

Federal Court



Cour fédérale

Date: 20191119

Docket: IMM-3439-18

Citation: 2019 FC 1458

Ottawa, Ontario, November 19, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

**CANHUA XIE
YANJUAN CAO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Canhua Xie (the Male Applicant) and Yanjuan Cao (the Female Applicant), a married couple, are citizens of China who came to Canada and claimed refugee status. They have three children, all born in Canada. They claim that they would face persecution if returned to China based on several grounds: (i) the police will arrest them because of their role in a protest against land expropriation that turned violent; (ii) they will face difficulties because they cannot pay the fine that will be imposed because they breached the “one child” policy in China; (iii) the Female Applicant will be forced to get an intrauterine device (IUD) and face regular invasive medical

checks and they may both face forced sterilization; and, (iv) the Female Applicant will be unable to practice her Christian faith freely in China.

[2] The Refugee Protection Division (RPD) dismissed their claims, finding they lacked credibility on the key elements of their narrative about being pursued by the police, and that the fears of forced sterilization and persecution based on religion were not supported in the evidence. The Applicants seek judicial review of that decision.

I. Context

[3] The Applicants leased an orchard in China in 2009 for a period of ten years, and had made investments in the property. On January 6, 2012, they received notice from their village that the land would be expropriated (in effect cancelling the lease) and that they had two months to vacate the property. Shortly thereafter, they received information regarding the amount of compensation they were to receive, and they found the amount to be unfairly low. They discussed their concerns with others similarly affected in their village, and the Applicants, together with two other farmers, approached local government officials on four occasions to seek better compensation. Each time they were told to wait to see if their concerns could be resolved.

[4] On February 20, 2012, construction officials came to their area and demanded that the properties be vacated. On March 6, 2012, the construction officials came back, this time with security officials, to begin demolition. The Applicants and others in the village protested to try to stop the work, and the protest became violent. As a result, the security officials threatened to arrest protesters, and the Applicants fled the scene. They went to their cousin's house, and upon

learning that the Public Security Bureau (PSB) had visited their home and left a summons, and that other villagers had been arrested, the Applicants decided to flee China.

[5] They engaged a smuggler to assist them with their travel. They had acquired United States visas prior to leaving China, left the country via Hong Kong, and flew to the United States, from whence they made their way to Canada. The Applicants arrived in Canada on April 28, 2012, and filed their claim for refugee protection two days later.

II. Decision Under Review

[6] The RPD accepted that the Applicants are citizens of China, based on their testimony and the certified true copies of their Chinese passports. The RPD found the determinative issue to be whether their fear of persecution upon return to China was well founded. It rejected their claims on the basis that their alleged fears were not credible or supported by the objective documentary evidence.

[7] In regard to their claims of being pursued by the PSB, the panel accepted that the PSB had arrested demonstrators in connection with the clash in the Applicants' village, but it found that the Applicants had run away before this happened. It did not, however, believe their claim that the PSB was looking for them. The Applicants submitted a summons that was allegedly left at their home, as well as a jail visitor card issued to one of the arrested neighbour's sons.

[8] The RPD found that the summons contained no security features, and it gave the documents little weight because it found that "these claimants have the propensity and capability to adopt fraudulent means and as such acquire fraudulent documents in support of their plans to

travel to Canada” (at para 14). This was because the Applicants had hired a smuggler to help them escape China, and the documentary evidence showed that fraudulent documents can be easily obtained in China.

[9] The RPD did not reject the testimony that the other farmers who had taken the lead with the Applicants in raising concerns with local officials were arrested, but it found that this did not bolster the Applicants’ claims because they had run away from the scene before the arrests occurred. It also rejected their evidence that the PSB had continued to visit their home and the homes of their relatives after 2012, because it found it not credible that the PSB would repeatedly visit these homes but not leave a follow-up summons or arrest warrant. Therefore, the RPD found that their claim that they were being pursued by the PSB was not credible.

[10] The RPD also found that the Applicants’ failure to claim asylum in the United States detracted from their credibility. It accepted that they might have hired a smuggler to get out of China, but found that this was for the purpose of coming to Canada, not because they were avoiding arrest by the PSB.

[11] Finally, on this point, the RPD found that even if the PSB was searching for the Applicants, that did not mean they were subject to persecution because the PSB was simply seeking to enforce the local laws against anti-government protests.

