael") and Jae Wook Kim ("Raphael"), refugee status under section 96 of the IRPA and refusing to find them to be persons in need of protection under section 97 of the IRPA.

III. Background

[11] The Applicants are twin brothers who were born in Seoul, South Korea on October 30, 1993. In 1997, the family moved to Hong Kong. The Applicants' father suffered from substance abuse problems and died on January 2, 2000. Before he died, the Applicants' father took on a large amount of debt, the responsibility for which has passed to the mother, Ms. So. After the death of their father, Ms. So found that she was unable to raise the Applicants by herself and arranged to send them to family friends, the Lees, in Canada.

[12] The Applicants arrived in Canada with student visas in January of 2004. By December of 2004 the Applicants were having problems with the Lees, primarily due to the fact that the Lees speak little English and the Applicants speak little Korean. On March 3, 2005, the Applicants ran

away from the Lees' home. After this incident, the British Columbia Ministry of Children and Family Development (MCFD) took the Applicants into its care and temporary custody.

[13] The MCFD contacted the Consulate General of the Republic of Korea, as well as International Social Services (ISS) to determine whether the Applicants would be cared for if they were returned to South Korea. The MCFD then decided to place the Applicants in Canadian foster care.

[14] The MCFD applied for an extension of the Applicants' study permits, as they were valid only until September 30, 2008. In response to this request, Citizenship and Immigration Canada (CIC) transferred the Applicants' file to its Vancouver office for review.

[15] Due to the circumstances surrounding their potential return to South Korea, the Applicants initiated their claims for refugee protection on October 6, 2008.

IV. Decision under Review

[16] The RPD found that the Applicants did not fit the definition of refugees under section 96 of the IRPA on the basis that they do not have a well-founded fear that they will be persecuted in South Korea on one of the grounds specified therein (Decision at p. 4).

[17] Counsel for the Applicants submitted to the RPD, "because Canada is a signatory to the Convention on the Rights of the Child (CRC) and because the *Guidelines for Child Refugee*

Claimants specifically refer to the CRC, that minor claimants possess more substantive rights than adult claimants under the *Immigration and Refugee Protection Act*" (Decision at p. 4). The RPD rejected this submission and held that child claimants possess the same substantive rights as adult claimants (nevertheless, the RPD does not discount that children have distinctive rights; as discussed below). The RPD held that the Guidelines refer only to procedural and evidentiary considerations to be taken into account when dealing with child refugee claimants. The RPD concluded that "minor claimants therefore have the same evidentiary burdens and rights as adult claimants. No additional rights may be grafted on the *Immigration and Refugee Protection Act*" (Decision at p. 5)

[18] The RPD held there is adequate state protection for the Applicants in South Korea (Decision at p. 6). The RPD cited the Federal Court of Appeal in the case of *Canada (Minister of Citizenship and Immigration) v. Carrillo*, 2008 FCA 94, 2008 4 F.C.R. 636 for the proposition that refugee claimants must demonstrate on a balance of probabilities that state protection is inadequate in their country of origin. In addition, the RPD stated that the claimant's burden to rebut this presumption increases in proportion to the level of democracy in their country of origin (Decision at p. 6).

[19] The RPD held that South Korea is a well-developed and functioning democracy that provides its citizens with access to an independent judiciary in order to redress human rights violations. In addition, South Korea has civilian control of security forces, an independent press and a functioning democratic political system. On this basis, the RPD found that South Korea is presumed to be capable of protecting its citizens (Decision at p. 7).

[20] Turning to the availability of state protection, the RPD held that South Korea adequately protects children who have been abandoned by their parents (Decision at p. 7). Specifically, the RPD held that South Korea provides orphanages, foster care, as well as group homes for abandoned children and found these measures to be adequate (Decision at p. 8).

[21] The RPD also stated that it would be in the best interests of the children to remain in Canada, as they do not speak Korean and they are currently in foster care here. That being said, the RPD held that the best interests of the children are not to be taken into account when determining whether the claimants are refugees for the purposes of section 96 (Decision at p. 9).

