Federal Court  Cour fédérale

Date: 20110215

Docket: IMM-3781-10

Citation: 2011 FC 181

Ottawa, Ontario, February 15, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

JIAN HUA ZHENG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Board"), dated June 10, 2010, refusing the Applicant's claim for refugee protection after determining that she was neither a convention refugee nor a person in need of protection.

[2] For the reasons discussed below, this application for judicial review is allowed.

Facts and background

[3] Jian Hua Zheng (the "Applicant") was born on May 9, 1976 in Fujian Province, in the People's Republic of China ("China").

[4] The Applicant arrived in Canada from the United States of America (the "US") in August of 2008, and did not apply for refugee protection until February of 2009. She was pregnant at the time of her application and has since given birth (in May of 2009) to a baby boy. Her son is, by birth, a Canadian citizen.

[5] The Applicant alleged the facts below in support of her claim.

[6] In April of 1996, while still living in China, she became pregnant. She was unable to marry her boyfriend, the father of her child, because neither she nor her boyfriend met the age requirement for marriage. Knowing that the local authorities would force her to have an abortion if they found out about the out-of-plan pregnancy, the Applicant went into hiding. The authorities became suspicious when the Applicant did not appear for a scheduled physical examination. They arrested her father in order to compel her to come out of hiding. In July of 1996, the Applicant surrendered herself to authorities and they confirmed that she was, indeed, pregnant. They forced her to have an abortion. She was also required to pay a fine.

[7] The Applicant and her boyfriend subsequently resolved to leave China. The Applicant's boyfriend left first. The two lost contact shortly thereafter. Despite losing contact, the Applicant remained determined to leave. She decided to fly by herself to the US, via Canada. She arrived in Canada on February 7, 1997 and was detained by immigration authorities. On February 10, 1997 she was released and she continued on to the US. The Applicant applied for asylum in the US in January of 1999. Her claim was rejected.

[8] In the summer of 2008, while still in the US, the Applicant met a man (via the internet) who lived in Toronto. He indicated that if the Applicant came to Canada, he would sponsor her so that she could become a permanent resident. He visited the Applicant when he was in the US for work. The Applicant became pregnant with his child. She moved to Canada in August of 2008. The relationship fell apart in January of 2009. The Applicant filed for refugee protection in February of 2009. Her child was born in May of 2009.

[9] At her hearing before the Board, the Applicant indicated that she did not want to return to China because she feared: a) forced sterilization should she marry (she indicated that she wanted to marry and that she wanted to have more children); b) that it would be difficult or expensive for her son to attend school in China and that he would not receive medical services there, and c) that it would be difficult for her to obtain a household registration (a *Hukou*).

[10] In support of her alleged fears, the Applicant submitted a statement from a "similarly situated person", her cousin. The cousin indicated that she had given birth to a child in the US and had been deported back to China with her son in 2008. She alleged that her son's education in China

was “restricted”, his tuition fees were several times those of other children, he could not be registered to the local household registration, and that there was no basic guarantee of health care for him. Furthermore, the cousin indicated that prior to marrying in China, the Family Planning Office required that she be sterilized.

Impugned decision

[11] The Board started its reasons by indicating that “the very human issue of separating the mother from her child” was the determining factor in the Applicant’s claim. The Board went on to point out that since the Applicant’s son was a Canadian citizen, he was under no obligation to leave and could, in fact, remain in Canada and be cared for by children’s welfare agencies. Although the Board acknowledged the difficulty of separating a mother from her infant child, it also indicated that this issue might be better considered in the context of a Pre-removal Risk Assessment (PRRA) or a Humanitarian & Compassionate (H&C) application. For the purposes of determining the claim for protection, then, the Board focused on a scenario whereby the Applicant would return to China without her son. Under these circumstances, the Board found that the Chinese authorities would never have to know about the son and, thus, the Applicant would not be at any risk for violating China’s family planning policies.

[12] The Board further noted that the claimant’s cousin, who was similarly situated, was able to return to China with her child who was born in the US and that it was not until she was to be married that she faced a risk of sterilization. In this regard, the Board noted that the Applicant’s plan to become married and have more children was, in fact, merely “speculative”.

[13] The Board also addressed the question of whether the "compelling reasons" provision of *IRPA* - subsection 108(4) – could apply in the Applicant's case. The Board indicated that for subsection 108(4) to apply, there had to have been a change in circumstances. In this case, it found that there had been no such change in circumstances and, thus, the exception did not apply.

