

Federal Court



Cour fédérale

Date: 20090723

Docket: IMM-4783-08

Citation: 2009 FC 751

Ottawa, Ontario, July 23, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**SUIZHAN HUANG
JIA HAO HUANG (a minor)**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board (Board), dated October 7, 2008 (Decision) refusing the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant and her son, Jia, are citizens of the People's Republic of China (PRC). The Principal Applicant was born in Guangzhou City, Guangdong Province, PRC.

[3] The Applicant was married on November 28, 1995 and had her first child, a daughter, on October 28, 1996. Shortly after the birth of her daughter, the Principal Applicant was required to wear an IUD. After the IUD was inserted, she was required to have a pregnancy check up to 4 times a year for the first 3-year period. From 2000, the Principal Applicant's pregnancy checks were reduced to twice a year.

[4] In May 2002, the Principal Applicant felt sick and began to vomit and react to food and oil smells, so she thought she might be pregnant. She confirmed that she was pregnant using a pregnancy test purchased by her aunt. She told her husband and they became worried because they are Buddhist and do not believe in abortion. The Principal Applicant and her husband agreed that she should go into hiding at her aunt's house.

[5] While in hiding, birth control officers went to the Principal Applicant's house because she did not attend her scheduled check-up. When the birth control officers asked the Principal Applicant's husband where she was, the husband told them that she was sick and had gone to a relative's house in another province for medical treatment and she would not be back for some time.

The birth control officers believed the husband and advised him that the Principal Applicant should attend for a check-up as soon as she returned home.

[6] The Principal Applicant gave birth to Jia on January 27, 2003 while in hiding at her aunt's house. One month after Jia was born, the aunt found a private doctor in the area to insert an IUD. The Principal Applicant left Jia with her aunt. She then returned home and had her check-up at the local birth control office. She was allowed to go, but was fined for failing to attend her IUD check-up at the appropriate time.

[7] On July 20, 2006, the aunt called and told the Principal Applicant that her son had a serious fever and was in the hospital for treatment. The aunt advised that the birth control officers at the hospital had asked for signatures from the Principal Applicant and her husband before treatment. However, the doctor had proceeded with treatment because Jia required an injection right away to avoid pneumonia. The birth control officers asked the aunt why she was with Jia and said they would look into the situation.

[8] The Principal Applicant and her husband sent the Principal Applicant's mother to see Jia and to bring him back after treatment. The Principal Applicant and her husband went into hiding at the Principal Applicant's cousin's house.

[9] On July 21, 2006, two birth control officers went to the Principal Applicant's house looking for her and her husband. The officers told the husband's parents that the Principal Applicant and her

husband had seriously breached the birth control policies and had deceived the birth control officers by having a second child. The birth control officers left a notice with the husband's parents that the Principal Applicant and her husband must go to the birth control office for sterilization and must pay a 70,000 RMB fine within a week.

[10] Less than one week later, the birth control officers, accompanied by two police officers, went to the Principal Applicant's house again and left a notice with her parents-in-law. After the Principal Applicant and her husband learned about this, they realized they were in "big trouble." They asked the husband's cousin for help. The cousin found a smuggler to take the Principal Applicant out of the country. The Principal Applicant and the smuggler pretended to be a couple. Jia has no legal status in China, so the Principal Applicant asked the smuggler if she could bring him with her. The smuggler agreed.

[11] The Applicants arrived in Canada on August 13, 2006 by air at Pearson International Airport and filed for refugee protection at the Etobicoke office of Citizenship and Immigration Canada (CIC) on August 15, 2006.

[12] The Principal Applicant claims to have a well-founded fear of persecution at the hands of the Communist regime in PRC and, in particular, the family planning officials, because Jia is a second child. Jia claims to have a well-founded fear of persecution because of his inability to obtain an education or other social benefits. They claim to be persons in need of protection because they would be subjected personally to a risk to their lives or to a risk of cruel and unusual treatment or

punishment, or to a danger of torture in the PRC. The Principal Applicant is the Designated Representative of Jia.

DECISION UNDER REVIEW

[13] The Board held that the Applicants were not Convention refugees or persons in need of protection.

[14] The Board found that, on a balance of probabilities, the Applicants do not have a well-founded fear of persecution. It was pointed out by the Board that the law with respect to the One-Child Policy in the province of Guangdong prohibits forced sterilization and that a fine must be paid within a three-year period. Jia could also be registered on the family *hukou*, allowing him to go to school and obtain any other social benefits.

[15] When the Principal Applicant was asked why she and her husband were required to pay a fine within one week and that one of them be sterilized (which the Board said was against the law) the Principal Applicant stated that she did not know. The Board cited country documentation as evidence that indicates forced sterilizations are against the law in Guangdong province. The Principal Applicant was also asked why the state requested that one of them must be sterilized, but she did not know. The Board did not find the Principal Applicant's testimony to be plausible, since it claimed that forced sterilizations are against the law in the province of Guangdong.

[16] In addition, the Board noted that the notice from the Public Security Bureau, which the Principal Applicant claimed to have received, does not contain a signature. It also does not have the appropriate perforation. When the Principal Applicant was asked to explain this, she indicated that the notice was from the local Public Security Bureau office, which is different from the Public Security Bureau. The Board did not accept this explanation and noted that it had seen hundreds of notices from the Public Security Bureau with signatures and perforations.

[17] The Board also pointed out to the Principal Applicant that there was nothing in the country documentation to indicate that two fines needed to be paid, and the Principal Applicant could not provide any documentary evidence to support her allegation with respect to the payment of two fines.

[18] The Board did not place any weight on the two notices provided by the Principal Applicant with respect to the payment of fines and forced sterilization. The Board cited country documentation that indicates a flourishing trade in fraudulent documents, including identity documents used by refugee claimants. The Board also noted that the fine of approximately \$10,000 was cheaper than the amount the Principal Applicant said it had cost for her and Jia to come to Canada, which was approximately \$30,000 US.

[19] The Board concluded that the Principal Applicant should be able to return to the PRC, pay a fine for having a second child, and have Jia registered on the family *hukou*. The Board found no serious possibility that the Applicants would be persecuted or subjected personally to a risk to their

lives or to a risk of cruel and unusual treatment or punishment, or to a danger by any authority in the PRC. Therefore, the Applicants were neither Convention refugees or persons in need of protection.

ISSUES

[20] The Applicant submits the following issues on this application:

- 1) Did the Board err in finding that forced sterilizations are against the law in the province of Guangdong and in its interpretation and analysis of Information Request CHN43031.E and Information Request CHN43165.E?
- 2) Did the Board err in not finding it plausible that family planning officials would indicate in a notice that someone would be forced to be sterilized, since country documentation indicates individuals could be incarcerated for breaking the law?

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[22] The Respondent submits that the standard of review for this Decision is reasonableness.

When a Board's decision is based on an assessment or weighing of facts before it, the decision is only reviewable where it is based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. The Board should be accorded appropriate

deference given its role as a specialized tribunal. See: *Pratap v. Canada (Minister of Citizenship and Immigration)* (26 March 2008) IMM-3500-07 (F.C.) [unpublished]. I agree with the Respondent's submissions.

[23] The issues raised by the Applicant go to the Board's credibility findings. The allegation is that the Board based its decision upon a finding of fact that was not supported by the evidence before it and then used that finding of fact to make adverse credibility findings. On issues of credibility, the standard of review has, pre-*Dunsmuir*, been patent unreasonableness: *Hou v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1586 at paragraph 13 and *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) at paragraph 4 (*Aguebor*).

[24] In *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[25] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may

adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[26] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues on this application to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

Did the Board err in finding that forced sterilizations are against the law in the province of Guangdong and in its interpretation and analysis of Information Request CHN43031.E and Information Request CHN43165.E?

[27] The Applicants submit that the Board cites Information Request CHN43031.E to support its finding that forced sterilization is against the law in the province of Guangdong. The Applicants say that this documentary evidence does not support the Board's conclusions, since Information Request CHN43031.E refers to the new population and family planning regulations for the province

of Guangdong that went into effect on September 1, 2002. The Applicants note that a review of the Guangdong Planning Regulations shows they do not provide that forced sterilizations are against the law in the province of Guangdong.

[28] The Applicants cite and rely upon *Chow v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. 788 at paragraph 9 for the proposition that it is irrational and unreasonable for the Board to use documentary evidence in a contradictory manner and that such use constitutes a reviewable error. The Applicants also cite and rely upon *Luzi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1179 at paragraph 34:

34 As occurred in *Hajai v. Canada (Minister of Citizenship and Immigration)* (2000), 192 F.T.R. 141, the Board here misapprehended the evidence before it in reaching its conclusions related to implausibility. Its findings in other areas are therefore suspect as well. As stated by Justice Pelletier, as he then was, in *Hajai, supra*, at paragraph 14:

...There comes a point at which the sheer number of errors, whether material or not, leaves one with little confidence in the soundness of the other conclusions reached by the Tribunal. It is clear that the CRDD based its decision on findings of fact made without regard to the material before it. For that reason, the decision must be set aside and the matter remitted to another panel for determination.

[29] The Applicants submit that the supporting documentation provides that forced sterilizations continue to occur and it is “very common” for out-of-plan births to result in the sterilizations of one of the parents. In particular, the Guangdong Planning Regulations provide as follows:

In order to prevent and decrease the number of unwanted pregnancies, the family planning administrative department at each level of government shall create the prerequisite conditions and advise couples of child-bearing age in how to make an informed

choice about contraceptive measures. The first choice for a woman of child-bearing age who has given birth to one child shall be an intrauterine device. Where there are already two or more children, the first choice shall be a ligation for either the husband or wife.

[30] The Applicants also cite Article 27 of the Guangdong Planning Regulations:

If a child should die after a couple has already undergone a sterilization operation, a tubal ligation (vas deferens) reversal procedure may be carried out where family planning requirements are met, husband and wife apply jointly and the family planning administrative department at the county or higher level approves.

[31] The Applicants submit that the Guangdong Planning Regulations in Information Request CHN43031.E clearly contemplate the sterilization of parents who have two or more children, which is contrary to the Board's finding that forced sterilizations are against the law in the province of Guangdong.

[32] The Applicants cite and rely upon *Egeresi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1133 at paragraph 7:

...No reference was made to the extensive documentary evidence that did not support its position nor was any reference made to the evidence given by the applicant in this regard. It may well be that this finding was open to the RPD, but it must be evident, from the reasons, that it has undertaken a proper analysis to support its conclusion. This it failed to do and such failure, in my view, constitutes reviewable error.

[33] The Applicants also rely upon *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 17:

17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the

more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.) In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[34] The Applicants also point out the following passage from Information Request CHN43165.E:

Amnesty International (AI), in an 8 October 2004 article, commented that human rights organizations have not been able to conduct independent research on allegations of forced sterilization and abortion in China due to strict control of information by authorities.

...

The lecturer in international relations indicated that, while she had no evidence of forced sterilizations for the period covered by this Response, this did not mean none had taken place.

...

...[i]n circumstances when social compensation fees and intense psychological and social pressure are not sufficient to compel women to have an abortion, there are reports, albeit declining, of instances where the authorities have physically forced a woman to terminate a pregnancy... Forced sterilizations continue to occur, most frequently when couples have more children than the allowable number.

...

A *People's Daily* article reported that the deputy director of the Legislative Affairs Office of the State Council indicated that China would neither tighten nor relax its family planning policy and that "China must impose strict restrictions on extra-policy births".

[35] The Applicants submit that the Board erred in its analysis of Information Request CHN43165.E by relying on the conclusion that the Principal Applicant would not be forced to undergo sterilization by offending the one-child policy.

[36] They also say that the Board appears to acknowledge that sterilization for those offending China's family planning policy is a potential penalty, but the penalty, if any, is the payment of a fine. The Applicants allege that the Board was confused in its understanding of the punishment for offending the one-child policy in China.

Did the Board err in not finding it plausible that family planning officials would indicate in a notice that someone would be forced to be sterilized, since country documentation indicates such individuals could be incarcerated for breaking the law?

[37] The Applicants rely upon *Yada v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 37 (F.C.T.D.) at paragraph 24:

24 The reasons or the bases set out for finding particular aspects of the applicants' evidence to be implausible simply do not reasonably relate to the evidence before the panel. Its conclusions might be reached by another panel, but the reasons for those conclusions must be rationally related to the evidence. Here that is not the case. The decision is patently unreasonable in the absence of reasons related to the evidence adduced.

[38] The Applicants submit that the Board's finding that it is implausible that family planning officials would indicate in a notice that someone would be forced to be sterilized is based on the finding that forced sterilizations in China are illegal. That finding is not supported by the evidence. Therefore, the errors committed by the Board cannot withstand judicial scrutiny.

The Respondent

Credibility

[39] The Respondent submits that the Board rejected the Applicant's refugee claim on the basis of numerous credibility concerns with the Applicant's story. The Board provides clear, comprehensive and cogent reasons for all of its credibility determinations.

[40] The Respondent says that it is trite law that a Board's factual and credibility findings are entitled to the highest level of deference by this Court. See: *Aguebor*.

