

Federal Court



Cour fédérale

Date: 20220519

Docket: IMM-4502-21

Citation: 2022 FC 744

Ottawa, Ontario, May 19, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

XIAOMEI HE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of China who seeks judicial review of the June 8, 2021 decision of the Refugee Appeal Division (RAD) denying her refugee claim. The RAD concluded that the Applicant was not at risk of religious persecution in China and not at risk of sterilization in Fujian as a result of violating China's family planning policy.

[2] For the reasons that follow, I have determined that the decision of the RAD is reasonable and procedurally fair. This judicial review is, therefore, dismissed.

I. Background

[3] The Applicant claims that she began attending an underground Christian church in China. In 2018, she received a call from her mother-in-law, advising that the police were looking for her, so she went into hiding at the home of a relative. The Applicant left the country with the assistance of a smuggler and with a fraudulent passport. The Applicant claims that other church members have been arrested by the police and sentenced to prison. The Applicant states the Public Security Bureau (PSB) have accused her of joining an illegal underground cult church.

[4] The Applicant states that she has three children and after the birth of her second child, she was given sterilization injections by the Family Planning Office, but became pregnant with her third child. She hid the child after he was born, and passed him off as a child she was babysitting when he got older. The Applicant states that when the PSB came to look for her, they found out about the third child. The Family Planning Office subsequently gave her a fine notice, and asked her to return for sterilization.

II. Refugee Protection Division Decision

[5] The Applicant's claim was denied by the Refugee Protection Division (RPD) who was not satisfied that the Applicant was of interest to the PSB. The RPD noted that she attended the church gatherings only a few times, the church was not one of the denominations considered to

be an evil cult by authorities, and Fujian Province has few anti-Christian incidents. The RPD acknowledged that there was some evidence that Christians were harassed by authorities, but noted the church the Applicant belonged to was not one of the denominations listed as an “evil cult”, and the authorities did not generally concern themselves with small church gatherings.

[6] The RPD concluded that “should the claimant wish to worship upon return to China, there are many congregations she could attend without attracting the interest of authorities”.

[7] On the family planning policy, the RPD concluded that the Applicant would not be subjected to forced sterilization on a balance of probabilities. The RPD noted the Applicant had registered three children before authorities changed the one-child policy to a two-child policy in 2016. The RPD stated “[t]he panel does not find credible that authorities would forcibly sterilize the claimant after changing the one child policy when those authorities failed to enforce the one child policy in 2014 when she had a third child and the policy was actually in place”.

[8] Finally, the RPD concluded that the family planning documents produced by the Applicant were likely fraudulent documents and, therefore, gave little weight to these documents. The RPD nonetheless noted that the risk analysis is forward-looking, and post-2015, the Chinese authorities allow couples to have two children and apply to have more without sanctions.

III. RAD Decision Under Review

[9] On appeal to the RAD, the Applicant argued that the authorities did not become aware of her third child until 2018, after she left China, which is why the authorities did not enforce the policy in 2014. However, the RAD noted the Applicant had provided a birth certificate for the third child, issued in 2014, by a government hospital. The RAD concluded that the birth certificate for the third child was not genuine, given inconsistencies in appearance between the document and the country condition evidence regarding the appearance of birth certificates. The RAD stated:

I have considered that the RPD did not question the Appellant about the birth certificate at the hearing. I note that the RPD is not obligated to put an obvious inconsistency between the Appellant's documents and the material provided in the NDP for China to the Appellant for an explanation.

[10] The RAD relied upon the decision in *Jiang v Canada (Citizenship and Immigration)*, 2018 FC 1064 [*Jiang*], where the Chief Justice stated: “[...] it may very well be reasonably open to the RAD or another decision maker to question the authenticity of a document based on very small or even microscopic differences between the document and an authentic counterpart. It is in the small or microscopic details where a forgery may well be exposed” (at para 31).

[11] With respect to religious persecution, the RAD agreed with the RPD that the Applicant could practice Christianity on return to China, and there was less than a mere possibility that she would be persecuted for doing so. The RAD reviewed the country condition evidence, and noted that:

The most recent *US Religious Freedom report* and *UK report on Christians in China country* [sic] in the record do not show any incidents of persecution of Christians worshipping in unregistered churches in Fuqing city in Fujian province. I find, on a balance of probabilities, that, if there were recent arrests, convictions or incidents of persecution of individuals relating to the practice of Protestant Christianity, including proselytizing, in Fuqing city, Fujian province, there would be some documentation of these arrests or incidents of persecution by reliable sources.

[12] The RAD acknowledged that unregistered religious groups were technically illegal, but weighed this against documentary evidence showing that the government is generally tolerant of small groups. The RAD also noted there was no evidence that the Applicant belonged to a group designated as an “evil cult” by the government, and the Applicant did not identify the name of the group in her testimony or in her Basis of Claim.

[13] The RAD further dismissed a criminal decision provided by the Applicant pertaining to three members of her church, given that the RAD found she had used fraudulent documents for her refugee claim, and had not shown how she came to be in possession of the document. The RAD stated at paragraph 15:

I have considered that the recent documentary evidence regarding the practice of Christianity in Fujian province reveals the closure of a church that had foreign ties, a warning given by a university (not the police) for handing out gospel tracts, and the harassment and closure of churches in Fuzhou and Xiamen cities. These incidents did not occur in Fuqing city, where the Appellant is from and do not show arrests of individuals by the authorities for religious activities. The single incident in Fuqing noted in the country conditions documentary evidence occurred four years ago and related to the demolition of a government approved church. The reasons for the demolition were not revealed. I have further considered these incidents in light of the documentary evidence, noting that over ¼ of the population of Fuqing city are practicing Christians; that a government-commissioned study on house churches determined that Protestant house church members in

China numbered between 45 and 60 million, with another 18 to 30 million attending government-approved churches; and that the government has stated through a policy posted on the SARA website that family and friends have the right to meet at home for worship, including prayer and Bible study, without registering with the government.

