

Federal Court



Cour fédérale

Date: 20210326

Docket: IMM-7680-19

Citation: 2021 FC 268

Ottawa, Ontario, March 26, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

**TIANHUI OU
HAOMING LIU
HORAN LIU
FENG LIU**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants are citizens of China, who claimed refugee protection in Canada based on a fear of persecution because they had violated China's two-child policy, and because they had converted to Christianity following their arrival in Canada.

[2] The Refugee Protection Division (RPD) dismissed their claims, finding that they were not Convention refugees or persons in need of protection. This decision was confirmed by the

Refugee Appeal Division (RAD) on November 18, 2019. The Applicants seek judicial review of the RAD decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[3] The main argument advanced by the Applicants is that the RAD's conclusion that they did not risk persecution for violating the two-child policy (for having a third child born in Canada) is unreasonable because the RAD conducted a selective review of the evidence and ignored information in the record that contradicted its findings. In addition, the Applicants submit that the RAD's analysis of their fear of persecution stemming from their conversion to Christianity while in Canada was unreasonable.

[4] For the reasons set out below, I am dismissing this application for judicial review. The RAD's decision is reasonable because it reflects an engagement with the evidence in light of the applicable legal principles, and the decision explains the basis for the conclusion in a manner that meets the requirements of the standard of reasonableness.

I. Background

[5] The Principal Applicant, Tianhui Ou, (PA) gave birth to two children in China. Following both childbirths, she experienced health difficulties that prevented her from wearing an intrauterine device (IUD), as required by local authorities under China's Family Planning Policy. On the recommendation of her physician, the PA relied on alternative forms of birth control, and she was required to attend periodic pregnancy examinations.

[6] The PA claims that in April 2016, she discovered that she had become pregnant for a third time. Fearing that she would be forced to undergo an abortion, she went into hiding at her aunt's home. However, she says she was apprehended by Family Protection Officers in July 2016 and forced to have an abortion and tubal ligation surgery. The PA says that she experienced complications following this surgery, and attended a private clinic in May 2017 to have the tubal ligation reversed. She says that Family Planning Officers attended her home in March 2018, informing her parents that the PA had violated China's Family Planning Policy by having the reversal procedure, and leaving a notice requiring the PA and her husband to attend for a sterilization procedure.

[7] On March 28, 2018, the Applicants fled China and entered Canada. The PA and her two children made refugee claims in May 2018. The male Applicant returned to China in August 2018 to help care for his father who had a heart attack. He says that the Family Planning authorities attended his parents' home in November 2018, and left a notice requiring him or his wife to attend for a sterilization procedure. He returned to Canada on November 29, 2018, and made a claim for refugee protection.

[8] After arriving in Canada, the PA and the male Applicant claim that they began attending a Pentecostal church and were baptized as Christians. In addition, the PA became pregnant and their third child was born in Canada. The third child is a Canadian citizen and is therefore not part of this application.

II. Issues and Standard of Review

[9] The only issue in this case is whether the RAD's decision is unreasonable. The Applicants submit that it is not, pointing to the RAD's findings regarding the Applicants' risk of persecution if they return to China because they violated the two-child policy and because they converted to Christianity.

[10] The parties submit that the standard of review to be applied is reasonableness, under *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 [*Vavilov*]. I agree.

[11] Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The burden is on the Applicants to satisfy the Court "that any shortcomings or flaws relied on... are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

[12] The Applicants' challenge to the RAD's decision is based on two grounds: (A) that its consideration of the risk of persecution for violating China's Family Planning Policy is unreasonable, and (B) that its analysis of their claim based on religion is also unreasonable. At the hearing, the Applicants' argument was directed to the first point, although they did not abandon the second ground. I will therefore analyze both grounds.

A. *The risk of persecution for violating the Family Planning Policy*

[13] Before the RAD, the Applicants did not challenge the RPD's finding that their allegations of mistreatment at the hands of the Family Planning authorities were not credible and that the documentation they submitted in support of this aspect of their claim was fraudulent. Instead, they argued that regardless of what had happened in China, they faced a risk of persecution because they were about to have their third child and would thus be in contravention of China's two-child policy. The RAD conducted its own analysis before concluding that the Applicants did not face a risk of forced sterilization as a family with three children.

[14] The Applicants submit that this conclusion is unreasonable. The main thrust of their argument is that the RAD conducted a selective review of the evidence and ignored evidence that contradicted its findings, contrary to the guidelines set out in *Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), [1999] 1 FC 53, [1998] FCJ No 1425 (FC TD) [*Cepeda-Gutierrez*]. In addition, the Applicants submit that the RAD erred by minimizing the likely impact on them of China's Family Planning Policy if they are forced to return to China.