[22] The RPD found the MCFD had not pursued all options related to repatriating the Applicants to South Korea. The RPD held there is no evidence that the Korean Embassy, Korean agencies that care for abandoned children or non-governmental organizations operating in Korea were ever contacted in an attempt to obtain protection for the Applicants (Decision at p. 9).

V. Issues

[23] (1) Did the RPD err in determining the impact of the CRC on the Applicants' claims?

(2) Are the best interests of the child to be taken into account by the RPD in determining whether a child is a refugee pursuant to section 96?

(3) Did the RPD err in finding that adequate state protection is available in the Republic of Korea?

(4) Did the RPD err by finding that insufficient attempts had been made to repatriate the Applicants?

VI. Relevant Legislative Provisions

[24] In order to be granted refugee protection, the Applicants must fit within the definition provided in section 96 of the IRPA:

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	*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*) 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.	*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.

[25] A claimant may also be a person in need of protection under section 97 of the IRPA:

Person in need of protection	Personne à protéger
97. (1) A person in need of	**97.** (1) A qualité de personne

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

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

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

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

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

(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.

[26] Subsection 3(3) of the IRPA states:

Application	Interprétation et mise en oeuvre
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
(*a*) furthers the domestic and international interests of Canada;	*a*) de promouvoir les intérêts du Canada sur les plans intérieur et international;
(*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;	*b*) d'encourager la responsabilisation et la transparence par une meilleure connaissance des programmes d'immigration et de ceux pour les réfugiés;
(*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental	*c*) de faciliter la coopération entre le gouvernement fédéral, les gouvernements provinciaux, les États étrangers, les organisations internationales et les

organizations;	organismes non gouvernementaux;
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;	*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
(*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and	*e*) de soutenir l'engagement du gouvernement du Canada à favoriser l'épanouissement des minorités francophones et anglophones du Canada;
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[27] Section 107 of the IRPA states:

Decision	Décision
107. (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.	**107.** (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

VII. Standard of Review

[28] The parties agree that questions relating to the adequacy of state protection are to be reviewed on a standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 157 A.C.W.S. (3d) 153 at para. 38).

[29] When applying the standard of reasonableness, a court must show deference to the reasoning of the agency under review and must be cognizant to the fact that certain questions that come before administrative tribunals do not lend themselves to one specific result. As the Supreme Court of Canada explained, reasonableness is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process", as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] SCC 9, [2008] 1 S.C.R. 190 at para. 47).

VIII. Summary of Parties' Positions

Applicants' Position

[30] The Applicants submit the Guidelines state that all of the elements of the definition of a section 96 refugee must be met in the case of child claimants, but they also direct, at footnote 8, that international human rights instruments, including the CRC, should be considered in determining whether the harm a child fears amounts to persecution.

[31] The Applicants also submit that paragraph 3(3)(*f*) of the IRPA states that the IRPA is to be construed and applied in a manner that complies with international human rights instruments to

which Canada is signatory, which includes the CRC. As a result, the Applicants cite the case of *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341, 127 A.C.W.S. (3d) 121 and submit that the best interests of the child is a consideration that must be taken into account in all decisions made under the IRPA.

[32] The Applicants submit that international human rights instruments help determine whether the harm feared by a refugee claimant amounts to persecution. The Applicants contend that the CRC recognizes children are in need of special protection, and therefore have greater human rights than adults as a result of their vulnerability. The Applicants cite the case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, where the Supreme Court of Canada accepted that persecution is the "sustained or systemic violation of basic human rights demonstrative of a failure of state protection". The Applicants take the position that since children have distinctive human rights, as recognized by the CRC, and "persecution" is defined as the violation of human rights; therefore, if special protections to which children are entitled are denied to them then fundamental human rights are violated and the country of origin's failure to protect abandoned children becomes persecutory.

[33] The Applicants also submit the RPD is required to take into account the cumulative effect of the various types of harm feared when determining whether it amounts to persecution.

[34] The Applicants argue the RPD erred by misconstruing evidence when it found there had been an insufficient amount of effort on behalf of the MCFD to repatriate the boys to South Korea,

as the MCFD had contacted the ISS in Korea, which concluded that returning the boys to Korea was not an option due to their unfamiliarity with the language and culture.

