Federal Court  Cour fédérale

Date: 20090729

Docket: IMM-4223-08

Citation: 2009 FC 779

Ottawa, Ontario, July 29, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SHIRLEY WU CAI HUA MA
AMY MA
BILLY MA
ANISA MA
ADA MA
GEOFFREY TINGFUN MA

Respondents

REASONS FOR 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 September 5, 2008 (Decision) granting the Respondents' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Respondents allege a fear of returning to the Solomon Islands where they were harassed and persecuted because of their Chinese ethnicity.

[3] Shirley and Geoffrey (Female and Male Adult Respondents) were born in China. Geoffrey went to the Solomon Islands in 1983 and became a naturalized citizen there in 1994. The Adult Respondents call the Solomon Islands their home and their four children were born there.

[4] Geoffrey returned to China on three occasions, for which he used his Solomon Islands passport. He applied for and obtained a Chinese tourist visa.

[5] The Respondents' family business and residence was burned to the ground during rioting which occurred on April 18, 2006 in Honiara. The riots had an ethnic basis and were directed against the residents of the Solomon Islands who were of Chinese decent. Geoffrey was not in the Solomon Islands at the time of the riot. He had returned to China on April 3, 2006 because his father had died and he went back to take care of the funeral arrangements.

[6] Shirley and two of her children, Billy and Amy, were recognized by the High Commissioner of Papua New Guinea on the Solomon Islands as "Persons Displaced by Violence," and were issued emergency travel documents for their evacuation to China dated April 24, 2006. Daughters Anisa

and Ada were attending school in Australia at the time of the riots and hold valid student visas for Australia.

[7] The Chinese government stepped in to assist nationals of Chinese descent by sending planes to evacuate them from the Solomon Islands. The family was reunited in China on April 25, 2006. At the time of the attacks, the family alleged that they "repeatedly" sought the protection of the police but the police said they were unable to respond and told the family to "fend for themselves."

[8] Geoffrey returned to the Solomon Islands to find the family home and their business and personal effects destroyed or looted and stolen. He remained in the Solomon Islands from May 5, 2006 until March 25, 2007 in an attempt to re-coup some of his losses through a government compensation claim, locate his documents and seek replacement passports for his wife and two of their children, Billy and Amy. During that time, Geoffrey alleges that he was repeatedly stopped by thugs who attacked and beat him on several occasions and extorted money from him. He also alleges that his car was stolen and that, when he reported this to the police, the police refused to take a report and told him there was nothing they could do. Geoffrey alleges that he was "in hiding and lived in constant fear" and that the attacks were "directed to him due to his ethnicity."

[9] After fleeing the Solomon Islands in April of 2006, the family, with the exception of Geoffrey, never returned. Shirley and two of her children subsequently came to Canada on May 21, 2006, arriving at Vancouver International Airport, and made a claim for refugee protection upon arrival. Geoffrey arrived later on March 30, 2007.

DECISION UNDER REVIEW

[10] The Board found that the Respondents were Convention refugees and had a well-founded fear of persecution in the Solomon Islands.

[11] The Board framed the issues for itself as follows:

a. Are claimants required to re-avail themselves of previous citizenship and nationality which they voluntarily relinquished, and which no longer exist, prior to seeking the protection of Canada?

b. If the answer to that question is yes, then the next issue is whether China would grant the claimants citizenship and re-invoke their status as nationals of China.

c. Finally, if the answer to that question is also yes, then the panel must analyse whether these claimants have a well-founded fear of returning to China.

Well-founded Fear of Solomon Islands

[12] The Board examined the documentary evidence and the evidence presented by the Respondents. The Minister argued that the Male Adult Respondent was not credible and had failed to note certain incidents in his PIF narrative that he was now alleging. The Board noted that the Male Adult Respondent had noted in his PIF narrative that he had had to live in hiding and was worried about whether the state would provide protection for him and his family. The Board took into consideration his demeanour and noted that he presented himself as an “unsophisticated

claimant with basic education." The Board concluded that it was satisfied "by the claimant's explanations for his failure to include the specific incidents after his return to the Solomon Islands."

[13] The Board found that the Respondents were at risk of persecution in the Solomon Islands based on their Chinese ethnicity. As well, the documentary evidence suggested that there was no state protection available and no reasonable internal flight alternative.

Chinese Nationality

[14] The Board felt there was "little doubt that the [Respondents] are not currently considered citizens or nationals of China. Although the adult claimants Geoffrey and Shirley Ma were born in China, upon their choice of becoming Solomon Island citizens they lost their Chinese citizenships."

[15] Under the Nationality Laws of China, Article 3, the People's Republic of China (PRC) does not recognize dual nationality for any Chinese national. The Board quoted part of Article 9 which states that "Any Chinese National who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality."

[16] The Board noted that the family had to obtain Chinese visitor's visas for their previous trips to China which, in the Board's view, indicated how they were viewed by the Chinese authorities. The Board also found it "extremely doubtful" that the children of the Adult Respondents would be

automatically eligible for citizenship on the basis that their parents were both born in China. The Board cited Article 5 of the Nationality Laws:

> Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

[17] The Board concluded that both parents had acquired Solomon Island nationality so that their children would not be considered Chinese nationals.

