

Federal Court



Cour fédérale

Date: 20150416

Docket: IMM-8340-13

Citation: 2015 FC 484

Montréal, Quebec, April 16, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

BI XING ZENG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This decision concerns an application for judicial review of a decision dated December 9, 2013 (the Decision), of the Refugee Protection Division (RPD) of the Immigration and Refugee Board which determined that the applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[1] For the reasons set out below, I have concluded that the application should be dismissed.

II. Background

[2] The applicant is an unmarried Chinese citizen who, after feeling sick for a time in May 2011, learned that she was pregnant. Fearing that Chinese authorities would force her to have an abortion (because she was not married), she alleges that she left her parents' home where she lived and went into hiding at her cousin's home. She alleges that in June 2011, Chinese birth control officers appeared at her parents' home and demanded that the applicant present herself for an abortion. They also left a notice to that effect (the Notice of Abortion). The applicant also alleges that a few days later the officers appeared again at her parents' home and confiscated a television and washing machine, leaving a notice to that effect (the Notice of Confiscation).

[3] Fearing a forced abortion and possible sterilization, the applicant claims that she fled China for Canada with the help of a smuggler and using a false passport. She made her application for refugee status in Canada in September 2011. She indicated that she entered Canada in July 2011, but that could not be verified because she made her application inland and provided no travel documents. She claimed that the smuggler kept them.

[4] The applicant's son was born in Canada on January 19, 2012. At the time of her hearing before the RPD on November 26, 2013, the applicant was pregnant with a second child who was due to be born in April 2014.

III. Hearing and Decision

[5] At the hearing, the applicant's counsel failed to appear at the appointed time. The RPD member presiding at the hearing noted that the applicant's counsel had double-booked the time and it seemed that he would not appear. The member explained that he could grant the applicant an adjournment and select another date, but that no further adjournment would be granted in the event that the alternative date conflicted with counsel's schedule. The member explained that, alternatively, he could hear the applicant's claim that day in the absence of counsel. At that point, the applicant indicated that she wished to be represented by counsel.

[6] The member and the applicant agreed that they would recess to see if the applicant's counsel would appear. Upon resuming, the member indicated that the applicant's counsel had advised that he was ill and would not appear. The member noted that this information had been communicated only an hour after the scheduled beginning of the hearing and that no dates of availability for an alternative date for the hearing had been provided (as required by the *Refugee Protection Division Rules*, SOR/2012-256). The member also noted that the applicant's counsel had not filed any documents recently "which makes me wonder if he ever was intending to come to your hearing, but that's not your fault." After indicating that the hearing would be rescheduled for another date before the same RPD member, the applicant asked that the hearing proceed that day. Accordingly, the hearing was conducted that day, in the absence of counsel.

[7] The RPD rejected the applicant's refugee claim on the basis of findings of negative credibility, which affect her claim to a subjective fear of persecution. The RPD member also

concluded, in his Decision, that the applicant does not face a risk if returned to China, citing documents indicating that parents who have more than one child overseas may return with their children without serious problem.

IV. Issues

[8] The applicant argues that she was denied procedural fairness in the hearing of her refugee claim because it went ahead in the absence of her counsel only after the RPD member persuaded her to proceed without an adjournment.

[9] The applicant also argues that the following negative credibility findings were erroneous:

- a. The narrative in the Personal Information Form (PIF) that accompanied the applicant's refugee application indicated that the time she spent home sick before learning she was pregnant was a week, whereas during the RPD hearing she testified that it was about two weeks.
- b. The Notice of Confiscation (which was received after the Notice of Abortion) bears a date in June 2010, whereas the applicant was not pregnant until the following year.

[10] The applicant also objected to a comment in the Decision concerning the fact that the applicant could choose to return to China without her children. However, it is not necessary for me to address this comment because of my other conclusions discussed below.

V. Analysis

A. *Procedural fairness*

[11] In arguing that the RPD member improperly persuaded the applicant to proceed with the hearing of her refugee application in the absence of her counsel, she notes that she initially indicated that she wished to adjourn until her counsel could be present, and only changed her mind when the member made disparaging comments about her counsel. The applicant states that she was concerned that the member was biased against her counsel and that her chances were better without him. The applicant places the most emphasis on the statement by the member that he doubted that the applicant's counsel ever intended to appear for her hearing.

[12] In my view, the member's statements may have been indelicate and said out of frustration rather than to assist the applicant, but they were not wrong. Everything the member said about the applicant's counsel was true or a fair inference in the circumstances. It appears that the member's inference that the applicant's counsel never intended to appear at the hearing was based on the fact that he was double-booked and that he had not filed any documents in the days before the hearing. As it turned out, there were indeed some documents that should have been provided earlier. Key documents such as the Notice of Abortion and the Notice of Confiscation were provided only at the hearing before the member. Moreover, these documents were not translated into one of Canada's official languages.

[13] It follows from the applicant's argument that, when the applicant indicated that she had changed her mind and wished to proceed without her counsel, the member should have refused to proceed. I am not prepared to conclude that the situation required that. In fact, a refusal to proceed, in the face of the applicant's explicit request, might have left the member open to criticism that the applicant was denied her right to a timely hearing and unfairly subjected to a delay in deciding her refugee claim.

[14] After agreeing to proceed with the hearing in the absence of counsel, the RPD member indicated that he would explain in greater detail than he usually does how the hearing would unfold. I have seen nothing to suggest that the conduct of the hearing was such that the applicant was denied procedural fairness. The applicant points out that she was not specifically advised that she had the right to submit her own evidence. However, the transcript of the hearing indicates that the panel asked the applicant several times if she had corroborative documents. The member went further, explicitly inviting the applicant to say anything she wanted. Moreover, the applicant did submit evidence. The applicant did not point to any specific evidence that could or would have been submitted if the applicant had been specifically invited to do so.

[15] The applicant also criticizes a number of comments by the member during the hearing as being improper and which would have been objected to if counsel had been present. The applicant argues that these comments deprived her of a right to a fair hearing. I have difficulty understanding how one could take offense to most of the cited comments. With regard to one of the comments, the respondent acknowledged at the hearing before me that it was "unfortunate"

that, after observing that China is a traditional society and the applicant has two children out of wedlock, the member asked the applicant, "Why are you like that?" I agree that this was unfortunate. The question was imprecise and it is not clear to me how the answer could be relevant. However, I am not prepared to find that this question, or any of the others cited by the applicant, deprived the applicant of a fair hearing.

B. *Credibility findings*

[16] As indicated above, the applicant challenges two negative credibility findings by the member: how much time she spent home sick before learning that she was pregnant, and the erroneous date on a government notice. I will deal with each of these in turn.

(1) Time sick at home

[17] The applicant notes that this is an issue over whether the applicant was home sick for "one week" or "about two weeks" during a period about two and half years before the RPD hearing. The applicant characterizes this treatment of her evidence as microscopic. I am inclined to agree that the applicant's vagueness about this amount of time is insufficient to ground a serious negative inference as to credibility. However, I do not believe that the member relied heavily on this negative inference. Immediately after stating his conclusion on this issue, the member turned to the issue of the erroneous date on the government notice which he characterized as "[t]he key credibility issue". In my view, the applicant must be successful on the issue of the erroneous date if she is to be successful in the present application.

(2) Erroneous date

[18] The basis for the applicant's argument on this issue is that the RPD member seems to have been confused about which document bears the erroneous date. Paragraph 26 of the Decision is key to this issue. This paragraph begins by stating that the applicant's failure to mention the Notice of Confiscation in her PIF narrative made the member suspicious that it (the Notice of Confiscation) was not genuine. The paragraph continues by concluding that the Notice of Confiscation is not genuine because it was presented at the same time as the Notice of Abortion, which the member also finds to be not genuine. The paragraph states that the reason for finding that the Notice of Abortion is not genuine is that it bears a date that does not correspond to the applicant's allegations. This is the point of the member's confusion, since it is the Notice of Confiscation, not the Notice of Abortion, which bears the erroneous date.

[19] The applicant argues that this error by the member cannot be ignored because it directly affects the member's conclusion on the genuineness of the Notice of Abortion which is central to the applicant's claim of a fear of persecution. In short, if the member's reasoning leads to the conclusion that only the Notice of Confiscation is fake (because it was not mentioned in the applicant's PIF and because it bears the wrong date), then there is no reason to doubt the genuineness of the Notice of Abortion.

[20] The respondent acknowledges that the wording of paragraph 26 is confused, but argues that this does not change the fact that there is a serious problem with the date of one of the documents relied upon by the applicant.

[21] In my view, the negative inference as to credibility, including as to whether Chinese authorities ever demanded that the applicant have an abortion, should stand. Based on the member's analysis, it seems clear that he would have drawn the same inference if the confusion concerning which document bore the incorrect date had been brought to his attention. I base this conclusion on the following passage from later in paragraph 26 of the Decision:

[...] When asked to explain this [the erroneous date], the claimant said it must have been a printing error. However, as this was alleged to be an official government document, the Panel does not accept this explanation, but finds rather that this was a (sloppily prepared) false document. From the provision of a false document the panel makes a negative inference as to credibility. Further, the Panel is entitled to, and does, make a general negative inference as to credibility from the provision of a false document. It also follows, and the panel so finds, that the authorities did not request that the claimant have an abortion. [...]

[22] The member went on to cite documentation indicating that false documents are widespread in China.

[23] The member was mainly concerned about the implications of having provided a false document. A clarification as to which document was shown to be false would not have altered the negative inferences the member drew.

C. *Other finding not seriously challenged*

[24] At this stage, it is useful to revisit the RPD's conclusion that Chinese parents who have more than one child overseas may return with their children without serious problem. The applicant did not seriously challenge this information. In light of this, any subjective fear of

persecution that the applicant might have had was not well-founded as required by section 96 of the *IRPA*.

VI. Conclusion

[25] For the reasons provided above, I conclude that the present application for judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is dismissed.
2. No serious question of general importance is certified.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Jayson Thomas FOR THE APPLICANT

Margherita Braccio FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levine Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario