Federal Court  Cour fédérale

Date: 20180928

Docket: IMM-4784-17

Citation: 2018 FC 968

Ottawa, Ontario, September 28, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

XINJIN OU
JIANFENG ZHOU,
KAI CHENG OU (a minor)
HAO NAN OU (a minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD], dated October 26, 2017 [the Decision],

which found the Applicants to be neither refugees nor persons in need of protection under ss 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed, because the Decision does not demonstrate that the RPD engaged with country condition evidence inconsistent with its finding that there would be no risk of the adult female Applicant being subjected to compulsory use of an intrauterine device [IUD] if the Applicants were to return to China.

II. **Background**

[3] The Applicants are a married couple, Mr. Xinjin Ou and Ms. Jianfeng Zhou, and their two children. Mr. Ou and Ms. Zhou are Chinese citizens from the province of Guangdong. In June 2006, the couple moved to Trinidad and Tobago, where their children were born. The children are citizens of Trinidad and Tobago but are also eligible for Chinese citizenship.

[4] In June 2012, Ms. Zhou returned to China for a visit. She states that she was told by a local official that she and her husband would be fined if they returned to China because they had violated its family planning policy, which at the time limited couples to having one child, that she would be required to use an IUD, and that if she became pregnant again either she or her husband would be forcibly sterilized. In November 2012, Mr. Ou's work permit for Trinidad and Tobago expired and he was unable to renew it. He and Ms. Zhou then contracted with a smuggler who helped them travel to Canada via the United States. The family entered Canada and made a claim for refugee protection, because they want to have more children but fear that Ms. Zhou would be forced to wear an IUD or that one of them would be forcibly sterilized if

they returned to China. Ms. Zhou became pregnant again in 2015 while in Canada, but she miscarried.

III. **The RPD Decision**

[5] The RPD found that Mr. Ou and Ms. Zhou were credible as to their desire to have more children and their opposition to any constraint on their ability to do so. However, it rejected their claim on the grounds that Ms. Zhou's allegations as to her risk of persecution if she were returned to China were not credible.

[6] Regarding forced contraception, the RPD referred to Article 19 of the *Population and Family Planning Law of the People's Republic of China* as indicating that Chinese citizens have a choice as to what contraceptive method they will use. It read the family planning regulations in Guangdong Province as being to the same effect. The RPD also referred to *Zheng v Canada (Citizenship and Immigration)*, 2009 FC 327, as indicating that it is the forced insertion of an IUD that constitutes persecution and as implying that the forced use of other forms of contraception would not necessarily be considered persecutory treatment. The RPD found that, while it was clear from the documentary evidence that the IUD was the preferred method of contraception, there was no evidence that the IUD would be the only available contraceptive method. It concluded that alternative contraceptive methods would be available to Mr. Ou and Ms. Zhou if they were to return to China, that these methods cannot be described as a direct physical assault on Ms. Zhou's reproductive integrity so as to represent persecution, and that there would be no risk of Ms. Zhou being forced to use an IUD.

[7] Turning to sterilization, the RPD noted that whether or not Mr. Ou and Ms. Zhou would have a third child is speculative at this time. As China's family planning law changed in 2016 to allow two children per family, and as the couple had not broken any law in China under the current two-child policy, the RPD concluded that they would be able to return to China without risk of any family-planning punishment including sterilization.

[8] The RPD also reviewed documentary evidence specifically related to Guangdong Province including the adult Applicants' home city of Guangzhou. That evidence indicated that family planning policies are unevenly enforced in China and that historically Guangdong authorities have taken a more relaxed approach to family planning than authorities in other parts of the country. The RPD noted that forced sterilization and forced abortions do occur in China but found that there was no evidence of such practices having occurred in Guangdong Province since 2012. The RPD found that, if Mr. Ou and Ms. Zhou were to have a third child after returning to China, the penalty would be a fine and this would not be persecutory.

[9] The RPD concluded that if the Applicants were to return to China there would be less than a mere possibility that they would be at risk of persecution and, on a balance of probabilities, they would not be in need of protection under s 97 of IRPA. It therefore found that they were neither Convention refugees nor persons in need of protection and dismissed their claims.

IV. **Issue and Standard of Review**

[10] The sole issue raised by the Applicants is whether the RPD's finding, that the Applicants do not face a well-founded fear of persecution, is reasonable. As indicated by this articulation of the issue, the standard of review applicable to the RPD's decision is reasonableness.

V. **Analysis**

[11] The Applicants' written submissions raise various arguments in support of their position that the Decision is unreasonable. However, at the hearing of this application, their counsel focused upon one argument in particular, that the RPD erred in finding that there would be no risk of Ms. Zhou being forced to use an IUD without taking into account country condition evidence to the contrary.

[12] The Applicants recognize that neither the national nor provincial legislation referenced by the RPD provides for mandatory use of an IUD in pursuit of China's family planning policy. However, they assert that the documentary evidence nevertheless supports their concern that IUD use is compulsorily imposed. They referred the Court to portions of that evidence included in the materials that were submitted to the RPD in support of their claim but emphasized in particular a statement in the Country Reports on Human Rights Practices for 2016, published by the United States Department of State [USDOS]. That document states that, while the Chinese government had raised the birth limit imposed on its citizens from 1 to 2 children, the revised law did not eliminate state imposed birth limitations or the penalties that citizens face for violating the law. It further states that the government considers IUDs and sterilization to be the

most reliable form of birth control and compelled women to accept the insertion of IUDs by officials.

[13] The law is clear that the RPD is presumed to have considered all documentary evidence that was before it. However, this is a rebuttable presumption, and the more significant the evidence that is not specifically mentioned and analyzed in the decision, the more willing a court may be to infer that the evidence was overlooked (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17. The Applicants submit that the evidence upon which their argument relies meets this threshold because it stands in direct contradiction to the RPD's conclusion that there is no evidence that Ms. Zhou would be forced to use an IUD.

[14] I note that the RPD did not expressly state that there was no evidence that Ms. Zhou would be subjected to compulsory use of an IUD. Rather, its statement was that there was no evidence that the IUD would be the only contraceptive method used. It found that other contraceptive methods would be available and that they would not be persecutory, a finding which the Applicant's counsel advised they are not challenging. However, taken in context, I accept the Applicants' characterization of the RPD's conclusion as related to evidence of forced use of an IUD. I also accept that the RPD was obliged to consider not only the relevant legislative provisions but also the documentary evidence as to how China's family-planning policy is implemented in practice. The USDOS report is relatively recent, appearing to reflect conditions in China after the change to the two child policy in 2016, and it supports a conclusion that women remain subject to compulsory IUD use. I agree that this evidence is sufficiently

inconsistent with the IAD's finding, that there would be no risk of Ms. Zhou being forced to use an IUD, that it is not safe to conclude that the RPD took this evidence into account.

[15] The Respondent argues that the USDOS report relates to country conditions in China generally and is not specific to Guangdong Province. The Respondent notes that the RPD did specifically analyse the documentary evidence which related to Guangdong Province. Given the country condition evidence that family planning policies are unevenly enforced in China, the Respondent submits that the evidence specific to Guangdong Province should be preferred to more general evidence and that the RPD's finding was therefore reasonable.

[16] I accept the Respondent's reasoning as a matter of general principle. However, as pointed out by the Applicants, the RPD's analysis of the documentary evidence specific to Guangdong Province appears restricted to the use of forced sterilization and abortions. There is no analysis in that portion of the Decision of the forced use of IUDs or other means of contraception, short of sterilization, in Guangdong Province.

[17] I therefore find the Decision unreasonable on the basis argued by the Applicants and will allow this application for judicial review, returning the Applicants' claim for redetermination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4784-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is remitted back to a differently constituted panel of the Refugee Protection Division for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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