Restoration of Chinese Nationality

[18] The Board agreed with the Minister that the correct question to address on this issue was whether it was "more likely than not that the claimants will obtain PRC nationality if they apply for it?"

[19] The Board relied on the test in *Williams v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 126 (*Williams*) at paragraph 22:

> The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in Ward and it is not

> restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself.

[20] The Board found that the Respondents met the test set out in *Williams* so that the re-instatement of Chinese nationality was not within their control. Although the Respondent's could have applied, the provisions of the Nationality Laws of China made it "far from automatic" and, in accordance with *Williams,* "it is not 'within his power' to acquire it."

[21] The Board also cites *Crast v. Canada (Minister of Citizenship and Immigration)* 2007 FC 146 (*Crast*) which confirms that an analysis must be undertaken as to the degree of certainty required in the application process. In that case, the evidence indicated that the result cannot be predicted with certainty, and the Board had failed to assess that degree of certainty.

[22] The Board noted that, since the Respondents have four children, there was no degree of certainty that their application would be approved. The Board states that there is a difference between "eligibility to apply, and what that outcome might be." The Board relies upon *Mijatovic v. Canada (Minister of Citizenship and Immigration)* 2006 FC 685 at paragraph 32:

> **32** According to the terms of the *Citizenship Law*, the Applicant may have been eligible to apply for citizenship of the FRY. Indeed, she might still be eligible to make an application. This, however, does not mean that she was in fact a citizen of the FRY. In the context of a refugee claim, the mere right to apply for the citizenship of a particular country does not make the claimant a citizen of that country, unless the application is a mere formality. This issue was

> addressed by the Federal Court of Appeal in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] F.C.J. No. 603.

[23] The Board also relied upon Lorne Waldman's *Immigration Law and Practice, 2nd edition*, volume 1 at paragraph 8.399:

> Hence the concept of nationality must be interpreted strictly so that surrogate protection in Canada is denied only in those cases where the person has, in fact, acquired citizenship in a given country or can obtain it as a result of matters entirely within his or her control. Thus, in order to deny a claimant refugee status based on the fact that he or she has citizenship in a country, the Board must find that he or she actually does have citizenship in that country or has an irrefutable claim to such citizenship. If the statute provides that the claimant might apply for citizenship, but not that the claimant actually has citizenship or will certainly obtain it, then the person should not be required to show that he or she is unable to find protection in the country of potential nationality.

[24] The Board concluded on this issue by stating that the law does not require these claimants to provide credible and trustworthy evidence that they have applied for, and been refused, PRC nationality, as the Minister's Representative submits.

Failure to Claim Elsewhere

[25] The Minister's Representative submitted that the Respondents had a duty to go to Australia to make a refugee claim, given that Australia is much closer to the Solomon Islands, and because they had previously visited there and two of their children attended school there. The Board commented that there was no legal authority that would support such a proposition.

[26] The Board concluded that the Respondents had established a well-founded fear of persecution in the Solomon Islands on account of their Chinese ethnicity. The Board also found that China was not a country of reference for any of the Respondents. Therefore, all of the Respondents were Convention refuges and their claims were accepted.

ISSUES

[27] The Applicant submits the following issues on this application:

1) Did the Board err when it found that state protection was not available to the Respondents in the Solomon Islands?
2) Did the Board err when it found that the Respondents were at risk of persecution in the Solomon Islands based on their Chinese ethnicity?
3) Did the Board err when it found that the Respondents had no obligation to apply for Chinese citizenship before being granted refugee protection in Canada?

STATUTORY PROVISIONS

[28] 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	**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

social group or political opinion,

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.

Person in need of protection

Personne à protéger

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

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*) 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

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) the person is unable or,

(i) elle ne peut ou, de ce fait,

because of that risk, unwilling to avail themself of the protection of that country,	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

[29] In *Dunsmuir v. New Brunswick* 2008 SCC 9 (*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.

[30] 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.

[31] 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 first two issues raised 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."

[32] The third issue involves a consideration of the correct legal test to be applied (which I have reviewed on a standard of correctness) as well the application of that test to the facts before the Board (which I have reviewed on a standard of reasonableness). In argument, the Applicant says that the Board applied the wrong legal test for state protection. I have also reviewed this issue on a standard of correctness.

ARGUMENTS

The Applicant

Board Erred When it Found that State Protection Was Unavailable

[33] The Applicant alleges that the Board held that state protection was not available to the Respondents in the Solomon Islands in one sentence in its reasons:

> The panel finds the claimants are at risk of persecution in the Solomon Islands based on their Chinese ethnicity. The panel further finds the documentary evidence suggests that state protection is not available, and accordingly, there is no reasonable internal flight alternative.

Board Applied the Wrong Test for State Protection

[34] The Applicant submits that the Board erred in law and applied the wrong legal test when it considered whether there was state protection available for the Respondents in the Solomon Islands. The availability of state protection is a crucial element in determining whether a refugee claimant has a well-founded fear of persecution. If state protection is available, then a claimant does not have a well-founded fear of persecution: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at

721-722 (*Ward*) and *Munderere v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 84 (*Munderere*) at paragraphs 34-39.

[35] The Applicant also cites *Ward* at 721-723 for the principle that persons who are seeking refugee protection in another country have the onus of proving that state protection is not available to them in their country of nationality. Absent a complete breakdown of state protection, a country must be presumed to be capable of protecting its citizens: *Ward* at 723-726.

[36] The Applicant argues that both the Supreme Court of Canada and the Federal Court of Appeal have held that, in order to rebut the presumption that a country of nationality is capable of providing protection, it must be proved that state protection is not available. Refugee claimants must provide "clear and convincing evidence" that establishes, on a balance of probabilities, that state protection is inadequate or non-existent: *Ward* at 723-726 and *Carrillo v. Canada (Minister of Citizenship and Immigration)* 2008 FCA 94.

[37] The Applicant points out that, in the current case, the Board did not determine whether there was "clear and convincing evidence" establishing that state protection was unavailable. Instead, the Board found that "the documentary evidence suggests that state protection is not available."

[38] The Applicant concludes on this issue that a finding that the documentary evidence "suggests" that state protection is not available is not equivalent to a finding or determination that there is "clear and convincing evidence" establishing, on a balance of probabilities, that state

protection is not available. Therefore, the Board erred in law and applied the wrong test when it found that state protection was not available on the basis that the documentary evidence "suggested" that state protection was not available.

[39] The Applicant argues that a finding by the Board that the evidence "suggests" that state protection is unavailable is not a finding that it is more likely than not that state protection is not available. It may be, at most, a finding that there is a possibility that state protection is not available; it is not a finding that it is more likely than not that state protection is not available.

[40] The Applicant also notes that the Board did not set out in its reasons any evidentiary basis for its finding that state protection is not available. Instead, the Board states that the "documentary evidence" suggests that state protection is not available. The Board did not even identify the "documentary evidence" upon which it relied.

Board Failed to have Regard for the Evidence

[41] The Applicant submits that, in addition to applying the wrong legal test, the Board also failed to have proper regard for the evidence before it when it found that the documentary evidence "suggested" that state protection was not available.

[42] The Applicant points out that the Board does not identify the documentary evidence upon which it relies when it says that "the documentary evidence suggested" that state protection is not

available. The only documentary evidence referred to by the Board in its reasons that might be relevant to the Board's finding that the evidence "suggested" that state protection is not available is: (1) a paper prepared by Professor Clive Moore that was critical of the way the police in the Solomon Islands handled the riots in April 2006; (2) a travel advisory from the Canadian government indicating that the police were limited in their ability to respond effectively to violent crime; and (3) two news reports indicating that the Australian government had sent additional troops to the Solomon Islands to restore calm.

[43] The Applicant submits that the Board's consideration of the documentary evidence relating to the availability of state protection in the Solomon Islands was cursory. There was documentary evidence, to which the Board does not refer, that the Regional Assistance Mission for the Solomon Islands (RAMSI), a multinational police-centered force organized by Australia, arrived in the Solomon Islands at the governments invitation in 2003 and restored law and order after a period of civil unrest in the country.

[44] The Applicant notes that the Respondents have not addressed the Applicant's submissions that the Board erred when it found that the Respondents had a well-founded fear of persecution if state protection was not available. There was no evidence before the Board that established that the Respondents would be at risk in the Solomon Islands if they returned.

[45] The Applicant alleges that the several documents cited by the Board do not reasonably suggest that state protection is not available in the Solomon Islands. Even if the criticism offered by

Professor Moor was accepted and the RAMSI poorly handled the April 2006 riots, it is not enough for a refugee claimant to show merely that his/her government has not always been effective in protecting persons in his/her situation in order to establish that state protection is unavailable. The Applicant further notes that Professor Moore is optimistic about RAMSI's ability to maintain law and order in the Solomon Islands. He ends his paper by stating that the future government in the Solomon Islands is looking better than it has since 1998 and RAMSI's presence should allow necessary reforms to take place." See: Clive Moore, *"No More Walkabout Long Chinatown: Asian Involvement in the Solomon Islands Economic and Political Processes"*, a paper presented on May 16, 2006 at the Australian Centre for Peace and Conflict Studies Seminar, University of Queensland.

[46] As regards the travel advisory from the Canadian government, the Applicant says that the fact that the police may not always be able to respond effectively to crime does not show that state protection is unavailable. The Canadian police cannot always respond effectively to crime.

[47] The Applicant says it is "noteworthy" that the Consular Information Sheet from the U.S. Department of State, dated September 2007, states the following about the capital city of Honiara:

> The Regional Assistance Mission in the Solomon Islands (RAMSI), a coalition of Pacific Island states that includes military and police forces from Australia and several other Pacific Island nations, has helped the Solomon Islands improve law and order. The Solomon Islands government and the vast majority of its citizens welcomed the intervention and security in the capital Honiara improved since the arrival of RAMSI in 2003. It is generally considered safe for visitors to walk the streets day and night, and there have been no reported security incidents against visitors.

[48] The Applicant concludes on this issue that the news reports indicating that the Australian government had sent additional troops to the Solomon Islands to restore calm do not show that state protection is unavailable. They show a commitment to providing state protection to persons in the Solomon Islands. The Applicant submits that one of the news reports relied on by the Board is from 2004, approximately four years ago, and is of little, if any, relevance to the situation in the Solomon Islands today.

Board Erred When it Found that the Respondents Were at Risk in the Solomon Islands

[49] The Applicant submits that, in addition to applying too low a test for finding that state protection was unavailable in the Solomon Islands, the Board also erred when it found that the Respondents had a well-founded fear of persecution if state protection was not available.

[50] The Applicant says that the Board failed to have regard for the material before it when it found that the Respondents had a well-founded fear of persecution in the Solomon Islands. The Board's consideration of the evidence relating to the Respondents' alleged risk in the Solomon Islands was, in the Applicant's view, as cursory as its consideration of the documents relating to the availability of state protection in the Solomon Islands.

[51] The Applicant highlights the test for a well-founded fear of persecution as being a "forwarding-looking test" that places the onus of proof on refugee claimants to show that they would be at risk of persecution if they returned to their home country.

[52] The Applicant says that the Board erred by, essentially, shifting the onus from the Respondents to show that they would be at risk of persecution in the Solomon Islands to the Minister to show that the Respondents would not be at risk.

[53] The Applicant submits that the only evidence regarding current conditions in the Solomon Islands that the Board referred to in its reasons were travel advisories from the Australian and Canadian governments, which indicated that violent crime had escalated in the Solomon Islands, particularly in the Chinatown part of the capital city, Honiara.

[54] The Applicant suggests that a fair reading of the travel advisories from the Australian and Canadian government shows concern about criminal activity and civil unrest, especially in Honiara, but it does not show that persons are at risk of persecution because of their Chinese ethnicity. The Applicant contends that evidence that crime has increased in a particular part of a city is not evidence that persons have a well-founded fear of persecution on the basis of their ethnicity. There are other reasons why crime might be higher in one part of a city that have nothing to do with ethnicity. As well, although there may be criminal activity and civil unrest in Honiara, this does not establish that persons are at risk throughout the Solomon Islands and that state protection is not available.

[55] The Applicant concludes that the Board failed to properly consider whether there might be an internal flight alternative for the Respondents, independent of the issue of the availability of state protection. If the Respondents were not at risk everywhere in the Solomon Islands, then the

Applicant contends that state protection is irrelevant, as any alleged lack of state protection does not create a risk if that risk does not otherwise exist.

Board Erred When it Found that the Respondents Had No Obligation to Apply for Chinese Citizenship

[56] The Applicant submits that the Board erred when it found that the Respondents had no obligation to try to re-acquire their Chinese citizenship before being granted refugee protection in Canada.

[57] The Applicant reminds the Court that one of the basic principles of international refugee law is that refugee protection is intended to be a back-up or "surrogate" protection to the protection that persons expect from their countries of nationality. International refugee protection is given when a claimant has no other alternative. Therefore, refugee claimants are required to approach their own countries of nationality for protection, or demonstrate that it is objectively unreasonable to have done so, before the responsibility of other states to provide them with protection becomes engaged. See: *Ward* and *Munderere* at paragraphs 34-39.

[58] The Applicant says that refugee protection is not intended to allow the practice of "country shopping," but is there to provide a safe haven to those who genuinely need it. Its purpose is not to give a quick and convenient route to permanent resident status for immigrants who cannot or will not obtain status in the usual way. Persons are not entitled to choose between becoming a refugee in one country over becoming a citizen in another country: *Grygorian v. Canada (Minister of Citizenship and Immigration)* (1995), 111 F.T.R. 316 (F.C.T.D.) (*Grygorian*).

[59] The Applicant cites *Williams* at paragraphs 22 for the proposition that a person's refugee claim will be denied even if they have a well-founded fear of persecution in one country "if it is within the control of the [person] to acquire the citizenship of a country with respect to which he had no well-founded fear of persecution."

[60] The Applicant points out that this Court has consistently held that it is within a person's control to acquire citizenship, so that a person's refugee claim should be rejected, if that person has an "automatic" right to citizenship in a safe country: *Alvarez v. Canada (Minister of Citizenship and Immigration)* 2007 FC 296; *M.R.A. v. Canada (Minister of Citizenship and Immigration)* 2006 FC 207; *De Barros v. Canada (Minister of Citizenship and Immigration)* 2005 FC 283; *Grygorian* and *Bouianova v. Canada (Minister of Employment and Immigration)* (1993), 67 F.T.R. 74.

[61] The Applicant argues that the issue in the present case is whether it may be within a person's control to acquire citizenship, even if the person does not have an "automatic" right to citizenship.

[62] The Applicant relies on *Williams* at paragraph 22 for the principle that it may be within a person's control to acquire citizenship of a country even where more than "mere formalities or technicalities," such as filing the appropriate documents are required to acquire citizenship. At paragraph 27 of *Williams*, the Federal Court of Appeal held that a person's refugee claim will be denied if it is within their control to acquire citizenship: "where citizenship in another country is

available, an applicant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his power to acquire that other citizenship."

[63] The Applicant submits that *Crast* leaves unanswered the question of whether it is within a person's control to acquire citizenship in a safe third country in some circumstances, even if it might not be certain or automatic. The Applicant cites *Khan v. Canada (Minister of Citizenship and Immigration)* 2008 FC 583 which held that it was not within a person's control to acquire citizenship in a country if the country's authorities had any discretion to refuse that person's application for citizenship. See: *Mijatovic v. Canada (Minister of Citizenship and Immigration)* 2006 FC 685.