[12] In relation to the Applicants’ narrative regarding their departure from China, the RPD found their claims to be lacking in credibility, given the evidence of the PSB capacity to share information through its Golden Shield project, and the evidence that airport security authorities

had access to this information. The RPD did not accept the argument that the smuggler had made all of the arrangements to permit the Applicants to avoid security checks upon their departure.

The RPD found, on a balance of probabilities, that it would not have been possible for the Applicants to bypass all of the security checks if they were being actively pursued by the PSB.

[13] Based on these findings, the RPD found, on a balance of probabilities, that the Applicants were not being pursued by the authorities in China as they had alleged. It further found that any interest the PSB may have had related to prosecuting them for breaking the law, and this did not expose them to a persecution or a risk to their lives or to cruel and unusual treatment or punishment or a danger of torture.

[14] In relation to the claims relating to the violation of China's family planning policy, the RPD accepted that they might have to pay a social support fee upon their return, but it found, on the basis of jurisprudence of this Court, that this did not amount to persecution because it was a law of general application, citing *Wang v Canada (Citizenship and Immigration)*, 2011 FC 636 at para 27; *Chen v Canada (Citizenship and Immigration)*, 2015 FC 225 at para 26, and *Li v Canada (Citizenship and Immigration)*, 2011 FC 610 at para 17. The Panel found that the Applicants had demonstrated that they were financially resourceful and that it was reasonable to expect they would have the financial resources to pay the fees.

[15] In regard to the Female Applicant's fear of persecution because she would be forced to undergo regular pregnancy assessments and be subject to restrictive birth policies which would interfere with her reproductive liberty, the RPD accepted that she would have to undergo such monitoring, but found that this did not amount to persecution. The panel noted the documentary

evidence that the family planning policy required mandatory checks by medical personnel of women of childbearing age, but found that these did not interfere with the Applicant's reproductive liberty. The essence of the RPD's analysis is contained in the following passages (at paras 49-50):

[The] question remains whether periodic pregnancy examinations interfere with the female claimant's reproductive liberty and, as such, are persecutory? The panel notes that the nature of the pregnancy examinations is non-invasive and is usually limited to ultrasound or, more commonly blood work...

The panel finds, based on the evidence in this case, the requirement to submit to periodic pregnancy examinations and contraceptive-use monitoring to detect unauthorized pregnancies as part of the family planning policy of China does not threaten the female claimant's basic human rights in a fundamental way and, as such, does not rise to the level of persecution. In this respect, the panel finds there is insufficient persuasive evidence to support these claimants' arguments.

[16] The RPD also rejected the Female Applicant's alleged risk of persecution based on her becoming pregnant in the future because it found this claim to be speculative, citing in support of this conclusion *Liang v Canada (Citizenship and Immigration)*, 2013 FC 765.

[17] In regard to the Female Applicant's fear of persecution based on her Christian faith, the RPD found that that she had joined the Living Stone Assembly Church in April 2017 and been baptized in October 2017, noting that she had arrived in Canada in 2012. It gave little weight to her knowledge of Christianity nor to the letter from the pastor of the Church, and concluded that she had joined the Church "only for the purpose of supporting a fraudulent refugee claim" (at para 57). Furthermore, the RPD found that the documentary evidence supported the view that even if she was a practicing Christian, her risk of persecution upon return to Guangdong

province in China was low because of changes in the approach of the government to religious practice.

[18] For all of these reasons, the RPD concluded that the Applicants were not Convention refugees nor persons in need of protection, under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27*.

III. Issues and Standard of Review

[19] The issue in this case is whether the RPD's decision is reasonable. This raises several questions:

- A. Was it reasonable for the RPD to conclude that the Applicants would not face persecution because of China's Family Planning Policy?
- B. Was it reasonable for the RPD to conclude that the Applicants were not being pursued by the PSB?
- C. Was it reasonable for the RPD to conclude that the Female Applicant would not face more than a mere possibility of risk of religious persecution?

[20] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why

the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

IV. Analysis

A. *Was it reasonable for the RPD to conclude that the Applicants would not face persecution because of China’s Family Planning Policy?*

[21] The Applicants argue that the RPD erred because neither of its findings were supported in the evidence. The RPD found that the Applicants would only have to pay the social compensation fine, yet the evidence indicated that the use of harsh and coercive family planning measures, including forced sterilization, continued in China despite certain changes in its policies. Furthermore, the social compensation fine could reach up to ten times a person’s annual disposable income, and could be imposed on each parent separately. The RPD’s finding that the Applicants would have the financial means to pay this amount is not supported in the evidence.