[14] The Board concluded that the Applicant had not established a serious possibility that she would be persecuted or that she would be personally subjected to a risk to her life or a risk of cruel and unusual treatment or punishment or a risk of torture by any authority in China. The Applicant's claim was rejected.

Issues

[15] This case raises the following issues:

A. *Did the Board err in conducting its analysis based on the premise that the Applicant could return to China without her infant son?*

B. *Did the Board err in treating the risk of sterilization as speculative?*

C. *Did the Board err in failing to consider the country conditions documents?*

D. *Did the Board err in concluding that subsection 108(4) did not apply to the Applicant's claim?*

E. *Did the Board err in failing to provide an independent section 97 analysis?*

Standard of Review

[16] The first four (4) issues identified above are questions of mixed fact and law. As such, the appropriate standard of review to apply is the standard of reasonableness (*Liu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 877, 353 FTR 132 at para 37).

[17] As to the fifth issue, whether the Board erred in failing to provide an independent section 97 analysis, Justice Crampton pointed out in *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, that the standard of review that has been applied by this Court has depended upon how the Court has characterized the nature of the question. I agree with Justice Crampton that the Board ought to be accorded deference with respect to whether it deals with claims made under both sections 96 and 97 of *IRPA* separately or in a single integrated analysis as in the current context. As such, the reasonableness standard of review ought to apply to this issue as well.

[18] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, the Supreme Court of Canada held that:

> … reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Argument and analysis

A. *Did the Board err in conducting its analysis based on the premise that the Applicant could return to China without her infant son?*

[19] The Applicant argues that the Board's suggestion that she could leave her child in the care of a Canadian children's welfare agency and then return to China is "revolting" and "beyond any definition of reasonableness". She submits that the interests of her son are inseparably linked with her own interests. In this regard, she points to the decision of this Court in *Obasohan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 92, 103 ACWS (3d) 1011 at para 15. Just as it is considered unacceptable to ask someone to conceal their political views, religious practices or sexual orientation, the Applicant argues it must also be unacceptable to ask someone to give up their child in order to live safely in their country of origin.

[20] The Applicant also refers to the Federal Court of Appeal's decision in *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 FCR 655 for the proposition that *IRPA* should be interpreted and applied in a manner that complies with international human rights instruments to which Canada is signatory. Specifically, the Applicant argues that article 9(1) of the United Nations' *Convention on the Rights of the Child* should be respected. Article 9(1), the Applicant argues, requires state parties to ensure that a child is not separated from his or her parents against their will. The Applicant also points to article 12 of the United Nations' *Universal Declaration of Human Rights* which indicates, in part, that "no one shall be subjected to arbitrary interference with his … family," and that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State ...".

[21] Finally, the Applicant submits that the Board erred in taking judicial notice of the fact that the Applicant's son would be accepted by a children's welfare agency in Canada. Without an allegation that a parent is unfit or harming a child, the Applicant argues that such agencies will not intervene.

[22] The Respondent replies by arguing that the task of considering the impact of separating the Applicant from her son is not appropriately carried out under sections 96 or 97 of *IRPA*. Instead, the Respondent submits that these considerations are more appropriately assessed via an H&C grounds application. This, the respondent submits, is essentially what the Board indicated in its reasons and, as such, those reasons cannot be said to be unreasonable.

[23] It is true that the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, 102 ACWS (3d) 592 (CA) indicated that the assessment of a claim for protection under sections 96 and 97 of *IRPA* should remain focused on considering the alleged risk, as opposed to considering humanitarian and compassionate factors. At paragraph 17, the Court indicated that to do otherwise would be to create "confusion by blurring the distinction between refugee claims and humanitarian and compassionate applications". Further, the Court indicated that:

> … the more humanitarian grounds are allowed to enter the determination of a refugee claim, the more the refugee procedure resembles and blends into the humanitarian and compassionate procedure. As a result, the more likely the concept of persecution is to be replaced in practice by that of hardship in the definition of refugee.

[24] The Federal Court of Appeal cited Justice Rothstein in the *Kanagaratnam v Canada (Minister of Employment and Immigration)* (1994), 83 FTR 131, 49 ACWS (3d) 350 (TD) decision as indicating, at paragraph 12 that, "humanitarian and compassionate considerations normally arise after an applicant has been found not to be a Convention refugee" [emphasis added]. As such, Justice Rothstein found that the Board's failure to consider humanitarian and compassionate factors in its Convention refugee determination was not a reviewable error in that case.

