Federal Court  Cour fédérale

Date: 20110322

Docket: IMM-2064-10

Citation: 2011 FC 353

Ottawa, Ontario, March 22, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

SOONOG PARK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background

[1] Soonog Park (the Applicant), is a citizen of South Korea whose refugee claim was rejected by the Refugee Protection Division (the tribunal) on March 11, 2010. She fears persecution on account of domestic violence at the hands of her ex-husband if she returns to South Korea. She married him in 1984 and obtained a divorce in 2008.

[2] Credibility was not an issue which concerned the tribunal. It believed the basis of her fear - domestic abuse (physical violence and mental distress). At paragraph 14 of its decision, the tribunal

member wrote “I accept that the claimant suffered some threats and physical harm from an abusive husband”.

[3] The tribunal rejected her claim because it determined “based on the analysis below and after considering all of the evidence, including counsel’s submissions, I find, on a balance of probabilities, that state protection is available to the claimant should she return to South Korea. In a previous paragraph the tribunal had said “the determinative issue is state protection and subjective fear” (Emphasis added).

[4] The principal factual finding made by the tribunal was “on a review of the evidence as a whole as well as the evidence of the claimant, she has not rebutted that presumption of the capacity of South Korea to protect its citizens”.

[5] It is conceded by Applicant’s counsel Ms. Park never reported to the police the constant and severe abuse she suffered at the hands of her husband which in 2001, 2007 and 2008 led to her hospitalization. Ms. Park believed the police in South Korea do not protect women from domestic violence; in sum, she is of the view, notwithstanding the legislation on the books, the law is not effectively enforced.

II. The facts

[6] It is not necessary to set out in detail the facts relating to the abuse the Applicant suffered. The following is an appropriate context:

- She married in 1984 and shortly thereafter gave birth to her daughter, her only child;

- Her husband became physically violent towards her one month after the marriage and this abuse, for a certain period, went on continuously at least once a month;
- In 2001, after an incident where she was hospitalized with a broken arm following an abuse, she persuaded her husband to let their daughter attend high school in Winnipeg.
- Shortly thereafter, because their daughter was having trouble adjusting in Canada, the husband agreed the Applicant could join her. She stayed in Canada for the next three years to support her daughter financially before returning to South Korea in October 2005, principally to take care of her terminally ill mother-in-law; she resumed living with her husband on his promise not to harm her and her mother-in-law's assurance he had changed. That promise broke down after the death of her mother-in-law in April 2006;
- While in Canada during 2001 to 2005, she did not make a refugee claim;
- After a particularly vicious attack in December 2007 she asked her husband for a divorce to which he consented on condition she gave up her claim for support and to any share of his mother had left to both of them. The divorce was obtained in April of 2008;
- He continued to harass her after the marriage was dissolved; she moved to the Korean countryside; he tracked her down at the restaurant she was working; he accused her of infidelity (adultery), dragged her away and severely assaulted her for which she required a month of hospitalization. She fled to Canada on September 11, 2008 making a refugee claim on October 17, 2008.

III. The tribunal's decision

[7] As noted, subjective fear and the availability of state protection in South Korea to victims of domestic violence where the grounds of the tribunal's rejection of her refugee claim.

[8] The basis of the tribunal's finding the Applicant did not have a subjective fear of persecution by her husband was grounded on two basis: (1) the fact she did not make a refugee claim in Canada when first here and (2) the fact she resumed living with her husband when she returned to Korea at the end of 2005.

[9] The tribunal finding, on the basis of balance of probabilities, state protection was available to the Applicant should she return to Korea, was based on the following well-known refugee law principles derived from the jurisprudence and, in particular, from the Supreme Court of Canada's decision in *Canada (Attorney General of Canada) v Ward*, [1993] 2 SCR 689, written for that Court, by Justice Gérard V. La Forest:

- There is a presumption that the state is capable of protecting its citizens;
- The onus is on a claimant to rebut that presumption by providing "clear and convincing" proof of the state's inability to protect its nationals;
- A claimant must approach her state for protection in situations where state protection might be reasonably forthcoming;
- Refugee protection is a surrogate and can only be properly sought after the claimant has first sought the protection of his or her own state; and
- A claimant's evidentiary burden is directly proportional to the democracry of the state in question.

[10] The tribunal explained its findings by first stating Korea was a mature democratic state and the Applicant must therefore show that she has taken all reasonable steps to obtain its state protection which she failed to do as she testified she had never approached the police who "cannot be faulted for not offering protection where incidents are not reported to them" (Emphasis added).

[11] The tribunal next reviewed the Applicant's testimony why she did not report the incidents of abuse to the police nor did she tell the hospital doctors the causes of her injuries. It wrote at paragraph 18:

> …The reason the claimant gives for not ever making a police report is that the police in Korea do not help, that they consider domestic violence a private matter and are too lenient toward the perpetrators. She thought only her own death or that of her husband would end the violence. The claimant stated she gleaned most of her knowledge from watching television, where she saw abusers being released shortly after being arrested and from reading court decisions. She testified that she also saw a woman who had been burned by her husband and a man's body who had been killed by his abused wife, and she thought that if the police had intervened at the beginning of the problem these incidents of violence would not have occurred. I note that the claimant had herself not had the police intervene in her case at an early stage, so they were not able to be of assistance to the claimant. The claimant also did not think that the police would help after her husband accused of adultery, her information again coming from television programs and documentaries. The claimant did not adduce any other evidence that she would not receive adequate protection if the authorities perceived that she committed adultery.
>
> [Emphasis added]

[12] The tribunal referred the Applicant's testimony saying she did not consult any Non Governmental Organizations (NGOs), did not consult a lawyer and did not pursue criminal charges

against her husband, offering various reasons for doing so, explanations which the tribunal did not accept.

[13] The tribunal reviewed some of the documentary evidence submitted by her counsel dealing with the inadequacy of state protection for women in South Korea in domestic violence cases. That documentary evidence consisted of:

- Dr. Emery's affidavit of February 5th 2009 (which the tribunal gave no weight); it included his 2009 report entitled "Intimate Partner Violence and State Protection in South Korea". That report has two aspects (1) an assessment of three documents which include two statements in recent Response to Information Requests (RIR) on South Korea issued by the Immigration and Refugee Board (the IRPB), namely, Police officers behaviour towards victims of domestic violence had improved remarkably since 2004; police will enforce protection orders if victims report "again and again" and a statement by an Equality Centre Korea is a "pioneer in the field of domestic violence policy" and (2) an evaluation of the question of the adequacy of state protection in South Korea for women victims of domestic violence. One of the elements of the research on this second question was a before and after comparison since the enactment of two statutes on domestic violence legislation by Korea in 1997-1998. The before picture consisted of three in depth interviews he had conducted in 1998 (two with police officers and one with a domestic violence advocate at the Korean Women's Hotline (KWHL). The after picture was based on interviews based on written questionnaires with two directors of the KWHL conducted in 2009.

- A January 2010 news release from the KWHL indicating 70 women had been killed by their husbands or partners. The news release was also critical of the light sentences handed out to abusers. The tribunal gave little weight to this document "because it had political tone calling on government to better fund spousal violence cases;
- A 2010 letter taken from the internet by South Korean lawyer specializing in domestic violence cases who indicated police in Korea tend to act passively unless they have proof of violence such as a recording or a medical certificate that could be used to report to the police. The tribunal accepted this document and noted the Applicant had an opportunity to obtain a medical certificate and hospital records and take them to the police but failed to do so; and
- Five affidavits from Korean women who suffered from domestic violence and whose claims were accepted in Canada on the basis of inadequate state protection. The tribunal did not refer to any of the affidavits in its reasons.

[14] The tribunal said it preferred the evidence in the South Korean National Documentary Package maintained by the Board as "this information is current and is provided by unbiased, independent sources with no vested interest in the outcome of any particular refugee claim". The tribunal concluded "adequate state protection is available and that it was reasonable to expect the claimant to access it" (My emphasis).

[15] The Tribunal did not accept Dr. Emery's report which concluded that state protection in Korea was not available to women in cases of domestic violence. It wrote this of his report at paragraph 22 of its decision:

> …However the writing represents an opinion, and the preponderance of the objective and reliable documentary evidence before the panel strongly suggests that the current government of the Republic of South Korea is making serious efforts in dealing with domestic violence, although not perfectly, at least adequately. Therefore, the panel, whilst accepting that domestic violence is a problem in South Korea as also discussed in Exhibit C-5 [Dr. Emery's report], gives no weight to the documents in establishing that the claimant cannot avail herself of state protection in South Korea as a victim of domestic violence. Country documents make clear that state protection is available to women who experience domestic violence. [8] Where the violence occurs habitually over time, it is criminally punishable. [9] In addition, the law has been modified to facilitate the granting of emergency measures to separate perpetrators from victims in domestic violence cases when there are fears that the violence will recur. [10] According to the Special Act for the Punishment of Domestic Violence, police officers who have received reports of ongoing domestic violence are required to arrive at the scene, stop and investigate the violence and if the victim is willing, arrange for a protective facility. [11] According to figures published in country reports for 2005, between January and August 2005, 1, 114 cases of domestic violence were prosecuted. [12]
>
> [Emphasis added]

[16] Referring to the Board's RIR dated November 29, 2007 and another Board's RIR referring a United Nations Committee Report, the tribunal was of the view the South Korean Domestic Violence Act which came into effect in 1999 demonstrated that:

> a preponderance of country conditions documentary evidence showed police effectiveness with regard to domestic violence including procedures followed by police when a victim files a complaint and that through a 2002 amendment sharpened its focus on protecting human rights and victims of domestic violence. [Emphasis added]

That documentation, according to the tribunal, indicated that police "must investigate domestic violence and provide police assistance to the victim if she so desires it". (Emphasis added)

[17] The tribunal concluded its state protection analysis by referring to the Federal Court of Appeal's decision in *Canada (Minister of Employment and Citizenship) v Villafranca* (1992), 18 Imm LR (2d) 130 for the proposition that "perfect protection is not the applicable standard but rather whether the police make serious efforts to protect its citizens" (Emphasis added). It considered the Republic of Korea as a constitutional democracy with an independent judiciary and a government which generally respected human rights. It wrote:

> [25] …Case law further notes that no state protection can guarantee perfect protection and where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its nationals; the mere fact that the state's efforts are not always successful will not rebut the presumption. [18] It is clear in the country documentary evidence cited above that the Republic of Korea meets all of these criteria. Case law also notes that a claimant's burden of proof is directly proportional to the level of democracy in the state in question. [19] I find, on a balance of probabilities, that state protection is available to the claimant in the Republic of Korea.

and concluded:

> [26] In light of the above, I am not persuaded that there is clear and convincing evidence that the state would not be reasonably forthcoming with adequate protection to protect the claimant from the person whom she fears if she were to return to any place in South Korea.
>
> [Emphasis added]

IV. The issues and arguments

A. *Lack of Subjective Fear*

[18] Counsel for the Applicant argues the tribunal committed three errors: (1) it assessed the Applicant's subjective fear at the time she returned to Korea in 2005 resuming cohabitation with her husband. Counsel says she was required to assess that fear when she left Korea in 2008 after two particularly vicious attacks; (2) the tribunal ignored the gender and cultural reasons why the Applicant returned to Korea in 2005 and (3) the tribunal failed to explain the relevance of the apparent inconsistency in the Applicant's evidence as to whether her husband was living with another person before she returned in Korea in 2005.

[19] Counsel for the Respondent argued the tribunal's finding of lack of subjective fear was reasonable but stressed the determining finding was state protection arguing that without clear and convincing proof of state's inability to protect her, the Applicant's claim must fail.

B. *The Availability of State Protection*

[20] Counsel for the Applicant argued the tribunal's finding on state protection was deficient because of the errors it committed in treating the documentary evidence submitted by the Applicant arguing the tribunal either assigned no weight to that documentary evidence or ignored timely and relevant evidence which supported a different conclusion than the one it reached on the availability of state protection. She submits, in either case, the tribunal's treatment of the Applicant's documentary evidence was unreasonable.

[21] In particular, Counsel for the Applicant submitted the basis for giving no weight to Dr. Emery's affidavit and report was flawed because of a number of errors made by the tribunal:

- First, it erred in its analysis when it held Dr. Emery relied on dated eleven year old evidence for his finding of lack of adequate state protection in Korea in cases of women subject to domestic violence. Counsel says the tribunal misconstrued the evidence because the 1998 evidence was in support of the before picture; the current picture on state protection, however, was based on 2009 interviews with the current directors of the KKHL and on a 2006 study by the South Korea Police University. The point of the before and after comparison was to determine whether and to what extent the state protection concerning domestic violence had changed;
- Second, the tribunal's findings that it could not evaluate the validity of Dr. Emery's qualification and whether "the writer is a disinterested source" are also in error because his qualifications, background and fact finding are in his affidavit which contains his report. Moreover, the tribunal's finding on this point is arbitrary because it relied upon the internet letter from a Korean lawyer whose qualifications are unknown as one of the factors to deny her claim i.e. her ability to obtain a certificate from the hospital to support a police report; and
- Finally, the Counsel argued the tribunal ignored relevant and probative evidence; specifically that evidence was the affidavits of five abused Korean women said to be similar situated as the Applicant whose claims were accepted by the Refugee Protection Division.

[22] Counsel for the Respondent's argument is also anchored on two recent developments in jurisprudence: the Federal Court of Appeal's decision in *Carrillo v Canada(MCI)*, 2008 FCA 94 and a host of recent cases from the Federal Court involving refugee claims by Korean women subjected to domestic abuse which held that there was adequate state protection in Korea; those cases are:

- *Song v Canada (MCI)*, 2008 FC 467 [*Song*];
- *Cho v Canada (MCI)*, 2009 FC 701 [*Cho*];
- *Mejia v Canada (MCI)*, 2009 FC 354]*Mejia*];
- *Nam v Canada (MCI)*, 2010 FC 783 [*Nam*];
- *Lim v Canada (MCI)*, 2010 FC 1101 [*Lim*];
- *Lee v Canada (MCI)*, Docket: IMM-576-10 [*Lee*];
- *Seo v Canada (MCI)*, 2010 FC 1262 [*Seo*]

[23] Counsel for the Respondent pointed out in *Carillo*, above, a domestic abuse case from Mexico, Justice Gilles Létourneau stressed the following principles for the state protection analysis in refugee law:

a. Burden of proof, standard of proof and the quality of evidence to meet the standard of proof are three different factual realities and legal concepts which should <u>not</u> be confused;
b. In order to rebut the presumption that a State is capable of protecting its citizens, a refugee claimant in the surrogate country bears both a evidentiary and a legal burden;
c. A claimant must first <u>introduce evidence of inadequate state protection</u>;

d. A claimant also has to onus to convince the trier of fact the evidence adduced established that state protection is inadequate (the legal burden of persuasion);

e. The legal burden is discharged on a balance of probabilities;

f. The nature or quality of the evidence required establish inadequate state protection (in other words rebut the presumption of state capacity to protect must not only be reliable; it must be of sufficient probative value to convince on a balance of probabilities the trier of fact state protection is inadequate

V. Analysis

A. *The Standard of Review*

[24] Prior to and since the Supreme Court of Canada's reform of the standard of review in judicial review matters in its decision in *Dunsmuir v New-Brunswick*, [2008] 1 SCR 190, coupled with its subsequent decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, it is well settled that questions as to the adequacy of state protection are questions of mixed fact and law reviewable on a standard of reasonableness (*Dunsmuir* at para 53).

[25] In particular, the tribunal's holding the Applicant failed to rebut the presumption of state protection is reviewable on that standard (see the Federal Court of Appeal's decision in *Huizman v Canada (MCI)*, 2007 FCA 171 at para 38).

[26] Generally, questions of fact, discretion or policy, deference (hence the reasonableness standard) will usually apply automatically questions of law are usually reviewed on the standard of correctness (*Dunsmuir* at para 50 and 53).

[27] What the reasonableness standard means was explained in *Dunsmuir* at para 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Discussion and Conclusions*

[28] For the reasons expressed below, I am of the view this Court's intervention is required with the result the Applicant's claim for protection must be determined anew.

(1) Lack of Subjective Fear

[29] The tribunal's subjective fear analysis was limited in terms of time- 2005 when she returned to Korea. Paragraph 13 of its reasons, is clear; it found on the balance of probabilities that her resumption of her marital relationship in 2005 and failure to make a refugee claim indicated "a lack of subjective fear at that time" (emphasis added). The tribunal made no finding the Applicant did not fear her husband when she fled Korea in 2008 having divorced her husband, escaped his environment by moving to the countryside, yet being tracked down by him and experiencing a brutal attack. Those facts do not point to the lack of subjective fear. Simply put, the tribunal's decision does not turn on this point; the tribunal's finding the Applicant did not rebut the

presumption the State of South Korea was unable to protect her was determinative. I now turn that finding.

(2) Availability of Adequate State Protection

[30] Before dealing with this substantive finding, a few observations are appropriate.

[31] First, in this case, the Applicant admitted not having approached the police for protection.

[32] In *Ward*, above, at para 48, Justice La Forest raised the issue whether a refugee claimant must "first have to seek the protection of state when claiming under the "unwilling" branch of the definition of "Convention refugee" in cases of state inability to protect". He was of the view the failure to approach the home state for protection did not necessarily defeat a refugee claim in the surrogate state because "most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively" [adding] "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a sate, merely to demonstrate that ineffectiveness" (emphasis added).

[33] At paragraph 49 in *Ward*, Justice La Forest formuled the test to determine when the failure to approach the state for protection will defeat a refugee claim; that claim will be defeated "only in situations in which state protection might reasonably have been forthcoming" or in other words "where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities" [Emphasis added].

[34] How does a claimant satisfy the test or make proof of the state's inability to protect? Justice La Forest provides the answer at paragraph 50 of his reasons:

> […] On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state [page725] protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant.
>
> [Emphasis added]

[35] Justice La Forest concluded the point by referring to the Federal Court of Appeal's decision in *The Minister of Employment and Immigration v Satiacum* (1998), 99 NR 171 as a case where the claim of *Satiacum* was defeated on the sole ground it was objectively unreasonable for him, citizen of the United States, not to have first sought protection there.

[36] In this case, the Applicant sought to discharge her evidentiary burden through her own evidence and through the documentary evidence previously referred to. In my view, if this had been a case of assessing the probative value of the evidence or one where the tribunal preferred documentary evidence in the National Package over that submitted by the Applicant, or a question of what proper weight to be given to the evidence, this application for judicial review would have

failed because the tribunal is owed deference on such questions. Here, the tribunal made the following serious errors.

[37] First, it misread Dr. Emery's report. Dr. Emery did not rely on dated evidence in 1998 to assess the current ability of South Korea to protect victims of domestic violence. It had current evidence from SKHL directors who provided information in 2009.

[38] It also misread one of the Board's RIR on the issue of the number of prosecution for domestic violence: it is true that number was 1,114 cases (without identifying the results) but it was out of 10,227 registered cases a number which the tribunal failed to assess. It also misread the Board's reference to the United Nations Committee on the Elimination of Discrimination against women in the National Package as evidence of adequate state protection. That report did not deal with domestic violence in Korea but on gender equality for women there.

[39] Second, it gave no weight to Dr. Emery's report holding it could not assess the validity of his qualifications on whether he was disinterested source. The tribunal said it preferred the unbiased, independent sources with no vested interest in the outcome of a refugee claim. The tribunal erred because it had his qualifications which are quite impressive and certainly could assess the seriousness of his research as well as the probative value of his findings. More important, it dismissed his report on a veiled finding of bias, interest in outcome, lack of independence without providing any reasons for such conclusion. In addition, such finding is pure speculation having no evidentiary basis. It is worthy of mention that in *Seo*, above, at para 10, Justice Michel Beaudry was of the view the tribunal, in that case, erred when it said Dr. Emery's qualification could not be

assessed. Likewise in *Nam*, above, Justice Richard Mosley found at para. 19 that Dr. Emery's report was an unbiased source. In *Lim*, above, Justice James O'Reilly distinguished Dr. Emery's report because the case before him was one of sexual assault and not domestic violence. The tribunal's approach is contrary to law. See *Tahiru v Canada (MCI)*, 2009 FC 437 at para 46 to 48, *Coitinho v Canada (MCI)*, 2004 FC 1037 at para 7.

[40] Third, the tribunal ignored relevant and probative evidence in the form of sworn affidavits from 5 Korean battered women whose claims where recognized by members of the Refugee Protection Division. Those affidavits set out the specific facts of their claims and the availability or lack of state protection. This evidence was important to the Applicant as it was said to be by similarly situated persons as signalled in *Ward*, above. Counsel for the Respondent conceeded this evidence was not considered by the tribunal but attempt to soften the error by claiming its probative value was negligible, a proposition which I cannot accept, especially because the discarded Emery report and the affidavit evidence show that in inappropriate police response in a domestic violence complaint can enhance the risk to a complaint's life. In short, the tribunal's evaluation of the Applicant's state protection evidence was flawed.

[41] In these circumstances, the tribunal's preference for the documents in the Package was flawed. On this basis, I conclude the tribunal's decision cannot stand.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application allowed, the tribunal March 11, 2010 decision denying the Applicant's claim is quashed and the Applicant's request for protection is returned to the Board for consideration by a differently constituted tribunal.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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