

Federal Court



Cour fédérale

**Date: 20150115**

**Docket: IMM-3220-14**

**Citation: 2015 FC 61**

**Vancouver, British Columbia, January 15, 2015**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**JIAHONG YU  
AND  
JIAWEN ZHANG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] In order to establish a well-founded fear of persecution, for the purposes of section 96 of the IRPA, Applicants must demonstrate both a subjective and an objective fear. An individualized fear of persecution must be established (*Canada (Attorney General) v Ward*, [1993] SCJ 74).

## II. Introduction

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a Refugee Protection Board's [RPD] decision, wherein the Applicants are found to be neither Convention refugees nor persons in need of protection under sections 96 and 97 of the IRPA.

## III. Background

[3] Ms. Zhang [the principal Applicant] and Mr. Yu are a married couple, who have two children born on October 23, 2011 and January 13, 2013 respectively. At the time of the hearing before the RPD, the principal Applicant was expecting a third child.

[4] As registered urban residents of China in the Province of Guangdong, the Applicants are subject to the Chinese government's Family Planning Office's [FPO] one-child policy. As such, the principal Applicant was required to wear an Intrauterine Device [IUD], a form of birth control, and to attend routine checkups at a government clinic to ensure that the IUD remained in place.

[5] In April 2012, the principal Applicant discovered that she was pregnant with her second child. Fearing that government officials would force her to abort her child or undergo forced sterilization, the Applicants fled the city of Guangzhou. With the help of a people smuggler, the Applicants arranged their travel to Canada through the United States.

[6] The Applicants arrived in Canada on August 19, 2012, and claimed refugee protection on September 4, 2012. A hearing was held before the RPD on January 22, 2014.

#### IV. Impugned Decision

[7] In its decision dated April 3, 2014, the RPD finds that the Applicants failed to establish an objective basis to their claim.

[8] The RPD finds the Applicants' allegations that upon return, Ms. Zhang would be forced to undergo sterilization or abortion, and that Mr. Yu would be instrumentalized by Chinese officials to force Ms. Zhang's return to China, to be inconsistent, speculative and unsubstantiated by the evidence. The RPD also assigned little probative value to the letters submitted by the Applicants, for reason of lack of credibility.

[9] The RPD concludes that upon return to China, the Applicants may be subjected to a monetary fine for "unauthorized children", pursuant to the family planning regulations of the Province of Guangdong. Relying on the jurisprudence of the Court, the RPD concludes that the levying of such a fee or fine does not amount to persecution for the purposes of section 96 of the IRPA.

#### V. Issue

[10] Are the RPD's findings that the Applicants did not establish a well-founded fear of persecution unreasonable?

## VI. Relevant Legislative Provisions

[11] The following provisions of the IRPA are applicable:

### **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,

- (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

### **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) 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

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,
- (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.

(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.

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) 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.

(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.

VII. Analysis

[12] The RPD's determination of whether the Applicants established a well-founded fear of persecution must be reviewed on the deferential standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Li v Canada (Minister of Citizenship and Immigration)*, 2011 FC 610 at para 8 [*Li*]).

[13] The Applicants submit the following grounds for judicial review:

- i) The RPD failed to apply the correct standard of proof required to establish a well-founded fear of persecution;
- ii) The RPD failed to adequately assess the risk faced by the Applicants;
- iii) The RPD failed to consider evidence directly contradicting its findings.

[14] The Court considers that the Applicants' arguments find no basis. The Court's intervention is therefore unwarranted.

[15] In order to establish a well-founded fear of persecution, for the purposes of section 96 of the IRPA, Applicants must demonstrate both a subjective and an objective fear. An individualized fear of persecution must be established (*Canada (Attorney General) v Ward*, [1993] SCJ 74).

[16] In its reasons, the RPD recognizes that although forced sterilization and forced abortion are illegal in China, such practices do occur. Relying on evidence of country conditions, the RPD

nonetheless concludes to the existence of sufficient safeguards against forced sterilization and abortions in Guangdong. The RPD notes that although evidence shows that certain categories of migrant workers who do not observe the family planning policy in Guangdong may be liable to lose their jobs and housing, the Applicants, who testified that they earn a comfortable living in Guangzhou, are not targeted by such measures. (If the Applicants, on the merits, were in a situation other than that, the reasoning may have turned in a different direction; however, each case must be taken on its own subjective and objective evidence.)

[17] Furthermore, as evidenced by the country conditions documentation, citizens who have “unauthorized children” such as the Applicants are required to pay a monetary fine known as the “social maintenance fee”, which is determined by individual provincial governments. Relying on the jurisprudence of this Court, the RPD concludes that economic sanctions, as a means to enforce compliance with the law, do not amount to persecution (*Li*, above; *Lin v Canada (Minister of Employment and Immigration)*, (1993), 66 FTR 207 at para 6).

[18] The Court finds that the RPD carefully considered and weighed the subjective and objective evidence in assessing the Applicants’ claim. In sum, the RPD’s findings are grounded in the evidence and deemed reasonable.

#### VIII. Conclusion

[19] In light of the foregoing, the application is dismissed.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is dismissed;
2. There is a question of general importance to be certified (see below).

**Question for Certification**

The Court specifies the following question of general importance for certification;

and, therefore, submits the following question to the Federal Court of Appeal:

“Does the one-child policy, when, in fact, executed by a State qualify as one of “persecution” as interpreted by the Refugee Convention, if, and when, a couple would want to have, have conceived, or have more than one child?”

“Michel M.J. Shore”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3220-14

**STYLE OF CAUSE:** JIAHONG YU AND JIAWEN ZHANG V THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** JANUARY 15, 2015

**JUDGMENT AND REASONS:** SHORE J.

**DATED:** JANUARY 15, 2015

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