[25] In considering whether humanitarian and compassionate factors should be analysed on a PRRA application, Justice Dawson reiterated the Court of Appeal's point at paragraph 15 of *Ammar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1041, 151 ACWS (3d) 499, by saying:

> … the Federal Court of Appeal has cautioned that humanitarian grounds should not be imported into the determination of refugee claims. See: *Canada (Minister of Citizenship and Immigration) v. Ranganathan*, [2001] 2 F.C. 164 at paragraph 17. Just as humanitarian and compassionate factors should not be considered in the determination of a claim to status as a Convention refugee, they should not, in my view, be imported into consideration of the need for protection based upon the factors prescribed in sections 96 to 98 of the Act.

[26] The Federal Court of Appeal in *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 FCR 3 confirmed that consideration of the best interests of Canadian-born children is a humanitarian and compassionate factor that is best considered in the context of a subsection 25(1) application. At issue in that case was a decision to reject a PRRA application. In addition to the personal risks alleged, the claimants also alleged that there would be a risk to their two Canadian-born children in the event that the children also returned to Hungary. The PRRA officer refused to consider this latter risk. He indicated:

> My mandate is to assess risk for applicants who are subjects to a removal order. The applicants' two Canadian citizen children are not subject to a removal order. Therefore it is not in my mandate to consider the applicants two Canadian citizen children.

[27] The Federal Court of Appeal found that the PRRA officer had not erred in deciding not to consider the interests of the two Canadian-born children. It indicated at paragraphs 9 to 10:

> 9 Section 96 refers to a well-founded fear of persecution, and section 97 refers to a risk of torture, and exposure to risks to life and of inhuman or of cruel and unusual treatment or punishment. Only risks to applicants are relevant. A broad-ranging consideration of children's interests is not contemplated by these provisions.
>
> 10 This latter exercise is properly conducted in the more open-ended inquiry to be undertaken in the course of an application under subsection 25(1) to remain in Canada on humanitarian and compassionate grounds (H&C).
>
> [emphasis added]

[28] Given the authorities cited above, it is fairly clear that consideration of the best interests of Canadian-born children is most appropriately conducted as part of a determination under subsection 25(1) of *IRPA*, as opposed to as part of a determination under sections 96 or 97 of *IRPA*.

[29] However, in the current case, the Applicant does not seek to have the best interests of her Canadian-born child considered as an additional factor in the refugee protection analysis. Instead, the entire basis of the Applicant's claim for protection is that she will be persecuted, or harmed, for returning to China with her infant son, because her son was born out-of-plan. It is true that part of the Applicant's alleged fear has to do with how her son will be treated should he return to China – in that she fears he may not receive proper education or medical care. However, she also alleges personalized fears, chief among which is the fear of forced sterilization should she marry or wish to

have further children. I find that the Board essentially disregarded this latter by finding that the Applicant could leave her child in Canada, thereby not engaging any forced sterilization practices that might be in place in China.

[30] In my view the case before this Court is akin to the situation alluded to by the Federal Court of Appeal in *Varga*, above at para 17, where it said:

> 17 In oral argument, counsel for the respondents argued that the PRRA officer failed to consider the possibility that, if their two Canadian-born children went to Hungary, the respondents would themselves be exposed to a greater risk of persecution. I agree that this is a matter within the PRRA officer's jurisdiction. However, since counsel did not make this submission to the officer, he cannot complain that the officer was at fault in not considering it.

[31] This excerpt from *Varga* was cited by Justice O'Keefe in *Narcisse v Canada (Minister of Citizenship and Immigration)*, 2007 FC 514, 157 ACWS (3d) 613 at para 15, who explained:

> 15 I take this paragraph to mean that a PRRA officer should consider whether the fact that Canadian-born children would be returning with their parents to their parents' country of citizenship would expose the parents to a greater risk of persecution. The record does not disclose that this argument was made before the PRRA officer, therefore the officer cannot be faulted for not considering it. There was no error made by the PRRA officer in this respect.

[32] In the present case, a significant portion of the Applicant's submissions before the Board was directed towards arguing that she would be personally at risk in the event that her Canadian-born son returned to China with her. Given this fact, this Court finds that the Applicant is right to submit that the Board's refusal to analyse her risk based on this eventuality constitutes a reviewable error. This is especially the case given how unlikely it is for a mother to choose, regardless of the

circumstances, to abandon her infant child in a country where that child has no family to care for him or her.

[33] The Applicant also submitted that *IRPA* should be interpreted and applied in a manner that complies with international human rights instruments (*De Guzman*, above). The Federal Court of Appeal addressed this question in the context of the interests of the child in *Varga*, above at para 13. It said:

> 13 Neither the *Charter* nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of IRPA: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655, 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the Applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

[34] Similarly, the Federal Court of Appeal indicated in *Idahosa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 418, 307 DLR (4th) 368 at para 54 that, “any assessment of whether a statutory provision violates Canada's international legal obligations must be made on the basis of the statute as a whole. IRPA provides opportunities for the consideration of the best interests of the children of those subject to deportation”.

[35] I do not think that the Applicant’s argument based on international law is particularly compelling. Nor is the Applicant’s argument that the Board erred in taking judicial notice of the fact

that the Applicant's son would be cared for by children's welfare agencies if he was left in Canada – surely this was a reasonable finding.

[36] However, this Court finds that the Board did err in conducting its analysis based on the premise that the Applicant could return to China without her infant son. Its assertion in this regard fell outside the range of acceptable outcomes defensible in respect of the facts and law and was, thus, unreasonable.

B. *Did the Board err in treating the risk of sterilization as speculative?*

[37] The Applicant argues that the Board erred in characterizing her fear of sterilization as being merely speculative. It was wrong, she contends, for the Board to discount her plans to marry and have more children as only a potential outcome. She argues that because there was no negative credibility finding, she should be given the benefit of the doubt in this regard. Furthermore, the Applicant submits that the Board improperly dismissed the evidence with respect to the similarly situated person (her cousin) based on the fact that the cousin was only sterilized when she decided to get married.

[38] The Respondent submits that the Board's determination was reasonable in this regard. The Respondent argues that while women in China with one child who are faced with forced sterilization do constitute a particular social group for the purposes of *IRPA*, the Applicant is not yet faced with forced sterilization as she has not yet become pregnant with a second child. In this case, the Respondent argues that the Applicant has not met the burden of providing evidence of a non-speculative harm.

[39] This Court agrees with the Applicant that the Board's reasoning is problematic. First of all, the Board was very brief with respect to this issue. It simply stated:

> [7] The panel notes as well, in dealing with the claimant's cousin who was a similarly situated individual, that she was able to return to China with her child from the United States, re-establish herself and child and not face a risk of sterilization until she was to be married.
>
> [8] With respect to the claimant's testimony that she wished to be married and have more children, the panel notes that this potential outcome is hoped for but is speculative as of today.
>
> [Emphasis added]

[40] The Board did not address the question of whether or not the Applicant would, in fact, face forced sterilization if she were to marry or become pregnant in China. In fact, the Board appears to have operated under the assumption that these assertions were true – i.e. that the Applicant might well be sterilized if she were to marry or become pregnant in China. Instead of assessing the reality of sterilization in China based on the evidence submitted - the country conditions documents and the evidence of the similarly situated person - the Board essentially implied that so long as the Applicant did not marry or have any further children, she would not suffer the consequence of forced sterilization. Since marriage or further children is only speculative, the Board concluded that the alleged harm was also speculative.

[41] This position is unreasonable. If the Board was going to accept that sterilization was a real possibility in the event that the Applicant did become married or have further children, then it should also have considered whether preventing the Applicant from getting married or from having further children by threatening forced sterilization might, in and of itself, amount to persecution. In

this regard, Justice Hansen indicated in *Chi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 126, 112 ACWS (3d) 132 at para 48 that:

> 48 The punishment that the applicant fears is the state-enforced suppression of her reproductive capacity. The CRDD's suggestion that the applicant can return to China and live as a single woman without being targeted for sterilization or forced insertion of an IUD is an imposition of a significant personal choice the applicant does not want to make and fails to take into account the cultural context.

[42] Therefore, this Court concludes that the Board's reasons in this regard do not demonstrate justification, transparency and intelligibility within the decision-making process and are unreasonable.

C. *Did the Board err in failing to consider the country conditions documents?*

[43] The Applicant argues that the Board erred by failing to consider any of the country conditions evidence on the topic of forced abortions and sterilizations in China. She submits that this evidence indicates that forced abortions and sterilizations continue to occur in China and that, as such, the Applicant's fear in this regard is objectively well founded. The Applicant points to specific excerpts from the documentary evidence.

