Federal Court  Cour fédérale

Date: 20130709

Docket: IMM-8066-12

Citation: 2013 FC 765

Ottawa, Ontario, July 9, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AI YAN LIANG
JUN WU SHAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 28 June 2012 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principle Applicant, Ai Yan Lang, is a 29-year-old citizen of China. She and her husband, Jun Wu Shan, the Secondary Applicant, seek protection in Canada from Chinese Family Planning (FP) authorities. The following narrative was laid out in the Principle Applicant's Personal Information Form (PIF) submitted with her refugee claim.

PIF Narrative

[3] The Principle Applicant was born in XinYi city, Guangdong province, China, and her husband was born in Guangzhou city, Guangdong province, China. They married on January 25, 2005, and had their first child, a daughter, on May 2, 2007.

[4] The Applicants' household is listed as an urban household, and they were therefore not allowed to have any more children pursuant to FP policy. As such, after the birth of their daughter, the Principle Applicant was required to wear an IUD and attend regular IUD examinations.

[5] Despite wearing the IUD, the Principle Applicant found out that she was pregnant again at the end of July, 2009. Fearing that she would be forced to have an abortion or that one or both of them would have to undergo sterilization, the Principle Applicant and her husband left their daughter in the care of the Principle Applicant's parents and went into hiding at a relative's home.

[6] While in hiding in early September 2009, the Applicants learned that after the Principle Applicant missed an IUD examination scheduled for the end of August 2009, the FP authorities had gone to their home and both of their parents' homes looking for them. The FP authorities questioned the Applicants' parents about the Applicants' whereabouts, and were told that the Applicants had gone to work in another province. The FP authorities left a notice requiring the Principle Applicant to report for an IUD examination.

[7] The FP authorities returned to the Applicants' parents' homes in early October 2009 to inquire about the Applicants' expected return, and to demand that the Principle Applicant submit to an IUD examination. The FP authorities also stated that if the Principle Applicant was discovered to be pregnant, she would be forced to undergo an abortion and sterilization, and would have to pay a large fine.

[8] The FP authorities returned to the Applicants' parents' homes for a third time in late October 2009. The Applicants learned at that time that their own home had been sealed because the FP authorities suspected, due to the Principle Applicant's failure to show up for her IUD examination, that they might have been hiding a pregnancy. The FP authorities accused the Applicants of violating FP policies and warned that there would be serious consequences for their failure to report.

[9] In addition to their fears of forced abortion and sterilization, the Applicants were concerned that even if they were able to have a second child in secret they would not be able to register the child on their household register. As a result, the child would not be allowed to attend school in the

future. Alternatively, if they did register the child, they would be forced to undergo sterilization and to pay a large fine.

[10] The Applicants decided that they would have no future in China if they remained in hiding, and decided to leave with the assistance of a smuggler. Since arriving in Canada the FP authorities have returned to the Applicants' parents' homes searching for them, and the Applicants continue to fear that they will be subjected to the sanctions noted above if they return to China.

Oral Testimony

[11] On June 28, 2011 and January 11, 2012 the Applicants attended hearings before the RPD panel. The RPD began by questioning the Principle Applicant about her resident identity card (RIC). The Principle Applicant testified that the address on her RIC was that of her parents and younger brother, and not the address at which she resided with her husband, the Secondary Applicant, and their daughter. The Principle Applicant stated that the reason for this was that the home that she and the Secondary Applicant had lived in was not yet purchased at the time that the RIC was issued. She further testified that she was on her brother's hukou (household register), and that since she already had a hukou she could not register the address of her new home.

[12] When asked how her brother was able to get an urban hukou when their parents had an agricultural hukou, the Principle Applicant explained that he obtained it as an added benefit when he purchased his home in the city. The RPD noted that normally one would not be able to easily obtain an urban hukou by simply purchasing property.

[13] The Secondary Applicant was asked why his wife was not added to his own hukou; he replied that to have someone added to a hukou was time-consuming and troublesome and that government offices were not open during his days off of work. He further testified that there was no real point to having her transferred as they both had identification and a marriage certificate to prove their identities and address.

[14] The issue of the authenticity of the Applicants' hukous was put to the Secondary Applicant. The RPD explained that an RCMP analysis of the Secondary Applicant's hukou had revealed that "the stitching part goes around the booklet, which is not how usually genuine documents are assembled. Usually cut at the edge of the document." The Secondary Applicant replied that his hukou was issued in 1999 and at that time a very simple process was used to assemble them, so any changes made would be done manually. In the case of the Secondary Applicant's hukou, the only alteration made was when the Applicants' daughter was added to it.

[15] The RPD also noted the fact that RCMP analysis revealed that the Principle Applicant's hukou had empty stitch holes on four pages, which meant that those pages were not originally part of the document.

[16] The Principle Applicant was questioned about her employment in China, at which point she testified that she had worked for a travel agency, but that she could not obtain documentation to prove that she had worked there because it was at her home in China which had been seized by the FP authorities. At the later hearing, in January 2011, the Principle Applicant provided a document

allegedly provided by the travel agency attesting to the fact that the Principle Applicant had worked there. The document was not on company letterhead.

