

Federal Court



Cour fédérale

Date: 20190627

Docket: IMM-4220-18

Citation: 2019 FC 870

Ottawa, Ontario, June 27, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**YAOCHUN ZHANG
XUCHEN ZANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Yaochun Zhang is the principal applicant in this matter, and Xuchen Zhang is his son. They are citizens of China. Mr. Zhang reports that he fears persecution in China as he has three other sons and is therefore in violation of China's Family Planning Policy [FPP].

[2] The Refugee Protection Division [RPD] found the applicants were neither Convention refugees nor persons in need of protection, a finding that was upheld by the Refugee Appeal Division [RAD].

[3] The applicants seek judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the RAD's decision. The application raises the following issues:

- A. Did the RAD act unfairly by raising new issues without notice?
- B. Were the RAD's credibility and fear of persecution findings unreasonable?

[4] For the reasons that follow, I am of the view that the RAD did not act unfairly. However, I am satisfied that the RAD's treatment of evidence relating to Mr. Zhang's fear of persecution undermines the reasonableness of the decision.

II. Background

[5] Mr. Zhang married his current wife, Ms. Li, in 2002. He reports that he is the father of four sons. Ms. Li is the mother of three of Mr. Zhang's children: Xuchen, born in China in 2002, and two sons born in Canada, the first in 2014 and the second in 2017. Mr. Zhang has a fourth son from a previous marriage.

[6] After Xuchen's birth in 2002, Ms. Li was required to take birth control measures under the FPP. She failed to fully comply with the required measures, and in November 2013, she discovered she was pregnant. Due to her pregnancy, she did not report for a regular examination

under the FPP and instead went into hiding as she feared a forced abortion. Arrangements were made with a smuggler and she fled to Canada in December 2013. While Ms. Li was in hiding, Mr. Zhang received a notice from the Family Planning Office regarding the missed examination. Ms. Li's claim for protection in Canada was ultimately refused.

[7] In June 2014, Ms. Li gave birth to Mr. Zhang's third son in Canada. Mr. Zhang, who had remained in China, feared that he or Ms. Li would be sterilized and that Xuchen would face adverse repercussions should Ms. Li return to China with a third son born in violation of the FPP. He reports the couple also wished to have more children and would be prevented from doing so in China.

[8] Mr. Zhang sought out a smuggler and made arrangements to leave China with Xuchen. Travelling through the United States, they arrived in Canada in July 2015 and made refugee claims. Ms. Li gave birth to Mr. Zhang's fourth son in 2017.

III. Standard of Review

[9] The RAD's assessment of the evidence and findings involving a consideration of questions of mixed fact and law are owed deference and are reviewed against a standard of reasonableness (*Zhuang v Canada (Citizenship and Immigration)*, 2019 FC 263 at para 10).

[10] Issues of fairness are reviewed against a standard of correctness, where fairness is assessed on the basis of whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

A. *Did the RAD act unfairly by raising new issues without notice?*

[11] In its decision, the RAD found that documentation from family planning authorities purporting to require compliance with regular inspections and directing attendance for an examination were not authentic. The RAD also concluded that since Ms. Li had visited a Chinese hospital and was found to be pregnant, this information would have been recorded and come to the attention of family planning authorities.

[12] The applicants submit these issues were new and the RAD was not entitled to raise them without having first given them notice and the opportunity to respond.

[13] There was no breach of fairness. The jurisprudence defines a “new issue” as one that falls outside the grounds of appeal as set out by the parties; they are legally and factually distinct from the issues raised on the appeal (*R v Mian*, 2014 SCC 54, cited in *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 66–67). Where issues raised and considered by the RAD are linked to the parties’ submissions or the RPD’s findings, the RAD is entitled to independently assess the evidence or make credibility findings (*Bebri v Canada (Citizenship and Immigration)*, 2018 FC 726 at para 16).

[14] The RPD did consider the documentation from family planning authorities and noted the absence of enforcement action. By independently considering this evidence, the RAD did not raise a new issue; it simply came to a more definitive conclusion than the RPD had.

[15] Similarly, in concluding that it was not plausible that family planning authorities would be unaware that Ms. Li had become pregnant, the RAD did not raise a “new issue.” Instead, the RAD engaged in an independent assessment of the evidence in addressing the applicants’ position that the only violation that the authorities were aware of was Ms. Li’s failure to attend an examination.

B. *Were the RAD’s credibility and fear of persecution findings unreasonable?*

[16] Mr. Zhang argues that the RAD made of number of errors in reaching its findings on credibility and fear. I am satisfied that the RAD did err in considering the risks faced by Mr. Zhang upon return to China with two additional Canadian-born children.

[17] The respondent argues the RAD reasonably concluded that the two Canadian-born children would not violate the FPP. It submits the RAD’s conclusion is consistent with the evidence, which provides that only Chinese citizens are subject to the FPP. The respondent notes that the children are Canadian, that China does not recognize dual citizenship, and that it was therefore reasonable to conclude they were unlikely to be recognized as Chinese citizens. The respondent further submits that even if Mr. Zhang were found to be in violation of the FPP, the RAD reasonably concluded that he was at no real risk of sterilization and that financial penalties are generally not persecutory. I disagree.

[18] The respondent relies on extracts from Chinese family planning legislation, regulations, and a 2016 United States Department of State [USDOS] report to demonstrate that the RAD reasonably concluded non-citizens are not subject to the FPP. The documentary evidence cited

by the respondent does refer to and impose obligations on Chinese citizens; however, it is clear that in doing so, the reference is to adult citizens upon whom family planning obligations are imposed, not their children. For example, the statement that “citizens have an obligation to practice birth planning in accordance with the law” is not an obligation imposed on minor children.

[19] The respondent also relies on the decision of Justice George Locke in *Li v Canada (Citizenship and Immigration)*, 2019 FC 95 [*Li*], where he states at paragraph 14 that “[i]t would be surprising if sanctions for violating the FPP would be applied in relation to non-citizen, non-resident children.” *Li* does not assist the respondent. In *Li*, the applicant had sought a pre-removal risk assessment. As in this case, children of Chinese citizens born in Canada were involved. However, unlike this case, the Officer in *Li* had found the Canadian children could very well remain in Canada as the applicant’s spouse was not to be removed. It was in this context that Justice Locke found that China was more tolerant of children born outside China and who were to remain outside China.

[20] Neither the jurisprudence nor the documentary evidence is supportive of the RAD’s conclusion that Canadian-born children who return to China with their parents would not count under the FPP.

[21] Similarly, in addressing the persecution risk, the RAD states that it “agrees that sterilization can still occur in China” but then states “[t]here is no evidence or documentation before the RAD that would suggest that this was the circumstance for the principal Appellant.”

In reaching this conclusion, the RAD points to the FPP notices received by Mr. Zhang and notes that the notices contain no reference to sterilization.

[22] The USDOS report notes that coerced sterilizations continue to occur to people who violate the two-child policy and that social compensation fees “can reach 10 times a person’s annual disposable income.” Mr. Zhang had submitted an article describing an incident of forced sterilization. The RAD did not address the USDOS report and dismissed the article on the basis that it was incomplete. The existence of these two sources undermines the RAD’s conclusion that there was no evidence that Mr. Zhang could be subject to sterilization. Where directly relevant evidence is not considered or analyzed by a decision maker, the door is opened to the inference that the decision maker made an erroneous finding of fact without regard to the evidence or ignored contradictory evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17 (TD)).

[23] In concluding that Mr. Zhang was not demonstrated to be at risk, the RAD failed to engage with the evidence. This failure undermines the intelligibility, and in turn, reasonableness of the decision.

V. Conclusion

[24] The application is granted. The parties have not identified a serious question of general importance and none arises.

JUDGMENT IN IMM-4220-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision maker; and
3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4220-18

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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