Federal Court  Cour fédérale

Date: 20101209

Docket: IMM-1944-10

Citation: 2010 FC 1269

Ottawa, Ontario, December 9, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

INSUN PARK
(a.k.a. IN SUN PARK)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 9, 2010, wherein the applicant was determined not to be a Convention refugee or a person in need of protection under

sections 96 and 97 of the Act. This conclusion was based on the Board's negative credibility finding and a finding that state protection was available to the applicant.

[2] The applicant requests that the decision of the Board be set aside and the claim remitted for re-determination by a differently constituted panel of the Board.

Background

[3] Insun Park (the applicant) was born on July 25, 1966 and is a citizen of the Democratic Republic of Korea (South Korea).

[4] In October 1988, the applicant married Mr. Mooyong Kim and shortly after he became violent with her. The applicant described several incidents of violence in her Personal Information Form (PIF) which resulted in her being hospitalized. The applicant claims that she also feared her husband because he was affiliated with a gang.

[5] The couple divorced in 2003, although the applicant states that this was a sham divorce orchestrated by her husband to protect their house from seizure by creditors. Her husband moved out of the house, but the applicant stated that he would return occasionally and physically and sexually assault her.

[6] In 2004, the applicant began an email-based relationship with a Korean man, Mr. Yeon, who was living without status in Canada. In August 2007, the applicant states that her husband found a

letter from Mr. Yeon and consequently became very violent with her. In March 2008, the applicant travelled to Canada to visit Mr. Yeon. The applicant's husband was, she attests, furious that she had gone to visit Mr. Yeon and told her that he and his 'henchmen' would kill her and Mr. Yeon.

[7] When the applicant returned to Canada in May 2008, she was stopped by Canada Border Services Agency (CBSA). While being interviewed, the applicant became paralyzed in her hands and feet and was hospitalized in a psychiatric ward. The following day she returned for further questioning and claimed refugee protection in Canada.

Board's Decision

[8] Applying the *Guidelines on Women Refugee Applicants Fearing Gender-Related Persecution* (the Gender Guidelines), the applicant's refugee hearing was heard by a female Board member, tribunal officer and interpreter. The Board agreed for the applicant's counsel to begin questioning the applicant.

[9] The Board found that the applicant was not a Convention refugee or person in need of protection. This was based on credibility concerns regarding the applicant's subjective fear of persecution as a victim of domestic assault. As a result of these credibility concerns, the Board concluded that the applicant was not physically abused by her former husband. In the alternative, the Board also found that adequate state protection exists for the applicant in South Korea.

[10] The Board found that the applicant inconsistently described the assault of 2007. The applicant had difficulty remembering this event without leading from counsel and she described the violence in her PIF differently than in her oral testimony. The applicant further testified that she had been out of the country when her husband found a letter from Mr. Yeon, which contradicted her PIF and earlier testimony. She later stated that her husband was immediately violent after finding the letter. The Board found that the applicant was in Australia when her former husband found the letter and concluded that the assault was fabricated.

[11] In its decision, the Board was further concerned with the applicant's omission from her PIF of her husband's senior role in the gang and the name of the gang. The applicant testified about overhearing gang members say they would bury someone. When asked about whether she reported this, she responded she did not take it seriously because they were just joking. The Board drew a negative inference from this response as to her credibility.

[12] The Board also found the applicant's descriptions of her relationship with Mr. Yeon to bbe inconsistent. In oral testimony, she said Mr. Yeon was a friend that she had known at school. In her PIF she said she had never met him in person. In her Port of Entry (POE) interview with CBSA, she stated that she was in a common-law relationship with Mr. Yeon but at the hearing stated that she had not used the term common-law and did not know the meaning of it despite having indicated that she understood the translation during the POE interview. The Board found this explanation implausible given the number of times the term appears in the POE notes.

[13] Finally, the Board drew a negative inference from the applicant's testimony that her husband had threatened to kill her mother and yet the applicant knew few details of what happened and could not explain why she did not ask her mother what had happened.

[14] Applying *Sheikh v. Canada (Minister of Employment and Immigration)* (1990), 71 D.L.R. (4th) 604, [1990] F.C.J. No. 604 (QL) (F.C.A.), due to numerous contradictions and inconsistencies between the applicant's oral testimony, PIF, Citizenship and Immigration Canada (CIC) declaration and interview with CBSA, the Board rejected all of the applicant's evidence as not credible.