[17] With regard to the Applicants' home, the Principle Applicant testified that the purchase documentation she submitted had been kept with her in-laws and that her husband's sister had sent it to her from China. The Secondary Applicant stated that they moved into that home in January, 2008.

[18] The Principle Applicant testified as to her fear that she would be forced to undergo sterilization if she returned to China because she had a second child while registered on an urban hukou. She further testified that she did not have the money to pay the required social fee to enter the second child on a hukou, and that she would still be sterilized regardless. When the RPD put to the Principle Applicant that country condition evidence indicates that there was no forced sterilization in Guangdong province she responded that the FP authorities had told her in-laws that if they found her they would send her for sterilization.

[19] The RDP questioned how the FP authorities would have known that she was pregnant, and she explained that when she missed her IUD check-up – which had been scheduled for August 26, 2009 – they became suspicious, seized the Applicants' house, and sent them a warning letter advising that they would be sterilized if found. The Applicants testified that when they realized the Principle Applicant was pregnant again they went into hiding, and their daughter stayed with the Secondary Applicant's parents for a short time before being sent to the Principle Applicant's parents' house about six hours outside of the city.

[20] The RPD asked the Principle Applicant why she got a notice from the FP office to come for an IUD examination if she had already scheduled an appointment in August, 2009. She explained that she could go for the check-up at any time in the month, but that usually she would make an appointment so that she could ensure her check-up would occur on a certain day, as the clinic might not have time to see her were she to simply show up.

[21] The Principle Applicant testified that the IUD check-up notices were delivered to her brother's home, and left on the doorstep. When asked why they were not delivered to the home she lived in with her husband and daughter, the Principle Applicant explained that although the FP bureau had that address, she was registered on her brother's hukou, so that is where the notices were delivered. However, a warning letter and a penalty decision letter were delivered to the Secondary Applicant's parents in October 2009 because the FP authorities had already looked for the Applicants at their own house and at the Principle Applicant's brother's house, and went to the parents' home when they could not locate the Applicants.

[22] The Principle Applicant also testified that the FP authorities only visited her in-laws, and not her own parents. The Principle Applicant stated that the FP authorities never found out her parents' address because her brother would not have told them for fear that they would then find the Applicants' daughter and use her to coerce the Applicants to return.

DECISION UNDER REVIEW

[23] The RPD stated that the determinative issue with respect to the Applicants' claims was the credibility of their oral testimony, PIF narrative, and documentary evidence. It ultimately found that the Applicants were not credible, and concluded that they were neither Convention refugees nor persons in need of protection.

[24] The RPD was not satisfied as to the authenticity of the urban hukous that the Applicants submitted as evidence that they were subject to the one child policy. The RPD noted that if they were agricultural hukous then the Applicants would have been allowed to have a second child under the FP regulations. However, the RPD sent the hukous to the RCMP for forensic examination, and the resulting report indicated that, since there were no specimens available for comparison, the authenticity of the hukous was inconclusive. The report further indicated that the Secondary Applicant's hukou had numbers and/or Chinese characters added to it, and was not assembled in a manner typical of such documents. The Principle Applicant's hukou also appeared to have had pages added to it, or removed and reinserted. As a result the RPD concluded that the hukous could not be relied on to establish that the Applicants have urban hukous.

[25] The RPD also noted confusing testimony as to why the Applicants did not have a hukou for the house where they actually resided, and was not satisfied with the Principle Applicant's explanation that they did not obtain a new hukou when they purchased their home because the authorities would not issue another one. The Principle Applicant could not provide any evidence as to why she could not be removed from her brother's hukou and placed on a hukou at the new

address of her husband. The Secondary Applicant's explanation for not obtaining a new hukou was that it was a hassle and they did not have time to do it.

[26] The RPD was critical of the Principle Applicant's testimony that her brother was able to obtain an urban hukou simply by purchasing property in the city. Furthermore, while she testified that the address on her RIC was that of her parents and her brother, the address on the Principle Applicant's RIC actually corresponded with her brother's urban hukou. The RPD noted that since the RIC was issued in 2004 and the Principle Applicant's brother's hukou was issued in 2005, it would have been correct to state that the address on the RIC was her brother's and not that of her parents, who have a rural hukou.

[27] The RPD found on a balance of probabilities that "these two documents" (it is unclear whether the RPD is referring to the two hukous or the Principle Applicant's hukou and her RIC) were fraudulent, which in turn caused it to question the genuineness of the rest of the Applicants' documents, as well as their credibility generally.

[28] Moving on to the documentary evidence submitted by the Applicants concerning their alleged problems at the hands of FP authorities, the RPD stated that the IUD examination reminder notice was "not what one would expect from an efficient office in a large city such as Guangzhou," and that if it was "a general notice, then it would not be addressed to the [Principle Applicant]." Furthermore, the Principle Applicant testified that she had made an appointment for a check-up on a specific day in August, and it would therefore be reasonable to expect that the notice would have reminded her of that appointment. The RPD was also critical of the fact that the Principle Applicant

had only submitted one reminder notice as evidence when "[p]resumably there would have been written notices for the other months when the [Principle Applicant] was due to be examined." As a result the RPD gave the reminder notice little evidentiary weight.

