Federal Court  Cour fédérale

Date: 20100727

Docket: IMM-6228-09

Citation: 2010 FC 783

Ottawa, Ontario, July 27, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HEE HYUN NAM
HWAN JEE
YAE IN JEE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated November 18, 2009, wherein the applicants' claim to refugee status pursuant to section 96 and 97 of the IRPA was refused.

[2] Hee Hyun Nam (the principal applicant) and her children, Hwan Jee and Yae In Jee are citizens of the Republic of South Korea. Hee Hyun Nam was appointed as the designated representatives for the minor applicants. They claim protection pursuant to section 96 and subsection 97(1) of the IRPA.

[3] These are my reasons for dismissing the application.

Background

[4] Ms. Hee Hyun Nam, the principal applicant and a citizen of South Korea, married her husband, Mr. Ho Young Jee on May 19, 1991. They have two minor children: their daughter Yae-In, aged eleven and son Hwan, seventeen.

[5] Ms. Nam claims that while they were still resident in South Korea, her husband gambled and physically and verbally abused her. She says that her husband continuously abused her from1996 to 2008, with the exception of the first two years following their arrival in Canada, from 2003 to 2005.

[6] During the course of this abuse, the principal applicant's husband threatened to kill her and their two children, choked her, put a knife to her stomach and throat, beat her with a chair and physically assaulted her on an almost constant basis. Ms. Nam also alleges that her husband threatened to kill their two children in a murder suicide pact. As a result of the prolonged abuse that she endured, Ms. Nam suffers from acute anxiety and depression.

[7] Ms. Nam did not report the abuse nor did she seek the protection of the South Korean authorities, police, social or legal agencies, family or friends in South Korea. Ms. Nam did not do so for cultural reasons and because, in her view, the police do not offer adequate protection to victims of intimate partner violence in Korea.

[8] After arriving in Canada in January 2003, Ms. Nam's husband ceased to abuse her until 2005 when he began gambling again. When the abuse by her husband commenced again, it was of the same nature and severity as previously inflicted until June 2008 when Ms. Nam's husband abruptly left the family home to return to South Korea.

[9] On August 27, 2008, Ms. Nam made a claim for refugee protection for herself and her two children, based upon the serious domestic violence/abuse that she had experienced at the hands of her husband in South Korea and here in Canada.

[10] Ms. Nam says that although her husband never physically attacked their children or held a knife to them, the children were seriously affected by the violence as they witnessed their father's threats and saw him beating their mother and holding a knife to her throat. Ms. Nam's children manifest corresponding symptoms of anxiety and fear.

[11] Ms. Nam also did not seek protection from the Korean police or others for her children because cultural norms in Korea dictate that as their father, Ms. Nam's husband could act with impunity towards their children.

[12] Ms. Nam believes that her husband will continue to make their lives a living nightmare if they are returned to South Korea. She also believes that her husband will seek custody of the children. Further contact with their father in South Korea would expose the children to his violent and abusive behaviour.

Decision Under Review

[13] The determinative issue in this case was the credibility of the principal applicant's Personal Information Form (PIF) and oral testimony concerning her subjective fear of persecution as a victim of domestic violence, whose profile puts her at risk of persecution should she return to South Korea. A further determinative factor is the issue of state protection and its adequacy, and the state's willingness to effectively implement procedural and legislative frameworks in an effort to protect its citizens.

[14] The panel found on a balance of probabilities that the principal applicant suffered threats, verbal and physical harm from her abusive husband and that her children suffered verbal abuse. However, the panel found that adequate state protection is available in the Republic of South Korea and that the principal applicant failed to take all reasonable steps to obtain this protection. Furthermore, should the principal applicant return to South Korea, the panel found, on a balance of probabilities, that state protection would be available to the principal applicant and her children.

[15] In applying the forward-looking test for refugee protection, the panel found that the South Korean government is capable of providing protection to the applicants through its legislation, police and judicial system.

[16] It was found that the principal applicant failed to seek state protection as she never contacted the South Korean police or the agencies, hotlines, legal resources or shelters available to provide assistance to abused women.

[17] The panel member noted that the Republic of South Korea is a constitutional democracy and that the civilian authorities maintain effective control of its security forces and the state generally respects human rights. It was said that state protection does not have to be perfect, with the applicable standard being whether the police make serious efforts to protect citizens at risk.

[18] The panel's reasons note that country documentation indicates that the South Korean government and police agencies take the issue of domestic abuse as a serious issue and they do extend protection to victims. The panel was cognizant that domestic violence continues to remain a problem in South Korea.

[19] Regarding Dr. Clifton R. Emery's Report on partner violence, provided by counsel, the panel found on a balance of probabilities, that given the small sample size of the research, its' results could not be reasonably applied to the general population of South Korea. While not dismissing Dr. Emery's report, the panel did not prefer Dr. Emery's report over other country conditions documents, which are also provided by unbiased sources.

[20] The panel concluded by finding that although the principal applicant's inaction in seeking state protection may have many causes, including psychological and cultural reasons, this inaction is not unique to women in South Korea, but is commonly known to occur in differing countries and cultures.

Issues

[21] The issues raised by the parties can be narrowed to the following:

a. Did the panel member err in failing to provide an independent analysis of the minor children's refugee claim?

b. Did the panel member err in finding that the principal applicant did not seek the assistance of South Korean authorities and that she failed to rebut the presumption of state protection?

Analysis

[22] I agree with the recent findings of my colleague Justice Shore stating that questions relating to the adequacy of state protection are to be reviewed on a standard of reasonableness: *Kim v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 149, [2010] F.C.J. No. 177, at para. 28, citing: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584, at para. 38.

[23] I also adopt the following comments of Justice Shore on the application of the standard of reasonableness, again in *Kim*, above, at para. 29:

> **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).

