Federal Court  Cour fédérale

**Date: 20191211**

**Docket: IMM-1114-19**

**Citation: 2019 FC 1593**

**Ottawa, Ontario, December 11, 2019**

**PRESENT: Mr. Justice Gascon**

**BETWEEN:**

**HUA SHENG ZHAO**
**JIN HUA GAO**
**GEN LE ZHAO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Mr. Hua Sheng Zhao [Mr. Zhao], his wife Mrs. Jin Hua Gao [Mrs. Gao] and their child Gen Le Zhao [together, the Applicants] are citizens of China. Upon their arrival in Canada in 2014, the Applicants sought refugee protection. Their claims were based on an alleged possibility of persecution or of personalized risk due to China's family planning policy. They

feared that, if they were to return to China, Mrs. Gao would be forcibly sterilised and the couple would not be permitted to have more children. In July 2014, the Refugee Protection Division [RPD] rejected their claims for lack of credibility. After the Refugee Appeal Division [RAD] dismissed the Applicants' appeal on a jurisdictional issue, this Court overturned the decision and remitted the matter back to the RAD in December 2015, to assess the appeal on the merits. In January 2019, the RAD refused the Applicants' claims for refugee protection and confirmed the RPD's conclusions [RAD Decision].

[2] The Applicants seek judicial review of the RAD Decision. They submit that the RAD: (i) breached the principles of natural justice and procedural fairness by refusing their request to provide further submissions on the RPD's credibility findings; (ii) had no jurisdiction to raise a new issue on its own volition in appeal, namely the changes to China's family planning policy; and (iii) erred in its assessment of credibility. They ask this Court to set aside the RAD Decision and to return the case to the RAD, so that their request can be reassessed by a differently constituted panel.

[3] For the reasons that follow, I will dismiss this application. Having considered the RAD's findings, the evidence before the panel and the applicable law, I can find no basis for overturning the RAD Decision. I am not persuaded that any breach of procedural fairness occurred as the Applicants had the opportunity to present their case and to make full submissions to the RAD. I am also satisfied that the RAD had jurisdiction to raise and consider China's new two-child policy. Furthermore, on the question of credibility assessment, the evidence reasonably supports the RAD's findings, and its reasons have the qualities that make the decision reasonable in that it

falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law. There are therefore no grounds to justify this Court's intervention.

## II. Background

### A. *The factual context*

[4] In 2002, Mr. Zhao and Mrs. Gao had their first child, Gen Le Zhao.

[5] In 2009, Mr. Zhao applied to immigrate to Canada. Mr. Zhao's mother and three of his sisters live in Canada. His application was rejected, since the Canadian authorities did not believe that he was a cook, and an exclusion order was then issued against him. The same year, Mrs. Gao allegedly became pregnant for a second time, in violation of the one-child policy then in force in China at that time. Mrs. Gao says that her pregnancy was discovered during a regulatory family planning checkup with the authorities, and that she was forced to have an abortion, with no option to pay a fine instead. According to her narrative, she was then required to attend regular fertility checkups and to use birth control methods.

[6] In September 2013, Mr. Zhao applied for a visitor's visa to visit his mother in Canada. His application was refused. At the end of 2013, the Applicants applied for visas to travel to the United States. Mr. Zhao testified that their purpose was to travel to Canada, so Mrs. Gao could have additional children. The visas were granted at the end of January 2014. In January 2014, Mrs. Gao consulted a doctor because she was not feeling well. A week later, her doctor confirmed her pregnancy. The doctor allegedly told her that the forced abortion in 2009 had

caused a tumour in her uterus. Mrs. Gao left the clinic fearing that the Chinese authorities would be informed and then force her to undergo another abortion. Later in January, Mrs. Gao revisited the hospital because she was still experiencing pain. Her doctor informed her that her pregnancy was not going well and gave her medication. Mrs. Gao returned to the hospital in early February, and confirmed wanting to continue the pregnancy. She was hospitalized and, five days later, was informed that continuing the pregnancy would be dangerous given the baby's health problems. The pregnancy was then terminated. According to the Applicants, the Chinese authorities never became aware of that pregnancy, because it was terminated before the fertility checkup.

[7] In April 2014, the Applicants left China for the United States, and then moved to Canada where they asked for refugee protection. In July 2014, the RPD rejected their claims for lack of credibility. On appeal, the RAD concluded that it did not have jurisdiction and did not evaluate the merits of the Applicants' claims. On judicial review, by a decision dated December 2015, this Court set aside the decision and remitted the matter to the RAD for reconsideration (*Zhao v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1384).

[8] Three years later, in November 2018, the RAD requested further submissions from the Applicants on China's new two-child family planning policy. The RAD gave the Applicants a 10-day deadline to respond. In a letter to the RAD dated November 19, 2018, the Applicants' counsel indicated that fairness required that the Applicants be given reasonable time to adduce documentary evidence and to make submissions on the question of changed circumstances, on the applicability of the compelling reasons exception set out in subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and on credibility. The

Applicants' counsel also argued in this letter that, pursuant to subsection 110(3) of the IRPA, the RAD could not adduce new evidence and raise new issues of its own volition at this stage in the process, and that the RAD's request was improper. Moreover, the Applicants' counsel wrote that an oral hearing should be held.

[9] At the end of November 2018, the RAD issued a further direction indicating that no oral hearing would take place since the new evidence did not raise a serious issue with respect to the Applicants' credibility, but rather involved a change of circumstances relating to China's two-child family planning policy. The RAD noted that it can adduce new evidence in the form of the most recent National Documentation Package for China [NDP], and that it is in fact required to consider the most recent NDP as per this Court's case law. As such, the RAD allowed the Applicants an additional ten days, until December 6, 2018, to provide submissions and documentation relating to the changes to the family planning policy in China.

[10] The Applicants filed a lengthy supplemental appeal record in early December 2018.

**B. *The RAD Decision***

[11] In its decision, the RAD first dismissed the Applicants' natural justice arguments. With regard to the fact that the RAD did not act on their file for three years, the RAD noted that the Applicants did not take any action to expedite their hearing and that the delay did not cause them any prejudice. The RAD also found that the Applicants were given sufficient time to make submissions on the changes to the family planning policy in China, as evidenced by the 214-page supplementary appeal record filed by the Applicants. This material included submissions

regarding the change of circumstances and compelling reasons. The Applicants stated that they did not have sufficient time to prepare expert reports, but did not provide evidence of the efforts made in that regard. Moreover, the RAD considered that no oral hearing was required, pursuant to subsection 110(6) of the IRPA, since the new evidence related to a change of circumstances and not to the Applicants' credibility.

[12] The RAD further found that it had jurisdiction to raise a new issue on appeal, subject to the procedural fairness requirement that the Applicants be notified and be given an opportunity to make submissions (*Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725; *Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031). The RAD also noted that it must consider the most recent information on country conditions. In the present case, said the RAD, the Applicants were given an opportunity to present submissions and evidence on this new issue.

[13] The RAD then reviewed the RPD's findings and confirmed that there was no serious possibility that the Applicants would be persecuted should they return to China. The RAD conducted its own assessment of the RPD record and concluded, as did the RPD, that the family planning booklet and the hospital documentation did not support the fact that Mrs. Gao underwent a forced abortion in 2009. In addition, the RAD confirmed that the Applicants' history of attempting to come to Canada was a relevant factor in assessing their claim for refugee protection. The RAD also found that the consequence of returning to China and being in violation of the family planning policy, which now allows for two children, would be the imposition of a fine – which is not persecutory – rather than forced abortion or sterilization.

[14] The RAD then dealt with the Applicants' argument that there was no change of circumstances, since the enforcement of China's population control policies continues to include forced abortion, sterilization and other coercive measures. The RAD noted that the change to a two-child policy was significant but not determinative since, even when the one-child policy was in effect, there was no serious possibility of persecution upon return of the Applicants to China.