[64] The Applicant points out that the Board found it was not in the Respondents' control to re-acquire Chinese citizenship. Although the Board accepted that the Respondents were entitled to apply to re-acquire Chinese citizenship, it was not certain that their application would be approved. The Board's interpretation, in the Applicant's view, is "overly restrictive and inconsistent with the concept of refugee protection as surrogate protection." The Board's Decision also encourages the practice of country shopping.

[65] The Applicant says that the evidence before the Board establishes that there was protection and a safe haven available to the Respondents in China if they were at risk in the Solomon Islands. Following the riots in the Solomon Islands in April 2006, the Female Adult Respondent and her two youngest children were evacuated by the Chinese government to China.

[66] The Applicant notes that the Board never referred to any evidence indicating that it was more likely than not that the Respondents would not obtain Chinese citizenship if they applied. Instead, the Board speculated that the Respondents might not obtain Chinese citizenship because they have four children. However, the Chinese authorities have already recognized the Respondents' connection to China and have previously offered them protection.

[67] The Applicant notes that the Respondents have already enjoyed protection and safe haven in China and Australia, but rather than applying to re-acquire or acquire citizenship in China, the Respondents elected to seek refugee status in Canada. Therefore, the Board erred when it held that the Respondents had no obligation to try to re-acquire their Chinese citizenship before being granted refugee protection in Canada.

[68] The Applicant points out that the Respondents' submissions do not respond squarely to the issue of whether it may be within a person's control to acquire citizenship in a third country. A claim should be refused, following *Williams*, even if a person does not have an "automatic" right to citizenship. The Applicant says that this issue is central to the Board's Decision because the Board found that *Williams* did not apply because it was not certain that the Respondents' application for Chinese citizenship would be approved, and the Board did not consider whether it might still be within the Respondents' control to acquire Chinese citizenship in the circumstances.

The Respondents

[69] The Respondents submit that included in the documentary evidence was a paper on the Solomon Islands that indicated as follows:

> The April riots were partly premeditated. The attacks were strategically targeted and clues existed before the outbreak that should have alerted the police to possible trouble. The police commissioner's lack of prior intelligence and a seemingly lack of an emergency plan to deal with what was always going to be a potentially explosive day, added to the poor performance of the RAMSI police and their lack of coordination with local police indicates that long-term changes will be necessary if the RAMSI the operation is to retain credibility.

[70] The Respondents note that the paper also states that there is rampant corruption and mismanagement in government in the Solomon Islands and that the 2006 riots were pre-mediated and clearly targeted the Chinese community. The Respondents also note that a response to information request confirmed that the Chinese community was targeted and that much of Chinatown was destroyed and, as a result, the Chinese government airlifted 325 citizens to China. Many Chinese nationals lost everything in the riots. A year after the riots, there was no rebuilding of Chinatown and there was a travel advisory against traveling to the Solomon Islands because of the violence. There was a similar travel advisory from the U.S. Department of State and Australian troops were sent to calm the violence in the Solomon Islands.

[71] The Respondents submit that also included in the evidence before the Board was the Nationality Laws of the People's Republic of China which indicate in Article 13:

> Foreign nationals who once held Chinese nationality may apply for restoration of Chinese nationality if they have legitimate reasons. Those whose application for restoration of Chinese nationality that have been approved shall not retain foreign nationality.

[72] The Respondents also cite a response to information which indicated as follows:

> It is possible to recover Chinese nationality after it has been lost. To recover Chinese nationality, a person must first renounce the other nationality they are holding and provide a report, for example proof of renunciation of other nationality and request reinstatement of Chinese nationality to Chinese authorities. Acquisition, loss or recovery of Chinese nationality can be requested or processed through Chinese Consulate or Embassies outside of China or inside China through the Public Security Ministry.

The Respondents' Testimony At Hearing

[73] Geoffrey, the Male Adult Respondent, testified at the hearing in detail about the problems he and his family have faced in the Solomon Islands. The Respondents note that they presented evidence at the hearing from an Immigration and Refugee Board of Canada, Responses to Information Requests which stated as follows:

> …the prevailing atmosphere of lawlessness, with frequent outbreaks of violence, widespread extortion, and compromised nature of the Royal Solomon Islands Police, whose senior officers maintained links with criminal gangs, were significant obstacles to recovery.
>
> From late 2002, the government's ongoing commitment to reform and fiscal discipline was increasingly undermined by extortion and other intimidation directed against the SI Government by criminal groups. The assassination of the former Police Commissioner (1982-1996) and National Peace Councillor Sir Fred Soaki in Auki on 10 February 2003, and the two day closure of commercial banks in Honiara in late May, as a result of threats, underscored the serious state of lawlessness in Solomon Islands.

[74] The Respondents conclude on this issue by pointing out that Shirley, the Female Adult Respondent, testified at the hearing that, even prior to the April 2006 riot, she and her husband experienced robberies at their store to which the police did not respond. She also testified that her husband was attacked by a person wielding a hammer, and sustained a head and eye injury, but the police stated that "they ha[d] no car to come" and never responded to the call.

Board Findings

[75] The Respondents submit that the Board made two important findings: (1) that the Respondents were credible; and (2) that the Board accepted the explanation for the omissions in their PIF. They allege that the Minister did not challenge these findings; therefore, the facts that were asserted by the Respondents must be accepted for the purposes of this application for judicial review.

[76] The Respondents submit that, based upon the evidence before the Board, and given the repeated, numerous attacks that were directed against the Respondents over a long period of time, as well as the repeated failure of the authorities to provide protection, and the documentary evidence which revealed that the police have failed to provide protection, the conclusion of the Board with respect to state protection was reasonably open to it.

[77] The Respondents stress that the Board found Geoffrey's testimony credible. There was no allegation of an error on the credibility issue by the Applicant. Therefore, the Board was entitled to

rely on the Respondents' evidence that the state had failed to provide protection on repeated occasions.

[78] The Respondents note that there is no allegation that there were alternate means of protection, or that the Respondents did not make efforts to obtain protection. There is evidence that efforts were made, that those efforts failed, and that the Respondents had suffered greatly. There was ample evidence to conclude that there was a failure of the state to provide protection.

[79] The Respondents cite and rely upon *Carrillo* at paragraph 30:

> **30** In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[80] The Respondents submit that the issue before the Board was whether or not the Respondents had met the burden of proof and had established the absence of state protection with reliable evidence, with probative value, that met the standard of proof. The evidence satisfied the Board that the Respondents had met the standard of proof. The Board's use of the word "suggests" was just a way of saying that evidence disclosed that state protection was not available. Therefore, this formulation is not incorrect and indicates that the Board was satisfied that it was more likely than not that state protection would not be forthcoming.

[81] In relation to the weighing of the evidence, the Respondents submit that there are several basic principles that emerge from the jurisprudence. The Board is not required to discuss each piece of documentary evidence and the Board is entitled to accept the evidence of the Respondents with respect to what happened to them. The Respondents note that the Board found that there was limited documentary evidence, accepted the Respondents as credible, and accepted the Respondents' version of repeated attacks directed at the Male Adult Respondent and the failure of the authorities to provide protection.

[82] The Respondents conclude that, given the totality of the evidence, there was nothing unreasonable about the conclusion of the Board.

Chinese Citizenship

[83] On this issue, the Respondents submit that whether some other alternate form of protection short of citizenship existed in China was not raised by the Minister and was not before the Board. Therefore, the mere fact that China evacuated some of the Respondents was not relevant or probative to the issue before the Board.

[84] The Respondents submit that, on the question of citizenship, there is but one issue that needs to be determined and that is the question set out in *Williams*: whether or not the person is a citizen or whether or not the person has the ability to obtain citizenship. The Respondents cite paragraph 22 of *Williams*:

> …The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in *Ward* and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention an the 1967 Protocol relating to the Status of Refugees* [Geneva, 1992] emphasizes the point that whenever "available, national protection takes precedence over international protection," and the Supreme Court of Canada, in *Ward*, observed, at page 752, that "[w]hen available, home state protection is a claimant's sole option."

[85] The Respondents submit that no error was made by the Board, particularly in light of Chinese Citizenship laws. The Respondents stress that the Board appreciated the circumstances and correctly noted that the Respondents did not have citizenship, since on each occasion when they returned to China, they had had to obtain temporary visas. The Board dealt with the evidence, applied the *Williams* test, and noted that, based on the evidence, there was no automatic right to citizenship. Therefore, the Board did exactly what it was required to do.

[86] The Respondents contend that the Applicant is attempting to suggest that “there was a duty for the tribunal to know the nature of how the discretion would be exercised in China.” However,

there was no evidence on this point and the only evidence was that there was a discretion and no certainty in the outcome. In the absence of evidence as to how the discretion would be exercised, it was not unreasonable for the Board to conclude that the test in *Williams* had not been met.

[87] The Respondents also note that the *Carrillo* decision does not hold that there is a higher burden of proof. The question at issue is not connected to the question of state protection but is a question of fact to be determined independently of the question of state protection by the Board based on the *Williams* test.

[88] The Respondents submit that the issue is whether or not the obtaining of citizenship would be a mere formality. The Board noted that, based on the evidence before it, it would not be a mere formality in the Respondents' case. The Respondents cite paragraph 32 of *Williams*:

> **32** Fourth, a person cannot be said to be deprived of the right of citizenship when he is given the possibility of renouncing the citizenship of a country where he is at risk of persecution in exchange of acquiring as a matter of course the citizenship of a country where he is not at risk. One's loss is one's gain. Further, it appears that a Rwandan citizen has an automatic and natural and historic right to Rwandan citizenship even if he has renounced it in order to acquire foreign citizenship (Rwanda Assessment, October 2002, paragraphs 5.3 to 5.5 and footnote 25(*g*), A.B., Vol. 1, Tab A, pages 119 and 165).

[89] The Respondents say there is no jurisprudence to support the Applicant's contention that an inference that can be drawn in favour of the acquisition of citizenship in such cases. The Respondents also submit that the Applicant's question of alternate protection in Australia and China was not raised. There is no evidentiary foundation to support a finding of exclusion under Article 1E

of the *Convention relating to the Status of Refugees,* Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, *entry into force* 22 April 1954, in accordance with article 43 (Convention). This would require evidence of a permanent status equivalent to citizenship.

[90] The Respondents submit that there is no requirement of evidence to demonstrate how discretion would be exercised in a citizenship decision. Evidence of discretion is all that is required.

ANALYSIS

State Protection

[91] The Applicant says that the Board applied the wrong test for state protection. In order to demonstrate this, the Applicant makes much of the Board's words that the "documentary evidence suggests that state protection is not available."

[92] My review of the Decision as a whole suggests to me that the Board does not shift the onus of proving a lack of state protection; nor does it lower the standard of proof. This is like arguing from paragraph 15 of the Decision that because the Board said "the question is whether these claimants face persecution in the Solomon Islands on account of their Chinese ethnicity" imposes too high a burden on the Respondents because it requires them to show that they will face

persecution and will be personally targeted. In my view, all such statements must be viewed in the context of the Decision as a whole to see what was really intended.

[93] The word “suggests” cannot be read in isolation as though it means that the Board found a mere suggestion of inadequate state protection to be sufficient. The word is obviously used by the Board in a colloquial sense to mean something such as “demonstrates” or “shows.” The full Decision also reveals that, as regards state protection, the Board placed a great deal of emphasis upon the first-hand evidence of the Respondents. Hence, when the Board turns to the documentary evidence it is, in effect, saying that the documentary evidence supports the direct evidence of the Respondents.

[94] This is not, in my view, a shift in the onus of proof or a lowering of the obligation on the Respondents to demonstrate with clear and convincing evidence, on a balance of probabilities, that state protection is inadequate.

[95] Applying a standard of correctness, I can find no reviewable error on this point.

Review of Evidence

[96] The Applicant also complains that the Board conducted a cursory view of the evidence that was available on state protection. The Applicant says that, in effect, the Board shifted the onus to

the Minister to disprove inadequate state protection in a context where there was a paucity of country documentation.

[97] It is true that the Board itself acknowledged a "paucity of objective country documentation to assist the panel in assessing what the current treatment of people of Chinese descent [is] in the Solomon Islands." The word paucity can mean "insufficient" in some contexts; however, it can also mean smallness in number or quantity. In the context of this Decision, the latter meaning is the one intended. I say this because the Officer felt that, notwithstanding that the available documentation was less than for other areas of the world, there was enough to allow him to make a decision that the available documentary evidence supported the Respondents' claim and their own account of the situation in the Solomon Islands.

[98] I think that what the Applicant is really taking issue with here is whether there was a sufficient evidentiary base to support the Board's conclusions on the inadequacy of state protection. However, as the Applicant has often pointed out to the Court in other cases, I am not in a position to simply re-weigh the evidence and come to a different conclusion that favours the Applicant.

Forward-Looking Risk

[99] The Applicant also says that the Board did not conduct a forward-looking evaluation of risk. This does not seem to accord with the Board's own description of what it is doing. In paragraph 16, when the Board refers to the "objective country documentation," the Board makes it clear that it is

assessing "the current treatment of people of Chinese descent in the Solomon Islands," (emphasis added). The final conclusion on risk at paragraph 24 is that "the claimants are at risk of persecution" and that "state protection is not available."

[100] Once again, I think that the Applicant's real complaint is that the available evidence does not support these conclusions on forward-looking risk.

[101] In the end, then, I believe that, apart from the Citizenship issue, the Applicant is really asking the Court to examine the available evidence to determine whether it will support the Board's conclusions on risk and inadequate state protection. In doing so, I must be cognizant of the voluminous case law, and numerous admonitions received from the Applicant in other cases, that the Court is not here to re-weigh evidence. This is the job of the Board. The Applicant must convince the Court that this Decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law," to use the well-known words of *Dunsmuir*.

The Evidence

[102] As the Decision as a whole reveals, the Board's conclusions are based upon the credible evidence of the Respondents concerning what had happened to them in the past and their fears for the future. The Minister's Representative at the hearing specifically called into question Geoffrey's testimony because of his failure to note certain incidents in his PIF. But the Board concludes that

Geoffrey's explanation for the omissions was satisfactory. No credibility concerns are expressed by the Board.

[103] The Board's conclusions in paragraph 24 of the Decision are that:

a) The Respondents are at risk in the Solomon Islands based on their Chinese ethnicity; and

b) The documentary evidence suggests that state protection is not available and, accordingly, there is no reasonable internal flight alternative.

[104] Counsel for the Applicant has referred me to specific areas of the record where she feels the evidence reveals that the Board's conclusions are untenable. Likewise, counsel for the Respondents has referred me to other portions of the record to show that the Board's conclusions are reasonably sustainable. Inevitably, this involves the Court in sifting and weighing evidence.

[105] I have looked at each area of concern raised by the Applicant and I can see that there are other possible interpretations and conclusions that the Board might have drawn from the evidence before it. I can see, for example, that a decision in favour of the Applicant on the basic issues of risk and state protection may well have been reasonable. What I cannot say, however, is that the Decision in favour of the Respondents falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. See: *Canada (Minister of Citizenship and Immigration) v. Khosa* 2009 SCC 12 and *Dunsmuir*.

Citizenship

[106] This is another area where the Applicant argues that the Board improperly shifted the onus to the Minister to show, in this instance, that there was no possibility that citizenship would be refused, and that the Minister had to show that citizenship would be granted.

[107] The Applicant also says that, in *Williams*, the Federal Court of Appeal did not address the problem that arises on the present facts. In the present case, the Chinese authorities have a residual discretion to grant citizenship to the Respondents. There is no way of telling how they would have exercised that discretion if the Respondents had made citizenship applications.

[108] In such a situation, the Applicant argues that the Respondents are under an onus to produce some evidence to show that they will not be able to acquire citizenship, in the same way as the Respondents are required to show that they will not receive adequate state protection if returned to the Solomon Islands. Otherwise, the Applicant says that the Minister is placed in the impossible position of having to prove that the Respondents would not be denied citizenship if they applied to the Chinese authorities.

[109] This very issue was raised by the Minister's counsel before the Board and is clearly addressed in the Decision. In fact, in paragraph 32 of the Decision, the Board agrees with Minister's counsel concerning the onus and the standard of proof:

> In paragraph 10 of the Minister's Representative's submissions, he states "The question then becomes is it more likely than not that the

> claimant will obtain PRC nationality if they apply for it? The panel concurs that this is right question to ask.

[110] Once again, it is over the matter of the available evidence on point where the Board parts company with the Applicant. See paragraph 33 of the Decision:

> This is where the panel takes issue. Indeed, the panel finds the evidence demonstrates that it is not guaranteed, automatic, or a mere formality that they could re-instate their Chinese nationality.

[111] So the dispute in the present case is whether the Respondents were required to show anything more than that, if they applied for citizenship, it was not a mere formality. Were they required to demonstrate that, if they applied for citizenship, it was more likely than not that they would be refused?

[112] The Board itself, in paragraph 36 of the Decision, points to *Williams* as the authority for the Board's Decision and actually quotes the key passage from that case:

> This panel finds that the claimants have met the tests set out in *Williams*. The re-instatement of Chinese nationality is not within their control. Although they could have applied, the provisions of the Nationality Laws of China make it clear it is far from automatic. In accordance with *Williams*, it is not "within the power" to acquire it.

[113] By referring to this passage from *Williams* the Board makes clear that it was fully aware that the test is "power within the control of the applicant," rather than other tests such as "mere formalities."

[114] The Board also demonstrates its awareness of what is at issue by making a direct comparison between the situation in *Williams* – "Ugandan citizenship was there for him to acquire, if he had the will to acquire it" – and the situation of the Respondents in this present case:

> This is not exactly the issue in the case at hand. The bars to re-obtaining Chinese nationality are not only contingent upon perfunctory renunciation of their Solomon Island status, as was the issue in *Williams*. The process with respect to China is not automatic, involved an application process, and required approval by government officials.

[115] Consequently, the Board found that the Respondents "met the tests set out in *Williams*:" The Board says "In accordance with *Williams*, it is not within his power to acquire it."

[116] What is more, in applying *Williams*, the Board provides full reasons as to why it is not within the Respondents power to acquire Chinese citizenship:

> 40. Given the fact these claimants have four children, it cannot be stated with any degree of certainty, that the application would be approved. The evidence regarding what might happen upon their return is equivocal, and thus not certain. On the one hand, the Minister's Representative in his submissions quotes from one of the Board's documents that generally people are welcomed back, and children born outside are largely forgiven. Yet this same document confirms the principles of one child policy remain in effect, and are said to apply to returned overseas Chinese and their families. The same document suggests that social fines of three to six times the average per capita net income would apply to child policy violations, and references an attempt by the authorities to force one woman who returned to have an abortion (it was later rescinded).
>
> 41. The adult claimants also testified about their worries about returning to China. They testified they had made inquiries, and were told they would be required to at best pay a large fine, and at worse, undergo sterilization. When placed in the context of the state's one-child policy, it is reasonable that the claimants were fearful of re-applying for Chinese nationality.

[117] There was evidence before the Board to demonstrate that it was not within the control of the Respondents to acquire Chinese citizenship, which is the test dictated by *Williams*. The children alone would cause them all kinds of problems and Shirley gave evidence that she might also be subjected to forced sterilization.

[118] The Applicant wants to push this issue further to say that the Respondents should have been required to demonstrate that it was more likely than not that, if they applied, they would not be granted Chinese citizenship. In fact, at the refugee hearing and as part of this application, the Applicant also argued that the Respondents were under an obligation to show that they had applied for, and had been refused, Chinese citizenship.

[119] This argument was, in my view, correctly rejected by the Board as being contrary to *Williams*. But it does show where the Applicant wants to push this issue. In my view, to go beyond *Williams* in order to do what the Applicant wants to do would impose an intolerable burden upon people in the position of the Respondents.

[120] It is certainly within the control of the Respondents to submit an application for Chinese citizenship but, on the evidence, it was not within the control of the Respondents to acquire Chinese citizenship, and the evidence suggested to the Board that they faced serious problems in doing so.

[121] In my view, then, the Board correctly applied *Williams* to the facts of this case. I can find no error of law on this point and the conclusion, reached by applying the law to the facts, falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[122] For the reasons given, I am of the view that this application should be dismissed.

[123] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-4223-08
STYLE OF CAUSE:	***THE MINISTER OF CITIZENSHIP AND IMMIGRATION***
	v.
	SHIRLEY WU CAI HUA MA et.al.
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	June 17, 2009
REASONS FOR JUDGMENT And JUDGMENT:	RUSSELL J.
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WRITTEN REPRESENTATIONS BY:

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