[35] The Applicants submit the RPD ignored evidence which shows that abandoned children in South Korea are not protected by the state. The Applicants cite certain sources to state that the chances that the boys will be adopted in South Korea are slim, largely due to strong family ties and prejudice against abandoned children, especially those over three months of age. Also, the Applicants submit the South Korean foster care program is limited and there are insufficient caregivers at orphanages.

[36] The Applicants submit the RPD failed to give sufficient weight to the boys' unfamiliarity with the Korean language when assessing the availability of state protection.

Respondent's Position

[37] The Respondent submits that neither the CRC nor the Guidelines contemplates taking the best interests of children into account when determining whether a child refugee claimant fits the definition in section 96 of the IRPA.

[38] The Respondent submits the Applicants are incorrect in citing the case of *Martinez*, above, for the proposition that the best interests of the child must be taken into account in all decisions made under the IRPA, as *Martinez* only deals with H&C applications. The Respondent also submits that, in spite of the CRC, the Applicants must still fall within section 96 in order for their claim to

succeed. The Respondent submits the CRC does not provide special substantive rights to child refugee claimants.

[39] The Respondent submits it was reasonable for the RPD to find that more attempts should have been made to determine the availability of state protection in South Korea.

[40] The Respondent submits the Applicants' evidence regarding the availability of adoption in South Korea is irrelevant to the determination of whether the Applicants are entitled to refugee protection in Canada. The Respondent also submits that even if adoption is unlikely, that does not mean that state protection is unavailable.

[41] The Respondent submits it was reasonable to find that South Korea absorbs its runaways and abandoned children in light of the evidence regarding foster homes and orphanages.

[42] The Respondent originally submitted that the RPD did not err by finding that state protection is available to the Applicants in spite of their unfamiliarity with the Korean language and culture. The Respondent did contend that the Applicants must have some familiarity with the Korean language and culture as they were born there, lived there until they were four and were in the company of their Korean father until they were six. The Respondent specified that the RPD considered the cultural differences and found that they did not alter the fact that state protection is available to the Applicants.

Applicants' Reply

[43] The Applicants reply that footnote 8 of the Guidelines states that the CRC should be considered when determining whether the harm feared by a child refugee claimant amounts to persecution. The Applicants argue that the best interests of the child is "the central component" of the CRC and because the CRC is to be considered when determining whether the child fears persecution, it follows that the best interests of the child should also be considered during that determination.

[44] The Applicants submit that paragraph 3(3)(*f*) of the IRPA states that the IRPA is to be construed and applied in a manner that complies with the CRC. The Applicants argue that the CRC, and therefore, the best interests of the child, are to be taken into account in all decisions made under the IRPA, as paragraph 3(3)(*f*) of the IRPA does not state that only certain portions of the IRPA must be applied with regard to international human rights instruments.

[45] The Applicants submit the RPD erred by finding insufficient attempts had been made to gain state protection in South Korea. Specifically, the Applicants argue the Consulate of the Republic of Korea may have offered travel documents but did not, at all, state they would assist in arranging care for the boys if they returned to South Korea (significant correspondence in this regard is specified below). Also, the Applicants submit the ISS branch in South Korea was the appropriate agency to contact and the ISS indicated that no placement would be available for the boys if they were sent to South Korea.

IX. Analysis

Issue 1: Did the RPD err in determining the impact of the CRC on the Applicants' claims?

[46] The case at bar focuses on what is to be considered by the RPD when determining whether the harm feared by child refugee claimants amounts to "persecution" for the purposes of section 96 of the IRPA.

[47] It is useful to begin this analysis by defining "persecution." The United Nations High Commissioner for Refugees Handbook states:

> 51. There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution.
> 52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

[48] In addition to the guidance from the UN, the Supreme Court of Canada, in the case of *Ward*, above, held that "persecution" has been "ascribed the meaning" of a "sustained or systematic violation of basic human rights demonstrative of a failure of state protection" (*Ward* at p. 734).

[49] If the Supreme Court of Canada's definition of "persecution" is adopted, then the question becomes what actions can amount to the denial of the basic human rights of a child and whether children have distinctive human rights that are not possessed by adults.

[50] In the eyes of the law, children have long been voiceless citizens. Even after all of the progress that has been made in empowering groups that used to be voiceless, such as women and ethnic and religious minorities, children remain largely silenced. That being said, the CRC recognizes the individual rights that children possess. The Supreme Court of Canada recognized this in the case of *Baker*, above, when it stated:

> 71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power. (Emphasis added).

[51] If the CRC recognizes that children have human rights and that "persecution" amounts to the denial of basic human rights, then if a child's rights under the CRC are violated in a sustained or systematic manner demonstrative of a failure of state protection, that child may qualify for refugee status on one of the grounds listed in section 96 (for example, the Applicants suggest they may be persecuted as a result of belonging to the social group of "abandoned children"). The Court's analysis must now turn to the impact of the CRC on section 96 of the IRPA.

[52] There are two ways in which the CRC enters the purview of the RPD: first, through paragraph 3(3)(*f*) of the IRPA and second, through the Guidelines.

[53] In the case of *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 the Federal Court of Appeal clarified the scope of paragraph 3(3)(*f*) of the IRPA and the impact of binding international human rights instruments, such as the CRC, on Canadian immigration law. The court held that paragraph 3(3)(*f*) does not go so far as to incorporate the CRC into domestic law, but instead directs that the IRPA be construed and applied in a manner that complies with the CRC (*De Guzman* at para. 73). The court also held that binding international human rights instruments are "determinative of how IRPA must be interpreted and applied, in the absence of a contrary legislative intention" (*De Guzman* at para. 87).

[54] In this case, it is clear that the word "persecution" is undefined in the IRPA and the meaning mentioned by the Supreme Court of Canada does not state what amounts to a denial of human rights. It follows from this lack of clarity that section 96 of the IRPA should be construed and applied in a manner that pays heed to the rights that children possess as recognized in the CRC.

[55] In addition to paragraph 3(3)(*f*) of the IRPA, RPD officers should also inform themselves of the totality of the Guidelines when determining whether a person qualifies for refugee protection.

[56] The Guidelines state that "all of the elements of the Convention refugee definition must be satisfied" in order to grant refugee status to a child claimant (Guidelines at p. 2). This sentence shows that children must meet the same test that applies to adult refugee claimants in order to become refugees pursuant to section 96. Although the Guidelines direct the RPD to apply a uniform

test to both adults and children, they also provide guidance to officers in their determination of child refugee claimants in a footnote to the abovementioned sentence which reads:

> 8. **In determining the child's fear of persecution, the international human rights instruments, such as the** *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the ***Convention on the Rights of the Child*, should be considered in determining whether the harm which the child fears amounts to persecution**" (Emphasis added).

[57] At paragraph 36 of its reasons, the RPD states that "minor claimants … have the same evidentiary burdens and rights as adult claimants. No additional rights may be grafted onto the *Immigration and Refugee Protection Act*" (Decision at p. 5). The RPD's ruling is an accurate statement of the law; however, the RPD failed to recognize what can amount to "persecution" of a child. To acknowledge that children have distinctive rights is not to graft additional rights onto the IRPA, but is instead to interpret the definition of "persecution" in accordance with the distinctive rights that children possess, as recognized in the CRC.

[58] In addition to recognizing the rights of children, the RPD should also be aware of the particular vulnerabilities of children when assessing whether particular acts amount to "persecution" of a child. The Preamble to the CRC states "[b]earing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'". Since the CRC recognizes the vulnerabilities of children, it is appropriate for the RPD to consider their physical and mental development when assessing whether the harm feared by a claimant amounts to persecution. Children, because of their distinct vulnerabilities, may be persecuted in ways that

would not amount to persecution of an adult. It is incumbent on the RPD to be empathetic to a child's physical and mental state and to be aware of the fact that harming a child may have greater consequences than harming an adult.

[59] The United Nations Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* has been placed before the Court. At paragraph 8.7 of that document it states:

> 8.7 It should be further borne in mind that, under the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the Scope of the refugee Convention. Examples of such policies and practices are the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation.

[60] In addition, the United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* states: "the refugee definition in [the 1951 Refugee Convention] must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children" (*General Comment No. 6* at para. 74). Although these two documents are not binding Canadian law, the Court finds them useful aids in the discussion of an ambiguous legal concept, namely, the interpretation of the CRC.

[61] The Court is in agreement with the Respondent that: "[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee"; however, the

Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult.

Issue 2: Are the best interests of the child to be taken into account by the RPD in determining whether a child is a refugee pursuant to section 96?

[62] The Applicants submit the best interests of the child must be taken into consideration in all decisions made under the IRPA. Specifically, the Applicants argue that the RPD must consider the best interests of the child in respect of both the procedural as well as the substantive aspects of assessing refugee protection claims.

[63] In the case of *De Guzman*, above, the appellant argued that paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR-2002-227 (Regulations) was inconsistent with the CRC, which, as has been stated, influences Canadian law as a result of paragraph 3(3)(*f*) of the IRPA (*De Guzman* at para. 3). Paragraph 117(9)(*d*) is a provision which excludes persons from membership in the Family Class if the existence of those persons was not declared by the potential Family Class sponsor when the sponsor applied for permanent residence. The appellants argued that paragraph 117(9)(*d*) violated Article 3(1) of the CRC because it does not take into account the best interests of children who are affected by the provision. The Federal Court of Appeal rejected this argument, holding that "not every statutory provision must be able to pass the 'best interests of the child' test, if another provision requires their careful consideration. In my opinion, section 25 is such a provision, because it obliges the Minister to consider the best interests of a child when

deciding whether, in his opinion, humanitarian and compassionate circumstances justify exempting an applicant from the normal selection criteria and granting permanent residence status" (*De Guzman* at para. 105).

[64] *De Guzman*, above, has the clear implication that it is not necessary for the best interests of the child to be a consideration in every decision made under the IRPA, as they are to be considered under section 25 (Reference is made to the Overview in respect of the distinctions as treated in section 96 of the IRPA and as specified in H&C discretion).

Issue 3: Did the RPD err in finding that adequate state protection is available in the Republic of Korea?

[65] Although the RPD failed to recognize the nuances identified above, that does not necessarily mean that the RPD's determination that state protection is available was unreasonable.

[66] In the case of *Ward*, above, the Supreme Court held that there is a presumption that a state is able to protect its citizens and a refugee claimant is called upon to provide "clear and convincing confirmation of a state's inability to protect" him or her (*Ward* at p. 724). This presumption of state protection increases in proportion the degree of democracy in the country of origin. In the case of *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 467, 167 A.C.W.S. (3d) 159 Justice Danièle Tremblay-Lamer held that South Korea is a functioning democracy and is presumed to be able to protect its citizens (*Song* at para. 14).

[67] The Court agrees with the Respondent that challenges relating to adoption in South Korea do not equate to a lack of state protection; however, it must be recognized that each case is a case

unto itself, as to its specific merits ("cas d'espèce"). The Court notes that there was a paucity of evidence before the RPD regarding the conditions in South Korean orphanages and foster homes. Much of the evidence cited by the Applicants is subjective, contradictory or vague. For example, one of the pieces of evidence cited by the Applicants is the allegation that there are 65,000 abandoned children in South Korea. The source for this statement is an opinion article from 2005 which states this figure without disclosing where that statistic came from. Also, it is noted that the article does not state how many of those children are receiving government care, as a child in an orphanage could still be considered to have been "abandoned" by his or her parents (Applicants' Record at p. 136). This is a key statistic cited by the Applicants and the Court finds it to be vague and suspect at best. The Court finds that the RPD based its decision on the best available evidence, which shows that there are agencies in South Korea to care for abandoned children when they are actually in Korea, itself.

Did the RPD err by failing to mention evidence which contradicted its conclusion?

[68] There is a presumption that administrative agencies make their decisions based on the entirety of the evidence placed before them and therefore they need not refer to every piece of evidence when drafting their reasons. That being said, if a party produces compelling evidence which goes against the agency's conclusion, the court may draw the conclusion that the agency made its decision without regard to the evidence before it (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1988), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at paras. 16-17).