[22] In relation to mandatory contraception and pregnancy examinations, there is no basis for the panel’s conclusion that the mandatory taking of a blood sample is “non-invasive” since it is a direction violation of the Female Applicant’s physical integrity. In addition, the RPD did not question that the Female Applicant would be forced to have an IUD implanted, and that she perceived this as persecution in relation to her reproductive liberty. However, the RPD simply does not address this aspect of the claim.

[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 Female 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 Female 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.

[24] The jurisprudence is consistent that a decision-maker's reasons do not need to be perfect, and that reasonableness review is not to be a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). However, the case-law of this Court is also consistent that a failure to address a core element of a refugee claim may be found to be unreasonable where the decision does not provide an indication that the matter was dealt with, at least implicitly (*Paramanathan v Canada (Citizenship and Immigration)*, 2012 FC 338 at paras 14-19; *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at paras 104-107).

[25] In this case, it is simply not possible to infer that the RPD considered this aspect of the Applicants' claims. It is not possible to reconcile its findings that pregnancy check-ups were "non invasive" and that undergoing mandatory examinations to detect unauthorized pregnancies "does not threaten the female claimant's basic human rights in a fundamental way" (at paras 49 and 50), with the evidence that shows that she would be forced to have an IUD implanted, against her consent. The two conclusions simply cannot stand together.

[26] There is ample jurisprudence of this Court that compulsory insertion of an IUD can constitute a form of state persecution. I can do no better than to quote from two decisions that deal directly with this point. In *Zheng v Canada (Citizenship and Immigration)*, 2009 FC 327 at para 14, Justice Robert Barnes stated:

[14] I do not agree with the Board that the forcible insertion of an IUD is not a form of state persecution. In *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at para. 92 the Court held that interference with a woman's reproductive liberty is a basic right ranking high on our scale of values. A similar observation was made by Justice Dolores Hansen in *Chi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 126, [2002] F.C.J. No. 186, where she examined the Chinese practice of sterilization and the forced use of IUD's. My own views conform with her concluding comments at paragraph 48:

The punishment that the applicant fears is the state-enforced suppression of her reproductive capacity. The CRDD's suggestion that the applicant can return to China and live as a single woman without being targeted for sterilization or forced insertion of an IUD is an imposition of a significant personal choice the applicant does not want to make and fails to take into account the cultural context.

[Emphasis in original.]

[27] Similarly, Justice Sean Harrington found, in *Liu v Canada (Citizenship and Immigration)*, 2015 FC 1193 at para 14, that “[b]oth jurisprudence and common sense conclude that the violation of a woman's reproductive and physical integrity, such as by means of forced abortion or the forced insertion of an IUD constitutes persecution...”

[28] It should be noted that each case will depend on its particular facts, and there are decisions in which the RPD has been found to have considered the evidence and reasonably

assessed the claim (see, for example *Huang v Canada (Citizenship and Immigration)*, 2019 FC 94, at paras 17-18).

[29] In this case, however, there is simply no discussion of this aspect of the Applicants' claims. It is not reasonable for the RPD to simply ignore a core element of a claim, in particular where jurisprudence has found other such claims to amount to persecution. This case falls into the category described by Justice Donald Rennie in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at paras 10-11, in a passage which was cited with approval in *Delta Air Lines Inc v Lukács*, 2018 SCC 2, [2018] 1 SCR 6 at para 28:

[10] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 does not save the decision. *Newfoundland Nurses* ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary *lacunae* may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.

[11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[30] I find that the failure of the RPD to assess this aspect of the Applicants' claims is unreasonable. While the focus of the argument was on the Female Applicant's claim relating to being forced to undergo the insertion of an IUD, the Male Applicant also asserted a fear of being forced to undergo sterilization. It is not clear what evidence may exist in regard to this aspect of the claim but it is not for a court on judicial review to delve into the record to discover it.

[31] In view of my conclusion on this issue, it is not necessary to consider the other arguments advanced by the Applicants.

V. Conclusion

[32] For these reasons, the application for judicial review will be allowed. The matter will be remitted back to the RPD for reconsideration by a different panel.

[33] There is no question of general importance for certification in this case.

JUDGMENT in IMM-3439-18

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted back to the Refugee Protection Division for reconsideration by a different panel.
3. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
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