Federal Court  Cour fédérale

Date: 20231011

Docket: IMM-10632-22

Citation: 2023 FC 1352

Toronto, Ontario, October 11, 2023

PRESENT: Madam Justice Go

BETWEEN:

YAOCHUN ZHANG
XUCHEN ZHANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Yaochun Zhang [Principal Applicant or PA], and his son, Xuchen Zhang [Associate Applicant or AA] are citizens of China, from Shanghai [together, the Applicants]. The Applicants filed a refugee claim based on their fear of persecution for violating China's Family Planning Policy.

[2] The Applicants seek judicial review of a decision dated October 17, 2022 by the Refugee Appeal Division [RAD] [Decision] confirming the decision by the Refugee Protection Division [RPD] dated July 18, 2017 dismissing the Applicants' refugee claim on the basis that they failed to establish a well-founded fear of persecution.

[3] This is the Applicants' third application for judicial review. This Court has granted the Applicants' two previous judicial review applications of decisions of the RAD*: Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 [*Zhang #1*] and *Zhang v Canada (Citizenship and Immigration)*, 2022 FC 642 [*Zhang #2*]

[4] For the reasons set out below, I grant the application.

II. Background Facts and Procedural History

[5] The AA is the first son of the PA and his wife, Li Li. The PA also has a son from a previous marriage [PA's eldest son]. Following the AA's birth, Li Li was required to wear an IUD in accordance with the Family Planning Policy. In September 2013, Li Li's IUD dislodged and she became pregnant in November 2013 while awaiting her scheduled IUD inspection appointment.

[6] The PA claims that he and his wife feared repercussion from China's Family Planning authorities, prompting Li Li to go into hiding. While Li Li was in hiding, the PA alleges that he received a notice from the Family Planning Office regarding his wife's missed IUD inspection. With the help of a smuggler, Li Li arrived in Canada and made a refugee claim in April 2014.

The RPD dismissed Li Li's refugee claim in June 2014, and the RAD rejected the appeal in January 2015. Leave for judicial review was dismissed by this Court in May 2015.

[7] On July 19, 2014, Li Li gave birth to the couple's second son (and the PA's third son) in Toronto.

[8] On June 25, 2015, the Canada Border Services Agency interviewed Li Li and informed her that she had to return to China. The Applicants travelled to the United States [US] with the help of a smuggler, and entered Canada on July 19, 2015. The PA and Li Li's third son (and the PA's fourth son) was born on July 11, 2017 in Toronto.

[9] In dismissing the Applicants' refugee claim, the RPD found that the Applicants failed to establish a well-founded fear of persecution. The RPD also raised credibility issues arising out of the Applicants' delay in leaving China and failure to make a refugee claim in the US. The RAD dismissed the Applicants' appeal on August 3, 2018, finding that the Applicants had not proven they would be at risk of persecution if returned to China. On June 27, 2019, Justice Gleeson remitted the Applicants' appeal for redetermination on the basis that the RAD failed to reasonably engage with evidence on forced sterilization: *Zhang #1* at para 22.

[10] The RAD dismissed the appeal a second time on December 17, 2019, finding, again, that there was insufficient evidence of a serious possibility of persecution. On May 3, 2022, Justice Sadrehashemi granted the Applicants' second judicial review: *Zhang #2*. Justice Sadrehashemi found it was "an unreasonable leap" for the RAD to acknowledge coercive birth control

measures in China, but then conclude since there was no mention of such practices in Shanghai, that coercive birth control measures did not occur in Shanghai: *Zhang #2* at para 11. Justice Sadrehashemi also found that the RAD repeated its error of ignoring evidence that threats from Family Planning authorities of "forcible measures" and "corresponding measures" - which the Applicants received in the form of notices - were euphemisms for coercive birth control practices in China: *Zhang #2* at para 12.

III. Issues and Standard of Review

[11] The Applicants raise several issues on judicial review, namely:

a. The RAD repeated several of the same errors previously identified by the Court in this matter;

b. The RAD erred in finding that the PA's eldest son does not count toward the Family Planning Policy and that the Two-Child and Three-Child Policies would apply retroactively; and

c. The RAD erred in finding that a social compensation fee would not be persecutory.

[12] The Respondent submits that the merits of the Decision are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Respondent further submits that a reasonableness review requires the reviewing court to "adopt a posture of restraint" and respect for the decision-maker's expertise. The Respondent asserts the reviewing court "must consider not only the outcome of the administrative decision, but also the justification of the result," (*Vavilov* at paras 75, 83, 86, 87, and 99).

[13] While the Applicant does not address the standard of review, the presumptive standard of review of an administrative decision is reasonableness, and the circumstances before this Court do not warrant a departure from this presumption: *Vavilov* at para 25.

[14] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. The onus is on the Applicants to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para 100.

IV. Analysis

[15] At the hearing, both parties narrowed the focus of their submissions on what they considered to be the determinative issues in this case. The Applicants submitted that the following two issues are determinative:

a. The RAD's erroneous finding that only the three children from the PA's current marriage count towards the birth limit under the Family Planning Policy, and

b. The RAD's unreasonable findings regarding the Family Planning Policy in China, by wrongly assessing the notices issued to the Applicants from the Shanghai Family Planning authorities and repeating the same errors this Court previously identified.

[16] The Respondent, on the other hand, argued that the determinative issue, as stated by the RAD, is the lack of a forward-facing risk of persecution. Irrespective of how many of the PA's children are counted under the current Family Planning Policy, the Respondent submits that the RAD reasonably concluded that the only consequences, if any, the Applicants would face upon their return to Shanghai would be in the form of social compensation fees. The Respondent submits that the RAD's finding that such consequences would not be persecutory was reasonable in light of the Applicants' circumstances.

[17] I will address these three issues in turn.

A. *Did the RAD err in finding that the PA's eldest son does not count toward the Family Planning Policy?*

[18] The RAD concluded that the PA's eldest son does not count towards the PA and Li Li's Family Planning Policy limits. The RAD reasoned this was because the couple were able to register the AA in their *hukou* (household registration booklet) without consequence, even though at the time, the PA had two children in total. The RAD also referred to the PA's testimony that he was permitted to have a second child since he fell under the exception of remarriage.

[19] The RAD found that the RPD erred when it concluded that the PA and Li Li's two Canadian-born children do not count towards the couple's Family Planning Policy limits. The RAD nevertheless found that given the 2021 Three-Child Policy (and previously, the 2016 Two-Child Policy) and its conclusion that the PA's eldest son does not count towards the

couple's total number of children, the PA and Li Li are within the Family Planning Policy limits and are, therefore, not in violation of the Policy.

[20] On whether China's Family Planning Policy would be applied retroactively, the RAD found mixed National Documentation Package [NDP] evidence. However, the RAD observed that in recent years, China has deprioritized its Family Planning Policy and was now concerned with declining birth rates and an aging population. Further, the RAD found that the new Family Planning Policy laws are national policies, and Shanghai, which is under the national government's direct rule, adopted the 2016 Two-Child Policy within months of its announcement. On this basis, the RAD concluded that it was "more likely than not by now" Shanghai was or is in the process of implementing the 2021 Three-Child Policy. As such, the RAD determined the Applicants are not at risk if they return to China.

[21] The Applicants call the RAD's finding that the PA's eldest son did not count towards the birth limit a fatal flaw, as it was on this basis that the RAD concluded that the PA was not in violation of the Family Planning Policy and would not be punished as a result. The Applicants argue the fact the PA and Li Li were able to register their son, the AA, actually meant that the PA's first son did count because the PA had to apply for permission to have another child when he remarried. If the PA's first child did not count, the Applicants submit that there would not have been a need for such an application in the first place.

[22] The Respondent argues the RAD reasonably found the PA's first son would not count towards the Family Planning Policy limits by relying on objective documentary evidence,

namely that remarried couples are exempt and that the couple were able to register the AA in their *hukou*.