[69] Based on a reading of the entirety of the reasons and of the evidence before the officer, the Court finds that the RPD provided adequate reasons. Even though the RPD did not refer to every

piece of evidence that contradicted its conclusion, such a duty cannot possibly be placed on the officer, especially when the evidence is of mixed quality. It is also noted that the RPD referred to pertinent contradictory evidence, such as the limitations of the Korean foster care system, as well as inconsistent levels of funding for orphanages (Decision at p. 8), and still came to a reasonable conclusion that adequate state protection is available to abandoned children residing in Korea.

Issue 4: Did the RPD err by finding that insufficient attempts had been made to repatriate the Applicants?

[70] It is trite law that refugee protection is granted by Canada to persons whose country of origin is unable or unwilling to protect them. Subsequent to this is the idea that persons claiming refugee protection must show that they have exhausted all avenues to gain state protection, or to explain why they should be exempt from this requirement. In the case of *Carrillo*, above, the Federal Court of Appeal held that the burden placed on the claimant increases if the state of origin is a functioning democracy (*Carrillo* at para. 32).

[71] In the case at bar, the RPD found that South Korea is a functioning democracy and is therefore presumed to be able to protect its citizens (Decision at p.7). The RPD also held that it was understandable for the MCFD to cease its efforts to repatriate the Applicants, as it determined it was in their best interests to remain in Canada, but that does not relieve the Applicants of their requirement to take sufficient steps to obtain state protection before making a claim for refugee status (Decision at p. 9).

[72] The standard of reasonableness demands that the reviewing court show deference to the analysis of the decision-maker. In this case, there was evidence before the RPD that the MCFD

ceased its efforts to obtain state protection years before this refugee claim was filed and there was also evidence showing that South Korea has entities in place to care for abandoned children. The Applicants do not argue that the RPD ignored a pertinent piece of evidence, but merely submit that the RPD came to an unreasonable factual conclusion based on the evidence before it. Upon review of all of the evidence, the Court cannot agree with the Applicants, as the RPD came to a decision that was reasonably supported by the material before it.

X. Conclusion

Issue 1: Did the RPD err in determining the impact of the Convention on the Rights of the Child on the Applicants' claims?

[73] When determining whether child refugee claimants meet the definition of "Convention refugees" under section 96 of the IRPA, attention must be paid to three factors: first, that children have distinctive rights under the CRC; second, that these rights influence decisions made under the IRPA as a result of paragraph 3(3)(*f*) and third, that children exist in a state of vulnerability which might make them more susceptible to "persecution" than adults.

[74] "Convention refugees" are defined in section 96 as being persons who have a well-founded fear of persecution. Persecution is defined by the Supreme Court of Canada in the case of *Ward*, above, as the "sustained or systematic violation of basic human rights" (*Ward* at p. 734). The CRC recognizes that children have distinctive human rights in light of their need for special protection. Paragraph 3(3)(*f*) of the IRPA states that the IRPA is to be construed and applied in accordance with instruments such as the CRC. Case law has confirmed the applicability of the CRC on domestic decision-makers; therefore, when determining whether a child claiming refugee status fits the

definition in section 96, decision-makers must inform themselves of the rights recognized in the CRC. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution if returned to his or her country of origin.

Issue 2: Are the best interests of the child to be taken into account by the RPD in determining whether a child is a Convention refugee?

[75] It is the Court's conclusion that the Canadian immigration system is to be examined in its entirety, not as compartmentalized sections, when assessing whether due consideration has been shown to the best interests of children.

[76] The Canadian immigration system provides for several methods by which to gain entry into Canada, one of which is to be a refugee under section 96. Section 96 provides a strict definition that is either met or not by the claimant in question. If the definition is met, then the claimant may be able to enter Canada as a refugee. If, on the other hand, the definition is not met, then the claimant may not enter Canada pursuant to that section and other options become available to him or her. One remaining option is pursuant to section 25, wherein the Minister in his discretion may grant an exemption "from any applicable criteria or obligation of" the IRPA. It is under section 25 that a substantive and thorough analysis of the best interests of the child is performed. At the stage of a section 96 application, it is sufficient that the best interests of the child are taken into account procedurally, as directed by the Guidelines. The Court must reiterate that the best interests of the child cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision.