[29] The RPD then noted a September 2, 2009 FP letter addressed to the Principle Applicant warning her to attend an IUD examination within 15 days or face unspecified punishment, an October 16, 2009 letter advising that the Applicants' residential property had been sealed until the Principle Applicant attended an IUD examination, and a penalty decision notice also dated October 16, 2009 which stated that because the Principle Applicant had failed to submit to an IUD examination and carry out the FP birth control policy, the Applicants would be dismissed from their employment and charged a 200,000 RMB Social Support Fee.

[30] The RPD assigned little weight to the penalty decision notice and the letter warning the Applicants that their property had been sealed, because they were both issued from the same office on the same date. Furthermore, the penalty notice was premature, as the FP authorities had no proof at that time that the Principle Applicant was pregnant and the Social Support Fee would only have been due upon the birth of a child, not on speculation that the Principle Applicant was pregnant (she would have only been four months pregnant at the time).

[31] The Principle Applicant also submitted a letter from her former employer confirming that she had been dismissed from her job at the travel agency because of her non-compliance with FP birth control policies. However, the RPD gave the letter no evidentiary weight because it was not

signed and was not on company letterhead, and it would be reasonably expected that an official document would have such features.

[32] The RPD expressed concern with the Principle Applicant's testimony that the first notice requiring her to attend an IUD examination in August was delivered to her brother's address because that is where her hukou was registered, yet she also stated that the FP office had the address where she actually resided on record. The RPD found that it was not plausible that the FP authorities would not have delivered the notice to her own address, as that would be the place that would be most likely to receive it, whereas there would be no assurance that her brother would be at home or able to notify his sister if it were delivered to his house. The RPD was also sceptical of the Principle Applicant's statement that the notices were left on her brother's doorstep and she did not see the FP officers because she was working. The RPD found it curious that the Principle Applicant would be expected to be at her brother's home instead of her own.

[33] The RPD did not find it plausible that the FP authorities did not go to the Principle Applicant's parents' home to look for the Applicants. The Principle Applicant testified that this was because they did not know the address; however, the FP authorities knew the Principle Applicant's brother's address because her hukou was there, and they actually went there to drop off notices. Therefore, the RPD reasoned that the FP authorities

> could easily have pressured him to provide the address or they could have traced her parents through her former address which is that of her parents and which is listed on her hukou. As the [Principle Applicant] also testified, if they went there then they could take her daughter and pressure her to return by using her daughter. As the FP seemed so intent on finding the [Applicants] that they delivered several notices and sealed their house and went to her in-laws, it does

> not seem reasonable that they would not have inquired at her parents' house, and not have traced her daughter.

[34] The RPD noted that there were mixed messages in the country documentation evidence. The Guandong Provincial Family Planning Regulations indicated that a social fee will be levied when there is an out-of-plan birth, that the fee will be multiplied by the number of out-of-plan children, and that if the fee is burdensome a payment plan will be arranged. A document on FP enforcement in Guangdong and Fujian provinces indicates that the enforcement of FP policies varies from region to region, that those who breach the Family Planning Regulations may be fined, that forced sterilizations still occur in China but it is less common than in the past, and that Guangdong falls into the category of provinces in which "unspecified remedial measures" are required for pregnancies that violate provincial law (as opposed to provinces that require termination of the pregnancy). The same document notes that authorities in Puning City in Guandong province conducted a sterilization campaign involving a very substantial number of people because of that city's high birth rate, that three women acting as surrogates were forced to undergo abortions in Guangzhou, and another woman was forced to undergo an abortion because her second pregnancy occurred before the required waiting period for a second child.

[35] The RPD determined that the Puning situation, which cited no sources, was distinctive and there was no other evidence of similar campaigns having occurred in Guangdong province. The incidents involving surrogate mothers were also distinctive and not comparable to the Principle Applicant's situation. Only one incident of forced abortion was noted in the whole province.

[36] On a balance of probabilities and in the context of the findings and negative inferences made, the RPD concluded that the Applicants would not be in jeopardy of forced sterilization in Guandgong province should they return to China. This determination was said to be supported by Justice Maurice Lagacé's decision in *Zhan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 711 [*Zhan*], in which he referred to the policy in Fujian province – where the penalty for an unplanned second child would most likely be a fine and not forced sterilization – and noted that country documentary evidence indicated that Fujian provincial policies were similar to that of Guangdong in terms of there being a lack of evidence of forced abortion and sterilization.

[37] The RPD then went on to consider the birth of the Applicants' son in Canada, and the impact of their potential return with him to China. Country documentary evidence indicated that there have not been any reports of couples experiencing difficulties upon returning to Guangdong province after having children overseas, that people returning from abroad are actively welcomed back, and children born overseas are largely forgiven in regard to Family Planning Regulations. A child born overseas would be registered in the family hukou after the payment of a fine, if such payment is required, and would be eligible for educational and health services.

[38] The RPD noted that it had considered counsel's submissions, as well as the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, but found no basis to amend its previous findings. Having previously found the Applicants' overall credibility in doubt, on the basis of the documentary evidence and cumulative findings and negative inferences drawn, and in light of the lack of persuasive evidence to the contrary, the RPD found that the Applicants' allegation that they would face persecution on the basis of China's one child policy was not credible. The RPD

further found that the Applicants' alleged subjective fear of persecution based on the one child policy was not supported by the objective situation in China, and that they would not face persecution on the basis of that policy.

