Federal Court  Cour fédérale

Date: 20180213

Docket: IMM-3076-17

Citation: 2018 FC 163

Toronto, Ontario, February 13, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

NENMEI MA
SHUQIN CHEN
LIQIN CHEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a mother [the Female Applicant, FA] and her two minor children from China. They seek judicial review of the June 19, 2017 decision of the Refugee Appeal Division [RAD] dismissing their appeal from the Refugee Protection Division [RPD] which found that they were not Convention refugees or persons in need of protection under ss. 96 and 97 of the *Immigration and Refugee Protection Act* [IRPA].

[2] The RAD concluded that the evidence in the form of a summons produced by the FA that she was wanted by the Public Security Bureau [PSB] and the Family Planning Authorities [FPA] in China was fraudulent and also concluded that it would have been impossible for the Applicants to leave China without coming to the attention of the authorities if the summons was genuine.

[3] For the reasons that follow, this judicial review is granted as the RAD's assessment of the summons is unreasonable and this assessment tainted the related findings of the RAD.

I. Background

[4] The FA claims to have been a practicing Roman Catholic since the age of 20 and a member of an underground church. After the birth of her first daughter, she says she was forced to wear an intrauterine device [IUD]. After she became pregnant with her second child she went into hiding. The FPA allegedly sought out the Applicant, and left a notice of a fine after she missed appointments. Subsequently, the Applicant had a second child and was again fined by the FPA.

[5] In May 2012, the FA found a doctor who would insert and remove her IUD for FPA appointments. In December 2015, the FA learned that this doctor, and a woman from her church who also used the services of this doctor, were arrested. The FA again went into hiding. A summons from the PSB was left for the FA. As a result of the summons, the FA alleges that she and her husband were fired from their jobs and their oldest child was suspended from school.

[6] With the assistance of a smuggler, the FA and her two daughters left China on February 17, 2016 and entered Canada via the United States.

[7] The Applicants' refugee claim was denied by the RPD on December 23, 2016. They appealed to the RAD.

II. RAD Decision

[8] In considering the appeal, the RAD noted that the two main issues were the credibility findings and the risk of persecution because of China's family planning policy.

[9] With respect to the credibility issue, the RAD confirmed a number of the negative credibility inferences drawn by the RPD. The RPD drew a negative credibility inference from the fact that the Applicants exited China through customs checkpoints on their own identities while the FA was allegedly wanted by Chinese authorities. The RAD confirmed this finding, noting that official documentation showed that airport security officials have access to an online database of wanted persons. Both the RPD and the RAD rejected the Applicants' explanation that their smuggler arranged for their passage through customs authorities. The RAD noted that while it might be possible for a smuggler to bypass some of the security controls, it was highly unlikely that the Applicants could bypass all of the controls. In this respect, the RAD preferred recent country condition evidence rather than Federal Court case law.

[10] The RAD also rejected the summons allegedly served on the Applicants because it did not match the form of summons which is consistent throughout China. This was a determinative

issue for the RAD from which it concluded that the FA was not wanted by Chinese authorities, and that her allegations of religious persecution and illegal insertion of IUDs were not credible.

[11] On the issue of the forced use of IUDs, the RAD affirmed the RPD's finding that Chinese regulations do not mandate the wearing of an IUD. The RAD distinguished jurisprudence from the Federal Court which held that the compulsory fitting of an IUD and regular periodic examinations constitute violations of liberty. The RAD referenced documentation which indicated that an IUD is not compulsory. The RAD concluded that the FA failed to overcome credibility concerns that she was ever forced to wear an IUD.

[12] Similarly, the RAD confirmed that the credibility findings affected the credibility of the FA's Christianity practice in China. The RAD concluded that she was not practicing Christianity in China, and was not sought by Chinese authorities. The RAD accordingly found that the FA did not have a *sur place* claim.

[13] The RAD rejected the Applicants' claims.

III. Issue

[14] The Applicants and Respondent raise various issues. However the determinative issue is the RAD's treatment of the summons, which is, in turn, dispositive of all other issues.

IV. Standard of Review

[15] The applicable standard of review is reasonableness (*Liang v Canada (Citizenship and Immigration)*, 2017 FC 1020 at para 7).

V. Analysis

[16] The Applicants argue that the RAD was unreasonable in finding that the summons was fraudulent. Further, they argue that this finding tainted the RAD's treatment of all other aspects of their claim.

[17] The RAD based its finding on its consideration of the documentary evidence respecting the uniformity of summonses in China and in particular a sample summons from 2013. The RAD found that the summons offered by the FA was fraudulent because of differences in the formatting between the FA's summons and the sample summons in the documentary evidence.

[18] The Applicants however argue that the sample summons is from 2013and cannot be relied upon as probative evidence. Further, they argue that even if there are differences in the summonses, any such differences are microscopic in nature.

[19] If the summons is not fraudulent, it conclusively demonstrates that the FA is wanted in China—and as the decision "rests so greatly" on this one finding, the balance of the decision is questionable (*Ye v Canada (Citizenship and Immigration)*, 2012 FC 1381 at para 3).

[20] The Applicants' position is supported by Federal Court decision. In *Lin v Canada (Citizenship and Immigration)*, 2012 FC 288 [*Lin*] the Court stated:

> [52] I accept the Applicant's argument that this finding was entirely unreasonable. RIR CHN42444.E, which the RPD relied upon, dated from June 2004. It is highly unlikely that this document could be a reliable authority as to what a Notice issued in 2009 would look like. In any event, RIR CHN42444.E specifies that the example summonses are "samples."
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> […]
>
> [53] Accordingly, based on the information in the RIR, the fact that the Notice is different in certain aspects from the samples attached to the RIR is neither surprising nor suspicious. I agree with the Applicant that the RPD erred by rejecting his Notice on the basis of an overly strict and ultimately misguided interpretation of an outdated document.

[21] Similarly, in *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 18, the Court noted, in respect of an outdated summons as follows: "[A]n authentic summons from 2010 may well appear different…"

[22] Here, the 2013 documentary evidence shows that the sample summons has not been updated since 2003. However, there is no evidence relating to the period after 2013 and the date of the RAD decision. It is entirely possible that the small differences may be attributable to changes made during the intervening time.

[23] Moreover, the differences noted in the document are not material. They primarily relate to formatting and spacing, and not substantive content. Therefore the summons offered by the FA is consistent with the documentary evidence which demonstrate that "regional variations are not meant to exist" in the summonses and are used throughout the country. Any differences

noted by the RAD are microscopic, and are therefore not reasonable (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 44).

[24] Furthermore, the RAD's conclusion with respect to the summons informed its conclusions on other matters. The RAD concluded that the "Appellants were able to leave China on their own identities because they were not wanted by the PSB…" This was a key credibility finding. Similarly, the RAD found the allegations regarding the mandatory use of an IUD and pregnancy checkups were not credible because of the FA's "lack of credibility regarding many issues of the claim, including the submission of fraudulent documentation."

[25] Finally the RAD doubted the Christian status claim on the basis of the submission of so-called "fraudulent documentation."

[26] The RAD, to the extent it disbelieved other evidence on the basis of the summons, should not have done so (*Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12).

[27] Accordingly the decision of the RAD is not reasonable and this judicial review is granted.

JUDGMENT in IMM-3076-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of RAD is set aside and the matter is remitted for redetermination; and
2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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