[14] The RAD, therefore, dismissed her appeal.

IV. Issues

[15] The Applicant raises the following issues with the RAD decision:

- A. Did the RAD breach the Applicant's procedural fairness rights on its assessment of the birth certificate?
- B. Is the RAD's analysis of religious persecution reasonable?
- C. Did the RAD misconstrue the evidence regarding family planning policies in China?

V. Standard of Review

[16] The issue of procedural fairness is considered on a correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[17] The other issues are assessed on the reasonableness standard, namely, "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the

decision” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

VI. Analysis

A. *Did the RAD Breach the Applicant’s Procedural Fairness Rights on its Assessment of the Birth Certificate?*

[18] The Applicant argues that as the authenticity of the birth certificate was not an issue raised by the RPD, the RAD should have given her an opportunity to respond to their concerns. She argues that the failure of the RAD to do so is a breach of procedural fairness. She relies upon *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 where at paragraph 25, Justice Gascon stated:

In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them [...] A “new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from. [Emphasis added.]

[19] However, the evidence here demonstrates that the Applicant herself raised the issue of the genuineness of the birth certificate in her submissions to the RAD. Her submissions stated: “the [RPD] had to make an effort to ascertain the authenticity of the documents” and “the RAD should assess this aspect of the Appellant’s claim to refugee protection and come to a different conclusion than that which the RPD did”.

[20] Accordingly, the Applicant placed this issue squarely before the RAD in her own submissions. She asked the RAD to find that the RPD made an error in questioning the reliability of the document. In these circumstances, this case is more in line with *Ahmad v Canada (Citizenship and Immigration)*, 2022 FC 14, where Justice Go explained:

By raising arguments in his RAD appeal to criticize the RPD's lack of credibility assessment of the documents, including an assessment as to whether the supporting documents are "fraudulent", it is hard pressed for the Applicant to now claim that he is surprised by the RAD doing exactly what he has asked them to do. [...] As he had asked the RAD to assess the documents for their credibility and authenticity, he and his counsel ought to have been prepared to address all the pitfalls and inconsistencies within the documents as part of their appeal (at paras 24,27).

[21] Therefore, I do not agree with the Applicant's position that the "genuineness of the birth certificate" was a new ground that triggered an obligation on the part of the RAD to give the Applicant an opportunity to respond. This issue was raised before the RAD by the Applicant herself. Likewise, it was reasonable for the RAD to apply *Jiang* when assessing the authenticity of a document.

[22] There has been no breach of procedural fairness.

B. *Is the RAD's Analysis of Religious Persecution Reasonable?*

[23] The Applicant argues that it was unreasonable for the RAD to focus on evidence of arrests when considering her risk of religious persecution. She points to various references in the evidence regarding actions by Chinese authorities against religious organizations. The Applicant

relies on *Dong v Canada (Citizenship and Immigration)*, 2010 FC 575 to argue that it was unreasonable for the RAD to focus on arrests.

[24] In considering this issue, the RAD outlined a number of reasons for finding that there was no risk of persecution to the Applicant, including:

- 26% of the population of Fuqing city are Christian;
- Though there was evidence of a government-approved church being demolished, there was no explanation as to why and this occurred over 4 years ago;
- The government policy posted on the State Administration for Religious Affairs states that family and friends have the right to meet at home for worship without registering with the government;
- The government is tolerant of groups that meet in homes or in small groups; and,
- Some unregistered churches meet openly and regularly with large memberships.

[25] The Applicant is correct when she points out that the RAD in its analysis considers “arrests” in relation to religious persecution in China; however, that is because the risk of arrest was an issue raised directly by the Applicant. In its analysis, the RAD also references “arrests or incidents of persecution” demonstrating that it did not confine its consideration to the issue of arrests only. It was reasonable and appropriate for the RAD to address the issue raised by the Applicant and I do not read the RAD’s decision as creating “arrest” as the threshold to be met to establish religious persecution.

[26] The decision in *Dong* is of no assistance to the Applicant as the circumstances are factually distinct. Here, the RAD did not confine its consideration to arrests only, and the mention of arrests was in response to the Applicant's own submissions. The RAD was being responsive to the issues raised by the Applicant. This supports the reasonableness of the decision.

[27] The RAD was not satisfied that the Applicant provided sufficient evidence to establish a personalized risk of religious persecution even considering the country condition evidence.

[28] The RAD decision on this issue is reasonable.

C. *Did the RAD Misconstrue the Evidence Regarding Family Planning Policies in China?*

[29] The Applicant argues the RAD unreasonably found there was insufficient information to indicate forced sterilizations are presently occurring in the Applicant's home province of Fujian.

[30] The Applicant points to the *Congressional-Executive Commission on China 2018 Annual Report* which states "official speeches and government reports from provinces across China – including Anhui, Fujian, Guangdong, Hubei, Hunan, and Sichuan – continued to promote implementation of harsh and invasive family planning measures".

[31] The RAD notes that the Chinese Government "continues to promote the implementation of harsh and invasive family planning measures"; however, the RAD concluded that there was insufficient evidence to indicate that forced sterilizations are occurring in the Applicant's province of Fujian.

[32] Considering the evidence before the RAD, this was a reasonable conclusion.

[33] In summary, reasonableness review is not a line-by-line treasure hunt for error, and a decision must be read holistically (*Vavilov* at paras 102-103). In my view, when the decision is viewed holistically, the decision is reasonable and the Applicant has not established a reviewable error.

[34] The judicial review is, therefore, dismissed.

JUDGMENT IN IMM-4502-21

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed; and,
2. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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