[39] On the basis of the totality of the evidence and the cumulative findings, the RPD concluded that the Applicants had not satisfied their burden of establishing a serious possibility that they would be persecuted or personally subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture by any authority in the People's Republic of China.

ISSUES

[40] The Applicants raise the following issues in this application:

a. Whether the RPD erred with respect to the Applicants' credibility;

b. Whether the RPD based the Decision on one or more erroneous findings of fact, misconstrued evidence and material facts, and/or made the Decision in a perverse or capricious manner without regard to the evidence before it;

c. Whether the RPD erred in law by failing to give any independent analysis of why the Applicants should not be considered persons in need of protection under section 97 of the Act.

STANDARD OF REVIEW

[41] The Supreme Court of Canada, in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of

review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[42] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, Justice Mary Gleason held at paragraph 9 that the standard of review on a credibility determination is reasonableness. The standard of review on the first issue is reasonableness.

[43] The RPD's evaluation of evidence is reviewed on the reasonableness standard. See *Ogbebor v Canada (Minister of Citizenship and Immigration)* 2011 FC 1331 at paragraph 15 and *Walcott v Canada (Minister of Citizenship and Immigration)* 2010 FC 505 at paragraph 18. The standard of review on the second issue is reasonableness.

[44] The RPD's decision to conduct a section 97 analysis is a matter of mixed fact and law that is reviewable on a reasonableness standard (see *Sow v Canada (Minister of Citizenship and Immigration*), 2011 FC 1313 at paragraphs 17-21). Thus, this issue will also be reviewed on a reasonableness standard.

[45] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[46] The following provisions of the Act are applicable in this proceeding

96. A Convention refugee is a person 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,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries;	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards,	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
[…]	[…]

ARGUMENTS

The Applicants

[47] The Applicants submit that the RPD was critical of their hukous, despite the RCMP report's conclusion that the analysis of the hukous was inconclusive. Without a clear finding by the RCMP that the hukous were not genuine, there is no evidentiary basis for finding a problem with them. Furthermore, the RPD relied in part on the hukous to establish the Applicants' identity, and the case law is clear that an identity document cannot be relied upon for one purpose and then questioned for

another purpose. The Applicants cite *Ru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 935 at paragraph 55 [*Ru*] as support for this argument.

[48] The Applicants argue that the RPD engaged in speculation when considering the FP notices submitted as evidence, despite the Applicants' explanations that the IUD check-up notice was merely a general notice reminding the Principle Applicant to go for a check-up at some time during the month. The RPD also questioned other documents for supposedly missing information, while the Applicants explained that there was a specific office responsible for her area and everyone knew where to go. The Applicants submit that one must read a document for what it says and not for what it does not say.

[49] The RPD found that the imposition of a penalty on the Applicants was premature; however, there was no evidence before the RPD on how things work in China with regard to the timeframe for the imposition of such a fine. The RPD was simply imposing its own view on the evidence, and it ignored the Applicants' explanation that when the Principle Applicant failed to show up for her IUD check-up, the FP authorities concluded that she was in violation of the one child policy. Similarly, when finding that the dismissal notice was not genuine the RDP ignored the Principle Applicant's explanation that the travel agency she worked for was small and she did not know if it had official letterhead.

[50] The Applicants submit that the RPD ignored evidence when it was critical of the fact that the FP authorities left the notices at the Principle Applicant's brother's home and not at the Applicants' home, when the Principle Applicant was in fact listed as living at her brother's home. The RPD engaged in further speculation when it suggested what the FP authorities should have done in their search for the Applicants.

[51] The RPD also selectively read the country documentary evidence, which gave repeated examples of sterilizations and forced abortions in Guangdong province, and which stated that "unspecified remedial measures" is code for forced sterilizations. Furthermore *Zheng v Canada (Minister of Citizenship and Immigration)*, 2012 FC 608 [*Zheng*], dealt with the one child policy in Fujian province, which has very similar measures to Guangdong province. In that case, at paragraphs 11 and 12, Justice David Near stated that

> The Applicant asserts that the Board misconstrued the evidence of "remedial measures" in Fujian as not including forced sterilization despite evidence that this was the case.
>
> I am inclined to agree with the Applicant's position under the circumstances. It was unreasonable for the Board "to assume that remedial measures refers to the Fujian provincial system of social compensation fees." Since the country documentation, notably the US Congressional-Executive Commission on China Annual Report 2009, clearly shows that reference to "remedial measures" includes forced sterilization, the Board's finding that such measures would only imply a social compensation fee in Fujian province does not reflect the evidence presented or meet the criteria of justification, transparency and intelligibility. On this basis alone, the matter will be sent back for reconsideration.

[52] The RPD further erred when it stated that there were no sources cited for the Puning sterilization campaign because this campaign is listed in several documents. Furthermore, with regard to *Zhan*, above, in that case there was insufficient evidence before the court of sterilizations and abortions in Guangdong; however, in a more recent case, *Huang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 205 [*Huang 1*], Justice Russel Zinn noted recent evidence of sterilization in Guangdong contrary to the RPD's findings.

[53] The Applicants submit that the size of the fee that would have to be paid if they were to return to China with their son is persecutory and beyond their means. Furthermore, the Guangdong

Family Planning Regulations clearly notes that the "first choice contraceptive measure for couples with two or more children is to be sterilization." The RPD therefore erred in stating that the Applicants do not face a risk of sterilization should they return to China.

[54] The Applicants cite the 2010 and 2011 United States Congressional Executive Commission on China Annual Reports as support for their submission that in addition to compensation fees, "remedial measures" (meaning forced sterilization and abortion) continue to be used for out-of-plan children in Guangdong province. They assert that these documents are clear that multiple punishments can be imposed, which suggests not only forced sterilization and/or abortions, but also that social compensation fees and denial of benefits to the child could occur.

[55] The Applicants submit that the RPD's reasoning process was deficient because it did not address why the country condition evidence in support of the Applicants' position, which was all from very reliable sources, was outside the realm of what could reasonably be expected and why other evidence was relied upon and preferred. The Court has intervened many times where insufficient reason is given for explaining why documentation relevant to an applicant's case is given little or no weight.

[56] Furthermore, while the Court maintains deference to the RPD's expertise in analyzing refugee claims, plausibility findings should be rejected where it is shown that they are based on an incorrect legal principle, perverse or irrational assumptions, or findings or assumptions which are contrary to or unsupported by the evidence.

[57] The Applicants submit that the RPD's reasoning was patently unreasonable and unsupported by the evidence, and request that this application for judicial review be granted.

The Respondent

[58] The Respondent submits that the RPD reasonably found that the Applicants were not credible on the basis of the fraudulent documents and implausible evidence they provided.

[59] The Applicants submitted hukous, the authenticity of which was questioned when forensic testing revealed that they had been altered. While the forensic report stated that there were no specimens available for comparison and that the authenticity of the documents remained inconclusive, it was still open to the RPD to conclude that the hukous were not genuine documents, and it provided sufficient basis for that finding. For example, in *Yang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1280 [*Yang*], the Court upheld the RPD's finding that certain documents were fraudulent as the RPD had provided sufficient basis for its finding despite a forensic report's conclusion that the authenticity of the documents was inconclusive (see also *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1235 [*Lin*]).

[60] The RPD also drew a negative inference from the Applicants' confusing testimony as to why they did not have a hukou for the house where they actually resided. The Principle Applicant testified that she, her husband, and their daughter lived alone in the house they purchased in 2005. However, the address of that residence is not on their RICs or on either of the two hukous submitted into evidence. Given that the Applicants have not challenged the RPD's credibility findings in this regard, they are deemed to be accepted as true.

[61] The Principal Applicant relied on the decision in *Ru*, above, for the proposition that the RPD erred by drawing a negative inference from the Principal Applicant's explanation as to why she was not a resident at the address that appears on the hukou. However, that case is distinguishable

because in that case there was objective evidence before the RPD that supported the applicant's explanation as to why she was not a resident at the address on her hukou. Here, the Applicants have not pointed to any objective evidence confirming why they lived at a different address than that in their hukous.

[62] With regard to the FP notices, the Respondent submits that the RPD's findings that they were not genuine are reasonable. The Principle Applicant testified that she had made an appointment for her IUD check-up for a specific day in August, and the RPD found that it would be reasonable that the notice she received would remind her of that appointment, which it did not. Further, the RPD accorded little weight to the FP Penalty Decision and the warning letter as they were sent on the same day from the same office. The RPD found it would not be plausible that a warning letter and a penalty would be issued on the same date as there would then be no point in the warning letter. Finally, the RPD gave little weight to the Principle Applicant's dismissal letter from her employer as it was not signed and was not on company letterhead; if the employer was in fact a travel agency, it would be expected to have letterhead – particularly in order to advertise to its customers.

[63] Contrary to the Applicants' assertion that the findings were unsupported by the evidence, the Board's findings regarding the FP notices were based on implausibilities, common sense and rationality. It is well-established that the RPD is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole (*Araya v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 626 [*Araya*] at paragraph 6).

[64] The RPD also reasonably found that the Principle Applicant will not, on a balance of probabilities, face forced sterilization in Guangdong province should she return to China. The RPD is presumed to have considered all relevant evidence, including contradictory evidence, and its conclusion in this case is supported by the documentary evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA)). The fact that the written reasons do not summarize all of the evidence which was introduced does not constitute a reviewable error of law.

[65] The RPD's conclusion that the Principle Applicant will not face persecution was based on the following evidence:

a. Articles 49 and 55 of the Guangdong Provincial Family Planning Regulations indicate that a social fee will be levied when there is an out-of-plan birth. If the fee is burdensome, an instalment plan is available;

b. Sources report that forced abortion and sterilizations still occur in China, although Freedom House states that "compulsory abortion and sterilization by local officials are less common than in the past"; and

c. Several provinces, specifically noted, require termination of pregnancies that violate provincial law, while other provinces, specifically noted, "require unspecified remedial measure." Guangdong province is included in the latter group.

[66] The RPD acknowledged contradictory evidence of forced sterilization in Guangdong, and while it misstated that there were no sources for the incident in Puning, the RPD found that there was no evidence of a similar sterilization campaign in any other part of Guangdong province. Further, the RPD's finding that the incidents involving surrogate mothers were distinctive and not

comparable to the Applicants' alleged experience was reasonable. Contrary to the RPD's submission, the RPD never states that there is no sterilization risk for the Applicants; The RPD ultimately concluded that the evidence was mixed and, on a balance of probabilities, the Principle Applicant would not be subject to forced sterilization should she return to Guangdong.

[67] The Applicants' argument that the RPD selectively read the documentary evidence is fundamentally problematic because the RPD is entitled to choose the evidence it prefers when there is a conflict. Although the Applicants may disagree with the RPD's findings and the weight it assigned to the evidence, this does not demonstrate a reviewable error. As was stated at paragraph 26 in *Huang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 288 [*Huang 2*]:

> I share the Respondent's view. The PA's argument amounts to a disagreement with the Board's assessment and weighing of the evidence. There is no reason for this Court to intervene. The conclusion that the Applicant's subjective fear is not supported by the objective situation in the Guangdong province is supported by the evidence.

[68] Furthermore, the Applicants incorrectly argue that the RPD ignored the 2010 and 2011 United States Congressional Executive Commission on China Annual Reports. These reports were not before the RPD when it made its decision – the Applicants submitted them approximately four months after the hearing, and they now provide no proof that they were before the RPD. In order to trigger the RPD's obligation to consider post-hearing submissions, the Applicants had an obligation to follow up with the RPD to ensure they had been received. In this case they have not satisfied that requirement.

[69] The Applicants rely on *Huang 1*, above, in which Justice Zinn noted that there was recent evidence of sterilizations in Guangdong; however, Justice Zinn found that the RPD erred in that

case because it referred to outdated documentary evidence when there was more recent evidence on the risk of sterilization in Guangdong available to it – Response to Information Request CHN103502, *China: Family planning laws, enforcement and exceptions; reports of forced abortions or sterilization of men and women particularly in the provinces of Guangdong and Fujian (2007 – May 2010)*. In the present case the RPD specifically considered this document and reasonably weighed it. There was no error, and as such, it did not err.

[70] The Applicants also rely on the case of *Zheng*, above, to support their argument that the RPD misconstrued the evidence with regard to "remedial measures." In that case Justice Near found that it was unreasonable for the RPD to assume that "remedial measures" refers to the Fujian provincial system of social compensation fees, as the country documentation, notably the United States Congressional Executive Commission on China Annual Report 2009 shows that reference to "remedial measures" includes forced sterilization. However, in the present case, the RPD noted that "several provinces require termination of pregnancies that violate provincial law, while other provinces, specifically noted, 'require unspecified remedial measures.' Guangdong province is included in the latter group." In this case, the RPD never concluded that "unspecified remedial measures" refers to social compensation fees, and as a result, it did not err.

[71] The RPD provided clear, intelligible reasons for refusing the Applicants' refugee protection claim, which allow this Court to determine whether its findings are within a range of possible acceptable outcomes. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada held that the reasons given by an administrative decision-maker do not have to include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred. Rather, the

reasons will meet the *Dunsmuir* criteria if the reviewing court understands why the tribunal made its decision and permits it to determine whether the conclusion is within the range of acceptable outcomes.

[72] In the present case the RPD refused the Applicants' claim because it found their evidence was not credible and that, based on the documentary evidence, the Principle Applicant would not be in jeopardy of forced sterilization should she return to Guangdong province. As such, the RPD's Decision meets the requirements set out in *Dunsmuir* and *Newfoundland and Labrador Nurses' Union*, and the Applicants' application for judicial review should be dismissed.

Applicants' Reply

[73] In response to the Respondent's submissions, the Applicants submit that the RPD's findings with regard to the hukous are unfounded because the RPD sought, and then ignored the RCMP's opinion that it could not make a conclusive determination as to the genuineness of the hukous. Furthermore, *Yang*, above, relied upon by the Respondent, is distinguishable from the case at hand because in that case the Court found that the lack of an identity card was important to the finding, the clear evidence of the drivers' licence being fraudulent also played a part, and after a consideration of the overall evidence, the applicant was not believable. In the current case there is an identity card as well as a multitude of other personal documentation.

[74] The Applicants submit that if, as the Respondent states, the RPD never found that there is no sterilization risk to the Applicants, then the Applicants are correct in asserting that there is a risk. The Respondent also submits that the RPD found that there was no risk, but the RPD cannot have it both ways; either there is a risk or there is no risk.

[75] With respect to the Respondent's argument that the Applicants' post-hearing submissions were not properly before the RPD, the Applicants submit that they were provided to the RPD by cover letter dated May 23, 2012, and the decision was made two months later, in July, 2012. The fax confirmation is deemed evidence that the materials were received by the RPD.

ANALYSIS

[76] Firstly, I disagree with the Applicants that the RPD should have turned its mind to forced abortions. At the refugee hearing, the Applicants indicated that they would like to have more children. However, there was no evidence before the RPD to suggest that the Principal Applicant was pregnant, or that she is ever likely to be. Consequently, the risk of a forced abortion is not something which the Applicants were facing at the time of the Decision and the RPD cannot deal with purely speculative risks.

[77] As to the reasonableness of the Decision, the RPD provides an objective basis for finding that the hukous were fraudulent. The analysis goes beyond the RCMP forensic report and relies upon unexplained alterations to the documents themselves, confusing testimony as to why the Applicants did not have a hukou for the house where they actually resided, unconvincing explanations as to why they did not obtain a new hukou for their new address and how the Principal Applicant's brother was able to acquire an urban hukou. The negative findings regarding the hukous are not speculative and are justified by the apparent physical alterations to the documents themselves and confusing and unsatisfactory testimony from the Applicants. The RCMP finding that the authenticity of the hukous is "inconclusive" did not prevent the RPD from exploring the

issue further with the Applicants and reaching a negative finding of authenticity based upon their testimony. See *Lin*, above, at paragraph 61-63.

[78] When it comes to the personal documentation concerning family-planning, paragraph 21 of the Decision is particularly problematic:

> I find that the "Notice" that the FP authorities addressed to the claimant is not what one would expect from an efficient office in a large city such as Guangzhou. The Notice is dated August 1, 2009 and reminds the claimant to go to the FP service unit for an examination because the IUD and pregnancy examinations have started for the month of August. If this is a general notice, then it would not be addressed to the claimant. Secondly, the principal claimant testified that she had made an appointment for the check-up on a specific date in August. Secondly, this is the only notice that the claimants submitted. Presumably there would have been written notices for the other months when the principal claimant was due to be examined. Thirdly, the principal claimant testified that she had made an appointment for the check-up on a specific date in August. It would be reasonable to expect that the notice would remind her of that appointment, which it did not. I therefore give this notice little evidentiary weight.

[79] It is apparent from this paragraph that the RPD's assessment of the Notice (Exhibit C-2) is based upon conjecture and there is little by way of an objective basis for a finding that "the 'Notice' that the FP authorities addressed to the claimant is not what one would expect from an efficient office in a large city such as Guangzhou." The RPD's attempt to justify its approach on the basis of what it "would be reasonable to expect" is not convincing.

[80] On the other hand, the RPD's treatment of the "Penalty Decision" notice and the warning letter, as well as the employer's letter, has a basis in fact. The RPD's findings of inconsistencies and

inadequacies in the documents themselves cannot be called unreasonable even though, as always, disagreement is possible.

[81] Overall, I do not think that the speculative treatment of the Notice (Exhibit C-2) found in paragraph 21 of the Decision renders the general finding in paragraph 27 that the Notices are not genuine documents unreasonable because there is a sufficient basis for this finding, apart from the conjecture found in paragraph 21.

[82] Based on common sense and rationality, the "other credibility concerns" and the plausibility findings found in paragraphs 28 and 29 of the Decision are reasonable. See *Araya*, above, at paragraph 6.

[83] All in all, then, I think there is a sufficient objective basis to support the RPD's negative credibility findings and I do not think they can be said to fall outside the range posited in *Dunsmuir*. This, however, does not end the matter because the RPD was also obliged to review the country evidence on Guangdong and decide whether the Applicants would face section 96 persecution or section 97 risk if returned, given the indisputable fact that the Applicants have had a second child who was born in Canada, and that the Principal Applicant was pregnant with this child when she left China.

[84] The RPD refers to evidence that establishes that forced sterilizations have occurred in Guangdong:

> This document also indicates that authorities in Puning City in Guangdong province conducted a sterilization campaign involving

> very substantial numbers of people because of that city's high birth rate. It is indicated as well that three women acting as surrogate mothers were forced to undergo abortions in Guangzhou and another woman was forced to undergo an abortion because the second pregnancy occurred before the required waiting period for a second child. In regard to the Puning situation, no specific sources are noted and no specific case is cited. In any case, with the exception of the Puning situation, which I find, on a balance of probabilities, to be distinctive in the context of no evidence available to the panel, there is no evidence that a similar campaign has occurred in any other part of Guangdong province. As well, regarding the incidents regarding the surrogate mothers, which are again, distinctive, and not comparable to the claimants' alleged experience, only one incident of forced abortion is noted in this very large province.

[85] The Respondent acknowledges that the RPD was wrong to say that there are no sources for what happened in Puning. However, it is clear from paragraph 31 of the Decision that the RPD's reasoning is that, whatever happened in Puning, the situation there, and the incidents regarding surrogate mothers, are "distinctive" because "there is no evidence that a similar campaign has occurred in any other part of Guangdong province," and the incidents are "not comparable to the claimant's alleged experience."

[86] The RPD acknowledges "mixed messages in the country documentary evidence available to the panel" but concludes, on a balance of probabilities, "that the principal claimant will not be in jeopardy of forced sterilization surgery in Guangdong province if she were to return to China" and that "neither of the claimants is at risk of a sterilization as a result of alleged incidents in China…."

[87] The Applicants say that, in fact, the documentation before the RPD repeatedly gives examples of sterilizations in Guangdong, and that the RPD is guilty of selectively reading this documentation.

[88] In *Huang 1*, above, Justice Zinn had occasion to assess the Response to Information Request CHN103502, *China: Family planning laws, enforcement and exceptions; reports of forced abortions or sterilization of men and women, particularly in the provinces of Guangdong and Fujian (2007 – May 2010)* which the Respondent says the RPD specifically considered and reasonably weighed in the present case.

[89] Justice Zinn's assessment of this report at paragraph 24 of his decision is that

> The report contains evidence of very recent large-scale forced sterilization in the applicants' home province. This cannot reasonably be characterized as being a series of isolated incidents - it appears to be a systematic (*sic*) government initiative.

[90] So we know that Guangdong province has imposed and could impose large-scale forced sterilization. The RPD, however, finds that, on a balance of probabilities, the Principal Applicant is not at risk because "there is no evidence that a similar campaign has occurred in any other part of Guangdong province."

[91] It seems to me that the reasonableness of the RPD's findings on this issue depends to a considerable extent upon the available evidence that forced sterilization is not imposed upon those in the position of the Applicants. The RPD addresses this evidence in paragraph 30 of the Decision:

> Articles 49 and 55 of the Guangdong Provincial Family Planning Regulations indicate that a social fee will be levied when there is an out-of-plan birth. It is further indicated that if this charge is burdensome, an instalment plan will be arranged. It is indicated as well that the fee will be multiplied by the total number of out-of-plan children. In addition, in another document concerning Family Planning enforcement, in Guangdong and Fujian provinces in particular, it is indicated that enforcement of family planning policies varies from region to region. It is indicated as well that those who breach the Family Planning Regulations may be find. It is also

> indicated that forced abortions and sterilizations still occur in China but this is less common than in the past. In regard to specific provinces, it is indicated that several provinces, specifically noted, require termination of pregnancies that violate provincial law, while other provinces, specifically noted, "require unspecified remedial measures." Guangdong province is included in the latter group.

[92] What the RPD assumes in the term "unspecified remedial measures" is not entirely clear from the Decision. However, unlike the situation in the *Zheng*, above, it is clear that the RPD in the present case does not assume that "remedial measures" does not include forced sterilization and only refers to a social compensation fee. The RPD in this case fully acknowledges the "mixed messages", and that forced sterilization does take place in Guangdong province. It simply finds that, on a balance of probabilities, the Applicants are not at risk because, apart from the Puning situation, there is "no evidence that a similar campaign has occurred in any other part of Guangdong province." The evidence that the Applicants do not face forced sterilization is found in Articles 49 and 55 of the Guangdong Provincial Family Regulations in Exhibit R/A-1, item 5.5, that enforcement of family planning policies varies from region to region. Even evidence cited by the Applicants before me — e.g. the Response to Information Request for 9 July 2010, page 1 — suggests that forced sterilization is not routine:

> According to the US Congressional Executive Commission on China's (CECC) Annual Report 2009, those found in violation of the Family Planning policy "are routinely punished with fines, and in some cases, subjected to forced sterilization, forced abortion, arbitrary detention, and torture." (US 10 Oct. 2009, 151)

Both counsel have urged that, when looking at the Decision, official policy going either way is to be mistrusted and that what matters is what is happening on the ground, and it was the RPD's job to assess what is happening on the ground. It is my view that the RPD does address the risks faced by the Applicants from this perspective.

[93] Overall, then, the RPD is saying that, in a province where the enforcement of family planning policies varies from region to region, there was insufficient evidence to establish that the Applicants would face forced sterilization if they returned to China. In this kind of situation, where the evidence is not clear, the RPD can do no more than weigh what is available. The weighing of evidence is the job of the RPD and the fact that other reasonable conclusions are possible does not render a decision unreasonable. As Justice Denis Pelletier said in *Conkova v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 300 at paragraph 5:

> … The issue here is the CRDD's assessment of the evidence, a matter clearly within its mandate and its expertise. The view which the CRDD took of the evidence was one which could reasonably be taken, just as the opposing view could also reasonably be taken. The evidence, as is so often the case, is ambiguous and equivocal. Some elements support the applicants' position, others undermine it. The CRDD's task is to consider all the elements (which does not require that specific mention be made of every piece of evidence which is reviewed) to weigh it and to come to a conclusion. As long as its conclusion is not one which is wrong on its face, it is not patently unreasonable. *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1997] 1 S.C.R. 748, (1996) 144 D.L.R. (4th) 1 (S.C.C.). In this case, the conclusion to which the CRDD arrived is not wrong on its face, even though others might come to a different conclusion. There is no reason for this Court to intervene.

[94] In the present case, I have to conclude that, although it is possible to disagree with the RPD, it cannot be said that its conclusions on whether the Applicants face forced sterilization fall outside of the *Dunsmuir* range. Hence, the Court cannot interfere with the Decision on this basis.

[95] The situation concerning enforcement of the one-child policy in Guangdong is very difficult to assess. Much will depend upon the evidence adduced in each case. In the present case, the RPD,

fully acknowledged these difficulties and assessed the evidence before it in a reasonable way. The Court cannot interfere.

[96] The RPD was also obliged to consider whether the son born in Canada would face section 96 persecution or section 97 risk. Once again, the RPD weighed the evidence on this point and reached a conclusion that the child would not be persecuted or placed at risk. There is nothing to suggest that this was unreasonable.

[97] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Marvin Moses	**APPLICANTS**
Sophia Karantonis	**RESPONDENT**

SOLICITORS OF RECORD:

Marvin Moses Law Office Barrister & Solicitor Toronto, Ontario	**APPLICANTS**
William F. Pentney Deputy Attorney General of Canada	**RESPONDENT**