[41] The Respondent notes that documents CHN43031 and CHN 43165, which are referred to by the Applicants, describe a "social compensation fee" which is required of those who have more than one child in Guangdong province. These documents do not provide that forced sterilizations are used as a punishment. Therefore, these documents support the Board's finding that there are few incidents of forced sterilizations in China.

[42] The Respondent also says that the Board was correct to say that there were no examples of people being forcibly sterilized between 2002-2005, as per document CHN43165.E. The fact that this document quotes persons who speculate without proof that sterilizations may still occur is not evidence that the Applicants are at risk of forced sterilization.

[43] The Respondent contends that the evidence supports the Board's finding that the punishment for unauthorized births in Guangdong province is a social compensation fine and that forced sterilization is not a punishment provided for in the Population and Family Planning Regulation of Guangdong Province.

[44] The Respondent also argues that the Applicants' arguments amount to a disagreement with the weight the Board placed on the evidence. The Applicants have failed to provide any cogent arguments to suggest that the Board's findings are unreasonable.

ANALYSIS

[45] The Board makes a crucial plausibility finding based upon its view that forced sterilizations are against the law in Guangdong province:

Since forced sterilizations are against the law in the province of Guangdong, I do not find it plausible that family planning officials would actually state that a person must be sterilized, since the country documentation indicates such individuals could be incarcerated for breaking the law.

[46] If the Decision is read as a whole, it is clear that the Board places considerable reliance upon its view that forced sterilization is against the law in Guangdong, and the Board refers to, and footnotes, Information Request CHN43031.E as the evidentiary basis for this view.

[47] The problem is that CHN43031.E does not say that forced sterilization is illegal in Guangdong.

[48] The Respondent says this does not matter because the preponderance of the documentation package leads to the conclusion that the Principal Applicant would not face forced sterilization if she were to return to China. This may be the case, but the documentation also suggests that sterilizations do sometimes take place and the Applicants' story was found implausible, at least in part, because the Board found that the notices were not genuine because sterilization is illegal in Guangdong.

[49] The Respondent also says that the reference in the Reasons to CHN43031.E is simply a footnote error. This hardly seems likely to me because the reference is made several times. Also, the Respondent's citing of CHN40685.E, which was also in the information package before the Officer, does not, in my view, alleviate the problem.

[50] The Respondent says that the following words support the Board's view on the illegality of forced sterilization:

Discrimination against, and maltreatment of, women who give birth to a female infant, as well as sterile women, shall be strictly prohibited. Discrimination against, maltreatment and abandonment of female infants shall be thoroughly banned (Xinhua 2 Jan. 2002).

[51] It is not entirely clear what this prohibition speaks to, but it provides no confirmation that forced sterilization is illegal in Guangdong and, in any event, this is not the evidence upon which the Board says it relied upon for its view that "forced sterilizations are against the law in the province of Guangdong."

[52] The document relied upon by the Board is CHN43031.E which provides no evidentiary basis for such a view. In fact, CHN43031.E refers to the actual regulations in force that deal with the new population and family planning regulations for the province of Guangdong which went into effect on 1 September 2002 (PRC 25 July 2002). A translation of those regulations actually refers to the use of sterilization in Article 25:

The first choice for a woman of childbearing age who has given birth to one child shall be an intrauterine device. Where there are already two or more children, the first choice shall be a ligation for either the husband or wife. (Emphasis added).

[53] This language does not support the Board's view that forced sterilization is illegal in Guangdong.

[54] In my view, then, this was not simply a case where the Board reviewed and weighed the evidence on forced sterilization in Guangdong and concluded that the Applicant would not face forced sterilization. This was a case in which the evidence showed that sterilization might still occur, even though it is becoming less frequent, and the Applicants' story concerning crucial evidence (the notices to report) was discounted, at least in part, because of the Board's unsupported views concerning the illegality of forced sterilization in Guangdong. In other words, because the notices were discounted, they could not be part of the weighing process.

[55] There was no evidentiary basis for the Board's repeated assertion that forced sterilization is illegal in Guangdong. The Board based its credibility findings, in significant part, upon its own unsupported assumptions. In my view, this renders the Decision unreasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is returned for reconsideration by a different officer;
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: IMM-4783-08

STYLE OF CAUSE: *SUISHAN HUANG*
JIA HAO HUANG (a minor)

v.

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: June 3, 2009

REASONS FOR JUDGMENT: RUSSELL J.

DATED: July 23, 2009

WRITTEN REPRESENTATIONS BY:

Leonard H. Borenstein FOR THE APPLICANT

Brad Gotkin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Leonard H. Borenstein FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada