Federal Court  Cour fédérale

Date: 20140508

Docket: IMM-4156-13

Citation: 2014 FC 444

Ottawa, Ontario, May 8, 2014

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

XY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision made by a Citizenship and Immigration (CIC) officer (the officer) on May 30, 2013, wherein the officer rejected the applicant's application for a pre-removal risk assessment (PRRA).

I. Factual background

[2] XY (the applicant) is a citizen of South Korea. The applicant came to Canada in 1995 to study.

[3] In 2002, the applicant was convicted of three (3) criminal offences in Canada: possession of property obtained by crime over $5000 pursuant to subsection 354(1) of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*); obstruction of a peace officer pursuant to subsection 129(*a*) of the *Criminal Code*; and, failing to attend court pursuant to subsection 145(2) of the *Criminal Code*. The applicant claims that he did not commit these crimes but that his roommate impersonated him and used his driver's license to commit the offences.

[4] On October 11, 2002, the applicant was deported from Canada to South Korea.

[5] Back in South Korea, the applicant started his own car importing business on February 20, 2003. Through personal connections, members of a criminal gang became involved in his business. The business grew over the years and became very profitable. The applicant began his military service in 2007. While serving in the military, business associates involved in criminal activities asked the applicant to give them control of the business. After being kidnapped and beaten, he partially gave them control of his business – he refused to give his official "signature stamp", a legal requirement in South Korea, – but the associates began operating without his consent. Another business partner shortly thereafter hired gang members to force the applicant to pay his share in the business with interest. After being threatened on several occasions, he gave the associates his signature stamp. The applicant was eventually charged with fraud regarding his business, but he claims that he was forced to sign documents by his former associates.

[6] The applicant continued to be harassed and beaten by gang members. He called the police but was told that they would not intervene as this was a private matter. The applicant understood that he could not count on them and decided never to call them again.

[7] During the fraud investigation, the applicant took a leave of absence from the army as he was having trouble fulfilling his duties. He never went back to the army and fled to Canada under a false passport at the end of 2008.

[8] On July 25, 2011, the applicant was arrested and charged with counts of unlawful entry into Canada, of knowingly acting upon a forged document, possession of controlled substances for trafficking and conspiracy.

[9] On August 24, 2011, a deportation order was issued against the applicant. The applicant made a refugee protection claim on the same day. The applicant was found to be inadmissible under paragraph 36(1)(*a*) of the Act.

[10] On December 5, 2012, the applicant was convicted in Brampton, Ontario, of an offence of export of a controlled substance contrary to section 6(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. The applicant received a sentence of thirty (30) months imprisonment. The applicant is currently detained in a correctional center.

[11] On April 21, 2013, the applicant made a PRRA application to CIC, alleging that he fears criminals and the authorities in South Korea.

[12] On May 30, 2013, the officer denied the PRRA application (PRRA decision).

[13] On August 13, 2013, Prothonotary Milczynski of this Court granted the applicant's motion for a confidentiality order pursuant to sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106.

II. Impugned decision

[14] The officer relied on international documentation and found that the possibility of being imprisoned for less than three (3) years for having deserted the army according to South Korean law is not severely disproportionate. The applicant violated a Korean law of general application and there is little evidence that he would be singled out or punished excessively. The officer referred to the latest US Department of State Country Report on Human Rights Practices and the US Department of State document, and found that South Korean detention and prison centres met international standards with very few abuses from officials and that there was insufficient evidence, that should the applicant be imprisoned in South Korea, he would not be treated fairly or protected from gang members by the authorities. The officer also found that there was not enough evidence to substantiate the applicant's contention that the South Korean state would not protect him from the threats he would face upon his deportation. With respect to the applicant's contention that he would be in a position of double jeopardy if he returned to South Korea, the officer determined that the evidence adduced did not support the applicant's position. The officer concluded that there is very little evidence corroborating the applicant's allegation that he risks the death penalty upon returning to South Korea for his drug-related conviction in Canada. The officer noted that, while Koreans committing drug-related offences in South Korea are subject to the death penalty, the last known execution happened in 1997.

[15] In conclusion, the officer determined that the applicant does not fall under paragraphs 97(1)(*a*) or 97(1)(*b*) of the Act. The officer indicated that the applicant adduced insufficient evidence to demonstrate, on a balance of probabilities, that he is more likely than not to be tortured by a public official or another person in an official capacity, or that he faces a risk of death or serious violation of his fundamental human rights. The officer therefore concluded that the applicant did not demonstrate with sufficient evidence a risk of torture or risk to life or cruel and unusual treatment or punishment if returned to South Korea.

III. Issues

[16] The sole issue raised by this application is the reasonableness of the PRRA officer's decision.

IV. Standard of review

[17] Because the present application essentially raises issues related to the officer's weighing of the evidence and his application of the law to the facts of the case, the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54, [2008] 1 SCR 190; *Obeng v Canada (Minister of Citizenship and Immigration)*, 2009 FC 61 at para 24, [2009] FCJ No 57 (QL)). Under this standard of review, the Court should be concerned with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

V. Analysis

[18] The applicant essentially contends that the PRRA officer made several errors in his decision by misinterpreting key legal principles and misapplying them to the facts of the case. These errors pertain to three (3) issues: the general understanding of section 97 of the Act, the determination regarding the principles of double jeopardy and the state protection analysis. For the reasons below, the Court is of the view that the officer's decision was reasonable on all three (3) issues.

[19] From the outset, it can be said that the officer's analysis of the "double jeopardy" through the lens of section 96 grounds – which are not engaged in a PRRA analysis – is awkward. However, it is clear from the officer's reasons that this was merely an alternative reasoning and it is not fatal to the present case. The main basis for the rejection of the applicant's allegation of double jeopardy was the failure by the applicant to adduce sufficient evidence establishing that he would face the risk of being convicted in South Korea for the same offences for which he was charged in Canada. As further discussed below, this error does not affect the reasonableness of the decision as a whole.

[20] Contrary to the applicant's contention, the officer did not solely analyse his risk under paragraph 97(1)(*a*) of the Act, which focuses on the actions of state actors, but also examined risks under paragraph 97(1)(*b*) of the Act, as is apparent from this passage of his reasons (Applicant's Record at 8):

> risk will be assessed to determine if the Applicant will be subjected personally to risk to life or a risk to cruel and unusual treatment or punishment under s. 97(1)(b) of the IRPA or if his removal would subject him personally to a danger, believed on substantial grounds to exist, of torture under s. 97(1)(a) of the IRPA.

[21] The Court is therefore satisfied that the officer properly considered s 97 of the Act and the applicant has failed to convince the Court that there is fatal error on that point.

[22] At hearing before this Court, the applicant emphasized its oral arguments on this issue of double jeopardy and argued that double jeopardy applies in South Korea. The applicant submits that the officer's findings are unreasonable as the sworn statements by the applicant's mother, his lawyer and a retired judge were ignored by the officer in the double jeopardy analysis.

[23] It is clear from the decision that the officer's findings flow from the weighing of the evidence before him, and contrary to what the applicant suggests, the officer did not challenge the credibility of the applicant or the evidence he adduced.

[24] More particularly, the officer mentioned a letter from a Korean lawyer stating that he believed that the applicant would face life imprisonment if he returned to South Korea (Tribunal Record at 113). This letter is vague and lacks clarity. The applicant also submitted a Korean Supreme Court judgment summary affirming that an unnamed accused – not the applicant – could face further litigation in South Korea even if he had been criminally punished for the same behaviour overseas (Applicant's Record at 117). This short and brief document, issued more than thirty (30) years ago, in 1983, does not refer to the applicant *per se* and does not say very much. It does allow this Court to draw a parallel with the applicant's case. The officer also noted that the applicant's mother's claims, in her affidavit, that the Korea authorities are aware of his convictions in Canada, have been interrogating his relatives and are awaiting his return. It was not unreasonable for the officer to find that the evidence adduced was not sufficiently detailed to demonstrate that Korean law indeed allows double jeopardy in criminal matters or that the applicant has been or would likely be charged for the same offences he committed in Canada. It

was thus reasonable for the officer, in reviewing the applicant's evidence, to find it insufficient to prove that removal to South Korea would put the applicant at risk of double jeopardy. Furthermore, it is worthy of note that a recent report entitled "Republic of Korea 2012 Human Rights Report" indicates that the law in the Republic of Korea (South Korea) provides "the defendants with a number of rights in criminal trials including freedom from double jeopardy" (Tribunal record, vol 2, p 422). Upon reading the record as a whole, the Court cannot but conclude that the finding on the double jeopardy issue was open to the officer.

[25] On the issue of state protection, the officer correctly recalled that there is a presumption that a state can protect its citizen that can only be rebutted with clear and convincing evidence of the state's inability to protect its citizens. In a functioning democracy, the mere fact that the state's efforts are not always successful will not rebut the presumption of state protection. The officer also stated that the applicant had to show that he took serious measures to obtain protection from state authorities.

[26] It is now well established that the relevant test to be applied in issues of state protection is whether the applicant has demonstrated, with clear and convincing evidence, that the state does not offer "adequate" protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paras 57, 59, [1993] SCJ No 74; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 27, [2013] FCJ No 1099 (QL) [*Ruszo*]). The more a state is democratic, the more a refugee claimant must have done to exhaust all the courses of action open to him (*Kadenko v Canada (Minister of Citizenship and Immigration*, [1996] FCJ No 1376 at para 5, 206 NR 272 (FCA)). Doubting the effectiveness of the authorities without reasonably testing it, or feeling reluctant to engage them is generally insufficient to rebut the presumption (*Ruszo*, above at para

33). The objective evidence contained in the "Republic of Korea 2012 Human Rights Report" also indicates that "the police is under effective control" and that "no reports of impunity involving security forces during the year [2012]" (Tribunal Record, vol 2, p 420). The report also states that the government has effective mechanisms to address if there is abuse and corruption (Tribunal Record, vol 2, p. 420).

[27] The officer also mentioned that there was evidence of increasing organized criminality in South Korea, but that, "according to the documentary evidence including the latest U.S. Department of State, Human Rights Report, the Republic of Korea has effective police and security forces and serious measures are taken to provide protection and safety for its citizens" (Applicant's Record at 17). He concluded that the applicant provided "very little evidence that the state of Korea would not be forthcoming in offering protection, should the Applicant find himself threatened by criminals or organized gang members" (Applicant's Record at 17). Nothing on the record suggests that it was unreasonable to conclude that the applicant failed to adduce clear and convincing evidence that the South Korean police and prison authorities would not be able to protect him from criminals, should he be imprisoned.

[28] Moreover, the officer noted that the evidence is silent on the information that was provided by the applicant in his sole complaint to the police, which allegedly told him that they would not intervene because it was a private matter. The applicant himself claims that he only went to the police once, at the beginning of his violent struggle with his former associates, because he didn't believe they would offer any help following their initial refusal. Since the officer applied the correct test, considered the relevant documentary evidence, and provided a coherent reasoning to support his decision, the Court finds that his conclusion is reasonable.

[29] For all of these reasons, the Court is satisfied that the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). The Court's intervention is therefore not warranted and the application will be dismissed.

[30] The applicant submitted four (4) questions for certification:

1. In referencing Article 1 of the Convention Against Torture, does s 97(1)(*a*) of the IRPA limit the consideration of such treatment to only that acquiesced in or inflicted by state agents?

2. In order to establish under s. 97 (1)(*b*) of the IRPA that cruel treatment is likely to be inflicted, is it necessary to show that the person will be singled out for such treatment on the basis of race, religion, nationality, membership in a particular social group or political opinion?

3. Where a person claims a likelihood of being subjected to cruel and unusual treatment under s 97(1)(*b*) of the IRPA because of double jeopardy, can this be sustained in the absence of actual charges being laid in the country to which the person will be returned?

4. Where a person is likely to face charges, carrying a significant penal consequence, in his country of nationality for an offence for which he has already been charged and convicted, does this constitute cruel and unusual treatment in light of Article 14.7 of the International Covenant of Civil and Political Rights and

> s. 7 and 11(*h*) of the *Canadian Charter of Rights and Freedoms*, within the meaning of s. 97(1)(*b*) of the IRPA, notwithstanding that it is a law of general application in the other state?

[31] With respect to question 1, Article 1 of the Convention Against Torture only encompasses torture by state officials, (not organized crime thugs); concerning question 2, the documentary evidence demonstrates that double jeopardy does not apply in South Korea and questions 3 and 4 do not arise from the facts of this case.

[32] Hence, the Court will decline to certify the questions as they are not issues of broad significance and they are not determinative of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application be dismissed. No question is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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