Issue 3: Did the RPD err in finding that adequate state protection is available in the Republic of Korea?

[77] It is the Court's conclusion that the RPD made a reasonable decision when it found that the Applicants had not adduced sufficient probative evidence to rebut the presumption that state protection is available.

Issue 4: Did the RPD err by finding that insufficient attempts had been made to repatriate the Applicants?

[78] The Court concludes that the RPD's finding that insufficient efforts had been expended to obtain state protection in South Korea was reasonable on the basis of the evidence, in and of itself, before the panel.

Obiter

Each and every case demonstrates a different facet of the human condition through jurisprudence. If recognized, jurisprudence could better serve as a litmus test by which to understand and then heal through the balancing act of justice what ails society. If witnessed in its consequences as concentric ripples, decisions of the judiciary could add more significantly to the dialogue between the three branches of government; each required to take cognizance of the other two branches (and respect the others' distinct jurisdiction), together as a tripartite whole, each branch serving within its jurisdiction, responding to its responsibility.

One of the challenges for the future of the world is how governments, not only Canada, approach the issue of abandoned children; the future does depend in large part on how abandoned children are treated, raised and educated. That will determine how these children, as adults, will contribute to a more peaceful world. (Reference is duly made to the book, "Three Cups of Tea" by

Greg Mortenson, as to how children, rather than become a violent problem for the world, can become a part of a peaceful solution. That is not only Canada's challenge but one for each country to meet).

This specific case, one unto itself, is for the consideration of the executive branch under H&C grounds, due to the very specific fact-pattern of the narrative. This case, with an encyclopaedia of references demonstrates the fragility of the human condition of two siblings who do not want to be separated. Although a lack of ties to their country of origin is evident due to an absence of language, of culture, their mother's grave problems and a complete lack of family support (thus, family child-care absenteeism), still the RPD did not consider that refugee status in their cases was warranted, due to explanations specified above.

Nevertheless, it is important to specify that the RPD did state, at paragraph 53 of its decision, that although, "Korea is providing adequate protection, but I venture to state that keeping the children in Canada would promote the best interests of the children. The children do not speak Korean. The designated representative testified that the claimants need consistency and permanence. The claimants are in an excellent foster home. It is in the best interest of the children for them to remain in Canada."

In the vein of the RPD decision, it is important to consider the documents in Tab 7 of the Applicant's Record. Other than the B.C. Provincial Authority's positive response in regard to the care of these children for the past four years, it is significant for all parties to note that there is neither family nor country of origin provision for the care of these specific children. (Although care appears to be available for abandoned children who are in Korea, no confirmation exists for these children who have been outside of Korea.) No specific care from their government of origin has

been offered or forthcoming (although, perhaps, existent in theory); it has been entirely non-existent in practice in regard to these children (as Tab 7 of the Applicants' Record, at pages 71 to 78, appears to specify, through correspondence in regard to these children, subsequent to a careful reading).

While the Consulate of South Korea has indicated that it would participate in returning the Applicants to South Korea, this participation is limited to ensuring that the Applicants have the necessary documents to allow their return when, and if, the time comes.

Nowhere in the correspondence from the country of origin of the Applicants is there any word that care would be arranged upon the boys' return. The appropriate agency in respect of the possibility of care for the boys, who, in fact, had been contacted, indicated that no placement would be available for them. This Court is in agreement with the RPD decision and also with the RPD's recommendation in regard to the H&C.

Yet, it is not for the RPD, nor is it for a member of the judiciary of this Court to decide on H&C, but, rather, it is for the Minister, in his discretion, to consider section 25 (H&C), in light of the merits of the case.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Warren Puddicombe	FOR THE APPLICANTS
Ms. Kimberly Shane	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ELGIN, CANNON & ASSOCIATES Vancouver, B.C.	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT