

Federal Court



Cour fédérale

Date: 20171127

Docket: IMM-52-17

Citation: 2017 FC 1073

St. John's, Newfoundland and Labrador, November 27, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**DAILING YUAN
JIANJUN LI
LEYI LI
LEQIONG LI
(A.K.A. LEQING LI)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Dailing Yuan (the “Male Applicant”), his wife Jianjun Li (the “Female Applicant”) and their minor daughters Leyi Li and Leqiong Li (A.K.A. Leqing Li (collectively “the Applicants”) seek judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”). In the decision, made on December 20, 2016, the RAD

dismissed the Applicants' appeal from the finding by the Refugee Protection Division (the "RPD") that the Applicants are neither Convention refugees nor persons in need of protection within the meaning of section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), respectively.

[2] The Applicants are citizens of China. They fear persecution on the basis of forced sterilization following a forced abortion, flowing from the family planning policies of the Chinese government.

[3] The Female Applicant delivered her first child on December 17, 2009. Her second child was born on November 2, 2011. She claims that she became pregnant a third time, despite using an Intrauterine Device ("IUD"). She discovered she was pregnant at the end of June 2014 and her next IUD check-up was scheduled for September 2014. Fearing a forced abortion, the Female Applicant hid in the home of her husband's uncle. When located there some weeks later by the family planning authorities, she was brought to a hospital and forced to undergo an abortion.

[4] The RPD did not believe the Applicants' claims and made negative credibility findings. In its decision, the RAD reviewed the findings of the RPD and confirmed the negative credibility determinations. Indeed the RAD went further and concluded that the Female Applicant did not undergo a forced abortion and that neither she nor her husband were at risk of forced sterilization.

[5] In their application for judicial review, the Applicants argue that the RAD erred in confirming the decision of the RPD, in particular in its treatment of the psychological evidence that had been produced, in confirming the negative credibility findings and by unreasonably concluding that there is no forward-looking risk of persecution.

[6] The first question to be addressed is the standard of review, beginning with the first standard of review, that is the standard of review to be applied by this Court to the RAD.

[7] The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see *Canada (Minister of Citizenship and Immigration) v. Huruglica* (2016), 396 D.L.R. (4th) 527 (F.C.A) at paragraph 35.

[8] Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and falls within a range of outcomes that are defensible in respect of the facts and the law; see the decision in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[9] Next, I refer to the standard of review to be applied by the RAD upon an appeal from the RPD.

[10] In judicial review of a decision of the RAD, the reviewing court must look at the standard of review applied by the RAD to the RPD's decision. The Federal Court of Appeal in *Huruglica, supra* at paragraph 77 said:

... I find no indication in the wording of the IRPA, read in the context of the legislative scheme and its objectives, that supports the application of a standard of reasonableness or of palpable and overriding error to RPD findings of fact or mixed fact and law.

[11] According to the decision of the Supreme Court of Canada in *Dunsmuir, supra*, there are generally only two standards of review, that is reasonableness and correctness. If the standard of reasonableness does not apply, only the standard of correctness remains to be applied by the RAD in its review of certain issues before the RPD.

[12] At paragraph 103, of *Huruglica, supra*, the Federal Court of Appeal concluded:

I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim.

[13] In my opinion, the paragraph quoted above means that the RAD must apply a correctness standard when reviewing decisions of the RPD which do not raise issues of the credibility of oral evidence. In the present case, credibility is the determinative issue. Those findings are subject to review on the standard of reasonableness, as noted above.

[14] I have reviewed the Application records filed by the parties, as well as the affidavit of Dana Salmon filed by the Respondent. A copy of the transcript of the hearing before the RPD is attached as an exhibit to that affidavit. Both Applicants testified before the RPD.

[15] In my opinion, the negative credibility findings made by the RPD were open to it.

[16] According to its decision, the RAD reviewed the audio recordings of the RPD hearing. There are repeated references to the audio recordings in the decision of the RAD.

[17] The decision of the RAD carefully sets out the basis upon which it rejected the arguments before it, presented by the Applicants.

[18] In the present proceeding, the Applicants challenge the conclusions of the RAD and submit that they were reached without regard to the evidence, in particular the psychological report. They also argue that the RAD failed to consider the ultrasound report dated October 9, 2014.

[19] That report was commissioned on behalf of the Female Applicant between the first and second sittings before the RPD. The thrust of that report, prepared by a clinical psychologist, was to say that the female Applicant suffers from Post-Traumatic Stress Disorder and that this condition may affect her ability to testify. Insofar as the RPD made negative credibility findings, which were upheld by the RAD, this report is relevant to the credibility assessment of the Female Applicant, and submissions on behalf of the Applicants were made from that perspective.

[20] I am not persuaded that either the PRD or the RAD disregarded this evidence.

[21] Insofar as the RPD considered the report in its assessment of the credibility of the Female Applicant, it was entitled, indeed required, to do so and to evaluate the relevance and weight to be afforded it.

[22] A psychological report cannot, by itself, replace the evidence of a witness, including an applicant, before the RPD or the RAD, as the case may be. I refer to the decision in *Khatun v. Canada (Citizenship and Immigration)*, [2012] F.C.J. No. 169, at paragraph 94:

In this case, the Applicant tries to rely on the Pilowsky Report and the RPD's alleged ignorance of it to explain away all of the negative credibility findings. However, as stated by the Respondent, no psychological report could act as a cure-all for deficiencies in the Applicant's evidence.

[23] I agree with the position of the Respondent that the arguments about the ultrasound report should not be entertained. These submissions were not raised in the Memorandum of Fact and Law. They were not raised before the RAD. In any event, neither the ultrasound report nor the arguments address the determinative issue of credibility.

[24] The Applicants submit that the RAD erred by failing to consider the issue of prospective risk.

[25] In my opinion, the RAD was not required to address this issue in view of the negative credibility findings which were open to it.

[26] In the result, I see no reviewable error arising in respect of the decision of the RAD and this application for judicial review will be dismissed. No question for certification arising.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed,
no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-52-17

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