

Date: 20071005

Docket: IMM-4941-06

Citation: 2007 FC 1023

Ottawa, Ontario, October 5, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**KI SUNG GIL (KIL), YUN HO KIL (GIL),
and SOO JIN KIM**

Applicant(s)

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Soo Jin Kim, Ki Sung Gil and Yun Ho Kil challenging a decision of the Immigration and Refugee Board (Board) rendered on August 8, 2006.

Background

[2] Ki Sung Gil and Soo Jin Kim are spouses and Yun Ho Kil is their minor child. They are all Korean nationals who came to Canada on November 8, 1999. Their claim to refugee protection was not made until May 2004 and it was based on allegations of abuse suffered by Ms. Kim in

Argentina dating back to 1989. Ms. Kim lived in Argentina from 1987 to 1992 and, through that time, she was a high school student. She alleged that she was victimized by a male friend of her brother, namely Hyo Sik Shim. She asserted that Mr. Shim stalked and threatened her and, on one occasion, raped her. These incidents were never reported to the Argentinian police. Ms. Kim claimed that she was so fearful of Mr. Shim that she stayed mostly at home for six months and only went out in the company of her sister. She also said that she was sufficiently traumatized by the rape that she attempted suicide by overdose. All of this caused her to return to Korea in 1992.

[3] Ms. Kim and Mr. Gil were married in Korea in 1997 and their son was born there in 1998. Notwithstanding Ms. Kim's return to Korea, she claimed that Mr. Shim attempted to contact her there and threatened to harm her and her family. She said that this contact by Mr. Shim was sufficiently troubling that the family left for Canada in 1999. She claimed that they did not immediately seek refugee protection in this country because of a misapprehension that lawful immigration status would be automatically conferred after five years of residency.

Board Decision

[4] The Board described Ms. Kim's testimony as confusing and glaringly inconsistent. In its lengthy decision, the Board identified the following credibility concerns:

- an inconsistency in her characterization of Mr. Shim as a "gangster" but not an "evil" person;

- an inconsistency about her stated reasons for frequently changing schools in Argentina and whether this was motivated by a fear of Mr. Shim or for financial reasons. The Board described her evidence on this point as "convoluted";
- several differences between her testimony and her Personal Information Form (PIF) declarations about the details of an alleged assault by Mr. Shim upon another student and other related incidents;
- an inability to recall the name of one of the schools she claimed to have attended in Argentina;
- her failure to disclose in her extensive PIF that Mr. Shim had continuously proposed marriage to her including one proposal made after her return to Korea. This was found to be inconsistent with her statement in the initial Record of Examination that Mr. Shim had never approached her after the alleged rape;
- an inconsistency between her testimony that she was at her mother's home when Mr. Shim called to threaten her family and her PIF declaration that she was then living in a "new apartment";
- her inconsistent evidence about Mr. Shim's behaviour in Korea. The evidence she gave of stalking was a "feeling" of Mr. Shim's presence. The Board summed up her evidence on this as follows:

I do not understand the claimant. First she claims that Mr. Shim stalked her from the day she returned to Korea until 1993. Then he stopped stalking her and would call her once or twice per month. And now she is saying that it was not when she was in Korea that this happened. She is contradicting herself at every turn. Her evidence is totally unreliable.

- her confusing and inconsistent testimony about whether Mr. Shim was supposedly in Korea when he made calls to her sister;
- her inconsistent evidence about whether Mr. Shim had ever made direct contact with her in Korea;
- her implausible evidence about Mr. Shim's ability to obtain confidential personal information about her from Korean authorities; and
- the inconsistency between her explanation for the long delay in advancing a protection claim (i.e. that it was not necessary) and her knowledge that she had no lawful status in Canada and was, therefore, at risk of detection.

[5] On the basis of the foregoing, the Board drew the following credibility conclusion:

The claimant has tried to make a connection between things that allegedly happened in Argentina and her stay in Korea prior to coming to Canada. Her story, however, has been inconsistent throughout. I do not have any persuasive evidence before me that Mr. Shim, to whom she refers, ever left Argentina and went to Korea in search of her as she would have me believe. In fact, I find that there is very little, if any truth in any of her story. I find on a balance of probabilities that her entire story was fabricated for the sole purpose of advancing her claim. I do not believe that she was stalked by Mr. Shim while in Korea. I do not believe either herself, her mother or her sister received any call from Mr. Shim in Korea and, consequently, find that she does not have good grounds for fear based on her allegations.