[23] I reject the Respondent's argument, as I find that the RAD erroneously equated the provision of an exemption under the Family Planning Policy with the counting of the number of children. I agree with the Applicants that if the PA's eldest son did not count towards the policy, then it would not have been necessary for the PA to seek an exemption before having his second child.

[24] Moreover, the RAD's finding is not supported by the country condition evidence before it. The RAD cited the Response to Information Request [RIR] dated October 8, 2020, as the basis of its finding. Yet nowhere in the RIR was the issue of how to count the number of births under the Family Planning Policy discussed. Instead, the RIR noted that under the then Two-Child Policy that came into effect in 2016:

> The 2019 annual report by the US Congressional-Executive Commission on China (CECC) notes that couples can apply to have a third child if they meet certain conditions specified by different provincial regulations, and that conditions governing the number of children one is allowed to have can include exemptions for ethnic minorities, couples who have remarried, and couples who have children with disabilities (US 18 Nov. 2019, 125).

[25] The above quoted passage and the rest of the RIR did not suggest that any of the children born in families benefiting from an exemption would not be counted towards the birth limit. Instead, it only stated that families would be allowed to have a ***third*** child, if they meet certain conditions. The use of the term "third child" throughout the RIR would appear to suggest that the previous two children were already counted towards the birth limit.

[26] Likewise, the Background Paper on China's Family Planning released by the Australian Government dated March 8, 2013 [Australian Paper 2013] described the conditions under which rural couples in Fujian would be allowed to have a second child per the former One-Child Policy. The Australian Paper 2013 also did not mention that by virtue of this exemption, the first child would not be counted towards the birth limit.

[27] In conclusion, I find the RAD's reasons for finding the PA's eldest son is not counted towards the Three-Child Policy lacks intelligibility.

[28] While not determinative of the application, I agree with the Applicants that the RAD's error in not counting the PA's eldest son tainted its overall approach in assessing the Applicants' claim, which in turn rendered the Decision unreasonable.

B. *Did the RAD repeat the same errors previously identified by the Court?*

[29] The Applicants submit that the RAD erred by repeating the same errors this Court has previously identified when overturning the RAD's two previous decisions. Specifically the Applicants point to two errors they argue the RAD repeated: (1) its finding on the risk of forced sterilization and (2) its findings on the Family Planning Policy in Shanghai.

[30] The Applicants submit that the RAD repeated its error of finding that the PA did not lead any evidence to suggest that he faces a personal risk of forced sterilization. The RAD acknowledged that forced sterilization still occurs in China, but found there was no evidence on record to support the Applicants' fear that the Shanghai Family Planning authorities would force

the PA to undergo this procedure. The RAD noted the three notices issued by the Shanghai Family Planning authorities threatened "forcible measures and relating financial punishment" but found no evidence such terms are used as "euphemisms for forced sterilization."

[31] The Applicants argue that the RAD's determination was not only inconsistent with the country condition evidence, but also with the previous findings of the Court on this very issue.

[32] The Applicants point to *Zhang #2* and cite *Huang v Canada*, 2021 FC 1330 [*Huang*] which also found the RAD was unreasonable when it repeated the same errors it was previously faulted for by the Court: *Huang*, at para 20.

[33] The Applicants further submit that the RAD also repeated its error of finding the PA does not face a serious risk of sterilization because coercive birth control methods are not employed in Shanghai. The Applicants submit this precise finding was previously addressed and found to be unreasonable in *Zhang #2*, and it was also belied by the evidence indicating that the Family Planning Policy was most strictly applied in urban centres like Shanghai. Further, the Applicants submit that while enforcement is "less brutal" in Shanghai, this is because city residents are strictly controlled, making violations of the Family Planning Policy a rarity, and in turn, reducing the need for enforcement.

[34] For the reasons set out below, I find that the RAD did commit an error when it concluded that the references in the notices to "forcible measures" were not a euphemism for forced

sterilization, and failed to explain why it departed from the Court's previous finding to the contrary.

[35] In the Decision, the RAD justified its finding by noting that "a statement on the Shanghai Government's own website published in 2016 after the two-child policy was implemented says 'individuals having three or more children will continue to be penalized through social compensation fees.'" The RAD then concluded: "evidence from Shanghai itself as far back as 2016 suggests that the municipality's method penalizing out-of-plan births has been a fine."

[36] In other words, in coming to its conclusion that references to "forcible measures and relating financial punishment" were not used as "euphemisms for forced sterilization", the RAD explicitly relied on country condition evidence from 2016, when it rejected the Applicants' forward-looking risk.

[37] In so doing, the RAD erred in two ways.

[38] First, the RAD did not explain why Justice Sadrehashemi's finding in *Zhang #2* that "remedial measures" are a euphemism for coercive practices no longer holds true. As Justice Sadrehashemi noted in *Zhang #2*:

> [12] The RAD's finding that the Applicants would only face a financial penalty for their violation was also justified, in part, based on the RAD's review of the notices issued by the Family Planning Office in Shanghai when Mr. Zhang's wife did not attend her appointment for an IUD inspection. The RAD found that these notices also support the view that the authorities in Shanghai only issue financial penalties for a violation of family planning rules. I find the RAD's review of these notices to be deficient. The RAD determined that the reference to other punishments, such as "forcible

> measures" and "corresponding measures", was vague and therefore not significant to their conclusion that only a financial penalty applied in Shanghai. The RAD reached this determination without reference to the documentary evidence before them that noted that vague terms like "remedial measures" in government notices and documents were a euphemism for coercive birth control practices like forced abortions and sterilizations. A similar problem was noted by this Court in *Zheng v Canada (Minister of Citizenship and Immigration)*, 2012 FC 608 at paragraphs 10-12.

[39] Nowhere in the Decision did the RAD address this specific finding in *Zhang #2*, nor did the RAD provide any reason for departing from the Court's finding. The lack of an explanation is particularly glaring given the RAD drew its conclusion based on evidence from previous years, when the previous RAD decision was rendered.

[40] As noted in *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48, at para 25, "an administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis." In this case, the RAD relied in part on the same facts, yet did not take into account this Court's finding in *Zhang #2*.

[41] Second, the RAD accepted that coercive birth control methods, such as forced sterilizations, still happen in China. Yet it failed to explain why the references to "forced measures" in the notices to the Applicants did not include forced sterilizations.

[42] The Respondent argues the Applicants "mischaracterized and decontextualized" the RAD's findings on forced sterilization and that the RAD's findings must be reviewed "in the context of the RAD's assessment of the evidence", including its findings that forced sterilization

is illegal. I reject this argument, as it does not answer the concerns that Family Planning authorities use euphemistic terms to hide their illegal acts, as the Applicants argue to be the case.

[43] The Respondent also submits that the RAD did not repeat errors. The Respondent submits the RAD acknowledged the evidence referred by the Applicants but reasonably preferred the more recent objective evidence, and that *Zhang #2* considered the previous RAD decision in light of the record that was before the decision-maker at the time.

[44] The Respondent's argument, in my view, is contradicted by the RAD's own finding. As noted above, the RAD did not simply rely on what was then the most recent NDP to find that the PA would not face a risk of sterilization. Rather, it directly pointed to evidence from 2016 to support its finding.

[45] Given these findings, and given the lack of an explanation on why the "forced measures" outlined in the notices to the Applicants were not a euphemism for more coercive measures, as this Court has previously found, the Decision lacks the requisite transparency, intelligibility and justification and is therefore unreasonable.

C. *Did the RAD err in finding that there is a lack of forward-looking risk?*

[46] My findings above are dispositive of the Respondent's argument with respect to the RAD's conclusion on forward-looking risk. Specifically, as I find unreasonable the RAD's conclusion that "forced measures" in the notices to the Applicants did not include forced

sterilizations, this also renders the RAD's conclusion that the PA would not be at risk of sterilization but would only have to pay social compensation unreasonable.

V. Conclusion

[47] The application for judicial review is allowed.

[48] There is no question to certify.

JUDGMENT in IMM-10632-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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