[15] The Board gave no evidentiary weight to the verification of hospitalization form from August 20, 2007 because the Board had found that the assault did not occur. Similarly, the Board assigned no weight to a letter from a Canadian doctor stating that applicant's body had scarring consistent with the type of abuse outlined in her PIF as the letter was based on the applicant's story of abuse which the Board had rejected as not credible. Finally, the Board assigned no weight to a psychological report because it was produced in one session with no referral for follow-up care.

[16] The Board concluded that the applicant was not abused by her husband.

[17] In the alternative, the Board found that there was adequate state protection available for the applicant in South Korea.

[18] The Board found that the applicant had never approached the South Korean authorities for protection from her husband. It noted her explanation that she thought her husband would be more

abusive and that she saw on television and the internet that the police do not assist victims of abuse. The burden was on the applicant to provide clear and convincing evidence that the state was unable to protect her. This burden is proportional to the level of democracy in a country and South Korea is a constitutional democracy in control of its security forces. The Board concluded that South Korea takes domestic violence seriously and has enacted several laws to combat and respond to domestic violence.

[19] The Board considered the report from Dr. Clifton Emery on domestic violence in South Korea, but found that it was not persuasive that South Korea could not protect the applicant.

[20] The Board concluded that the applicant had not rebutted the presumption of state protection in South Korea and denied the refugee claim.

Issues

[21] The applicant submitted the following issues for consideration:

1. Did the Board member fail to adequately consider the totality of the evidence in determining that the applicant had not been abused?

2. Was the Board member overzealous in making credibility findings? Did she misconstrue the evidence in doing so? Did she make negative credibility findings based on peripheral issues?

3. Did the Board member ignore the *Guidelines on Women Refugee Applicants Fearing Gender-Related Persecution* by failing to consider the specific cultural and psychological factors that kept the applicant from reporting her abuse?

4. Did the Board member selectively read and misconstrue the documentary evidence?

[22] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in assessing the applicant's credibility?

3. Did the Board err in its analysis of state protection?

Applicant's Written Submissions

[23] The applicant submits that the Board misconstrued the evidence before it in making its negative credibility findings.

[24] The Board found that the applicant was not assaulted in 2007 because she was in Australia when the alleged assault occurred. However, it is clear from both the oral testimony and her PIF that the applicant was not in Australia and did not testify that she was.

[25] The Board found that the applicant was inconsistent about her relationship with Mr. Yeon because she described the relationship as common-law in her POE interview and then testified that she had never heard the term common law. The Board's conclusion was unreasonable because there is no record of what the applicant or translator said in Korean during the POE interview. It was

further a misconstruction for the Board to find that the applicant's evidence of her husband's gang affiliation was inconsistent because she mentioned that her husband had men and underlings in her POE and referred to his henchmen in her PIF.

[26] The Board erred in law by ignoring the extrinsic evidence of the 2007 hospital report from South Korea and the Canadian medical report regarding the applicant's scarring. The Board was not permitted to ignore extrinsic evidence on the basis that applicant's oral testimony lacked credibility.

[27] The remainder of the Board's credibility findings were based on peripheral issues. The applicant submits that whether she met Mr. Yeon through a friend or on the internet, whether she used the term common law to describe their relationship and how and when her husband found the letter from Mr. Yeon are all irrelevant to the issue of whether she was severely beaten by her husband and hospitalized on numerous occasions and whether she would remains at risk if returned to South Korea. It was a reviewable error for the Board to focus on the details and not the substance of the applicant's claim.

[28] The applicant submits that the Board ignored the Gender Guidelines by not considering what were the psychological and cultural factors preventing the applicant from reporting abuse and how they prevented her from seeking police protection. The Board was obliged to consider the particular social and cultural circumstances of the applicant according to the Gender Guidelines.

[29] Finally, the applicant submits that the Board erred in its assessment of state protection. The Board selectively relied on the documentary evidence. It focused on the enactment and content of

legislation to address domestic violence and not on whether the legislation is adequately enforced. The Board ignored evidence that police responses to domestic violence in Korea are unsatisfactory and that police blame victims and are reluctant to make arrests putting victims at heightened risk.

[30] The Board's credibility and state protection findings were both unreasonable and the judicial review should be allowed.

Respondent's Written Submissions

[31] The respondent submits that the Board's credibility findings were reasonable. The Board is in a better position to assess credibility than this Court as this is at the heart of its specialized jurisdiction. The Board found numerous inconsistencies and implausibilities in the applicant's testimony, specifically that:

- the applicant was unable to answer questions about the assault in 2007 without leading questions and her description of the event differed from her PIF;
- she provided inconsistent and contradictory information about her whereabouts when her husband discovered the letter from Mr. Yeon;
- her allegations about her husband's gang membership evolved over the course of questioning and this information was omitted from her PIF; and
- she provided inconsistent and unreasonable responses regarding her relationship with Mr. Yeon and the circumstance of their meeting.

