

Federal Court



Cour fédérale

Date: 20130219

Docket: IMM-4528-12

Citation: 2013 FC 173

Toronto, Ontario, February 19, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ZHAN CONG CAO
SHU FEN WEN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Member's finding that the applicants' oral testimony, personal information form (PIF) narrative, and documentary evidence concerning their treatment by family planning authorities in China was not plausible or credible, and as a result that they were not objectively at risk of sterilization, was based on a microscopic examination of the applicants' evidence; speculation; and unsupported inference. As a consequence the decision is unreasonable.

Background

[2] The applicants are married and are citizens of China. In July 2007, they had their first child – a son. Ms. Wen says that after she gave birth, the couple was not permitted to have any more children, and that she was required to wear an intrauterine device (IUD) to prevent any further pregnancy.

[3] In September 2008, Ms. Wen attended an IUD examination with family planning officials. Despite the IUD, she was pregnant. The family planning officials took her to the hospital immediately for a forced abortion and they wanted her to be sterilized. Ms. Wen would not agree and the officials accepted that she continue to wear an IUD but stated that if she became pregnant again she would need to be sterilized.

[4] On March 2, 2009, Ms. Wen attended another IUD examination with family planning officials and was again found to be pregnant. She was again brought immediately to the hospital to have a forced abortion, but this time the officials were insistent that she also be sterilized. However, the doctors concluded that she could not at that point be sterilized because she was haemorrhaging from the abortion. So the family planning officials decided, that day, that Mr. Coa must be sterilized instead, and immediately set off for his house.

[5] Mr. Coa was not home when the family planning officials arrived. They left a notice for him to report to the birth control office on March 6, 2009. According to the applicants' PIF, the couple went into hiding on March 4, 2009. When Mr. Coa did not report to the birth control office as demanded, the officials paid another visit to their home. They confiscated family

property, damaged the home and suspended the supply of utilities. The applicants produced a list of confiscated items, purportedly issued by the family planning authorities, dated March 7, 2009.

[6] On May 8, 2009, fearing that they could no longer remain in China safely, the applicants departed for Canada with the assistance of a smuggler, and claimed refugee status shortly after arriving.

[7] In January 2011, Ms. Wen gave birth to the applicants' second child, a girl. The applicants say they "continue to fear sterilization as the family planning officials have continued to seek us out at [Mr. Coa]'s uncle's home and our close relatives' homes, more recently once every two months." On each of these visits, the authorities' warnings have only been verbal.

[8] Ms. Wen testified at the refugee hearing on behalf of both applicants. Certain notable documents were before the Board: the above-mentioned confiscated items list, "an IUD booklet, a sterilization notice for Mr. Coa, two documents concerning abortions in September 2008 and March 2009, and an illness diagnosis document dated March 3, 2009."

[9] The Board, in rejecting the claim, made the following negative credibility findings:

(i) The Board found that the *Guangdong Provincial Family Planning Regulations* provide that the penalty for an "out-of-plan" child is a social support fee, which rises with the number of out-of-plan children, and that "there is no evidence available to [it] that women are forcibly sterilized in China because there is the possibility of a future pregnancy." It found Ms.

Wen's explanation as to why the authorities would try to sterilize her, despite these rules and the fact that she had only one child at the time, "neither plausible nor credible [emphasis added]."

(ii) Ms. Wen's IUD booklet, testimony, and PIF indicated that her second forced abortion took place on March 2, 2009, but two hospital documents tendered as evidence were dated March 3, 2009. The Board felt that Ms. Wen's explanation was "that the hospital document was provided on the day she was released and she stayed one night in the hospital" was insufficient as "two hospital documents were disclosed. One document specifically concerns the abortion and it is dated March 3, 2009. The other document concerns the female claimant's health problems after the abortion and further indicates that as a result, she cannot be sterilized. It too is dated March 3, 2009." The Board found that Ms. Wen did not provide a credible explanation for the discrepancy.

(iii) The March 3, 2009 document indicating abortion surgery had been performed also indicated that the patient's condition after surgery was "well." However, the second March 3, 2009 hospital document indicated there was bleeding after the surgery and there could be no sterilization.

(iv) If the planning authorities documented their demand that the male claimant be sterilized, it was "reasonable to assume that the demand that the female claimant be sterilized would also be documented."

(v) The demand for Mr. Coa to be sterilized was dated March 2, 2009, but the medical documents concerning Ms. Wen were dated March 3, 2009. Ms. Wen did not provide a credible explanation about the discrepancy.

(vi) There was no documentation from the family planning authorities concerning Ms. Wen's two forced abortions.

(vii) Except the March 2, 2009 demand for Mr. Coa to appear at the birth control office, there was no documentation from the family planning authorities since the applicant couple went into hiding, and all of their demands from that point had been “verbal” only.

[10] The Board also found that the documentary evidence generally supported the conclusion that the imposition of fines, as noted above, and not forcible sterilization was the norm in Guangdong Province, and that the applicants would be subject to a fine at most were they to return to China with their second Canadian-born child.

[11] In summary, the Board found that the documents provided were fraudulent and that the applicants had not discharged their burden of proving, on a balance of probabilities, that they would be persecuted or be personally at risk of cruel and unusual treatment or punishment or a risk to their lives or a risk of torture by any authority in China, and dismissed their claims accordingly.

Issues

[12] The applicants raise the following issues:

1. Whether the Board erred in finding that the applicants’ fear of sterilization was not credible; and
2. Whether the Board erred in assessing the applicants’ objective basis of the claim.

Analysis

[13] Much of the Board's decision as to credibility rested on its view that the two hospital documents dated March 3, 2009, showed that the abortion was performed on that date, one day after the husband was issued a document directing that he be sterilized. I agree with the applicants that these documents show no such thing.

[14] These two documents are "stamped" by the hospital on March 3, 2009, but neither state that the abortion was performed on that date. The Member unreasonably concluded that the date the document was stamped reflected the date the abortion was performed. Ms. Wen's testimony that she was made to undergo an abortion on March 2, 2009, and that the family planning officials decided that day that her husband would be sterilized is not inconsistent with these documents, as the Member found.

[15] The applicants also submit that the Member was unreasonable in finding any contradiction with the documentary description of Ms. Wen's post-abortion condition. She was not "well" immediately following the surgery on March 2, they say, but well, or well enough to be discharged on March 3, 2009.

[16] The Birth Control Surgery Certificate states:

Condition after surgery: Well.

The Illness Diagnosed Certificate states:

The illness was diagnosed from our obstetrics and gynecology department as followed:

1. Early pregnancy, abortion

2. bleeding after the surgery, light anemia.
[sic]

The applicants' PIF states that Ms. Wen suffered from haemorrhaging during the abortion and, as a result, could not be sterilized at that time. Her testimony at the hearing was that she had "a major haemorrhage after the abortion."

[17] In its reasons, the Board drew a negative inference from the discrepancy in the descriptions of Ms. Wen's post-abortion condition – "Well" versus haemorrhaging. Even if one accepts that the Birth Control Surgery Certificate was issued on March 3, 2009, that does not satisfactorily explain why "Well" would have been noted as Ms. Wen's condition after her surgery the day before. Her condition was not well; according to her, she was haemorrhaging badly. Moreover, whoever filled out the other March 3, 2009 hospital document Ms. Wen was provided – the Illness Diagnosed Certificate – *did* note that she was bleeding after the surgery.

[18] On the other hand, there was an issue at the hearing about the accuracy or precision of the translations provided by the applicants – an issue the Board itself identified at the hearing when the hearing translator rendered a different translation of certain parts of the hospital documents, and which prompted the Board Member to remark: "You better get yourself another translator, counsel."

[19] I agree with the Member that the literal meaning of the Birth Control Surgery Certificate contradicts the Illness Diagnosed Certificate, and the Board was justified in pausing to consider this issue. On the other hand, one must question how strong an inference can be drawn from this. Could "well" have meant "stable?" The Board had already noted certain translation

inaccuracies on these hospital documents. Standing alone, this negative inference is valid, but by itself it is not particularly strong and standing alone it would be unreasonable to reject all of the applicants' evidence.

[20] The Board also found that it was "reasonable to assume, in the context of the documentary evidence," that "there would be some Family Planning documentation concerning ... [Ms. Wen's] alleged required sterilization."

[21] This assumption is made without any foundation. There is no reference to any documentary evidence that establishes a foundation for this assumption and the Board Member does not profess to have any special expertise in this area. I agree with the applicants' submission that the lack of documentation from the authorities demanding that Ms. Wen be sterilized is consistent with what she explained happened on March 2, 2009 – that the Family Planning authorities took her to the hospital straight from her IUD examination, and spoke directly with the doctors regarding her sterilization. In that circumstance there was no need for any documentation. Mr. Coa, on the other hand, was not home when the authorities went to find him – so they left him a written demand for him to appear.

[22] The Board also examined both the official family planning regulations in Guangdong Province and documentary evidence about incidences of forced abortions and sterilization in its reasons. It found that forced abortions and sterilization, such as seems to have occurred in Puning City, were the exception in Guangdong Province and that the applicants were not

personally at risk or would be pursued for forced sterilization. The Board also found that the applicants' story lacked plausibility in light of the regulations in place in Guangdong.

[23] The applicants submit that despite the official regulations in Guangdong, "coercive measures are well documented in the country references." They highlight a multitude of passages from documentary evidence before the Board stating that the government in Guangdong was cracking down on the population problem; that the mass sterilization campaign in Puning City (Guangdong Province) was not an isolated instance; and that couples in violation of family planning policies were "routinely subjected to forced abortions and/or sterilizations." They point out that in the context that the IUD had been ineffective not once but twice, there was an objective basis for their fear and their allegations of attempted coerced sterilization are entirely plausible.

[24] I find the Board's conclusion to be unreasonable. Certainly the applicants' story is *plausible* based on the evidence in the record. Most important, however, is that the Board makes its finding in relation to the documentary evidence "in the context of [the] findings and negative inferences noted above" [emphasis added]. Given my finding that a number of these inferences were unreasonably made, it must be concluded that so too is the Board's conclusion as to the significance of the documentary evidence.

[25] The Board's decision is unreasonable. It lacked valid reasons for rejecting Ms. Wen's sworn testimony and documents and relied on improperly made plausibility findings. The decision must be set aside.

[26] No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the applicants' refugee claim is remitted back to the Board to be determined by a different Member, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4528-12

STYLE OF CAUSE: ZHAN CONG CAO ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 18, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: February 19, 2013

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