

Date: 20080527

Docket: IMM-4210-07

Citation: 2008 FC 678

Toronto, Ontario, May 27, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

**XIAOZHEN YANG
(a.k.a. Xiao Zhen Yang)
JIESHENG SU (a minor)
(a.k.a. Jie Sheng Su)**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] At the hearing of this application for judicial review, I indicated that I would allow the application. These are my reasons for doing so.

[2] Ms. Yang, the adult applicant, asserts that the Refugee Protection Division (the board) erred in two respects when it denied her claim for refugee protection. First, it erred in its assessment of identity. Second, it erred in its assessment of risk arising from Ms. Yang's failure to comply with China's one-child policy.

[3] At the hearing, the Minister's counsel, candidly and appropriately, acknowledged the deficiency in the board's analysis with respect to the issue of identity. The board purported to rely on its "specialized knowledge" regarding circumstances that could not properly be characterized as "specialized knowledge". The error was compounded by the board's failure to adhere to Rule 18 of the *Refugee Protection Division Rules* (a claimant must be notified that the board intends to use information or opinion within its specialized knowledge and provided an opportunity to make representations and give evidence regarding the use of the information or opinion). Further compounding the problem, the board then relied upon this "core" finding arising from its "specialized knowledge" as a basis for rejecting the other documents tendered by Ms. Yang.

[4] However, although the board was not satisfied that Ms. Yang had established her identity, it went on to deal with the substantive claim. Consequently, if the decision in relation to the substantive claim is reasonable, the error regarding identity is not necessarily fatal. The board's decision that the claim was not well founded was premised on the documentary country conditions.

[5] Specifically, the board concluded that while there are "mixed message in the evidence found in the country documents", the "preponderant message from both Chinese government sources and independent sources is that a fine rather than a forced abortion and sterilization is more likely than not the penalty that would be faced by the claimant".

[6] Examination of the documentary evidence establishes that the board's statement regarding the documentary evidence is a flagrant exaggeration. The contents of the country conditions documents are indeed "mixed". However, a "preponderant" message that points in only one direction does not exist on these documents.

[7] It is settled law that it is open to the board to prefer documentary evidence over the testimony of a claimant. Similarly, the board may choose to prefer some reports over others. Where there is contradictory evidence central to the claim, it is incumbent upon the board to analyze the evidence and state the reasons for its preference. It is not acceptable for the board to avoid such an analysis by stating that the "preponderant message" lies in one direction when that is clearly not the case.

[8] The decision must be set aside because the reasons do not exhibit the existence of justification, transparency and intelligibility within the decision-making process. Consequently, the decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v. New Brunswick* 2008 SCC 9 at para. 49.

[9] Counsel did not suggest a question for certification and none arises.

ORDER

IT IS ORDERED THAT the application for judicial review is allowed and the matter is remitted to the Refugee Protection Division, differently constituted.

“Carolyn Layden-Stevenson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: *XIAOZHEN YANG(a.k.a. Xiao Zhen Yang)JIESHENG SU (a minor) (a.k.a. Jie Sheng Su) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 27, 2008

REASONS FOR ORDER AND ORDER: LAYDEN-STEVENSON J.

DATED: May 27, 2008

APPEARANCES:

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