

Federal Court



Cour fédérale

Date: 20191021

Docket: IMM-2776-18

Citation: 2019 FC 1316

Ottawa, Ontario, October 21, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**MEI LING HE
BIN BIN CHEN**

Applicants

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of an unsuccessful appeal to the Refugee Appeal Division (“RAD”) by Ms. Mei Ling He and her adult son, Mr. Bin Bin Chen (the “Applicants”). The application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*].

[2] The Applicants seek to quash the RAD decision.

[3] For the reasons that follow, this application is allowed.

I. **Background Facts**

[4] Ms. He claims that she was subject to, and still is, at risk of forced sterilization in China. Mr. Chen claims that he stood up to the authorities on behalf of his mother, and as a result, he also faces persecution in China.

[5] The RAD denied the appeal and upheld the decision of the Refugee Protection Division (the “RPD”). The RAD and the RPD each found, for different reasons, that the evidence the Applicants provided in support of their claim for refugee protection was not credible.

[6] The Applicants alleged before the RPD that the Family Planning Officials (FPO), and later the Public Security Bureau (PSB), persecuted them because Ms. He had breached China’s one child family planning policy. Mr. Chen was her second child, born on May 20, 1996 with permission from the FPO, which was received after the family paid a fine to obtain an advance birth permit.

[7] After Mr. Chen was born, Ms. He was forced by the FPO to have an intra uterine device (“IUD”) inserted. On March 2, 2015, Ms. He learned that she was pregnant for a third time as a result of her IUD shifting its position in her body. She was forced by the FPO to have an abortion that day. As there was a lot of bleeding after the abortion, Ms. He was sent home and told to return approximately one week later to undergo sterilization.

[8] Ms. He went into hiding. She did not return for her sterilization procedure. Ultimately, in early May 2015, Ms. He and Mr. Chen were smuggled out of China and came to Canada, ten days apart.

[9] Ms. He and Mr. Chen made their applications for refugee protection in September 2015. The applications were heard by the RPD in June 2017. The RPD rendered the negative decision one week after the hearing.

[10] The decision upholding the RPD was issued in May 2018. The appeal to the RAD was in writing. No new evidence was presented to the RAD.

[11] The RAD concluded, after reviewing two issues in great detail, that there was no serious possibility of persecution for the Applicants, nor would they be subjected personally, on a balance of probabilities, to a risk to life, a risk of cruel and unusual treatment or punishment, or danger of torture, should they return to China. Accordingly, the Applicants were found to be neither Convention refugees nor persons in need of protection.

II. Issues

[12] The Applicants have alleged that the RAD decision is unreasonable and that it was arrived at in a procedurally unfair manner that violated the principles of natural justice.

[13] I have determined, as set out below, that the RAD process was procedurally unfair to the Applicants. It is therefore unnecessary to address any other issue.

III. Standard of Review

[14] Issues of procedural fairness and natural justice involve a duty to act fairly. The reviewing Court is required to determine whether the process followed by the decision-maker achieved the level of fairness required by the circumstances of the matter and whether the decision was the result of a fair process: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 54.

[15] In *CPR* the Federal Court of Appeal looked at whether a standard of review analysis is appropriate when addressing questions of procedural fairness. It determined that, although the terminology was awkward, and strictly speaking no standard of review is applied, the review is “best reflected in the correctness standard”: *CPR* at para 54.

[16] In any assessment of whether there has been a breach of procedural fairness, no deference is owed to the decision-maker. The question is whether the applicant knew the case to be met and had a full and fair chance to respond: *CPR* at para 56.

IV. The Differences Between the RPD and RAD Decisions

[17] The RPD and the RAD each considered two issues in depth and one issue superficially.

[18] They each considered in depth the ability of the Applicants to leave China using their own passports.

[19] The RPD also considered the Applicants' delay in claiming refugee protection in Canada in depth. It spent very little time (one paragraph) discussing the supporting documents put forward by the Applicants to show the risk of persecution they faced in China.

[20] The RAD spent very little time (one paragraph) discussing the Applicants' delay in claiming refugee protection in Canada.

[21] The RAD considered extensively the supporting documents put forward by the Applicants to show the risk of persecution they faced. It spent very little time (one paragraph) discussing the Applicants' delay in claiming refugee protection in Canada.

[22] The Applicants submitted to the RAD that the majority of credibility findings and alleged inconsistencies found by the RPD were not supported by the evidence and were based on incorrect facts as well as unfounded speculation. They also alleged that the RPD had imposed its own worldview as to the events that had occurred and how the documentation should look.

