

Federal Court



Cour fédérale

Date: 20160720

Docket: IMM-4111-15

Citation: 2016 FC 846

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**SHU FEN LU
JIN HUI SU
ZHI YING SU
XU YANG SU**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated August 16, 2015, in which the RAD confirmed the decision of the Refugee Protection Division [RPD] that the Applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

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

I. Background

[3] Shu Fen Lu, her husband, Jin Hui Su and their children, Zhi Ying Su and Xu Yang Su, are all citizens of China. As expressed in the RAD's decision, their claim is based on Mrs. and Mr. Lu's violation of the Family Planning Policy of China. Mrs. Lu and her husband had a daughter but wanted also to have a son, and in August 2010, Mrs. Lu attended a private clinic to remove her IUD. She became pregnant soon after, and their son was born on July 19, 2011.

[4] Mrs. Lu received a fine for missing her mandatory IUD checkup and for the birth of her second child. Three months later, when she attended the birth control office to have an IUD inserted, she was diagnosed with severe pelvic inflammation. As an alternative to the IUD, she was mandated to attend a pregnancy check up on a monthly basis and her husband was provided with condoms.

[5] Mrs. Lu alleges that she discovered that she was pregnant again in December 2013 and went into hiding at an aunt's house. In January 2014, her husband was handed a fine notice, as she had not attended her monthly check up. She alleges that in April 2014, four birth control officers came to her aunt's house and she was forced to undergo an abortion. She was also informed that she would have to be sterilized to ensure that she would have no more children.

[6] In June 2014, the Applicants found a smuggler who assisted them to come to Canada. They arrived on February 1, 2015. They allege that Family Control officers have gone to their

house since they left China and left a fine notice, because Mrs. Lu did not attend the sterilization surgery.

[7] The RPD refused the Applicants' claim on June 3, 2015, following which they appealed to the RAD. There was no oral hearing before the RAD, and the Applicants did not submit any new evidence.

II. Impugned Decision

[8] The RAD considered the issues raised by the Applicants including the RPD's credibility assessment, findings on peripheral issues, and assessment of personal documentation submitted in support of the claim.

[9] Credibility was the determinative issue in the appeal. First, the RPD found that Mrs. Lu provided inconsistent evidence as to when she stopped working in China and that it would be reasonable to expect her to recall this timing, because she stated that she quit her job in order to leave China. The RAD agreed with the RPD that this inconsistency affected Mrs. Lu's credibility.

[10] Second, the RPD found that if Mrs. Lu was in hiding, it was not reasonable that she would continue to go to work even for one or two days per week as she had testified at the hearing. The RAD found that this evidence was central to the claim. It concluded that her testimony that she was in hiding was at odds with her testimony that she worked one to two days per week and, therefore, she was likely not in hiding as alleged.

[11] Third, the RAD, on its review of the record, found that Mrs Lu gave contradictory evidence regarding the medication she took to control her pelvic inflammation. According to the RAD, this called into question whether she was indeed unable to wear the IUD in the first place. It found that this detail was also central to the claim.

[12] In addition to the credibility findings stated above, the RAD made adverse findings with regards to documentary evidence.

[13] The RPD had questioned the veracity of Mrs. Lu's gynecological examination records, since they failed to mention that she and her husband had to use condoms. The RAD found that this information would reasonably be expected to be included in the examination records, as the authorities provided the condoms and the very purpose of the visit was to monitor contraceptive use.

[14] The RPD had considered other documentary evidence (certificate of diagnosis of pelvic inflammation, notice of mandatory sterilization procedure, notice of penalties related to mandatory sterilization, and certificate of induced abortion). However, in the absence of security features and the negative findings regarding the testimony of Mrs. Lu, the RPD accorded no weight to these documents and concluded that Mrs. Lu was likely not forced to undergo an abortion in April 2014 as alleged. The RAD found that it was open to the RPD, based on the contents or lack thereof of the specific documents, to accord no weight to the documentary evidence submitted by the Applicants.

[15] The RAD found that the evidence surrounding the certificate of induced abortion was the most significant. The RAD agreed with the RPD's finding that the illegality of forced abortions in China called into question the veracity of this document. Therefore, in its view, the RPD's finding was absent of any error.

[16] Finally, the RPD had considered the risk of forced sterilization if the family were to return to China, given that they already have two children. Referencing material from the National Documentation Package [NDP], the RPD accepted that parents of two children are often pressured to be sterilized but considered that the Applicants were not at risk for sterilization until the authorities discovered a third pregnancy in April 2014. The RAD found it telling that Mrs. Lu was never fearful of being sterilized after the birth of her second child and noted the RPD's finding that the Principal Applicant's fear with respect to China's one-child policy was speculative. The RAD again found the RPD's findings to be absent of any error.

III. Issue

The sole issue is whether the RAD's decision was unreasonable.

IV. Standard of Review.

[17] The Respondent refers to the Federal Court of Appeal's decision on standard of review in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FC 93 [*Huruglica*], particularly Justice Gauthier's observation at paragraph 79 that an appeal before the RAD is not a true *de novo* proceeding and her conclusion at paragraph 103:

[103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[18] The Respondent argues that the RAD in the present case performed its own independent assessment, both taking into account the RPD's decision and conducting its own analysis, which met the requirement of *Huruglica* to review the RPD's decision on a standard of correctness. However, the Applicants are not arguing that the RAD incorrectly articulated or misapplied the standard of review. Rather, they argue that the RAD's assessment of the evidence was itself flawed. The Respondent submits that the Court's review of such assessment by the RAD is to be performed on a standard of reasonableness, relying on paragraph 35 of *Huruglica*. I agree that this is the applicable standard and note that the Applicants do not take issue with this, as they argue that the RAD's decision is unreasonable.

V. Positions of the Parties

A. *Applicants' Argument*

[19] The Applicants submit that the RAD engaged in an overzealous assessment of Mrs. Lu's testimony and focused on collateral points immaterial to the claim. They argue that the

determinative issue in this claim is not whether Mrs. Lu was in hiding, but whether she is at risk of forced sterilization given that she and her husband already have two children and tried for a third child in violation of China's family planning policy. They rely on a number of official documents to support their claim and argue that the RAD only considered two of these documents, the certificate of family planning services and the certificate of induced abortion.

[20] The Applicants' position is that the RAD committed a reviewable error in rejecting the certificate of family planning services on the basis that this document did not mention that the adult Applicants were provided with condoms. The Applicants argue that there was no evidence before the RAD to indicate that this information is ordinarily contained in such a certificate. They also submit that it was unreasonable for the RAD to draw an adverse inference from Mrs. Lu's failure to provide an explanation as to why that information was missing from the document, as she was not its author.

[21] The RAD's finding with respect to the certificate of induced abortion is similarly impugned on the basis that this is an unreasonable plausibility finding and that it was unreasonable to expect Mrs. Lu to be able to explain why the authorities would have issued a certificate related to an illegal procedure.

[22] The Applicants also argue that the RAD failed to consider the notice of mandatory sterilization procedure, which was relevant and probative to the central issue in the case. They rely on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 FCJ No 1425 which states that the more important the evidence that is not mentioned and specifically

analyzed in an agency's reasons, the more willing a court may be to infer that the agency made an erroneous finding of fact without regard to that evidence.

[23] Lastly, the Applicants submit that the RAD erred in dismissing the treatment of the risk of forced sterilization for parents of two or more children. The NDP indicates that there is an incentive on the part of family planning officers to impose forced abortions and forced sterilizations in order to uphold the one child policy. The Applicants refer to a considerable volume of evidence in the NDP to the effect that these practices persist. Their position is that the RAD erred in rejecting Mrs. Lu's present fear of forced sterilization on the basis that she did not flee China after the birth of her second child four years ago. The Applicants argue that characterizing their fear as speculative discounts the fact that the fear only became real after the forced abortion and is a finding inconsistent with the country condition evidence.

B. *Respondent's Argument*

[24] The Respondent notes that the Applicants did not take issue with certain determinative RAD findings. The RAD concluded that Mrs. Lu was not in fact hiding and continued to work until July 2014 and also that she was not forced to undergo an abortion and forced sterilization.

[25] With respect to the documentary evidence, the Respondent submits that Mrs. Lu's alleged encounters with officials are within her direct personal knowledge and it was open to the RAD to ask her why one type of contraception was mentioned in her records and not the other. Similarly, the RAD's finding that the certificate of induced abortion was fraudulent was reasonable and rooted in an assessment of the evidence before it on the illegality of forced abortion. The

Respondent also argues that the Applicants have not explained how the notice of mandatory sterilization procedure, which is one of several documents submitted by the Applicants that had no security features, lends credence to their account.

[26] Finally, the Respondent submits that the RAD's assessment of forward-looking risk as speculative was reasonable, taking into account both the country condition documents and the evidence of the Applicants' own experiences to the extent they were accepted by the RPD and the RAD.

VI. Analysis

[27] The Respondent argues that, on this judicial review application, the Applicants did not take issue with the RAD's adverse credibility findings. While these findings were not the focus of the Applicants' arguments, I do not consider the Applicants to have left these findings entirely unchallenged, as their written argument does take the position that the RAD conducted an overzealous assessment of Mrs. Lu's testimony and focused on collateral points immaterial to the claim. However, I am not convinced that there is any error in these findings. I do not find it unreasonable for the RAD to have concluded that Mrs. Lu's inability to recall when she quit her job because she wanted to leave China, and the fact that she testified to continuing to work at the time she was in hiding, impugned her credibility on issues central to her claim.

[28] The Applicants' arguments focused principally upon the RAD's treatment of the documentary evidence submitted by the Applicants and its findings on risk of forced sterilization, given the volume of country condition documentation identifying this risk.

[29] I do not find the RAD's treatment of the gynecological examination records or certificate of induced abortion to be unreasonable. The Applicants rely on *Lin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 683 as authority that a negative inference should not be drawn because a claimant cannot explain a third party's decision. While I agree with that principle, I do not read the RAD's reasons as turning on the Mrs. Lu's inability to explain why the gynecological examination records do not refer to the method of contraception or why the authorities would issue the certificate of induced abortion and thereby document the illegal practice of forced abortion. The RAD gave Mrs. Lu an opportunity to speak to its concerns about these documents and cannot be faulted for doing so. However, its finding on these issues turns on its own analysis, not on the lack of an explanation from the Mrs. Lu.

[30] With respect to the gynecological examination records, the RPD relied on documentary evidence that mandatory gynecological checks are performed for the purpose of monitoring contraceptive use, from which it concluded that it was reasonable to expect that the Applicants' use of condoms as a means of birth control would be noted. Based on the absence of that information in those records, the RPD drew a negative inference as to the Applicants' credibility and found it more likely than not that the gynecological examination record was fraudulent.

[31] The RAD found no error in the RPD's negative inference, also reaching the conclusion that these records are used to monitor an individual's contraceptive and pregnancy records. While the Applicants argue that the RAD's finding was not supported by any evidence as to what such records should contain, I find that that evidence as to their purpose supports the reasonableness of the RAD's conclusion.

[32] Turning to the certificate of induced abortion, I do not understand the Applicants to be challenging the RAD's observation that forced abortion is illegal (although they argue based on the country condition documents that it nevertheless takes place). Rather, their position is that the RAD engaged in an impermissible implausibility analysis in questioning the veracity of the certificate based on the illegality of such practice. I interpret the RAD's reasoning to be that, while this practice may take place, it is not logical that Chinese authorities would document the illegal practice in a formal certificate. I cannot conclude this reasoning to be unreasonable.

[33] The Applicants also argue that the RAD erred in failing to individually assess the notice of mandatory sterilization. They rely on Justice Russell's decision in *Liu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 896 [*Liu*] at paragraph 43, which states that it is an error to reject one supporting document outright because another document is found not to be genuine, and my decision in *Yu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1138 [*Yu*] at paragraphs 31 to 35, finding it to be an error to reject the authenticity of a supporting document based on a finding that the applicant was not credible.

[34] I consider the import of both these decisions to be that a supporting document must be subjected to some independent assessment and that, credibility concerns, on their own, are not sufficient to impugn the documentary evidence. In my view, the RAD did not rely exclusively on credibility concerns but engaged in an independent assessment of the documentary evidence. Both the RPD and the RAD refer to the notice of mandatory sterilization procedure, but the RPD gives no weight to the document, and the RAD finds no error in that conclusion. Based on a review of both decisions, this conclusion is based not only upon the concerns with the credibility

of Mrs Lu, but also upon the adverse finding on the veracity of the certificate of induced abortion.

[35] I do not consider it unreasonable for the RAD to have relied on its adverse finding on the veracity of the certificate of induced abortion as contributing to its rejection of the notice of mandatory sterilization procedure. As the Respondent points out, these two documents are not independent. The certificate of induced abortion itself refers to a requirement to appear for a mandatory sterilization procedure, and the notice of that procedure was issued three days later. In my view, the relationship between these documents distinguishes their treatment by the RAD from the approach which was impugned in *Liu*. In *Liu*, the RPD found a summons issued to the applicant to be fraudulent and on that basis rejected what appears to have been unrelated documentation of the detention of the applicant's mother and the dismissal of his father from his employment. My conclusion is that, where there is a relationship between documents supporting an applicant's claims, it is not unreasonable for the RAD to take one document into account in its assessment of the other. In this case, the probative value of the mandatory sterilization procedure was diminished once the RAD found that the certificate of induced abortion that preceded it was likely a fake document.

[36] Finally, I have considered the Applicants' arguments related to the RAD's findings on risk of return to China. The Applicants refer to a significant volume of country condition evidence before the RAD which supports their position that parents of two or more children face risk of forced sterilization in China. However, I do not read the RAD's decision, or that of the RPD, as taking issue with that position. Referencing one of the documents in the NDP, the RAD

expressly notes that the RPD accepted that the Applicants' family has two children and that parents of two children are often pressured to be sterilized. Rather, the decision turns on an analysis, based on the evidence specific to the Applicants' claim, of whether they themselves face that risk.

[37] The Applicants argue that they face the risk of forced sterilization, because they are a family that already has two children, and that no further analysis is required. My conclusion is that the RAD cannot be faulted for reviewing this question in the context of the evidence surrounding the Applicants' claim. The RAD's finding that the Applicants have not satisfied their burden on this issue is derived from consideration of the Applicants' alleged interactions with Chinese family planning authorities; to the extent those allegations were accepted by the RAD. The RAD rejected the allegation that Mrs. Lu was forced to undergo an abortion of a third pregnancy, and the evidence is that the birth of their second child prompted Chinese authorities to impose contraceptive measures but did not prompt them to pursue forced sterilization. I cannot conclude the RAD's decision based on this evidence to be outside the range of reasonable outcomes. Being conscious of the deference required in applying the applicable standard of review, I find no basis to interfere with the decision.

[38] Neither party proposed a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
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