

Seoul Administrative Court
The 13th Administration
Adjudication

Case 2009-guhap-30165 “Appeal for the Cancellation of Denied Refugee Status Recognition”
Claimant A
Counsel ** Firm of Law
Attorney ***
Defendant Minister of Justice
Prosecutor ***
Date of Hearing December 1, 2009
Date of Adjudication December 24, 2009

Order

1. The defendant’s denial of the claimant’s application for refugee recognition dated June 4, 2009 is cancelled.
2. The defendant is to be responsible for all related litigation fees.

Claims

Same as order.

Grounds

1. Proceedings of Defendant’s Denial
 - a. The claimant is a Pakistani citizen who left Pakistan on December 19, 1996 and entered South Korea on December 24, 1996 with a Visa waiver (B-1). He continued to illegally reside in Korea even after his term of legal residence expired and was detained on January 20, 2009, in a public crackdown on illegal aliens. While he was in protection at the Hwasung Protection Shelter he applied for refugee status recognition with the defendant on February 16, 2009.
 - b. The defendant denied the claimant’s application for refugee status recognition on June 4, 2009, on the grounds that the claimant could not be acknowledged to be suffering from ‘well-founded fear of being persecuted,’ as is stated in article 1 of the ‘Convention Relating to the Status of Refugees (July 28, 1951)’ (“Refugee Convention”) on the definition of refugees. (“ruling”)

[Evidence: Kap-1, Kap-2, All claims mentioned in claimant’s arguments]

2. The legality of the ruling
 - a. Claims of the claimant
The claimant is homosexual. The current Pakistani laws forbid homosexuality, and anyone who engages in homosexual acts is subject to life in prison or lashing/whipping punishments. The claimant’s family and relatives, knowing that the claimant is homosexual, not only threatened him that they would turn him over to the police, but also attacked him and committed group violence on him. As the claimant came to South Korea to flee from such persecution inflicted on him by the people around him and the Pakistani government, his refugee status must be acknowledged. The defendant’s ruling was established on different premises and violates the law.

b. Related Laws

Related Laws are provided as an attachment.

c. Agreed facts

c.i. Pakistan's Treatment of Homosexuals

c.i.1. Article 377 of the current Pakistani criminal law stipulates that 'Anyone who voluntarily engages in sexual intercourse against nature with another man, woman or animal should be sentenced to life in prison or 2 to 10 years of imprisonment and fines. Also, according to the Sharia Law, which is an Islamic religious law adopted by Pakistan in the early 1990's, homosexual acts can be subject to penalties including lashing/whipping, detention or death.

c.i.2. According to the Immigration and Refugee Board of Canada's report on homosexuality in Pakistan, in October 2005, the tribal council of the province of Khyber, located in the western part of Pakistan, had warned two men who married each other that they would face death if they did not leave the province on the grounds that they had violated religious and tribal rules and regulations. Also, in May 2007 a married couple had requested protection from the husband's abusive family but the Lahore High Court detained the married couple for perjury. This was on the grounds that, despite the fact that the couple got married after the husband went through a sex change to become a man, they had lied in court and that their same-sex marriage was anti-Islamic. On May 17 2007, two men (ages 38 and 14) were caught having homosexual intercourse in a public bathroom in the Bara Bazaar section of the Khyber region of Pakistan and were sentenced to a whipping punishment, and in 2003 in the Lahore region of Pakistan, during a party three men were caught by a relative having homosexual intercourse. The relative reported this to the police and the three men were detained. Furthermore, according to the Border Agency of the British ministry of state's National Report on Pakistan, Pakistani police have been frequently threatening and extorting things from homosexual individuals. Therefore according to a report on homosexuals in Pakistan issued by the Immigration and Refugee Board of Canada, the majority of Pakistanis get married and have children while maintaining their homosexuality.

c.i.3. There was a case of a Pakistani homosexual having been recognized as a refugee on May 16, 2008 by the Australian Supreme Court, after entering Australia and applying for refugee status recognition.

c.ii. The claimant's background and activities

The claimant is the second child of a family with 4 brothers and 5 sisters. While living in the city of Lahore he graduated from ** school in 1968, ** school in 1972 and ** university of law in 1977. Thereafter he completed his training as an attorney in 1982 and from 1983 to December 1996 ran a law firm in the city of Lahore. From 1993 to 1995 he provided consulting

services on male sex life and other similar issues at the Family Planning Union. The claimant was also an active member of Pakistan's People Party and was elected as a regional representative in 1996.

c.iii. The claimant's testimony on his homosexuality, etc. (Testimony at Hwasung Foreign Migrant Workers' Shelter)

(a) The claimant considered himself as a homosexual from his age of approximately 14 or 15. He married *** in 1975 and had four children but he engaged in homosexual relationships on a regular basis even after his marriage. On an unknown date, he was arrested by the Pakistani police while he was seated in a cab at ** market, located near his residence, with the intent to have a homosexual affair, but was released the next day.

(b) Moreover, due to his homosexuality, the claimant was threatened by his wife and family, experienced tensions with his father on family inheritances, and was blackmailed by people who possessed videos of him engaging in homosexual relations. As the situation intensified the claimant eventually chose to leave for South Korea on December 24, 1996, by the guidance of an acquaintance.

(c) After he arrived in South Korea he resided in Ilsan until 1999 and attended an Islamic mosque in Itaewon. During his attendance he was threatened by other Pakistani Muslims for being homosexual and after he moved to the shelter at the Itaewon Islamic Mosque in 2001 he was also threatened by other mosque attenders who found out that he was homosexual by his voice and the way he walked.

[Evidence: Kap-3, Kap-4, Kap-5, Kap-6, Kap-7, Kap-8, Eul-6.1~7, All claims mentioned in claimant's arguments]

4. Judgment

(1) Criteria for Refugee Status Recognition and Responsibility to Provide Evidence

(a) The Criteria for Refugee Status according to the Refugee Convention and Characteristics of Recognized Refugee Behavior according to the Immigration Law

1) The Refugee Convention and the 'Protocol Relating to the Status of Refugees' (January 31, 1967) define a refugee to be a person who, 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country.' Such criteria correspond with the stipulations relating to refugees in South Korea's Immigration Law, Article 2-2-2.

On the other hand, the criteria according to the Refugee Convention are declaratory rather than established, and therefore if the criteria are fulfilled then a person should be recognized as a refugee as defined by the Refugee Convention [Refer to Article 28 of the Handbook on Criteria and Procedures for Determining Refugee Status ('handbook') issued by the international protection division of the Office of the United Nations High Commissioner for Refugees, which is a practical guide to refugee status recognition]. It is not compulsory under the Refugee Convention for states signatory to the Convention to recognize and grant 'asylum' status for all the refugees who meet the requirements of the Convention (Refugee Convention 12-1); generally it is

understood that each respective country independently determines whether or not asylum would be granted or not to the refugee, and if granted what kind of legal status would be given to the refugee.

2) Under Article 76-2-1 of the South Korean Immigration Law, when foreigners apply for refugee recognition, he/she is only given the possibility of being recognized as a refugee and there are no national laws that provide information on granting what type of legal status recognized refugees are entitled to. However, by opening the possibility of recognizing these people as refugees in the first place, this shows that it involves clear intent of protection. Therefore, the rules of refugee status determination do not stop at merely confirming whether the person falls under the conditions of the Refugee Convention (in this case the claimant would not be entitled to any rights) but rather, granting certain rights to foreigners who fulfill the necessary conditions of a refugee.

3) Therefore, the procedure begins with whether the person meets the conditions under the Refugee Convention. If the person meets the requirements, he/she will be recognized as a refugee under the Immigration Law Article 76-2-1 and balanced decisions will be made upon whether to grant certain protection measures or forcefully repatriate persons to a third country even if he/she is recognized as a refugee. (Under Article 33(1) of the Refugee Convention “No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”). Before exercising the above authority, if fault is observed in determining the status of refugees in regards to the conditions of the Refugee Convention, in which necessary measures are not taken, this will be considered unlawful and can lead to the annulment of the decisions already made.

(b) Criteria for Refugee Status Recognition based on the Refugee Convention (well-founded fear of persecution)

1) A refugee as defined in the Refugee Convention is a person suffering from fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. There is no universally accepted definition of “persecution”, but it may be inferred that such serious violations to one’s human rights such as a threat to life or physical freedom would constitute persecution (Refer to Handbook Article 51). Furthermore such offenses that are generally not acceptable in a civilized society as unjust discrimination, suffering, and disadvantages are also regarded to be categorized as persecution. The main actor of the persecution should not be limited to a governmental organization but can also be a non-governmental organization when governmental protection is not viable (Refer to Handbook Article 65).

2) To be recognized as a refugee, it is not enough to just feel the fear of persecution but should be able to fully provide evidence for having that fear. This means that the claimant’s subjective psychological and mental condition should be supported by the objective situation (Handbook Article 38), and if it is decided that anyone who is put under the applicant’s general experience and circumstances in its entirety would clearly feel a fear of persecution, then it will be regarded that the fear has sufficient evidence.

In order to evaluate the applicant's general experience and circumstances, the general human rights violation status of his/her country of origin must certainly be considered, but it is also important to find out what other specific conditions or events in his/her country can be related to causing the applicant to feel possibility of fear. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself (Handbook 195).

(c) Responsibility to Provide Evidence

Generally the person who applies for refugee status is responsible for providing evidence. However in the case of refugees it is more general that the refugees will not be able to furnish a sufficient amount of objective evidence on the content, possibility or causes of the persecution. Therefore it is difficult to demand a refugee to provide objective evidence on all claims. It will be enough for the applicant's claims to be overall reliable and credible, however the arguments should be coherent and plausible while at the same time not run counter to generally known facts. (Handbook Article 204).

(2) Possibility of Recognition of Persecution on the Claimant

Coming back to the case, in consideration of the following circumstantial factors displayed in the above agreed facts, namely, 1) the fact that the criminal law of Pakistan stipulates that anyone engaging in the act of homosexuality must be sentenced to life, 2 to 10 years in prison or be subject to monetary fines and that the Sharia Law also rules that homosexual acts are subject to whipping/lashing penalties, detention or death; 2) not only has the Lahore High Court ruled that same-sex marriage is anti-Islamic but also a same-sex married couple was expelled and sentenced to a whipping/lashing penalty in the Khyber region of Pakistan, and homosexual individuals were arrested for their sexual orientation in the Lahore region of Pakistan, 3) the fact that, although the claimant was well established in Pakistan to have worked as an attorney in OOO from 1983 to December of 1996, the claimant claims to have come to South Korea in 1996 to escape from threats by his wife, family and acquaintances because of his homosexuality, 4) the fact that the claimant was arrested by Pakistani police for his homosexuality, was threatened by his family and others, and continued to be threatened by other Pakistani Muslims for being homosexual; 5) the fact that the Immigration and Refugee Board of Canada reports that many homosexual individuals in Pakistan have to maintain a married life in Pakistan despite their sexual orientation, the claimant's claims are in and of themselves coherent, plausible and overall credible and do not run counter to facts that are generally known, therefore it can be said that it is very likely that the claimant, in the case that he gets sent back to Pakistan he will be persecuted by Pakistani Muslims, the Pakistani government, etc. for being homosexual.

(3) Concluding Remarks

Therefore, as the claimant is judged to have 'a well-founded fear of being persecuted', and is recognized as a refugee according to the Immigration Law Article 2-2-2, the defendant's ruling is found to be unlawful.

3. Conclusion

It follows from the foregoing that the claimant's appeal is well-grounded and therefore the court accepts the claimant's appeal and rules as stated in the order.

Chairman Judge 000
Judge 000
Judge 000

Related Laws

[Immigration Law]

Article 2 (Definitions)

Definitions of the terms used in this Law shall be as follows:

2.2 The term “Refugee” means a person who falls within the provisions of Article 1 of the Convention relating to the Status of Refugees (hereinafter referred to as “Refugee Convention”) or the provisions of Article 1 of the Protocol relating to the Status of Refugees.

Article 76-2 (Recognition of a Refugee)

(1) When an alien physically present in the Republic of Korea applies for recognition as a refugee under the Presidential Decree, the Ministry of Justice may recognize such an alien as a refugee.

(2) The Application as referred to in Paragraph (1) shall be performed within sixty days from the date which an alien lands or enters the Republic of Korea (when the reasons arise during his staying in the Republic of Korea, this will be determined from the date which an alien discovers such reasons), except for other unavoidable reasons such as diseases.

(3) When recognizing the alien as a refugee in accordance with Paragraph (1), the Minister of Justice shall deliver the certificate of refugee status, and if not, the Minister of Justice shall notify him of the reason in writing.

(4) The procedure of examination on a recognition of a refugee under Paragraph (1) and other necessary matters, shall be prescribed by the Presidential Decree.

[Convention Relating to the Status of Refugees (July 28, 1951)]

Chapter 1 General Provisions

Article 1 definition of the term “refugee”

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Chapter 2 Juridical Status

Article 12 Personal Status

The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

Chapter 5 Administrative Measures

Article 33 Prohibition of Expulsion or Return

1. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[Protocol Relating to the Status of Refugees (January 31, 1967)]

Article I General Provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.

※South Korea joined both the convention and the protocol on December 3, 1992.

[Handbook on Criteria and Procedures for Determining Refugee Status]

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

38. To the element of fear--a state of mind and a subjective condition--is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

51. There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution.

65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.