

Federal Court



Cour fédérale

Date: 20160615

Docket: IMM-5118-15

Citation: 2016 FC 669

Ottawa, Ontario, June 15, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HUIMING CAO and ZHUOQI YANG

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, determining that the Applicants are not Convention refugees pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor persons in need of protection pursuant to section 97 of IRPA. The RPD also found that the Applicants' claims do not have a credible basis.

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

I. Background

[3] The Applicants are Ms. Huiming Cao [the Principal Applicant] and her five-year-old daughter Zhuoqi Yang, who are citizens of the People's Republic of China [China or the PRC] and came to Canada on July 26, 2015. Their claim was submitted to the RPD on August 4th, 2015. The Principal Applicant claims that she is at risk of persecution in PRC by being subjected to forced sterilization as a result of becoming pregnant a second time.

[4] Six months after her daughter's birth in 2011, the Principal Applicant had an intrauterine device [IUD] inserted by the PRC Family Planning Office [FPO] to prevent future pregnancies. Following the insertion, she experienced painful and irregular menstrual periods and was diagnosed with and medicated for a hormonal imbalance. She attended three checkups per year from the time her daughter was born, the records from which show that from August 1, 2012 to September 5, 2014 her IUD was in place and she was not pregnant.

[5] The Principal Applicant alleges that when she attended the FPO for her January 7, 2015 checkup, she was told that her IUD was not in place and that she was pregnant. She was also informed she would be required to have an abortion and was forcibly taken to hospital and put under general anesthesia while this procedure was performed. When she awoke, she found medication, her medical record relating to the abortion procedure, and a notice requiring her to report back to the hospital on February 2, 2015 to be sterilized. She took the items and called her husband to escort her home.

[6] The Principal Applicant states that she did not return to the hospital, instead attending another medical facility for follow-up care on the advice of a friend. Not wanting to comply with the notice of sterilization, the family went into hiding, staying with a cousin in another city. The Principal Applicant alleges that, around the time of her sterilization appointment, she received several calls from the FPO, but screened them and did not answer. She was also informed by her neighbours that representatives from the FPO had come to her house looking for her.

[7] The family remained in hiding until the Applicants left China on July 22nd. She states that she fears the FPO will continue to look for her and sterilize her if she is returned to China. Her husband remained at home, but she has the support of her parents and other family here in Canada.

II. The Impugned Decision

[8] The RPD found the Principal Applicant lacking in credibility and that the evidence she produced was not trustworthy. Consequently, it concluded she had not established that the FPO was looking for her and thus she was not at risk. As a result, the dependent claim of the minor Applicant also failed. The RPD further found that, having considered the totality of the evidence, there was no credible basis for her claim.

[9] The RPD referred to a number of areas of the evidence that it considered to be of particular concern. First, it found it suspect that the abortion was the only entry in the outpatient medical record booklet presented by the Principal Applicants as documentary evidence of that procedure. It questioned her on this, especially given that she had previously testified she went

for follow-up treatment, and she responded that she went to another hospital and did not take the booklet. She testified that she was given medicine at this hospital. The RPD that noted the Principal Applicant did not provide any medical evidence in this regard, concluded that she was making up answers to explain inconsistencies, and drew a negative inference as to her credibility.

[10] Secondly, the RPD referred to the passage from the outpatient medical record booklet which states that the patient consented to general anaesthesia and that the whole procedure went smoothly, which the RPD considered to be inconsistent with the Principal Applicant's testimony that she resisted the abortion.

[11] The third inconsistency identified by the RPD in the medical documentation was the fact that the booklet recording the Principal Applicant's family planning checkups lacked an entry for the checkup on January 7, 2015, when she alleges the pregnancy was identified. When questioned on this, the Principal Applicant said that she does not know why there was no entry recorded on that day, but she offered the possible explanation that, as she physically resisted being taken from the FPO to the hospital, it may have been forgotten in the commotion. The RPD rejected this explanation. The Principal Applicant had testified she found the booklet beside her bed when she awoke after the abortion. The RPD concluded that, if the FPO officers had kept the booklet while she was undergoing the abortion, they would have had time to update it to reflect her last checkup.

[12] The RPD also drew a negative inference from her testimony surrounding the history of trouble with her IUD and the lack of documentation supporting that history. When asked if she

felt anything was wrong with her IUD, she testified she as always in pain, so it did not make a difference. When prompted, she did refer to several issues with the IUD and testified to receiving medicine when she had pain. She then testified that she was diagnosed with a hormone imbalance. The RPD found that, when asked about this diagnosis, investigations and treatment, her testimony was evolving and did not have the ring of truth. She also did not provide any medical documents regarding these medical conditions. When questioned on this, the Principal Applicant said these documents were in China and she did not know that she needed to bring them. The RPD was not satisfied with this explanation, as corroborative documents with respect to her gynecological problems were central to explaining why she allegedly lost her IUD and became pregnant.

[13] The RPD also pointed to two inconsistencies in the Principal Applicant's testimony and Point of Entry (POE) documentation. First, it questioned her as to whether the FPO called her around the time of her sterilization appointment. When she answered that they had called multiple times, the RPD asked why this was not in her POE documents, where her narrative states that they came to her house. She replied that she didn't think it was necessary to refer to both as, if they had come to her house, they would certainly have called as well. The RPD was not satisfied with this explanation. It concluded that the Principal Applicant was making up answers to be consistent with her earlier testimony that the FPO used to call her to remind her of her IUD check-ups. The RPD again found that she was not forthcoming and drew a negative inference as to her credibility.

[14] The second inconsistency was in the Principal Applicant's description of how she came to be in possession of her medical documentation. She testified that the notice of sterilization was given to her by the FPO but later said that, when she awoke from the abortion, her medical documentation was sitting on her bedside table, that she did not see a nurse or a doctor, and that she called her husband and went home. When asked about this inconsistency, she explained that she meant the same thing by both statements because the notice was left for her by the FPO officials. The RPD was also not satisfied with the lack of explanation for why the sterilization was not performed at the time of the abortion. When asked, the Principal Applicant said that she did not know why the sterilization was not performed at the time, but thought it may have been due to heavy bleeding, as there was a good deal of blood on her pants. The RPD found it made little sense that, after she was dragged to the hospital, tied to her bed, and forcibly subjected to an abortion as she had testified, there was no one there when she woke up and the relevant documents were just left by her bed.

[15] Based on this analysis, the RPD did not believe, on a balance of probabilities, that the Principal Applicant was pregnant on January 7, 2015, that she was forced to have an abortion, that she is sought for sterilization, or that the FPO is after her. Although she had documents to support the allegations regarding the abortion and the sterilization, the RPD found that it could put little weight on these documents in its assessment of the claim, noting that these documents have no security features and could have been produced by anyone. It referred to an ultrasound report, noting that it was a printout and that the markings on the image are not decipherable. The RPD also noted the documentary evidence indicating the availability of fraudulent documents in

China. Considering this, along with its credibility concerns regarding the testimony of the Principal Applicant, the RPD found that the documents could not be relied on.

[16] The RPD concluded by rejecting the Applicants' claim and finding it had no credible basis.

III. Issues and Standard of Review

[17] The issues raised by the Applicants are whether the RPD erred by:

- A. Making credibility findings that are unreasonable, cannot be supported by the evidence, or are without proper reasons or explanation;
- B. Not giving any weight to the Applicants' supporting documents because they lacked security features and due to the fact that fraudulent documents are easily obtained in China; and
- C. Finding there to be no credible or trustworthy evidence on which it could have made a favourable decision and therefore that there is no credible basis for the claim.

[18] The parties agree, and I concur, that the issues raised in this application, as they relate to matters of credibility, are to be reviewed on a standard of reasonableness (see *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9; *Moshood v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 504 [*Moshood*], at para 9; *Zhou v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 619 at para 26). This standard also applies to review of findings of

no credible basis (see *Moshood*, at para. 9; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 114, at para. 3; *Mahdi v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 281, at para 9).

IV. Positions of the Parties

A. *The Applicants' Submissions*

[19] The Applicants have provided detailed arguments in support of their position that the RPD erred in the manner identified in the issues the Applicants have raised.

[20] They submit that no negative inference was warranted regarding the abortion being the only entry in the Principal Applicant's medical booklet, as the booklet is specific to the region the hospital is in and does not constitute a complete medical record. They argue that it made sense for the Principal Applicant to seek follow-up care at a different institution, as it is reasonable not to wish to return to a place where one has had an abortion forced upon her. They also argue that drawing a negative inference from the record stating that the Principal Applicant consented to anesthetic is unfair, as it is unlikely the doctor would have noted the anesthetic and the abortion were forced on her, as this would constitute proof of a human rights violation.

[21] The Applicants submit the RPD was also unreasonable in rejecting the record of family planning checkups, as it is plausible the January 7, 2015 appointment would not have been recorded in the booklet. As the visit was not routine, there was a struggle, and she was taken

from the place where she received the checkup to the hospital and did not return, there are many plausible explanations for why no entry was made that day.

[22] The Applicants also challenge the finding that the Principal Applicant contradicted herself when she stated the FPO gave her the notice of sterilization. As the FPO left it for her beside her hospital bed, it is not inconsistent for her say the FPO gave her the document. The Applicants argue that, particularly when it is considered that her testimony was given through an interpreter, such a finding constitutes an improperly microscopic analysis.

[23] The Applicants submit it was unreasonable for the RPD to reject the ultrasound report because the image of the baby was not clear. As the RPD is not an ultrasound technician or medical professional, what is important is the accompanying report which supports the allegation of the pregnancy. Furthermore, the Applicants cannot have been expected to produce the original, as it is with the hospital.

[24] It is the Applicants' position that the RPD also erred in drawing a negative inference from the lack of medical documentation of the history of issues with the IUD, as this matter was not central to the claim. Any documentation which could have been provided could only have gone to the pain the IUD had been causing Ms. Cao, not to why she lost it as the RPD seemed to expect.

[25] With respect to the alleged inconsistency between the testimony and the POE documentation as to phone calls from the FPO, the Applicants submit it is unclear why the RPD

rejected the Principal Applicant's explanation. The RPD merely recited what was said and then stated a lack of satisfaction. No reasons were given for the negative inference.

[26] The Applicants also argue the RPD erred by not giving weight to the supporting documentation. No analysis was performed as to the authenticity of the notice of sterilization, the IUD proof of placement, the outpatient medical record, or the family planning certificate. The Applicants submit the RPD is obligated to consider this documentation, and not merely reject it on the basis of the availability of fraudulent documentation in the PRC and a lack of security features. They argue it was an error to fail to assess the individual documents and note that some of the documents do bear stamps from the purported issuer.

[27] Finally, the Applicants submit the finding of no credible basis was unwarranted as the Board conflated the analysis with that of the Principal Applicant's credibility. They argue that the RPD failed to consider whether the documentary evidence, including country condition documentation, could support a finding in the Applicants' favour regardless of the credibility of the testimony.

B. *The Respondent's Submissions*

[28] The Respondent submits that both the credibility findings and the finding of no credible basis are reasonable and supported by detailed reasons. The Respondent refers to the RPD's concerns with respect to the medical documents, arising from the inconsistencies between the documents and the Principal Applicant's testimony, noting in particular the consent to general anaesthetic, the lack of evidence of follow-up care, and the absence of a record of the January 7,

2015 family planning checkup or notation of the pregnancy in the booklet recording those checkups. As a result, little weight was placed on these documents.

[29] In relation to the no credible basis finding, the Respondent relies on *Espinoza v Canada (Minister of Citizenship and Immigration)*, 2012 FC 502, in which the Court found that where the RPD gives adequate reasons for a negative credibility finding, further reasons are not required for a finding of no credible basis. The Respondent also argues that, even if the RPD has failed to consider documentary evidence, a finding of no credible basis may be reasonable if it is found the documents cannot themselves sustain a positive determination. Therefore, it was reasonable for the RPD to make a finding of no credible basis following its rejection of the Principal Applicant's credibility and discounting of all the evidence.

V. Analysis

[30] The task assigned to the RPD to make credibility determinations in refugee claims is a difficult one and, in keeping with the applicable standard of review, such determinations should be disturbed by the Court only if outside the range of acceptable outcomes, even if the Court might have reached a different conclusion on the same evidence (see *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*], at para 47). This is particularly so in circumstances where credibility determination are based in part on a claimant's testimony, which only the RPD has had the benefit of witnessing first-hand (see *Dunsmuir* at para 49; *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 4). Nevertheless, while conscious of the required deference, having reviewed the RPD's decision and considering the

Applicants' arguments challenging the decision, I am unable to conclude that it falls within the acceptable range.

[31] The RPD made a number of findings from which it draws adverse inferences as to the Principal Applicant's credibility. However, the most significant component of her testimony relates to the alleged forced abortion, which is the foundation of her alleged fear and which the RPD found on a balance of probabilities did not occur. It found that her testimony surrounding the event made little sense, as it was not reasonable to expect that, after having been dragged to the hospital and forcibly restrained and subjected to an abortion, she would then be left alone to wake up, retrieve documents and medicine left for her, and leave the hospital.

[32] This amounts to a finding that the Principal Applicant's evidence is implausible. This Court has held that implausibility findings should only be made in the clearest of cases (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776; *Yang v Canada (Minister of Citizenship and Immigration)*, 2016 FC 543 at para 10; *Chen v Canada (Citizenship and Immigration)*, 2014 FC 749, at para 54; *Vodics v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 783). In *K.K. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 78, Justice Annis considered the principles underlying plausibility findings, particularly in the context of credibility determinations, and their consideration by a reviewing court. In keeping with the deferential standard of review required by *Dunsmuir v New Brunswick*, 2008 SCC 9, Justice Annis' conclusion at paragraph 84 was that the applicable test can be expressed as follows:

[84] The question the reviewing court must ask is whether there exists a range of reasonable inferences that may be drawn which

would include that drawn by the Board. Is the underlying evidence capable of supporting alternative inference and, if so, does the Board's decision lie with that range? If the gap between underlying facts and the proposed inference based on them is too wide, the outcome may be considered reasonably speculative.

[33] Regardless of which articulation of the approach to reviewing plausibility findings is preferred, I conclude this finding to be unsupported by any evidence as to practices either as to methods of enforcement of China's family planning policies or as to treatment in Chinese hospitals generally. The Applicant has argued that this finding appears to be based on assumptions regarding standards of care applicable in Canadian hospitals. I agree with this submission and conclude this finding to be outside the reasonable range.

[34] I also agree with the Applicants that the RPD's decision was unreasonable in finding that the Principal Applicant contradicted herself in testifying first that documents were given to her following the abortion and later that they were left by her bedside table. From reviewing the transcript of her testimony, I read her evidence as identifying the source of the documentation and do not read any of her testimony or its context as suggesting she was physically handed documentation by medical staff or the FPO following the abortion.

[35] This portion of the RPD's decision also refers to the RPD asking the Principal Applicant why she was not sterilized at the time of the abortion, to which she responded she wasn't sure, but it was perhaps because she had bled a lot. The RPD stated it was not satisfied with her explanation but gave no reason for this conclusion in relation to the possibility of performing the abortion and sterilization at the same time. Moreover, the Principal Applicant cannot be expected

to be able to speak either to the practices of the FPO or the medical implications of combining these procedures, and I again find this portion of the decision to be unreasonable.

[36] The RPD's adverse credibility determination was also influenced by what it interpreted to be gaps in the medical documentation. Specifically, the RPD mentions the booklet documenting the abortion contained no other entries, the lack of record in her family planning booklet of the pregnancy and abortion, and the lack of documentation of either her follow-up visit related to her abortion or the earlier history of problems with her IUD. The RPD also relied on the absence in the Principal Applicant's BOC narrative of references to calls from FPO officers at the time of her sterilization appointment.

[37] I do not find these latter conclusions, which turn on lack of support for her testimony and inconsistencies in her evidence, to be themselves outside the range of acceptable outcomes. However, it is not possible for the Court to assess whether the RPD would have reached the overall conclusion that the Principal Applicant was not credible and rejected her claim, if it had not made the unreasonable findings described above in relation to her testimony surrounding the abortion. The RPD's rejection of the main supporting documents, being the record of the abortion and the notice of sterilization, was based in significant measure upon its concerns as to her credibility. As such, the Court also cannot know if the RPD would have afforded any greater weight to the corroborating documents had it not made the errors identified above. It is therefore my conclusion that the decision must be set aside and returned for redetermination by another RPD member.

[38] Having concluded that this application for judicial review must be allowed based on errors in the credibility determination, and as the no credible basis finding followed from the adverse credibility determination, that finding must also be revisited.

[39] The parties did not propose any question of general importance for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to another member of the Refugee Protection Division for re-determination. No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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