...

The gravity of the inconsistencies, omission of incidents, implausibilities in the absence of a reasonable explanation coupled with the element of delay in claiming refugee status in Canada, is

such that it leads the panel to find that the lack of credibility extends to all relevant evidence emanating from the claimant and renders her entire testimony not credible. The panel finds, on a balance of probabilities that the claimant has fabricated the allegations to the narrative to extend a refugee claim.

Issues

- [6] (a) What is the appropriate standard of review for the issues raised by the Applicants?
- (b) Did the Board err in its treatment of the evidence?
- (c) Did the Board breach the duty of fairness?

Analysis

[7] The Applicants challenge the Board's adverse credibility conclusion but, in so doing, they acknowledge that the standard of review is patent unreasonableness. With respect to the procedural fairness issues they raise, the standard of review is, of course, correctness: see *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631 at para. 44.

[8] Much of the Applicants' argument on this application was directed at excusing or explaining some of the inconsistencies that the Board relied upon in rejecting Ms. Kim's evidence. The Applicants have identified a number of relatively minor evidentiary issues touching on collateral matters and assert that the Board misinterpreted Ms. Kim's testimony or took her evidence out of context. They argue, in addition, that the Board was unduly influenced by testimonial lapses concerning "minute" or "peripheral" details. They say that the Board failed to examine the reliability of the evidence bearing on the central events of persecution described by Ms. Kim - most notably the rape and the subsequent stalking events.

[9] There is no question that a number of the Board's credibility concerns arose out of evidentiary inconsistencies that were not central to the Applicants' allegations of persecution. A good example of this was the Board's reliance on Ms. Kim's failure to recall the name of one of the schools she had attended in Argentina. If the Board's credibility conclusion had been based exclusively - or even primarily - on such matters, this argument might have succeeded. That, though, was not the case. Ms. Kim's evidence was throughout confusing, inconsistent and, in a number of respects, implausible. For example, her evidence of Mr. Shim's alleged stalking of her in Korea was confusing and inconsistent to the point of being virtually incoherent. It is impossible to tell from her testimony whether she was claiming that Mr. Shim had followed her to Korea from Argentina or whether she simply "felt" that he had. The same concern arises from her evidence concerning Mr. Shim's alleged assaultive behaviour at her school and her reasons for moving from school to school. These were not peripheral issues but went squarely to the issue of persecution. The Board's rejection of Ms. Kim's evidence on these critical aspects of her protection claim was entirely reasonable in the face of her testimonial lapses.

[10] The Applicants are critical of the Board's reliance upon contradictions between Ms. Kim's initial immigration interview and her testimony. They describe those contradictions as immaterial and they say that the Board gave them "unwarranted weight". In any event, they argue that these problems should be excused because they arose from alleged translation problems.

[11] Ms. Kim cannot fairly criticize the Board for the fact that her testimony was confusing and inconsistent. She had the responsibility to offer a clear and convincing narrative and to provide plausible explanations for any inconsistencies that had arisen earlier in the process. She was represented by counsel and suffered from no apparent testimonial impediments. Her translation excuse was soundly rejected by the Board largely because she accused the translator of bullying and improper conduct. The Board's scepticism about this explanation was fully warranted. What the Board was left with was a wholly muddled and implausible story about Ms. Kim being stalked by Mr. Shim in Korea from the day of her return there from Argentina in 1993. Even at that, it is not clear that she actually believed that Mr. Shim was ever in Korea or whether his alleged attempts to contact her were all carried out from Argentina. How she would be any safer in Canada was never plausibly explained.

[12] The Applicants contend that the Board erred by concluding that a single incident of rape could not constitute persecution. While it is true that the Board member did make a questionable observation to that effect during the hearing and was strongly challenged for it, the final decision was limited to a finding that no rape had ever occurred. I cannot conclude that an arguably injudicious point made by the Board during argument constitutes a part of the decision under review. In the result, this argument must fail.

