Federal Court  Cour fédérale

Date: 20210430

Docket: IMM-6566-19

Citation: 2021 FC 386

Ottawa, Ontario, April 30, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

DAN XIAO, JIAHUI LIANG, JIE SUN AND RUOWEN SUN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dan Xiao and Jie Sun each have a daughter from a previous marriage, and together have two further daughters, one born in China and a second who was born in 2019 in Canada. Ms. Xiao and Mr. Sun allege they face persecution from Chinese family planning authorities for violating China's two-child policy. They seek refugee protection in Canada, saying that if they

return to China they risk forced sterilization, forced abortion, forced use of an intrauterine device (IUD), and/or imposition of substantial fines and fees.

[2] The Refugee Appeal Division (RAD) rejected the family's refugee claim. It found the objective evidence showed fines to be the more commonly imposed policy instrument, particularly in the family's province of Liaoning, and that imposition of fines does not amount to persecution. It also found the evidence established only a "mere possibility" not a "serious possibility" that Ms. Xiao and Mr. Sun would face persecution in the form of forced abortion or sterilization. The RAD therefore concluded they had not established an objective basis for their fear of persecution and were thus not Convention refugees or persons in need of protection.

[3] The applicants argue the RAD erred in applying too high a standard in assessing the likelihood of persecution, in finding that forced abortions are uncommon, and in finding the imposition of heavy fines does not amount to persecution. They argue in particular that the RAD failed to adequately account for their past experiences with the family planning authority of Liaoning, an argument they did not raise on their appeal to the RAD.

[4] I find that the RAD's reasons were justified, transparent, and intelligible in light of the applicants' submissions to the RAD, which focused solely on the country condition evidence in the Immigration and Refugee Board's National Documentation Package (NDP) for China. The applicants' submissions on this application amount to a request that this Court consider new arguments and reweigh the evidence to come to a different conclusion. This is not the role of the Court on judicial review.

[5] This application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[6] The main issue on this judicial review is whether the RAD erred in concluding the applicants did not have a well-founded fear of persecution and were therefore neither Convention refugees nor persons in need of protection. Within this main issue, the applicants raise two sub-issues:

A. Did the RAD err in concluding the applicants did not face a "serious possibility" of persecution in the form of forced sterilization or abortion?

B. Did the RAD err in finding that the imposition of fines would not amount to persecution?

[7] I agree with the applicants that both of these issues are reviewable on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25. In conducting reasonableness review, the Court must be satisfied that the RAD's decision was justified, transparent, and intelligible in light of the factual and legal constraints bearing on the decision, while refraining from reweighing the evidence or supplementing the decision maker's reasons: *Vavilov* at paras 15, 96-97, 125-128.

[8] The Minister argues that a different standard should apply to the RAD's factual inferences. Drawing on Justice Annis' pre-*Vavilov* decision in *Aldarwish*, the Minister argues the RAD's findings of fact should be subject to the "palpable and overriding error" appellate standard: *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265 at paras 21-30; *Housen v Nikolaisen*, 2002 SCC 33 at paras 3–6, 10–25, 36. In my view, the concerns and principles raised in *Aldarwish* are subsumed in the Supreme Court's analysis in *Vavilov*, which

confirmed that the standard applicable to the findings of fact of an administrative decision maker is that of reasonableness: *Vavilov* at paras 125–126; *Sivalingam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1078 at paras 24–25.

[9] In particular, Justice Annis focused on the importance of deferring to an administrative decision maker's assessment of the weight to accord to evidence: *Aldarwish* at paras 22–30. This principle is captured in *Vavilov*'s reasonableness review, which instructs that the Court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125. Justice Annis also concluded that allegations of "fact-finding process errors," such as failing to consider relevant evidence, should be owed less deference: *Aldarwish* at paras 21, 33, 42. The Supreme Court in *Vavilov*, likewise, clarified that this is an element of reasonableness review, recognizing that a decision may be unreasonable if it misapprehends or fails to account for relevant evidence: *Vavilov* at paras 125-126.

[10] I will therefore adopt the reasonableness standard in respect of both issues raised.

III. Analysis

A. *The RAD's conclusion that the applicants did not face a "serious possibility" of persecution in the form of forced sterilization or abortion was reasonable*

(1) The RAD's Decision

[11] The RAD identified the issue raised by the applicants on appeal as being whether the Refugee Protection Division (RPD) "erred in its assessment of the country evidence available regarding the two-child policy and its subsequent finding that [Ms. Xiao and Mr. Sun] would not

face a serious possibility of persecution if they were to be returned to China." The RAD's decision was directed to this issue raised on appeal.

[12] The RAD agreed with the applicants that the RPD erred in one of its evidentiary references. The RPD held the evidence showed fines were the most commonly imposed form of enforcement and forced abortions were illegal in China. To support this statement, the RPD gave a footnote reference to Item 5.14 in the NDP, a Response to Information Request (RIR) entitled "China: Whether a National Population and Family Planning Commission directive prohibiting forced abortion and sterilization was issued in 2012 and implemented (2012-January 2015)" (CHN105051.E). The RAD agreed it was an error for the RPD to rely on this document for its statement about fines, since the document does not speak to fines.

[13] However, the RAD concluded on its own analysis that while the RPD's citation was in error, its conclusion that the documentary evidence showed fines were most commonly imposed was not. The RAD pointed first to Item 5.1 of the NDP, an RIR directed to family planning violations in Liaoning province, entitled "China: Family planning violations in the province of Liaoning; whether information about a person who is wanted by family planning authorities in Liaoning province is entered in the Golden Shield or Policenet databases" (CHN105145.E). That document stated that breaches of Family Planning Regulations are not generally considered criminal and that "individuals who violate family planning policy in Liaoning province are required to pay a 'social maintenance [or compensation] fee.'"

[14] The RAD next considered a report from the United Kingdom Home Office entitled "Country Policy and Information Note, China: Contravention of national population and family-planning laws" (Item 1.9 in the NDP for China). The UK Home Office report referred to 2016 and 2017 reports from Freedom House, which found "forced abortions and sterilizations were less common." It also referred to a BBC report from 2016 that "could not find any evidence that a forced abortion had taken place since the introduction of the two-child policy, although they admitted the threat still existed" [the foregoing quotes are from the RAD decision; the version of Item 1.9 referred to by the RAD was not in the certified tribunal record nor the applicants' record].

[15] Based on its review of these documents, the RAD concluded that "technically sterilization can exist as a sanction for violating the two-child policy," but agreed with the RPD's finding that "the far more common policy instrument is that of fines." The RAD underscored it was considering the forward-looking risk of sterilization, and found the overall trend in recent years was a reduction in the use of sterilization as an enforcement instrument.

[16] The RAD therefore concluded the RPD did not err in its analysis of the documentary evidence and in its conclusion that the applicants had not established a sufficient objective basis for their fear of persecution. The RAD found that at best, "the risk of persecution is that of mere possibility, rather than serious possibility." It therefore found the applicants were neither Convention refugees nor persons in need of protection.

(2) The Applicants' Arguments

[17] The applicants raise two primary arguments in respect of the RAD's conclusion they did not face a serious possibility of persecution in the form of forced sterilization or abortion. First, they argue the RAD misapplied the test for establishing a well-founded fear of persecution, putting them to a higher standard than appropriate. Second, they argue the RAD misapprehended the evidence regarding the use of these persecutory practices in China, including the evidence of their own experiences in Liaoning. For the reasons that follow, I conclude the applicants have not shown the RAD's decision to be unreasonable.

(a) *The RAD did not misapply the test for a well-founded fear of persecution*

[18] A Convention refugee is someone "who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, […] is unable or, by reason of that fear, unwilling to avail themselves of the protection" of their country of nationality: *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], s 96. To establish a well-founded fear of persecution, a claimant must show they have a subjectively and objectively well-founded fear that if they return to their country of nationality they face a "serious possibility" of persecution: *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA) at p 682; *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 8.

[19] The "serious possibility" standard is equivalent to a "reasonable chance." It is more than a mere possibility of persecution, but does not require an applicant to show that persecution is

probable. Thus while the facts must be established on the civil standard of a balance of probabilities, those facts need only show that persecution is a serious possibility, not that it is likely: *Alam* at para 8. The assessment is made on a forward-looking basis, as conferral of refugee protection is a mechanism for protecting individuals from future harm, not providing redress for past harms: *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 75; *Pour-Shariati v Canada (Minister of Employment and Immigration*), 1994 CanLII 3542, [1995] 1 FC 767 (TD) at pp 775-776; *IRPA*, ss 96, 97.

[20] As set out above, the RAD cited the "serious possibility" standard, concluding that "the risk of persecution is that of mere possibility, rather than serious possibility." Nonetheless, the applicants argue that given the evidence regarding the ongoing practice of forced sterilization, it is implicit in the RAD's conclusion that it applied a higher standard and that it failed to consider forced sterilization as a form of persecution. They argue the RAD's reliance on forced sterilization becoming less common, and on an "overall trend" of reduction of sterilization to enforce family planning policies, improperly put the emphasis on relative terms rather than the actual risk of persecution.

[21] I disagree that the RAD applied the wrong standard. The RAD did not take issue with the fact that suffering forced sterilization or abortion would be conduct amounting to persecution. It took issue with the fact that there was an insufficient "objective basis to their fear of persecution" and found that at best the risk of persecution was "that of mere possibility, rather than serious

possibility." This did not amount to the RAD requiring that the applicants establish that persecution was probable.

[22] Nor did the RAD refer exclusively to trends or relative frequencies in assessing the objective evidence of the likelihood of facing such persecution. In addition to noting that the evidence showed forced abortions and sterilizations to be less common than previously, the RAD found the evidence showed fines to be the "far more common policy instrument," and that fines were imposed in Liaoning. The RAD's references to the UK Home Office report also considered the risk of forced abortion since the introduction of the two-child policy rather than simply directional trends.

[23] Contrary to the applicants' submissions, the fact that the practice of forced sterilization "still exists" does not in itself establish that the risk of such persecution is more than a mere possibility. Nor does it mean that the RAD applied a higher standard in concluding the applicants had not established a sufficient objective basis for their fear. I therefore cannot conclude that the RAD applied the wrong standard in its analysis.

(b) *The RAD's conclusion was reasonable in light of the evidence and submissions*

[24] Ultimately, the applicants' arguments amount to a challenge to the RAD's appreciation and weighing of the country condition evidence and their personal evidence. They argue the country condition evidence shows that forced abortions and sterilizations continue to occur and pose a material risk. They also point in particular to Ms. Xiao's evidence that she was forced to

get an abortion after the birth of the couple's first daughter together, and that Ms. Xiao and Mr. Sun were threatened with forced sterilization and/or the imposition of a fine if they became pregnant again, which they did shortly before leaving China. They argue it was unreasonable for the RAD to prefer the country condition evidence, particularly the UK Home Office report, over their own evidence that Ms. Xiao was forced to undergo an abortion.

[25] Having carefully considered the RAD's analysis, the evidence and arguments that were before the RAD, and the applicants' arguments in this Court, I conclude the applicants have not established the RAD's assessment of the evidence was unreasonable.

[26] Significantly, I consider the RAD's reasons must be read in light of the submissions that the applicants made to the RAD on their appeal. As the Supreme Court of Canada stated in *Vavilov*, "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties" [emphasis added]: *Vavilov* at para 127. This is of particular importance in the context of the RAD, which sits as an appellate body reviewing the decisions of the RPD: *IRPA*, ss 110–111. The RAD's procedural rules require an appellant to set out in their submissions the "errors that are the grounds of the appeal": *Refugee Appeal Division Rules*, SOR/2012-257, s 3(3)(*g*)(i); *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at paras 30–35. The RAD may in some circumstances raise new issues if proper notice is provided: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65–76; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paras 24–26. However, I agree with the Minister that as a general

rule it is the refugee claimant who defines the scope of the appeal before the RAD through their submissions.

[27] Before the RAD, the applicants identified two issues: that the RPD "failed to consider the central issue of forcible abortion" and that the RPD "misapprehended the evidence in respect of the treatment of foreign born children." On the former issue, the applicants criticized the RPD's reference to Item 5.14 of the NDP, and argued that the RPD had failed to consider relevant evidence, namely Item 1.9. No other evidence was referenced in submissions to the RAD, and no other arguments regarding the RPD decision were made.

[28] As can be seen from the summary at paragraphs [11] to [16] above, and as the Minister points out, the RAD's reasons were structured to respond to the two arguments and pieces of evidence raised by the applicants with respect to the issue of forcible abortion. The RAD recognized that forced sterilization and abortion were possible, and that the threat still existed. However, it concluded based on the evidence that the risk of such sanctions to the applicants in Liaoning did not rise above "mere possibility."

