Federal Court  Cour fédérale

Date: 20210514

Docket: IMM-522-20

Citation: 2021 FC 429

Ottawa, Ontario, May 14, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

YINGRU DENG,
CHAOHUA YANG, AND
ZHISHAN YANG

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an Application for judicial review of a December 18, 2019 decision [Decision] of the Refugee Appeal Division [RAD] brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act* SC 2001 c 27 [*IRPA*] . The RAD dismissed the Applicants' appeal of a

Refugee Protection Division [RPD] decision, which found that the Applicants were neither Convention Refugees nor persons in need of protection pursuant to s 96 and 97 of the *IRPA*.

[2] The Applicants submit that the RAD erred by unreasonably interpreting China's family planning laws and failing to consider that fines for violating family planning laws are persecutory in certain circumstances.

[3] The application for judicial review is dismissed.

II. Background

[4] The Principal Applicant, her husband, and their daughter are citizens of Guangdong, China. After the Principal Applicant gave birth to the couple's daughter on April 13, 2011, she was required to have an IUD inserted and submit to an IUD check-up three times a year. The couple became pregnant with their second child in 2015 after receiving approval by the family planning authorities to remove the Principal Applicant's IUD. The family planning office told the Principal Applicant that she would undergo sterilization after the birth of her second child despite her objections. The Principal Applicant and her husband discussed the warnings of the family planning officers and decided to leave the country before the birth of their second child.

[5] The Applicants left China on November 24, 2015, entered the United States, and travelled to Canada. The Principal Applicant states that while in Canada, family planning officers visited her in-law's home in China asking for their whereabouts and their return to China. According to the Principal Applicant, the officers said that without status in Canada, and upon

their return to China, the Applicants would have to comply with China's family planning policy and she would have to undergo sterilization. The Applicants' second child was born in Canada in April 2016.

[6] The Applicants applied for refugee protection in 2019 while the Principal Applicant was pregnant with their third child. On April 24, 2019, the RPD denied their claim on the basis that the Applicants failed to establish that they were in violation of the Population and Family Planning Regulations [Regulations] of Guangdong Province. The RPD also noted that if the Applicants were found to be in violation of the Regulations for having a third child, there was only a possibility that they would be required to pay a fine, which the RPD did not find to be persecutory. The Applicants appealed the RPD decision to the RAD.

III. The RAD Decision

[7] The Applicants submitted that the RPD erred in two ways. First, the RPD erred in its interpretation of the Regulations about whether they applied to overseas births. Secondly, it erred in its determination that the Applicants would only be subject to a fine.

[8] The RAD upheld the RPD's findings and concluded that the Applicants were not at risk for having "out of plan" children because the Regulations do not apply to childbirths abroad. Alternatively, the RAD upheld the RPD's finding that, at most, the Applicants would be subjected to a fine, which amounts to a law of general application and does not rise to the level of persecution.

IV. Issues and Standard of Review

[9] The sole issue for review is whether the Decision was reasonable.

[10] The parties agree that this issue is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. Under the reasonableness standard the Court must focus on the Decision, including the reasoning process and the outcome (*Vavilov* at para 83).

[11] This standard requires a consideration of whether the Decision is "one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). In doing so, the decision-makers' written reasons must be interpreted holistically and contextually (*Vavilov* at para 97).

V. Parties' Positions

(1) Applicants' Position

[12] The Applicants submit that the RAD erred by determining that children born in Canada would not count towards China's two-child policy, failing to consider that the new law is not applied retroactively, and failing to consider that the fines that the Applicants would be subject to would amount to persecution in their particular circumstances.

(2) The Respondent's position

[13] The Respondent submits that the Applicants' arguments amount to a request for the Court to reweigh the evidence. It submits that the RAD did not err in finding that the Applicants failed to establish that the two children born in Canada would count under the Regulations for the purposes of family planning. The Respondent submits that the RAD properly considered the governing Regulations as well as the applicability of enforcement actions and penalties in coming to its Decision.

VI. Analysis

A. *Was the interpretation of the family planning laws unreasonable?*

[14] I am not persuaded by the Applicants' assertion that the RAD relied on or based its Decision on the wording of the Fujian Province law. In reviewing the Decision, it is apparent that the RAD referenced the Fujian Province's law as an interpretative tool in understanding the Regulations in Guangdong Province. There is nothing in the Decision to suggest that this one factor was determinative of the issue.

[15] I am also not persuaded by the Applicants' position that the RAD's interpretation of Article 20 is unreasonable and renders much of the law devoid of any purpose. The Applicants base their conclusion on the argument that if the Regulations applied only to in-province births there would be a simpler way to word it and the Regulations would be worded accordingly. Further, they submit there would have been no need for specific rules within the Regulations.

[16] I see no error in the RAD's consideration of the Regulations. The RAD found that the Regulations would not apply to the Applicants since they only applied to those who bear children in Guangdong Province. Since two of their three children were born in Canada, the RAD found that the Regulations would not affect the Applicants. In coming to this conclusion, the RAD addressed Article 20 of the Regulations, which reads as follows:

> Regulations of the Guangdong Province on Population and Family Planning shall be implemented, except otherwise prescribed by the state, in the cases of childbearing in the Province by the following persons: returned overseas Chinese and their relatives, citizens who reside outside China but whose registered permanent addresses are within the Province and persons whose spouses are residents of Hong Kong Special Administrative Region, Macau Special Administrative Region or Taiwan or foreign citizens.
>
> [Emphasis added]

[17] The RAD also addressed Article 2 of the Regulations and determined that the Regulations only apply to Chinese citizens residing or registered in Guangdong Province who were bearing children. The RAD addressed amendments to the Regulations and the National Documentation Policy and canvassed the case law the Applicants had submitted. Additionally, they assessed neighbouring provincial regulations in the Fujian Province as an aid to understanding the Guangdong Regulations. They did this on the basis that there is a similarity in the nature and timing of recent regulatory changes in both Provinces.

[18] In summary, I find that the RAD engaged in a reasonable interpretation of the Regulations. While the RAD did assess the Regulations based on a plain reading of the statute, it is clear that the RAD did not stop there and considered the changes in China's law and policy.

While the Applicants have a different interpretation of the law, it does not make the RAD's interpretation unreasonable.

B. *Did the RAD consider that the most recent Regulation did not apply retroactively?*

[19] The Applicants state that the RAD erred by failing to consider if they would face persecution as a result of the non-retroactive nature of the Regulations and the family planning enforcement action that the Principal Applicant was subjected to prior to departing from China.

[20] The Applicants submit that regardless of what the law is today, the family planning officials had already determined that the Principal Applicant would be subject to sterilization upon return to China. They presume that the family planning officials would carry out the sterilization in light of the non-retroactive nature of the new Regulation. In support, they cite *Xie v Canada (Citizenship and Immigration)*, 2019 FC 1458 [*Xie*]:

> [23] I agree that the RPD committed a fatal error when it failed to address the Applicants' claim that they feared they would face sterilization upon return to China because they had three children while in Canada. In addition, the Principal Applicant's claim that being forced to submit to mandatory contraception through the insertion of an IUD amounts to persecution is also stated clearly. This is a core element of their claim. It was stated in the Personal Information Form of both Applicants and repeated in their testimony. The RPD acknowledges the Principal Applicant's fear that she would be forced to employ mandatory contraception in the form of an IUD (at para 44), but then fails to analyze either of these claims.

[21] The Applicant's reliance on *Xie* is not particularly helpful. The Applicants have clearly stated that their position before this Court is that the RAD failed to consider retroactivity. In turning to the RAD's reasons and the record, however, it is apparent that this was not the focus

of the appeal. The RAD specifically canvassed retroactivity with specific reference to the cases that the Applicants had cited as well as country condition evidence. I, therefore, find that rather than ignoring a claim, which was the basis of *Xie*, the RAD simply came to a conclusion that was different than the Applicants' submissions on appeal.

C. *Did the RAD fail to consider whether a fine is persecutory?*

[22] I am not persuaded by the Applicants' submissions that the RAD failed to consider whether the fines that they may be subjected to are persecutory in nature. The Applicants submitted that the fine would be somewhere between three to six times the Applicants' annual income, and that they would not be able to afford them, and a failure to pay would lead to additional surcharges.

[23] I am persuaded by the Respondent's submissions that since the RAD found that the Regulations did not apply to the Applicants they reasonably concluded that they would not be subjected to any fines.

[24] The RAD was alive to the issue of penalties and that they could be persecutory in nature. After reviewing the country condition evidence and relevant jurisprudence, the RAD determined that the only economic sanction that might be imposed would be a social compensation fee that would only arise if the Applicants have more children upon their return to China. I see no error in how the RAD arrived at its Decision.

[25] In summary, I find that the RAD's determination on this issue is reasonable.

VII. Conclusion

[26] The Applicants bear the onus to prove that the Regulations will lead to persecution for the purposes of establishing that they are Convention Refugees or persons in need of protection. It was reasonable, on the evidence before the RAD, to conclude that this was not established. The RAD's reasons illustrate the process they undertook in arriving at its Decision. The Decision meets the standard of justification, transparency, and intelligibility and falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[27] The application for judicial review is dismissed.

[28] There is no question of general importance for certification.

JUDGMENT in IMM-522-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-522-20
STYLE OF CAUSE:	YINGRU DENG, CHAOHUA YANG, AND ZHISHAN YANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 20, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MAY 14, 2021

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