[13] The Applicants also argue that the Board was insensitive to Ms. Kim's reasonable explanations for failing to report her rape to the Argentinian authorities. Her explanation for this was that her cultural norm was one of shame and isolation so that going to the authorities was never

contemplated. The problem with this submission is that the Board decision nowhere suggests that Ms. Kim's explanation was not accepted at face value. Apart from acknowledging her evidence, there is no indication that the failure to report the rape incident was considered by the Board in rejecting Ms. Kim's credibility. Once again, the Board's factual conclusion was that no rape had occurred.

[14] Any fair reading of Ms. Kim's testimony leads inevitably to the conclusion that her evidence was wholly unreliable. While it is almost always possible to take issue with the few aspects of a decision like this one, it is not the purpose of judicial review to reassess the weight assigned by the Board to the evidence. It is also not the role of the Court to take issue with the Board's factual inferences provided that there is some evidence to support them. The fact that the Applicants are able to make a case for the drawing of other inferences on the same evidence does not open up the Board's findings to successful review.

Fairness

[15] The Applicants also challenge this decision on the ground of fairness. They say that the Board was unduly aggressive in its treatment of Ms. Kim which led to areas of testimonial confusion and misunderstanding. While there was some evident frustration by the Board in dealing with Ms. Kim's testimony, the member's impugned remarks do not, to my eye, create a reasonable apprehension of bias or otherwise exceed the boundaries of fairness recognized in other decisions of this Court: see the authorities cited in *Chaudhry v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1015, 56 Imm. L.R. (3d) 82 at para. 13.

[16] The further argument that the Board took too long to render its decision has no merit. While it is always preferable to issue decisions in a timely way, a delay of five months after the completion of the hearing raises no concern in law. Indeed, the Board decision in this case reflects a clear appreciation of the issues and the evidence, all of which is carefully set out in 31 pages of reasons.

[17] The Applicants criticize the Board's finding that no rape occurred having regard to its stated reluctance to inquire into the precise details of that claimed assault. They say that before the Board could reasonably reject that aspect of her claim it had to allow her the opportunity to fully describe it. Such an argument might have been persuasive but for the fact that it was Ms. Kim's counsel who urged the Board not to venture into those details to which the Board acquiesced. All of this arose under questioning of Ms. Kim by the Refugee Protection Officer (RPO) and led to the following exchange:

01:06:09 COUNSEL: May I ask a question at this point?
I'm wondering whether it's really
required to go into the detail of what
happened between Mr. Shim and the
claimant, if it's possible,

RPO OFFICER: I'm not intending to ask...

MEMBER: Shh, let her finish.

RPO OFFICER: Sorry.

01:06:43 COUNSEL: I wanted to know the extent of the
description (inaudible) I don't want
her to...

MEMBER: No no no no, I'm not interested in
what I would call lurid details myself,

it doesn't do anything. Besides which, if these things really happened I don't want her to relive that. And I don't think that's what you're trying to do.

01:07:22 RPO OFFICER: I suppose I would like a confirmation, just a plain statement, something happened. I want to know what she did about it after this, I'm not asking for details.

01:07:34 COUNSEL: If you allow me, I would like to ask...member, Mr. Gil, how he feels, if he wishes to be...

MEMBER: But you see, like I said, we are not going to get into (inaudible) details about what happened. Mostly when it happened, where it happened, and what did she do about it, those are the things that I believe would cause a problem, so...

01:08:11 RPO OFFICER: Ms. Kim I don't want to ask you details about what happened but I would like your confirmation that this man did assault you and where did this happen?

[18] On this issue the Board cannot be faulted for steering away from a sensitive area of evidence at the request of counsel for the Applicants.

[19] In conclusion, I can identify no errors by the Board which are sufficient to meet the applicable standards of review and this application is dismissed.

[20] The Applicants have proposed the following certified question:

In a sexual assault case, if the Board found that there is a lack of credibility regarding peripheral events, could the Board dismiss the material points of the evidence?

[21] Because the fundamental premise of this question is not supported by this decision (that the adverse credibility finding was based solely on peripheral events), it is not appropriate for certification. In the result, no question will be certified.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

“ R. L. Barnes ”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4941-06

STYLE OF CAUSE: KI SUNG GIL (KIL) ET AL

v.

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, ON

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REASONS FOR ORDER: Barnes J.

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