Federal Court  Cour fédérale

Date: 20090824

Docket: IMM-585-08

Citation: 2009 FC 841

Ottawa, Ontario, August 24, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

HONG LIAN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (*"IRPA")* for leave to commence a proceeding pursuant to section 18.1 of the *Federal Courts Act*, R.S., 1985, c.F-7. The Applicant seeks judicial review of a decision from a panel of the Refugee Protection Division ("the Board") of the Immigration and Refugee Board of Canada ("IRB") refusing her claim for refugee status.

[2] The Applicant, Ms. Hong Lian Li, is a Chinese citizen who had permanent residence status in Argentina. She sought refugee status because she feared violence at the hands of her divorced spouse in Argentina and also because she feared she was sought by the Chinese authorities because of alleged harbouring of Falun Gong in a residence she owned in China.

[3] The Board decided that Ms. Li had not proved to its satisfaction that she had lost her permanent status in Argentina. It decided Ms. Li, as a permanent resident, was entitled to return to Argentina and could avail herself of state protection against domestic violence there. The Board denied her claim for refugee status because she was excludable under Article 1(E) of the Refugee Convention and because of the availability of state protection in Argentina.

FACTS

[4] Ms. Li is a 38 year old Chinese citizen. She married in 1992 and gave birth to her first child, a daughter, in 1993. In 1994 the Applicant and her husband decided they wanted a son. They were prevented by China's one child policy from having other children, so they moved to Argentina. They left their daughter behind with her paternal grandmother. They had a son in Argentina in 1995. In 1996 they applied to become permanent residents in Argentina, this application was finally granted in 2003.

[5] The couple ran a supermarket in Buenos Aires. Ms. Li accuses her husband of getting drunk and beating her on several occasions. The Applicant says she did not seek help from police. She did not report these assaults to the police in past because she did not speak Spanish. In August 2004

the couple decided to end their relationship. Since they were married in China, they decided to divorce there. Two years later, the ex-husband wanted to sell the supermarket. Ms. Li who had remained in China after the divorce, went to Argentina because the sale required her consent.

[6] The Applicant was given $20,000 in cash from the proceeds of the sale by her husband. That night, Ms. Li says, two Chinese men robbed her in her hotel room. They held a gun to her head and forced her to hand over the $20,000 she received earlier that day. She says the men told her that her husband demanded she leave Argentina and if she didn't he would kill her. She reported this to the police with the help of the manager at the hotel where she was staying since he was Chinese and spoke Spanish. The Applicant says the police treated her claim lightly, suggesting she try to settle her dispute with her husband. She says she persisted and the police said they would look into the matter. The Applicant believes nothing was done because she said she spoke with a friend of her ex-husband and asked if police had questioned him and the friend said they hadn't. The Applicant says she did not follow up with her report to the police because she did not have any faith in them.

[7] Ms. Li was in a hurry to return to China. She says her only travel option was to return via Toronto. The Applicant applied for a transit visa and it was granted. The Applicant left Buenos Aires for China, transiting in Toronto. While in Toronto, She says she called her mother in China who warned that security forces were looking for her. The Applicant owns a rental property in China. The authorities arrested practitioners of Falun Gong in the apartment. The Applicant believed Chinese authorities would find her guilty by association. She says she will face the same

persecution as did members of the religious cult if she returns to China. The Applicant submitted evidence indicating her daughter was dismissed from school because of the Falun Gong tenants.

[8] The Applicant does not want to return to Argentina because she says she will live in constant fear her ex-husband will see through his threat to kill her and the police are not reliable protection for her.

THE DECISION UNDER REVIEW

[9] The Board decided that the Applicant is excluded from refugee status by Article 1(E) of the Refugee Convention. It then determined the Applicant has not adduced enough evidence to prove that the state is unable or unwilling to protect her from domestic violence if she were to return to Argentina.

[10] The Board found the Applicant was excluded from refugee status because Article 1(E) provides:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[11] The Board applied the test in *Shamlou v. Canada (M.C.I.)*, [1995] F.C.J. No. 1537 at para. 35 which poised four questions in relation to rights of residence in a country being whether there was:

(a) the right to return to the country of residence;
(b) the right to work freely without restrictions;
(c) the right to study, and
(d) full access to social services in the country of residence.

[12] The Board found in Ms. Li's testimony sufficient satisfaction of the above criteria. It found that she had permanent resident status in Argentina at the time of her application for refugee status with no date of expiry. The Board found it unnecessary to analyze the Applicant's prospects for returning to China because of its finding that the Applicant could return to Argentina.

[13] The Board referred to the presumption that states can protect their citizens, and its accessory conclusion that applicants for refugee status must provide some evidence to prove a state is unwilling or unable to provide that protection.

[14] The Board took issue with the quality of the Ms. Li's evidence she proffered on the question of state protection available to the Applicant in Argentina. The Board found the Applicant didn't fully pursue her options for state protection from her divorced husband. In result, the Board concluded the Applicant has not exhausted the options of state protection available to her and had not rebutted the presumption of state protection.

ISSUES

1. Did the Board err in its assessment of evidence on whether the Applicant had a right to return to Argentina?

2. Did the Board err by failing to have regard for adverse documentary evidence on the availability of state protection in Argentina for victims of domestic violence?

STANDARD OF REVIEW

[15] The Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 recognized two standards of review: correctness and reasonableness.

[16] In *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 65, I found the proper standard of review since *Dunsmuir* with respect to the treatment of evidence was reasonableness.

[17] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, Justice Binnie stated "…there might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

ANALYSIS

Did the Board err in its assessment of evidence on whether the Applicant had a right to return to Argentina?

[18] Ms. Li asserts that she had been absent from Argentina for over two years by the time of the Board's decision and that her permanent residence status in Argentina has expired. She relies on a 2008 KPMG Report for business executives which notes that "individuals who have been resident

in Argentina shall lose their residence status when they acquire permanent residence in another country or remain in another country for 12 months or more."

[19] In *Canada (Minister of Citizenship and Immigration) v. Choovak,* [2002] F.C.J. No. 767 Justice Rouleau followed the reasoning of the Federal Court of Appeal in *The Minister of Citizenship and Immigration v. Mahdi,* [1995] F.C. J. No 1623 that "the real question that the Board had to decide in this case was whether the respondent was, when she applied for admission to Canada, a person who was still recognized by the competent authorities of the United States as a permanent resident of that country".

[20] The Board found on the evidence that Ms. Li had acquired permanent resident status in 2003 with no date of expiry. The Board also found she was able to return to Argentina after her divorce notwithstanding she had been away from Argentina and in China for almost two years. The Board also noted that the Applicant had not made any effort to approach the Argentine authorities to inquire whether she could re-enter Argentina after being in Canada.

[21] I find it was reasonably open for the Board, on the evidence before it, to reach the conclusion that the Applicant had a right of return to Argentina and that Article 1E had application in her case.

Did the Board err by failing to have regard for adverse documentary evidence on the availability of state protection in Argentina for victims of domestic violence?

[22] In *Ward v. Canada (Attorney General),* [1993] 2 S.C.R. 689, the Supreme Court of Canada provides guidance in cases where state protection is an issue, "…the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state".

[23] The Applicant cites a report from the United States Department of State which offers a recent (2007) assessment on the protection of women in Argentina against domestic violence. It generally concludes in spite of government action, violence against women is still a serious problem in Argentina. The Applicant alleges the Board read evidence selectively, and drew conclusions solely from evidence of legislative action in Argentina.

[24] The Federal Court of Appeal held in *Mahanandan v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 1228 at para. 7, that a board must consider the documentary evidence supporting a refugee claimant's fear.

[25] The Board acknowledged "some" documents showing domestic violence reportedly remains a problem in Argentina and "that laws and regulations are not as effective as they should be…". The Board stated "the preponderance of objective and reliable documentary evidence before the

panel…strongly suggest that while not completely eliminating the problems of domestic abuse, the authorities are making serious efforts to address this issue".

[26] Ms. Li's minimal effort to secure police protection for herself does not call for a closer critical examination of the effectiveness of state protection available to the Applicant. She necessarily relies on documentary evidence. Accordingly, the Board is entitled to draw its conclusion from the totality of the documentary evidence before it.

[27] I find that the Board did consider the adverse documentary evidence indicating problems with provision of state protection from domestic violence for women. The Board's conclusion is reasonable having regard to the whole of the evidence before it.

CONCLUSION

[28] The Applicant has not made out that the Board's decision on exclusion or its decision on state protection was unreasonable. The application for judicial review does not succeed.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No general question of importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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