[29] Before this Court, the applicants pointed to additional passages in the NDP in support of their argument that forced sterilization and forced abortion continued to occur in China, and that the risk amounted to a serious possibility of persecution. I cannot accept this argument, for two reasons.

[30] First, I conclude the RAD cannot be faulted for not making specific reference to elements of the NDP that were not identified or argued by the applicants. The RPD had considered a number of other documents in the record, and the only issues the applicants raised with the RAD were with the treatment of NDP Items 5.14 and 1.9. The RAD is presumed to have reviewed the evidence, and need not refer to every piece of evidence, even if relevant: *Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 16, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA). The applicants ask this Court to consider different elements of the evidence than those argued before the RAD and to reach a different conclusion on the likelihood of persecution. Absent an unreasonable appreciation of the evidence, this Court should not engage in a reweighing of the evidence: *Vavilov* at para 125.

[31] Second, I am not satisfied that the RAD's conclusions based on the evidence were unreasonable. The RAD did not conclude that forced sterilization or abortion never occurred in China. It referred to the BBC report that had found no evidence of forced abortion since the introduction of the two-child policy, but its primary conclusions pertained to the likelihood of an abortion or sterilization being imposed. While different elements in the NDP speak to this issue, the RAD's assessment of the evidence, and its treatment of the applicants' grounds of appeal, met the requirements of justification, transparency, and intelligibility.

[32] The applicants also argue the RAD's conclusion was unreasonable because it was contradicted by and failed to consider their personal evidence that Ms. Xiao had been forced to undergo an abortion, and the couple was threatened with sterilization and fines. Again, this is an argument that was not raised with the RAD. The RPD's decision, like that of the RAD, noted the

applicants' personal experience, but reached its conclusion on the forward-looking risk based on the documentary evidence. Yet the applicants did not argue before the RAD that the RPD erred in reaching its conclusions despite, or without consideration of, the personal evidence. They only raised errors in the RPD's treatment of the country condition evidence. In my view, the applicants cannot now argue it was unreasonable for the RAD not to have given greater consideration to their personal experiences in reaching its conclusion on the objective well-foundedness of their fear: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26; *Dahal* at para 35; *Oluwo v Canada (Citizenship and Immigration)*, 2020 FC 760 at para 43.

[33] The applicants argue they raised this issue implicitly as their appeal was focused on the risk of forced abortion, which was particularly relevant since Ms. Xiao was pregnant at the time of the RPD hearing. I cannot agree that these references raise the issue the applicants now raise, namely the impact of the applicants' personal evidence on the assessment of the objective risk of persecution. To the contrary, the applicants' only concern as raised with the RAD was that the RPD "ought to have considered the aforementioned evidence" (Items 5.14 and 1.9 of the NDP) in assessing the risk of forcible abortion. Their submission to the RAD did not refer to their personal evidence of past persecution at all, except through passing and indirect reference to reliance on "the facts as set out in their Basis of Claim forms."

[34] If the applicants had argued before the RAD that the RPD had failed to adequately consider their personal evidence in assessing the risk of forced abortion, I agree the RAD would have been obliged to consider that issue. I cannot agree, however, that this necessarily would

have changed the RAD's assessment of the forward-looking risk. I note that the applicants do not argue that because Ms. Xiao had been subjected to a forced abortion in the past, this increased the likelihood she would be personally targeted for another forced abortion. Nor did the applicants' evidence contradict the country condition evidence the RAD relied on, which recognized the existence and possibility of coerced abortions and of threats of sterilization. Ultimately, however, it is speculative to try to assess what the RAD's determination might have been based on arguments that were not presented to it. This is part of the reason this Court does not generally entertain new arguments on judicial review, nor consider an administrative decision unreasonable for failing to address an argument not put before the decision maker.

[35] In my assessment, the RAD's conclusion that the evidence established no more than a "mere possibility" of persecution was reasonably available to it given the evidence and submissions made to it. The applicants had an opportunity to challenge the RPD's assessment of the evidence in determining that they did not face a serious possibility of persecution. They chose to limit that challenge to the RPD's treatment of the evidence from the NDP, rather than the absence of analysis of their personal evidence. In such circumstances, I cannot conclude that it was unreasonable for the RAD not to have given greater consideration to their past experience in this analysis.