[15] Finally, the RAD rejected the Applicants' argument that even if there was change of circumstances, the compelling reasons exception applied to them, pursuant to subsection 108(4) of the IRPA. The RAD determined that this exception does not apply to the Applicants, since it only covers situations where there has been a determination that a person was a refugee and the conditions that led to that finding are later found to no longer exist. Here, the RAD confirmed the RPD's conclusion that the Applicants are not refugees. The RAD therefore concluded that the compelling reasons exception did not apply as the Applicants were never declared refugees in the first place.

## C. *The standard of review*

[16] On the issues of procedural fairness, both parties submit that correctness is the applicable standard of review, relying on *Mission Institution v Khela*, 2014 SCC 24 at para 79 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. I agree that it is generally accepted that "correctness" is the standard of review for determining whether a decision-maker complies with the duty of procedural fairness and the principles of fundamental justice. However, in recent decisions, the Federal Court of Appeal [FCA] has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather,

it is a legal question for the reviewing court, and the court must be satisfied that procedural fairness has been met (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54).

[17] In *CPR*, the FCA emphasized that, here the duty of an administrative decision-maker to act fairly is questioned, assessing a procedural fairness argument requires the reviewing court to verify whether the procedure was fair having regard to all of the circumstances, including the five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 23-27. It is up to the reviewing court to make that determination and, in conducting this exercise, the court is called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54).

[18] Whether a decision is procedurally fair must be determined on a case-by-case basis. It is well recognized that the requirements of the duty of procedural fairness are "eminently variable" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 79) and "[do] not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53): the nature and extent of the duty will fluctuate with the specific context and the various factual situations dealt with by the administrative decision-maker, as well as the nature of the disputes it must resolve (*Baker* at paras 23-27; *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at para 115). As the FCA eloquently expressed it in *CPR*, "[n]o matter how much deference is

accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56).

[19] Therefore, the true question raised when procedural fairness and the duty to act fairly are the object of an application for judicial review is not so much whether the decision was "correct", but rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered the parties a right to be heard and the opportunity to know and respond to the case against them (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54).

[20] Turning to the credibility issues, it is well established that the RPD's and the RAD's assessment of the credibility of an alleged persecution attracts a standard of review of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4; *Akzibekian v Canada (Citizenship and Immigration)*, 2019 FC 278 at para 6; *Clermont v Canada (Citizenship and Immigration)*, 2019 FC 112 at para 11; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at para 13). Since the jurisprudence has already established the applicable standard of review, no further analysis of the standard of review is needed (*Dunsmuir* at para 62).

[21] Under the standard of reasonableness, the reviewing court must show deference to the decision under review, so long as it is justified, transparent and intelligible and falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"

(*Dunsmuir* at para 47). In other words, the reasons behind a decision are reasonable if they "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 standard of reasonableness requires to show deference to the decision-maker as it is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33; *Dunsmuir* at paras 48-49). Under a reasonableness review, when a question of mixed fact and law falls squarely within the expertise of a decision-maker, "the reviewing court's task is to supervise the tribunal's approach in the context of the decision as a whole. Its role is not to impose an approach of its own choosing" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 57). A high degree of deference is particularly required when, as in this case, the impugned findings relate to the credibility of a refugee claimant's story, given the decision-maker's expertise in that regard and its role of trier of fact (*Lawani* at para 15).

## III. Analysis

### A. *There was no breach of natural justice*

[22] The Applicants first assert that the RAD breached the principles of natural justice, claiming that it ignored their request to make further submissions on the issue of credibility.

They argue having the right to make additional submissions on credibility because more than three years have passed since the Court set aside the RAD's original decision in 2015.

[23] I am not persuaded by the Applicants' arguments.

[24] First, the Applicants have not taken any step to expedite their appeal before the RAD and have failed to demonstrate any prejudice caused by the three-year delay before the November 2018 request for further submissions. Second, the Applicants failed to provide any evidence on the prejudice they might have suffered resulting from any alleged inability to present additional submissions on credibility. In fact, they have effectively made detailed submissions on credibility by filing an extensive appeal record before the RAD, including detailed written arguments, which specifically addressed the RPD's findings on credibility. Those submissions on credibility go back to the Applicants' initial round of submissions in the first appeal to the RAD in 2014. They also had the opportunity to file a supplementary appeal record. The Applicants' submissions on the issue of credibility were addressed in detail in the RAD Decision. I further observe that the Applicants have not identified the evidence they would have presented to address their alleged shortcoming in the credibility assessments, or how they were prevented from making submissions on credibility before the RAD.

[25] A review of the RAD Decision establishes without a doubt that, on appeal, the RAD did not consider any new evidence relating to the Applicants' credibility, and that the new evidence considered by the RAD solely related to a change of circumstances due to China's new family planning policy. In this case, the RAD upheld the RPD's credibility findings after scrutinizing

the RPD's credibility assessments and conducting its own assessment of the evidence. Further to its analysis, the RAD agreed with the RPD and found that the Applicants had not established on a balance of probabilities that Mrs. Gao was subjected to a forced abortion in 2009. The RAD found that the RPD did not err in concluding that this negatively impacted the Applicants' credibility. As such, the RAD agreed with the RPD after independently assessing the evidence and reaching its conclusion on the Applicants' credibility. This evidence included the Applicants' appeal record and supplementary appeal record.

[26] In the circumstances, I cannot detect any breach of the principles of procedural fairness in the decision-making process followed by the RAD. On the contrary, the Applicants had multiple opportunities to be heard and to understand the case they had to meet. The Applicants' contention, that they were not given a proper opportunity to be heard and to address the RPD's credibility findings before the RAD, does not reflect the actual contents of the decision or the facts surrounding the treatment of their appeal. In light of the RAD Decision and the underlying facts, I am not convinced that the RAD breached any principles of procedural fairness or natural justice. To the contrary, the Applicants had a fair and just process and I have no hesitation to conclude that they knew the case they had to meet and had a full and fair chance to respond.

**B.** ***The RAD had jurisdiction to consider changed circumstances***

[27] Relying on *Jianzhi v Canada (Citizenship and Immigration)*, 2015 FC 551 and *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896, the Applicants argue that the RAD did not have jurisdiction to raise a new issue, or to consider a non-determinative issue of the RPD's

reasoning. The Applicants maintain that, in this case, the changes in circumstances is a new issue.

[28] I disagree. I pause to underline that the so-called change of circumstances was first identified and characterized as such by the Applicants themselves, not by the RAD. The Applicants raised it in their November 2018 letter to the RAD. In its initial direction, the RAD had asked the Applicants to make submissions on the two-child policy while making reference to the most recent version of the NDP for China.

[29] I agree with the Minister that the RAD had the jurisdiction to consider the change in circumstances of China's family planning policy because this was not a new issue as such. In fact, the RAD had a duty to disclose the most recent country condition documents laid out in the latest NDP for China, and to advise the parties of the RAD's concerns relating to the new two-child policy.

[30] A new question or issue is one which "constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from" (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24). This is not the case here. The new family planning policy was not a "new issue on appeal" that had not been decided by the RPD. The case law defines new issues as ones falling outside the grounds of appeal as set out by the parties. New issues are therefore legally and factually distinct from the issues raised on the appeal (*Zhang* at para 13; *R v Mian*, 2014 SCC 54, cited in *Ching v Canada (Citizenship and Immigration)*, 2015

FC 725 at paras 66-67). In this case, the Applicants' entire refugee claim was based on their fear of forcible sterilization or abortion through the enforcement of China's family planning policies. The changes to China's family planning policy is therefore not a "new issue" on appeal. Rather, it has always been a central matter to the Applicants' claim, which the RAD had a duty to consider.

[31] As a matter of procedural fairness, the RAD simply had a duty to disclose the most recent NDP and to give the Applicants an opportunity to respond and make submissions on this matter. This is exactly what the RAD did in this case.

**C. *The RAD did not err in upholding the credibility findings of the RPD***

[32] The Applicants finally submit that it was unreasonable for the RAD to conclude that the Applicants were not credible and that the RAD misconstrued the evidence and made plausibility findings unsupported by evidence, notably on Mrs. Gao's explanation for the omission of the July 2009 exam and pregnancy from her family planning document, her medical certificate confirming that she underwent an abortion in July 2009, and the Applicants' strong desire to come to Canada.

[33] Once again, I am not convinced by the Applicants' arguments. In rendering its decision, the RAD acted in accordance with the FCA's guidance in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 as the RAD member considered the RPD's decision as a whole, and then carried out her own analysis to determine whether the RPD had erred. I am of the view that the RAD properly considered the evidence on the record and that this evidence amply supports

the conclusions on the Applicants' lack of credibility. The RAD provided detailed reasons stating why Mrs. Gao's testimony was rejected, with respect to all dimensions of the Applicants' refugee claim. The Applicants present various objections to the RAD's conclusions without showing how the decision is unreasonable, and their arguments essentially boil down to a reassessment of the evidence before the RAD. In short, on all credibility issues, the Applicants simply express their disagreement with the RAD's assessment of the evidence and invite the Court to reweigh the evidence. However, this is not the Court's role when conducting a reasonableness review of factual findings. To the contrary, the RAD's determinations regarding the Applicants' credibility are entitled to significant deference, and it is not up to the Court to substitute its own interpretation.

[34] In *Lawani*, at paragraphs 20 to 26, I summarized the main principles governing the manner in which an administrative tribunal like the RPD or the RAD must assess the credibility of refugee applicants. Applying these principles, I conclude that, on every front, the RAD Decision falls within the scope of possible, acceptable outcomes. In the case of the Applicants, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of their refugee claim support the negative conclusion reached by the RAD about their credibility (*Lawani* at para 21). The adverse credibility findings did not stem from minor contradictions that were secondary or peripheral to the Applicants' refugee protection claim, but instead went to the very heart of it.

[35] In summary, the RAD provided careful, comprehensive and well-considered reasons explaining why the Applicants were not found credible. The test for reasonableness dictates that

the reviewing court must start from the decision and the decision-maker's reasons, while recognizing that the administrative decision-maker has the primary responsibility to make the factual determinations. A judicial review is not a "line-by-line treasure hunt for error" and a reviewing court must instead approach the reasons and outcome of a tribunal's decision as an "organic whole" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 138; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53). When the RAD Decision is read as a whole, and not through the piecemeal approach put forward by the Applicants, I am satisfied that the RAD engaged in a thorough and detailed assessment of the evidence, and that its credibility findings are reasonable. The question before the Court is not whether another outcome or interpretation might have been possible. The question is whether the conclusion reached by the decision-maker falls within the range of acceptable, possible outcomes.

## IV. Conclusion

[36] For the foregoing reasons, the application for judicial review of the Applicants is dismissed. On a standard of reasonableness, it suffices if the decision subject to judicial review has the required attributes of justification, transparency and intelligibility. This is the case here in respect of the RAD's findings on credibility. Furthermore, I do not see anything in the record suggesting that the Applicants' right to be heard has been breached or that the decision-making process followed by the RAD was unfair. In all respects, the RAD met all procedural fairness requirements in dealing with the Applicants' submissions. Therefore, I cannot overturn the RAD Decision and must dismiss this application for judicial review.

[37] The parties did not raise any serious questions of general importance for certification in their submissions, and I concur that there is none.

**JUDGMENT in IMM-1114-19**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1114-19 |
| **STYLE OF CAUSE:** | HUA SHENG ZHAO AND JIN HUA GAO AND GEN LE ZHAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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| **JUDGMENT AND REASONS:** | GASCON J. |
| **DATED:** | DECEMBER 11, 2019 |

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