[32] The Board properly considered the extrinsic evidence and it acknowledged the evidence of injury but reasonably concluded that it was not clear that the injuries had been incurred in the manner described by the applicant.

[33] The Board reasonably determined that the applicant had not rebutted the presumption of state protection. The Board reviewed that documentary evidence and acknowledged that domestic abuse is a serious societal issue in South Korea and that state protection is not always perfect. However, South Korea is a functioning democracy and the applicant was required to make reasonable efforts to pursue domestic avenues of state protection before seeking protection abroad. The applicant did not approach the South Korean authorities and the Board's conclusion that she failed to rebut the presumption was reasonable.

[34] The judicial review should be dismissed.

Analysis and Decision

[35] **Issue 1**

What is the appropriate standard of review?

This Court need not undergo a standard of review analysis in every case. Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57).

[36] Credibility findings lie at the heart of the Board's expertise in determining the plausibility of testimony and drawing inferences from the evidence. Assessments of credibility are essentially pure findings of fact and it was Parliament's express intention that administrative fact finding would command this high degree of deference and will be reviewable on the reasonableness standard (see *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 46).

[37] Assessments of the adequacy of state protection raise questions of mixed fact and law and are also reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171 at paragraph 38).

[38] In reviewing the Board's decision using a standard of reasonableness, the Court should not intervene on judicial review unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59).

[39] **Issue 2**

Did the Board err in assessing the applicant's credibility?

The applicant submits that the Board misstated the facts of the applicant's case and misconstrued the evidence when making its negative credibility finding. I agree.

[40] First, the Board based its finding that the applicant was not assaulted by her former husband in 2007, in large part, on its belief that she was in Australia at the time. The Board stated:

> The Panel has found on a balance of probabilities that the assault did not occur because the applicant had testified that she was in Australia when her former husband discovered the letter.

[41] The Board also stated that the applicant declared in her PIF that in the summer of 2007, she was in Australia for a week. These findings are incorrect. The applicant stated in her PIF that she was in Australia in 1997, not 2007. Similarly, while at one point in the hearing the applicant testified that she was out of the country when her husband found the letter from Mr. Yeon, she never testified that she was in Australia (tribunal record, page 399).

[42] I agree with the applicant that the Board's own misconstruction of the evidence influenced its credibility finding (see *Mushtaq v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1066, 33 Imm. L.R. (3d) 123 at paragraph 6). If this were the only error, it might not be fatal to the Board's decision, as the applicant's evidence was somewhat inconsistent on how and when she was assaulted by her husband in 2007. However, other errors were present in the credibility finding.

[43] The Board found that the applicant was misleading about her relationship with Mr. Yeon. In her POE interview, the applicant described Mr. Yeon as a common law partner, whereas she testified at the refugee hearing that she had never heard the term common law. The Board found it implausible that she did not use the word common law in the POE interview, given the number of times it appears in the POE notes. In *Neto v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 565, Mr. Justice Douglas Campbell held that:

> 6 In my opinion, the IRB statement just quoted forms a patently unreasonable basis for discounting the Applicant's evidence since it cannot be known what was said by the Applicant to the interpreter, or what was said by the interpreter to the Applicant, since both sides of

> the conversation occurred in Portuguese. As the translation which forms the port of entry notes is not appended to an affidavit or other declaration of accuracy, and since the identity of the interpreter is not known, and since the qualifications of the interpreter are not known, I find it is a reviewable error for the IRB to make an assumption that the translation is accurate, particularly in the face of the objection as to it's accuracy voiced by the Applicant.

[44] I agree with the applicant that based on *Neto* above, the Board's finding was unreasonable since there is no record of what the applicant or translator said in Korean at the time of the POE interview.

[45] The Board found that the applicant's evidence on the fact of her former husband belonging to a gang was unreliable in part because she did not mention the gang name in the POE interview or her PIF and she did not indicate her husband's level in the gang. The Board did acknowledge in the refugee hearing that the applicant mentions the gang in her PIF. I agree with the applicant that the language used in the POE and PIF also indicate her husband's level in the gang. In the POE, she stated that her husband was involved in organized crime and in her PIF she refers to his henchmen. This was consistent with her later testimony on her husband's membership and role in a gang.

[46] Finally, the Board gave no weight to a Canadian medical report indicating that the applicant had scars of injuries consistent with her PIF statement. The Board found that the doctor made his assessment based on the applicant's allegations in the PIF which the Board found to be untrustworthy and therefore the medical report was not persuasive. In *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, 47 Imm. L.R. (3d) 169, Mr. Justice Edmond Blanchard considered similar reasoning of the Board and held at paragraph 27 that:

> It is open to the Board to afford no probative value to a medical report if that report is founded essentially on a applicant's story which is disbelieved by the Board. However, there may be instances where reports are also based on clinical observations that can be drawn independently of the applicant's credibility. In the instant case, Dr. Hirsz's medical report is based, at least in part, on independent and objective testing. In such cases, expert reports may serve as corroborative evidence in determining a applicant's credibility and should be dealt with accordingly before being rejected. The Board here, however, rejected the two reports based solely on its finding that the Applicant was generally not credible. Given my determination that the Board erred in its general credibility finding, it follows that its finding in respect to these reports is not sustainable.

[47] While the Board relied on *Sheikh* above, for the proposition that it could reject the medical reports since it found the applicant not to be credible, it is clear from *Ameir* and *Sheikh* above, that the Board may only reject evidence emanating directly from the applicant. Since the doctor considered objective factors of scarring as well as the applicant’s allegations, the Board ought not to have rejected the medical report on the basis of its credibility finding.

[48] Based on the cumulative factors above, I consider the Board to have erred in its negative credibility finding that the applicant was not abused by her former husband.

[49] The Board also undertook an independent state protection analysis in the alternative to its credibility findings. The applicant must demonstrate that both the credibility and state protection findings contain errors for the ultimate refugee determination to be considered unreasonable.

[50] **Issue 3**

Did the Board err in its analysis of state protection?

Refugee protection is a form of surrogate protection available only where the applicant's own state cannot offer protection (see *Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL) at paragraph 25).

[51] South Korea is a highly functioning democracy which is presumed to be capable of protecting its citizens. Where the state is a functioning democracy, the presence of democratic institutions will increase the burden on the applicant to prove that she exhausted all courses of action open to her (see *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532, [1996] F.C.J. No 1376 (F.C.A.)(QL) at paragraph 5).

[52] The Board reasonably found that the applicant never approached the South Korean state for protection from her husband's abuse. As such, she had to present clear and convincing evidence of similarly situated individuals demonstrating that state protection would not have been forthcoming (see *Ward* above, at paragraph 57).

[53] The applicant submits that she in fact did present such evidence, but that the Board selectively read or misconstrued the documentary evidence in analyzing state protection.

[54] While Board members are presumed to have considered all the evidence before them, where there is important material evidence that contradicts a factual finding of the Board, it must provide reasons why the contradictory evidence was not considered relevant or trustworthy (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J.

No. 1425 (QL) (F.C.T.D.) at paragraph 17; *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.) (QL)).

[55] The Board accepted that domestic violence is a serious problem in South Korea and noted that there is criticism of the protection afforded victims of domestic violence in South Korea. However, much of the Board's analysis focused on the enactment and content of legislation addressing domestic violence in South Korea, rather than on the practical enforcement of that legislation.

[56] This Court has held that democracy and legislation alone does not ensure adequate state protection and the Board is required to consider any practical or operational inadequacies of state protection (see *Zaatreh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 211 at paragraph 55; *Jabbour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 831, 83 Imm.L.R. (3d) 219 at paragraph 42). As Mr. Justice Yves de Montingy held in *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249 at paragraph 24:

> . . . the mere fact that the government took steps to eradicate the problem of domestic violence does not mean that the fate of battered women has improved.

[57] The applicant pointed to a significant amount of documentary evidence before the Board which addressed the actual response and conduct of the police in South Korea. This evidence discussed a lack of intervention by police in domestic violence due to the belief that it was a family problem, it noted that police often blame victims and expose them to physical danger, it mentioned the rarity of men being taken into custody or charged with domestic violence, as well as the lack of

understanding and awareness in the police of the serious nature of domestic violence. This evidence on the practical reality of state protection in South Korea, which emanated from a variety of sources, was not addressed by the Board. This amounted to a reviewable error.

[58] Given the errors in the credibility findings and the analysis on state protection, the judicial review will be allowed.

[59] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[60] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, R.S.C. 2001, c. 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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,	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

would subject them personally

avait sa résidence habituelle, exposée :

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

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

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

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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