[15] The Applicants conceded that the PA would not be forced to undergo an abortion if she was forced to return to China, because she was due to give birth shortly after the RAD hearing, and the child would likely be born by the time the RAD's decision was issued. The RAD's analysis, therefore, focused on the impact of the birth of the third child on the Applicants' claim.

[16] The RAD found that the documentary evidence indicated that children born outside of China could be registered in their parents' household register either without penalty or after an

assessment of a fine. The RAD further noted that forced sterilization was banned in China and although the practice still occurred in spite of the law, it happened less frequently than in the past.

[17] The RAD considered an article submitted by the Applicants that recounted the experience of one woman in China who was recently subjected to forced sterilisation, but the RAD noted that the article did not specify where in China this incident occurred. The RAD considered: (a) the evidence of the inconsistent application of the Family Planning Policy in different regions of China, (b) the fact that the Applicants would be returning to the province of Guangdong, which has historically taken a more relaxed approach to the enforcement of the Family Planning Policy, and (c) the absence of evidence that the Applicants were presently persons of interest for the Family Planning authorities in China.

[18] Based on these elements, the RAD concluded that there was no serious possibility that the PA or her husband would be subjected to forced sterilisation in spite of the birth of their third child. Rather, the RAD concluded that they were most likely going to be required to pay a social compensation fee.

[19] On the issue of the social compensation fee, the RAD found that it would not amount to persecution of the Applicants. They had paid for several extended trips abroad, and the PA and her husband had previously been employed in China. Therefore, the RAD concluded that the payment of the fee would not impose an undue burden on them.

[20] Finally, the RAD rejected the Applicants' claim that being required to submit to forced contraception would amount to state persecution. The evidence showed that the Applicants would be able to select their own form of contraception in Guangdong province, and that if they decided not to use any they would be subjected to a small fine. The PA had testified that she experienced health problems when she had been forced to wear an IUD but she had not indicated an unwillingness to use any other form of birth control, nor had she stated any generalized opposition to using contraception. The RAD concluded that the Applicants could choose which type of contraception they preferred, and this did not amount to persecution.

[21] On the basis of all of these findings, the RAD therefore upheld the RPD's rejection of this aspect of their claim.

[22] The Applicants submit that the RAD's finding flies in the face of the objective evidence in the record, as well as common sense. The Applicants would be returning to China as a family of five with three children, which puts them in breach of China's two-child policy. They argue that the RAD applied the wrong standard in assessing their risk of prospective harm when it required the Applicants to demonstrate evidence that forced sterilization was imposed on returning families with foreign-born children. The test is whether they faced a serious possibility of such an event occurring, not whether they could prove it would happen. Therefore, the RAD imposed too high a burden when it stated that "the most likely outcome for... having a third, foreign-born child would be a social compensation fee" (RAD Decision at para 28).

[23] The evidence in the record contains reports that show that sterilization and forced insertion of IUDs continue to be imposed for violations of the Family Planning Policy, but the

Applicants note that none of this evidence was discussed by the RAD. Instead, the RAD simply noted that while forced sterilisation is banned in China, the practice continued to occur – although less frequently than in the past. The Applicants submit that this is a selective reading of the evidence, which fails to address evidence that directly contradicts the conclusion of the RAD, contrary to the decision in *Cepeda-Gutierrez*.

[24] In addition, the Applicants contend that the RAD missed the point in its treatment of the article submitted by them about the woman who was forced to undergo sterilization. The RAD's focus on the fact that the article did not specify where this occurred, and that the implementation of the Family Planning Policy was uneven throughout the country, ignored the primary conclusion to be drawn from this evidence, namely that forced sterilization continued to occur.

[25] The Applicants submit that the RAD erred in focusing on their likely treatment in Guangdong province, because the test requires an assessment of the risk of persecution in China, not a comparative assessment of risks in different parts of the country. Further, the RAD erred in failing to apply the test for a forward-looking risk of persecution, in light of the fact that the Applicants would be returning to China with a third child. The findings regarding their prior treatment were not a reliable guide for their risks if they returned to China, and the RAD erred in failing to draw this distinction.

[26] Furthermore, the Applicants submit that the RAD's assessment of the impact of the social compensation fee was unreasonable. Even if the minimum fee was imposed on them, the impact would be enormous, and the RAD erred in concluding that because they had been financially successful in the past they would be able to re-establish themselves. The RAD failed to take into

account the evidence showing that violation of the Family Planning Policy could lead to difficulties in finding employment, and it also ignored the reality that they would have greater expenses as a family of five than they had when they previously lived in China.

[27] I am not persuaded.

[28] The point of departure for the analysis is the *Vavilov* framework, which focuses on the reasons and considers whether they justify the result through a coherent line of reasoning that is rooted in the legal and factual matrix that sets the boundaries for the decision.

[29] In this case, the RAD's analysis is careful and thorough, and it expressly considers evidence brought forward by the Applicants. The RAD acknowledges, for example, that the evidence shows that the Family Planning Policy is administered inconsistently in different parts of China. However, it also notes that Guangdong province, to which the Applicants would be returning, did not have a history of vigorous enforcement.

[30] The RAD also explicitly considered the article submitted by the Applicants that showed a woman had experienced forced sterilization, but did not find it persuasive evidence of the prospective risks the Applicants faced in Guangdong because the article did not specify where the incident occurred. The weighing of this evidence was done and explained based on the specific attributes of the publication when considered in the context of the case. That is all that reasonableness requires.

[31] Overall, I find that the RAD's analysis of all of these points is grounded in the evidence and based on an understanding of the applicable legal principles. It is not the role of a reviewing Court to re-weigh the evidence (*Vavilov* at para 125).

[32] I also do not agree that the RAD applied the wrong legal test in its consideration of the Applicants' risks upon returning to China. The RAD states that the assessment of the risk at the heart of the refugee claim is forward-looking (RAD Decision at para 26), and goes on to analyze the evidence before concluding that "there is no serious possibility of sterilization for the Appellants, in spite of the birth of their third child. Rather, the Appellants most likely have to pay a social compensation fee for their foreign-born child" (RAD Decision at para 30). The use of the term "most likely" is not an indication that the RAD applied the wrong standard of proof. When viewed in context, the expression is simply the RAD's description of its assessment of what the evidence showed. The RAD expressly applied the "no serious possibility" test to its assessment of the risk.

[33] On the issue of forced contraception, the Applicants rely on decisions of this Court that have found this practice amounts to a fundamental violation of a woman's rights (*Zheng v Canada (Citizenship and Immigration)*, 2009 FC 327 [*Zheng*]; *Canada (Citizenship and Immigration) v Ye*, 2013 FC 634 [*Ye*]). Those cases found that coercive and physically intrusive interference with a woman's reproductive liberty, such as forcible insertion of an IUD, can constitute persecution (*Zheng* at para 14; *Ye* at para 16). There can be no doubt that this is correct.

[34] However, in this case the PA's claim that she had been forced to undergo sterilization was rejected by the RPD and this finding was not appealed. The evidence discussed by the RAD did not support a finding that she faced a serious possibility of being forced to undergo a violation of her physical integrity if she returned to China. Instead, the RAD concluded that the PA could either choose the type of contraception she would use, or pay a small fine if she chose not to use any. These findings were open to the RAD on the evidence before it.

[35] On the payment of the social compensation fee or the small fine for failing to use contraception, the RAD's findings were supported in the record, based on the ample evidence about the Applicants' history of international travel and their prior employment in China. These were conclusions that were open to the RAD on the evidence, and its explanation of them withstands scrutiny.

[36] For all of these reasons, I do not find that the RAD's analysis of the Applicants' risk of persecution for violating China's two-child policy is unreasonable.

B. *Risk of persecution based on religion*

[37] The Applicants' evidence was that they had converted to Christianity after they arrived in Canada. The male Applicant explained that their religious conversion was largely linked to the hardship they had experienced from the Family Planning Committee. When asked why they decided to be baptized at the church, he "explained that because of the forced abortion and the loss of their child, they now cleaned their sin and had faith, and they believed that they were given a third child" (RAD Decision at para 15).

[38] The RPD rejected their claim that they faced a serious risk of persecution because of their religion. It had already found the Applicants not to be credible regarding their claims about their persecution under China's Family Planning Policy. The RPD extended these negative credibility findings to their claim based on fear of religious persecution, and concluded that their conversion had only been done to bolster their claim.

[39] The RAD accepted the Applicants' argument that the RPD had erred in this analysis, and conducted its own independent review of this aspect of the claim. It found that the Applicants' conversion had only occurred approximately one year prior to the RPD hearing, and noted that the PA's knowledge of her religion was not extensive. However, the RAD also acknowledged that "evaluating the genuineness of one's faith is not meant to be a trivia test, and the Appellants are not expected to recite religious principles and doctrine with absolute precision" (RAD Decision at para 14).

[40] The crux of the RAD's analysis on this issue concerns its doubts about the Applicants' explanation for why they converted. As noted earlier, the evidence was that their conversion was linked to their treatment in China including the forced abortion. The problem for the RAD was that this had been rejected by the RPD because it found the Applicants to be lacking in credibility, and they had not appealed this finding. The RAD conducted its own analysis of the evidence, and concluded that the RPD's conclusion on this point was correct. It therefore concluded that the Applicants' explanation for why they converted was not credible.