[44] The Board's reasons suggest that it did not consider the documentary evidence on forced sterilization in China because it believed that, even if the Chinese government was conducting forced sterilizations, the Applicant would not be affected. The Board had concluded: a) that the Applicant would be returning to China without any children, and b) that the possibility of the Applicant getting married or having further children in China was merely speculative. The Board's

reasons are clear that it felt that the Applicant "would not be in any violation of the One-Child Policy" and that any forced sterilization practices, if they did exist, would not impact her.

[45] Given this Court's finding on the two issues above, it also concludes that it was unreasonable for the Board to have ignored the country conditions evidence as it relates to forced abortions and sterilizations in China.

D. *Did the Board err in concluding that subsection 108(4) did not apply to the Applicant's claim?*

[46] The Applicant argues that the Board erred in finding that subsection 108(4) of *IRPA* did not apply to her case. The Applicant submits that because she previously underwent a forced abortion for an out-of-plan pregnancy, and because the Applicant now fears a forced sterilization for an out-of-plan birth, the provision should apply.

[47] The Respondent submits that subsection 108(4) of *IRPA* applies only in extraordinary cases where past persecution has been so exceptional that even in the wake of changed circumstances, it would be wrong to return the refugee claimant (*Dini v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 217, 104 ACWS (3d) 549). As such, the Respondent argues that the Board did not err in its determination in this regard.

[48] Subsection 108(4) of the *IRPA* indicates:

> 108 (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they

> remained, due to such previous persecution, torture, treatment or punishment.

[49] Paragraph 108(1) (e) of *IRPA* indicates:

> 108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:
> …
> (e) the reasons for which the person sought refugee protection have ceased to exist.

[50] Justice Layden-Stevenson indicated in *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, 264 FTR 244, at para 5 that:

> …[f]or the board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state.

[51] At no point did the Board find that there was a valid refugee (or protected person) claim in the Applicant's case. Nor did it find that the reasons for any potential claim had ceased to exist. The Court therefore finds there is nothing unreasonable about the Board's conclusion that there "has not been a change in circumstances and therefore there is no trigger in order to consider the exception".

E. *Did the Board err in failing to provide an independent section 97 analysis?*

[52] The Applicant submits that the Board failed to properly analyse her claim by conducting a separate section 97 analysis in its reasons.

[53] The Court has held that it is open to the Board to conduct an integrated assessment of sections 96 and 97 claims so long as the Board analyses each of the claims. Justice Crampton, in *Velez v Canada (Minister of Citizenship and Immigration),* 2010 FC 923 at para 47, indicated that an integrated assessment was acceptable in that case because "the RPD did not fail to analyse the Applicants' claims under section 97. Rather, it analysed them together with their claims under section 96, which is permissible". Justice Crampton went on at paragraph 49 to explain that:

> 49 In this case, the RPD's integrated assessment focused on two issues, both which were relevant to the claims made by the Applicants under each of sections 96 and 97 of the IRPA. These issues were (i) whether the failure of the Applicants to seek asylum or to otherwise legalize their status in the United States for over eight years was consistent with their stated fears, and (ii) whether the documentary evidence provided any objective basis for those fears. In this context, it was not necessary for the RPD to conduct a separate analysis of the Applicants' claims under sections 96 and 97 of the IRPA, as the Applicants' claims and the evidence adduced could comfortably be assessed in an integrated fashion.

[54] In the present case, the Board's analysis was such that, were it found to be reasonable, it would have constituted a sufficient basis for rejecting a claim under both sections 96 and 97 – therefore, the Board's integrated approach would have been acceptable.

[55] However, since it was unreasonable for the Board to base its determination on the premise that the Applicant could leave her infant son in Canada, and since the Board's treatment of the Applicant's risk as speculative was also unreasonable, and since the Board's failure to deal with country conditions also constitutes a reviewable error, application for judicial review is allowed. The matter is therefore sent for reconsideration by a differently constituted Board.

Certification

[56] Counsel for the Applicant submits that the following question should be certified as a serious question of general importance:

> Whether reliance on alleged persecutory government documents is inherently prejudicial to the claimant given it is in effect asking the wolf to guard the sheep?

[57] I am not satisfied that this is a serious question of general importance, and therefore no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The Board's decision is set aside and the matter is returned for reconsideration by a differently constituted Board; and

2. There is no question for certification.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3781-10
STYLE OF CAUSE:	JIAN HUA ZHENG v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 1, 2011
REASONS FOR JUDGMENT:	SCOTT J.
DATED:	February 15, 2011

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