[24] Cognizant of the fact that the issues that were before the panel in this case do not lend themselves to one specific result, I am unable to intervene in the panel's conclusion that a state, such as South Korea, that is actively trying to engage and protect victims of domestic violence cannot be considered to be unable or unwilling to provide state protection when the principal applicant has failed to approach the state for protection.

[25] Acknowledging the reality of the special vulnerability of children's claims and the need for special procedural protections, as argued by the applicants, I am unable to find that the panel's reasons did not focus on both the principal and child applicants in this case. The authorities cited by the applicants are of limited assistance as these cases dealt with unaccompanied minors: *Lorne v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 384, [2006] F.C.J. No. 487; *Charles v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 103, [2007] F.C.J. No. 137.

[26] Ms. Nam, as the designated representative of her two children, had the responsibility to present the claims of the minor applicants. While it does not appear from the record that she failed in the exercise of that responsibility, any inadequacy there may have been in the representation of the children's interests is not attributable to the panel: *Manalang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1368, [2007] F.C.J. No. 1763, at para. 111; *Kurkunov v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1377, [2001] F.C.J. No. 1895, at para. 11.

[27] I note that the child applicants did not provide their own individual PIFs, specifically stated that they relied on the PIF of their mother, the principal applicant, and that the applicants who had the opportunity to modify their PIFs at the hearing chose instead to confirm that their PIFs were complete and accurate. The principal applicant's PIF states that her husband never hit the children. The panel was entitled to rely on that statement. Thus, I am unable to find that the letters provided by the child applicants, submitted shortly before the hearing and raising vague allegations of physical abuse, were improperly assessed by the panel.

[28] The argument that the panel erred by not independently analyzing the claims of the minor children individually is not persuasive as the claims of the minor children were linked to the claim of their mother, the principal applicant: *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 467, [2008] F.C.J. No. 591, at para. 20.

[29] I agree with the respondent that the child applicants did not raise separate claims from that of their mother and I am satisfied that the panel's analysis did adequately focus on the claims of both the principal and child applicants in its reasons.

[30] Regarding the second issue in this case, I am also unable to find that the panel member erred in its determination of state protection and its adequacy. I note that the panel's reasons observed that country documentation indicated that the South Korean government and police agencies take the issue of domestic abuse as a serious issue and that they do extend protection to victims. I find that

the panel was cognizant of the reality that domestic violence continues to remain a problem in South Korea.

[31] The panel reasonably found, in my view, that although the principal applicant's inaction in seeking state protection may have many causes, including psychological and cultural reasons, this inaction is not unique to women in South Korea, but is commonly known to occur in differing countries and cultures.

[32] As I have previously stated in *Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723, [2008] F.C.J. No. 969, at para 10, the decision of the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, such as South Korea, the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for the principal applicant merely to show that her government has not always been effective at protecting persons in her particular situation: *Canada (Minister of Employment and Immigration) v. Villafranca* (F.C.A.), (1992), 18 Imm. L.R. (2d) 130, [1992] F.C.J. No. 1189.

[33] Further, I emphasise Justice Tremblay-Lamer's finding that South Korea is a functioning democracy and is presumed to be able to protect its citizens: *Song*, above, at para. 14:

> **14** As correctly stated by the Board, South Korea is a functioning democracy and as such it is presumed to be capable of protecting its citizens. As indicated by my colleague Madam Justice Johanne Gauthier in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181 (QL), at para. 21 "In developed democracies such as the U.S. and Israel, it is clear from *Hinzman* (at paras. 46 and 57) that to rebut the presumption of state protection

> this evidence must include proof that an applicant has exhausted all recourses available to her or him." However, the situation is different for developing democracies whose position on the "spectrum of democracy" may dictate a weaker presumption, which is not the case with South Korea.

[34] In light of the documentary evidence regarding South Korea's ability to protect women who are victims of domestic violence, the fact that South Korea is a functioning democracy, and considering that the principal applicant failed to seek state protection as she never contacted the police or other agencies, hotlines, legal resources or shelters, it was reasonable for the panel to conclude that adequate state protection was available to the principal applicant and her two children.

[35] I do not accept the applicants' argument that the panel erred when it failed to specifically mention (1) the study entitled "Police Response to Domestic Violence in Korean" (the KNPU report); and (2) the collection of affidavits from five women respecting their personal experience and knowledge of Korean society. The failure to mention some documentary evidence is not fatal to the panel's decision, as the panel is assumed to have weighed and considered all the evidence presented unless the contrary is shown: *Florea v. Canada (Minister of Employment and Immigration)* (F.C.A.), Appeal No. A-1307-91, [1993] F.C.J. No. 598, at para. 1.

[36] As stated in *Kim*, above, at para. 69, "even though the panel 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."

[37] The panel noted that there is criticism of state protection for victims of domestic violence in South Korea. It was also stated that protection was not perfect. I think it clear from the reasons,

read as a whole, that the panel considered the documents cited by the applicants: *Quinatzin v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 937, [2008] F.C.J. No. 1168, at para. 30; *Sholla v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 999, [2007] F.C.J. No. 1299, at paras. 13-14.

[38] The panel's finding that the principal applicant was unsuccessful in rebutting the presumption of state protection, in light of her inaction in seeking protection, should stand as the panel's reasoning process was not flawed and the resulting decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[39] I find that the process adopted by the panel and the resulting outcome fit comfortably with the principles of justification, transparency and intelligibility. Accordingly, it is not open to this Court to intervene: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[40] In light of the above, I conclude that the panel made a reasonable decision when it found that the principal applicant had not adduced sufficient probative evidence to rebut the presumption that state protection in South Korea was available to her.

[41] Accordingly, I must dismiss the application. No questions were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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