[23] The issue of procedural fairness arises from the vastly different ways in which the RPD in the RAD considered and analysed the supporting documents. For context, a brief overview of each decision, with respect to each of the three issues, follows.

A. *Delay in making a claim in Canada*

[24] The vast majority of the RPD decision addressed two issues – delay in claiming in Canada and their ability to leave China using their own passports. The RPD decided that when

taken together, the two issues it considered led to the conclusion that the Applicants were generally without credibility regarding the basis of their claim.

[25] The RPD decided that since it found the Applicants were generally without credibility, they were not wanted by the PSB or the FPO. As such, the RPD found that the Applicants' entire basis for claiming refugee status was undermined.

[26] After arriving in Canada, the Applicants waited four months to make their claim for refugee protection. They told the RPD that the reason for the delay was to wait for the husband/father to arrive so they could all claim together. The RPD found that explanation was neither reasonable nor credible. As the husband was previously an unsuccessful refugee claimant, he was not eligible to claim again.

[27] The Applicants said they did not know the husband was ineligible. The RPD found the Applicants then embellished their testimony by saying they received advice from an immigration consultant to delay making the claim. The RPD found that explanation was not credible.

[28] In considering the Applicants' delay in claiming refugee protection, the RPD conducted a detailed analysis of the testimony they gave setting out a second reason for the delay: the husband's opposition to abortion on religious and moral grounds.

[29] The RPD analysis of the Applicants' delay in claiming protection involved 18 paragraphs, set out over five pages.

[30] The RPD concluded that the Applicants had failed to adduce sufficient credible evidence to establish that the husband was a Christian who was strongly opposed to abortion on religious grounds.

[31] The result was that the Applicants had failed to explain reasonably the reason for their four month delay in making a claim in Canada for refugee protection. They had failed to adduce sufficient credible evidence to establish that they were wanted by the PSB or that they were still being sought by the PSB.

[32] The RAD on the other hand spent virtually no time examining the Applicants' delay in making a refugee claim in Canada.

[33] In one paragraph, composed of two sentences, under the heading "Additional Submissions in Error", the RAD said it had reviewed and assessed the evidence in the record of delay and the husband's religious identity. It found that even if the arguments had merit, it would not be sufficient to overcome the adverse credibility findings it had found earlier in the decision.

B. *Ability to leave China with their own passports*

[34] The other issue the RPD considered in depth was the ability of the Applicants to leave China on their own passports. That analysis took place over 25 paragraphs across eight pages.

[35] The RPD preferred the evidence in the country condition documentation, which it found was detailed and well researched, in preference to the testimony of the Applicants.

[36] The RPD found the Applicants' testimony was "vague, speculative, and insufficient to credibly establish, on a balance of probabilities, that they had successfully evaded China's exit controls". In particular, the RPD were dissatisfied with the level of detail the Applicants were able to provide as to how their smuggler had assisted them to circumvent the security systems in place.

[37] The Applicants submitted to the RAD that the RPD finding that it was not credible that they could leave China on their own passports was speculative because snakeheads are experts at getting people out of China without being stopped, and there was documentation before the RPD showing that snakeheads bribe officials or work in tandem with them on occasion to facilitate departures.

[38] The RAD conducted a thorough review of the evidence related to the ability of the Applicants to leave China using their own passports at a time when the PSB was searching for them. The RAD relied upon the information in the March 2017 National Documentation Package for China and the September 2015 RIR CHN105049.E [RIR].

[39] The RAD also considered the testimony of the Applicants at the RPD and the case law of this Court that supported the position of the Applicants that the RPD made a speculative finding.

[40] The Applicants pointed out to the RAD examples in the RIR of instances of fraud and corruption enabling people to evade the security checks. In particular, the Applicants submitted that while four passport checks may be requested, the RIR did not say must be requested and the practices vary not only between airports but also within the same airport. Ultimately, the RAD

preferred the evidence to the contrary in the Australian background paper on corruption in China because it was comprehensive, unbiased and factual.

[41] In the end, the RPD and the RAD each took a somewhat similar approach to their analysis of this issue. Given the analysis which follows it is not necessary to review further either the analysis of the delay in claiming or of the ability of the Applicants to leave China with their own passports.

C. *Insufficiency of other Disclosure/Supporting Documents*

[42] The determinative issue is that the RAD conducted an extensive review of the supporting documents submitted by the Applicants to show that Ms. He was being sought by the FPO and the PSB so that she could be sterilized.

[43] After its conclusion on the passport issue, the RPD noted under the heading “Insufficiency of other disclosure” that fraudulent documents are widespread in China. It coupled that observation with the previous credibility findings on delay and the manner of leaving China, to conclude that little weight would be assigned to the documents going to the allegations of persecution.

[44] The RPD identified those documents as the Sterilization Notices, the diagnosis certificate and the abortion certificate.

[45] The RPD's analysis was an observation that the documents appeared to be newly created computer-typed letters with a simple stamp that could be easily reproduced in a fraudulent manner.

[46] That entire analysis by the RPD is found in one paragraph.

[47] The documents referred to by the RPD as "Insufficiency of other disclosure" were referred to by the RAD as the supporting documents.

[48] The RAD decided that it would independently assess the Applicants' supporting documents because the RPD reasons "do not seem wholly adequate to support the decision" it had rendered.

(1) Sterilization Notices

[49] After reviewing the sterilization notices and the documentary evidence, as well as considering the amended Basis of Claim narrative and the testimony of the Applicants at the RPD hearing, the RAD determined that the sterilization notices were inconsistent with the new two-child policy that was implemented by China.

[50] The RAD also noted that both forced abortion and forced sterilization became illegal in China in 2012 and a directive had been issued to local family planning committees prohibiting those activities.

[51] The RAD gave little evidentiary weight to the sterilization notices. It found that it was unlikely that such notices would be issued as forced sterilizations had become illegal. On a

balance of probabilities, the RAD found the it was not credible that the Applicants were given two sterilization notices after a forced abortion and that authorities from the Family Planning Office and the Public Security Bureau were continuing to seek them.

[52] Specifically, the RAD found there was sufficient evidence to conclude that the sterilization notices were not genuine documents.

(2) Diagnosis and Abortion Certificates

[53] The RAD determined that the diagnosis and abortion certificates were each fraudulent. As with the sterilization notices, the RAD noted that the certificates were unsigned and printed on plain paper with no letterhead although purporting to be from a government entity. It also noted that they would not be difficult to produce as they were simple forms.

[54] With respect to the Diagnosis Certificate, the RAD observed that the information it contained would normally appear in the “Outpatient and Emergency Medical Record for Hospitals and Clinics” [Outpatient Record]. It is a small booklet containing a list of a patient’s symptoms, written by the doctor. Distribution of the booklet is mandatory; it is kept by the patient. The RAD noted, however, that the booklet is difficult to verify because information is handwritten and because it is not difficult to obtain a booklet from a hospital.

[55] The RAD noted that the Outpatient Record was not disclosed by Ms. He to support her claim. It found that in a claim involving health and medical concerns, it was a central document as it would serve to confirm the medical procedures and health records.

[56] The RAD concluded that the evidence submitted by the Applicants was insufficiently persuasive to assign any weight to the Diagnosis Certificate.

[57] Regarding the Abortion Certificate, the RAD found that it did not confirm the procedure was forced or imposed upon Ms. He. Because forced abortion and sterilization are illegal in China, the RAD found it unlikely that a hospital would provide written confirmation of those procedures.

[58] The RAD also noted that the information in the Abortion Certificate would normally appear in the Outpatient Record and it would be noted in Ms. He's Birth Control Service card where family-planning checkups and procedures are recorded by the FPO. The RAD found that the Birth Control Service card was another document it expected to find in the record to support Ms. He's claim, which was based on family planning. Therefore, the RAD gave the Abortion Certificate no evidentiary weight.

[59] The RAD concluded that the Applicants had knowingly submitted false documents to support their claim and that they were not credible witnesses. It found that by submitting multiple false family-planning documents, the Applicant's entire account was in serious doubt.

[60] The RAD determined that the Applicants had submitted false documents to support their claim, they were not credible witnesses and, given the magnitude of the misrepresentation with multiple family planning documents, the credibility of their entire account was in serious doubt. The RAD found as a result that the Applicants were not being pursued by the FPO or the PSB and Ms. He was not at risk of sterilization in China.

V. Analysis

[61] It should be remembered that the RPD determined, in one paragraph, under the heading “Insufficiency of other disclosure” that the supporting documents would be given little evidentiary weight. This was because of the credibility findings it made against the Applicants, and because the documents appeared to be newly created. It found that collectively those documents were insufficient to overcome the adverse credibility findings.

[62] Given the scant attention paid to the supporting documents by the RPD it is no surprise that the submissions made to the RAD by the Applicants fully addressed the RPD analysis of the delay in claiming refugee protection in Canada and the analysis of their ability to exit China using their own passports.

[63] The only reference in the submissions to the supporting documents was that the RPD “arbitrarily accepts or dismisses the [Applicants’] personal documentation based on appearances”. The submissions pointed out that the documents had the proper seals and were on the proper sized paper. The English translations were typed but the original Chinese documents were on paper normally found in China.

[64] The submissions also pointed out that the RPD had mentioned the generalization that fraudulent documents were widely available in China.

[65] In this application, the Applicants allege that in addressing the genuineness of the supporting documents submitted to the RPD, the RAD made several new credibility assessments that were not raised by the RPD. The Applicants say that by doing so, the RAD was procedurally

unfair to them. The RAD was required to hold an oral hearing because the credibility findings were central to their claim. The Applicants cite the decision of Mr. Justice Hughes in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 [*Husian*] to support their argument.

[66] The Respondent says that the RAD was procedurally fair because one of the Applicants' grounds of appeal was that the RPD did not put sufficient weight on their supporting documentation.

[67] I disagree. There is a difference between the amount of weight attributed to the supporting documents and the introduction of a determinative, entirely new and much more extensive analysis of those documents.

[68] The RAD noted that the RPD found the documents were simple and could be produced by an individual with a computer. The RAD went much further. It looked at the tone of the Sterilization Notice and found it appeared to be inconsistent with the allegation that Ms. He had been forced to have an abortion.

[69] The RAD engaged in a discussion of the likelihood of whether written notices would be issued requiring an appearance for a forced sterilization procedure. Within that discussion, the RAD extrapolated from documents used in Guangdong province to say that Fujian province was a similar size and had a similar overall profile to Guangdong, and the document presented by the Applicants was not listed as one that would be issued in Guangdong.

[70] The RAD relied heavily on evidence in the country condition documents indicating that forced abortion and forced sterilization were illegal in China. It found that reports of women who

had been subjected to forced sterilization and/or abortions tended to live in rural areas. It found from the documentation in evidence that only one forced abortion occurred in Fujian province in 2012.

[71] The RAD relied on those findings to place little evidentiary weight on the Sterilization Notice.

[72] Unlike the sophisticated analysis of the documents by the RAD, the RPD conducted a very rudimentary one. Instead, it relied on previous credibility findings coupled with country documentation indicating that fraudulent documents are widespread in China to conclude that little evidentiary weight should be assigned to the supporting documents. It referred to and relied upon the decision in *Huang v Canada (Citizenship and Immigration)*, 2011 FC 288 to say that the claimant's overall credibility may affect the weight given to the documentary evidence.

[73] The RAD analysis of the diagnosis certificate and the abortion certificate went much further afield than the RPD comments, which were made generically with respect to all of the supporting documents.

[74] The RAD once again reviewed the wording of the certificates in addition to the simplicity of the documents. The RAD then introduced a completely new analysis by comparing the documents to the Outpatient and Emergency Medical Record for Hospitals and Clinics and criticizing Ms. He for not submitting that document.

[75] The RAD also criticized Ms. He for not submitting the Birth Control Service Card.

[76] The RAD relied on its findings with respect to the supporting documents to conclude that the Applicants were not being pursued by the FPO and the PSB and that Ms. He was not at risk of sterilization in China.

[77] The importance of this analysis to the outcome of the RAD decision is underscored by the fact that the conclusion was made prior to the RAD analysing the ability of the Applicants to leave China using their own passports.

[78] In *Husian*, Mr. Justice Hughes sent that RAD decision back for redetermination because the RAD did not simply review the findings of the RPD, it went on to give further reasons, based on its own review of the record. As Justice Hughes put it “if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.”

[79] I find that given the extraordinary difference between the analysis conducted by the RAD and, in light of the lack of analysis conducted by the RPD, this case fits comfortably with the analysis conducted by Mr. Justice Gascon in *Kwakwa* that produced the following principles:

- the RAD cannot give further reasons based on its own review of the record, if the refugee claimant has not had the chance to address them: para 22;
- credibility conclusions not raised by the applicant on appeal of the RPD decision amounted to a “new question” on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions: para 25;
- when additional comments regarding the documents submitted by an applicant in support of [a critical element of their claim], were not raised or addressed specifically by the RPD, the applicant should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued: para 26;

[80] In *Kwakwa*, as in this matter, the evidence reviewed by the RAD was not central to the RPD decision or to the appeal. It cannot therefore be assumed that the Applicants' knew the case to be met on appeal.

[81] For the foregoing reasons, I find that the process was procedurally unfair and the Applicants were denied natural justice.

[82] The application is allowed and the matter will be sent back for redetermination by a different panel of the RAD. There is no question for certification on these facts.

JUDGMENT in IMM-2776-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the RAD decision is set aside.
2. The matter is returned to the RAD for redetermination by a different panel.
3. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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