[41] The Applicants submit that the RAD erred because it had a positive obligation to consider each separate ground for their claim, and the mere fact that they were not found to be credible on one ground is not sufficient grounds to find that they are lying about other aspects of their claim.

[42] The Applicants also argue that the RAD had a duty to consider their *sur place* claim, and even if it found their evidence about their experience in China lacked credibility, the RAD was obliged to consider the risks that arose because of their conversion to Christianity in Canada. It was an error to require that this aspect of their claim “overcome” the RAD’s previous credibility findings. Instead, the proper approach was to consider whether the Applicants were practicing Christians in Canada (*Yin v Canada (Citizenship and Immigration)*, 2010 FC 544 at paras 89-94 [*Yin*]).

[43] The RAD had discounted a letter from the Applicants’ pastor, finding it to be brief and very general and noting it did not provide any details about how or why they converted, nor did it comment on the genuineness of their faith. The Applicants submit that the RAD’s analysis was unrealistic, because it required the Applicants and the pastor to anticipate the RAD’s concerns and to tailor the letter to address these questions. They argue that the letter shows that they have regularly attended Church services for eight months, they have donated money to the Church, and they wish to continue to freely and openly practice their faith.

[44] The Applicants submit that the RAD’s failure to analyze these crucial facts is unreasonable, as is its treatment of their evidence about their fears of being able to continue to practice their religion in China. They contend that the RAD demanded that they show a detailed

knowledge of China's practices regarding the practice of religion and this goes beyond what the law requires according to the Applicants.

[45] I do not agree. The RAD's analysis is thorough, sensitive, and supported in the evidence.

[46] The RAD's analysis of this aspect of the Applicants' claim was grounded in the evidence, including the fact that the Applicants did not challenge the RPD's rejection of their narrative of mistreatment by the Family Planning Committee and about the forced abortion. The fact that this was not appealed, and the RAD's own analysis of the evidence, left it with no alternative than to cast doubt on the Applicants' evidence about why they converted. The reasons for the Applicants' conversion to Christianity was a relevant consideration (*Ma v Canada (Citizenship and Immigration)*, 2011 FC 417).

[47] Similarly, the RAD considered the letter from their pastor, but in doing so it reasonably considered the lack of details regarding the Applicants' faith journey, their participation in the Church and the genuineness of their faith. This is unlike the facts in the *Yin* case relied upon by the Applicants, where the applicant had put forward a *sur place* claim that was supported by evidence, but that evidence was simply not assessed (*Yin* at para 90).

[48] In regard to the Applicants' claim that they would not be able to practice their faith in China, the RAD examined the evidence and found it to be vague and rehearsed. Its conclusion that this was not a genuine fear is based on its assessment of the evidence, and there is no basis to disturb this finding.

[49] The following paragraph captures the core of the RAD's analysis on this issue:

[21] Half of the Appellants' claim has already been found not to be credible by the RPD, and the RAD has upheld these findings, as the family planning allegations were found not to have occurred, and their documents have been found to be fraudulent. As indicated above, the RAD finds that the Appellants' reason for conversion and their refusal to attend a state-run church is not genuine. The RAD finds that the pastor's letter and baptism certificate lack probative value. While the Appellants show some religious knowledge, the RAD finds that their knowledge does not overcome the credibility concerns regarding their motivation and sincerity for joining a church. After carefully considering all the evidence, the RAD finds that the RPD was correct in finding that the Appellants are not genuine Christians and that their participation in a church is meant to bolster their claim, on a balance of probabilities.

[50] The passage cited above demonstrates that the RAD's findings are amply supported by the evidence and it is not the role of the Court to re-weigh the evidence. In addition, the line of analysis of the RAD is clear and persuasive.

[51] I disagree with the Applicants' argument that the RAD mistakenly applied its credibility findings on other issues to its assessment of the claim based on religion. Instead, I find that the RAD considered the unchallenged findings of the RPD in its assessment of the claim and it conducted its own independent analysis of each ground of the Applicants' claim, as it was required to do. It also assessed the other evidence in support of this aspect of the claim, and found it to be lacking.

[52] Overall, I find that the RAD's analysis of this aspect of the claim to be reasonable. There is no basis to intervene.

IV. Conclusion

[53] For the reasons set out above, this application for judicial review is dismissed.

[54] There is no question of general importance for certification.

JUDGMENT in IMM-7680-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7680-19

STYLE OF CAUSE: TIANHUI OU, HAOMING LIU, HORAN LIU,
FENG LIU v THE MINISTER OF CITIZENSHIP
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