B. *The RAD's conclusion that the imposition of fines would not amount to persecution was reasonable*

[36] As the applicants concede, this Court has found on a number of occasions that fines imposed for breaching China's family planning policies are generally not persecutory: *Lin v*

Canada (Minister of Employment and Immigration), [1993] FCJ No 809 (Fed TD); *Li v Canada (Citizenship and Immigration)*, 2011 FC 610 at paras 17, 19; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 443 at para 8; *Mai v Canada (Citizenship and Immigration)*, 2017 FC 486 at para 28; *Yu v Canada (Citizenship and Immigration)*, 2015 FC 61 at para 17.

[37] The applicants argue the imposition of a heavy fine may nonetheless amount to persecution in some circumstances, since even laws of general application may be persecutory: *Zheng v Canada (Citizenship and Immigration)*, 2009 FC 327 at para 13. The applicants point to evidence that fines in Liaoning province could be up to 10 times the average local income. They submit that to determine whether this amounted to a serious possibility of persecution, the RAD had to consider the applicants' ability to pay such fines and what would happen if they did not.

[38] Again, however, the applicants did not argue before the RAD that the RPD erred in concluding that the imposition of fines was not persecutory treatment. They also failed to put any evidence or argument before the RAD that they would be unable to pay a fine or "social compensation fee," whether for violating the family planning regulations or to register their foreign-born child in the hukou. Rather, the applicants' submissions to the RAD were that the RPD misapprehended the evidence in respect of the treatment of foreign-born children. They argued the evidence showed that in some parts of China foreign-born children are not given the option to pay a fee to be registered in the hukou and will thereby be denied access to education and health care. The RAD dismissed this submission on the basis that the only foreign-born child at issue was Ms. Xiao and Mr. Sun's Canadian-born daughter, who was not included in their claim for refugee protection.

[39] Again, I cannot conclude it was unreasonable for the RAD not to address the applicants' inability to pay a fine when that argument was not made to it: *Dahal* at paras 30–31, 35–40.

[40] The applicants rely on the Supreme Court's decision in *Ward* to argue that the RAD, like the RPD, has a duty to consider all potential grounds of persecution, whether or not they were raised by the claimants themselves, and "decide whether the Convention definition is met": *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 745-746. It is unclear in my view that the principle cited from *Ward* has equal application to the RAD, which sits as an appellate body rather than an inquisitorial one, albeit one with broad fact-finding powers: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 56; *Canada (Citizenship and Immigration) v Ahmed*, 2015 FC 1288 at para 11. The applicants did not point to any cases in which a decision of the RAD was found unreasonable for failing to consider a ground of persecution not raised by the appellant. Conversely, in *Idris*, Justice Brown concluded that despite the principle in *Ward*, the general principle remained that failure to raise an issue before the RAD is "fatal" to an applicant's argument: *Idris v Canada (Citizenship and Immigration)*, 2019 FC 24 at paras 21–28.

[41] In any event, while the principle in *Ward* requires the assessment of whether the Convention definition is met, including on grounds not asserted, the assessment must be made on the facts as asserted by the claimants: *Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 37. There was little evidence to support or corroborate Ms. Xiao and Mr. Sun's allegations that they would be unable to pay a fine or fee, or of the anticipated consequences of such failure. The same is true of arguments based on evidence of other discriminatory sanctions

in the context of employment, which were raised for the first time before this Court. In such circumstances, I cannot conclude that *Ward* imposed an obligation on the RAD to consider the possibility that a fine could amount to persecution based on the applicants' inability to pay it.

[42] Therefore, I find no error in the RAD's conclusion that the imposition of fines for breaching the family planning regulations would not amount to persecution in this case.

IV. Conclusion

[43] The RAD reasonably concluded that Ms. Xiao and Mr. Sun had not established an objective basis for their fear, nor that they faced a "serious possibility" of persecution for violating the family planning regulations in Liaoning province. The applicants' arguments amount to a request that the Court reweigh the evidence regarding the risks they face and consider new arguments that were not raised before the RAD. This is not the Court's function on judicial review.

[44] The application for judicial review will therefore be dismissed. Neither party proposed a question for certification. I agree that none arises.

JUDGMENT IN IMM-6566-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6566-19
STYLE OF CAUSE:	DAN XIAO ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 13, 2021 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	APRIL 30, 2021

APPEARANCES:

Dov Maierovitz	FOR THE APPLICANTS
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT