Immigration and Refugee Board of Canada
Refugee Protection Division

Commission de l'immigration et du statut de réfugié du Canada
Section de la protection des réfugiés

RPD File No. / N° de dossier de la SPR : TB2-03971

Private Proceeding / Huis clos

Reasons and Decision – Motifs et Décision

Claimant(s)	XXXX XXXX (a.k.aXXXX XXXX XXXX XXXX	**Demandeur(e)(s) d'asile**
Date(s) of Hearing	May 22, 2018 June 29, 2018 April 11, 2019	**Date(s) de l'audience**
Place of Hearing	Toronto, Ontario	**Lieu de l'audience**
Date of Decision and reasons	July 25, 2019	**Date de la décision et des motifs**
Panel	R. Andrachuk	**Tribunal**
Counsel for the Claimant(s)	Jordana Rotman Barrister and Solicitor	**Conseil(s) du (de la/des) demandeur(e)(s) d'asile**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Pat Retsinas	**Conseil du (de la) ministre**

Canada

REASONS FOR DECISION

[1] The claimant, XXXX XXXX is a citizen of China, who is claiming refugee protection pursuant to sections 96 and 97(1) of *the Immigration and Refugee Protection Act* (IRPA).[1]

[2] The Minister has intervened, maintaining that the claimant is excluded from claiming refugee protection as there are serious reasons for considering that she has committed serious non-political crimes in the United States (US), prior to her admission to the country of refuge, Canada.

ALLEGATIONS

[3] The claimant details her allegations in her Personal Information Form (PIF).[2] The following is a summary.

[4] The claimant was born in China on XXXX XXXX XXXX 1985.

[5] While residing in the United States in 2011, she suffered from headaches but could not see a doctor as she did not have medical insurance. She returned to China from the United States XXXX XXXX XXXX 2011, to seek medical help. While there, she saw a doctor who diagnosed her with migraines.

[6] In December of 2011, the claimant's friend introduced her to Falun Gong (FG). After practicing at home she joined the group practice in January 2012. The group practice was raided by the Public Security Bureau (PSB) on February 5, 2012. The claimant escaped and went into hiding. The PSB went to her home, accused her of being a FG practitioner, and confiscated some photos. The claimant left China and came to Canada. The PSB are still looking for her. She fears being arrested and not being able to practice FG freely, if she has to return to China.

Addendum

[7] In a PIF Addendum[3] received by the Board on May 15, 2018, the claimant indicates that she has given birth to two children in Canada in 2013 and 2016, and hence, she fears that if she were to return to China, she would be forced to wear an intrauterine device (IUD) or use other forms of birth control, which she does not wish to do.

DETERMINATION

[8] Based on the evidence before me, I find that the Minister has not met the legal burden that there are serious reasons to consider that the claimant was involved in a serious non-political crime before she arrived in Canada and claimed refugee protection. The claimant is, thus, not excluded pursuant to Article 1F(b) of the United Nations High Commissioner for Refugees (UNHCR) *Convention and Protocol Relating to the Status of Refugees* ("*Refugee Convention*").[4]

[9] I also find that the claimant is neither a Convention refugee nor a person in need of protection.

IDENTITY

[10] I find that, on a balance of probabilities, the claimant is a citizen of China. Her identity has been established by her oral testimony, and documents submitted by the Minister.[5]

EXCLUSION 1F(B)

[11] The Minister provided documentary evidence[6] submitting that the claimant should be excluded due to serious non-political criminality, pursuant to section 98 of the *Immigration and Refugee Protection Act*[7] and Article 1F(b) of the *Refugee Convention*.[8]

[12] The Minister provided the following facts and submissions regarding exclusion:[9]

> The Minister is of the opinion that article 1F(b) of the United Nations Convention Relating to the Status of Refugees has been raised by this claim. The grounds for this intervention are the claimant's criminal activities in the United States prior to her entry into Canada.
>
> …
>
> …The Minister submits that there are serious reasons to consider that she has committed serious non-political crimes in the United States prior to her admission to Canada.

[13] The claimant is wanted in the United States for having committed burglary, theft, and the fraudulent use of a credit cards prior to entering Canada.

[14] Canada considers theft and fraudulent use of credit cards to be serious crimes, which is indicated by the fact that they can be treated as indictable offenses, punishable by a maximum sentence of 10 years imprisonment under the *Criminal Code of Canada*.[10]

[15] According to section 98(1) of IRPA: "A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention Refugee or person in need of protection."[11]

[16] Subsection 1F(b) of Article 1, of the *Refugee Convention* states:[12]

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> …
>
> > b) he has committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee…

[17] The standard of proof on which the Minister must demonstrate the case for exclusion before the Board is that of "serious reasons for considering", which is below the civil standard of proof of a "balance of probabilities."[13] The crime does not have to have been prosecuted for the standard of proof to be met.[14]

[18] According to the Federal Court, any offence for which a maximum sentence of 10 years could be imposed under Canadian law is presumed to be serious.[15]

[19] In order for crime to be considered political it must be committed with the motive of changing a government, or government policy.[16] In this case, there is no indication that the crimes were politically motivated.

[20] The Minister has submitted evidence, which indicates that:[17]

> On October 12, 2011, the claimant was arrested and charged by the North Brunswick Police Department of Middlesex County, New Jersey with: seven (7) counts of Burglary, four (4) counts of Theft, five (5) counts Unlawful Theft or Receipt of a Credit Card and four (4) counts of Fraudulent Use of a Credit Card. On January 19, 2012, the Superior Court of New Jersey, Middlesex County Criminal Division issued a bench warrant for the claimant's arrest.

[21] The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* defines "serious crime" as "a capital crime or a very grave punishable act."[18] For the purpose of

exclusion under Article 1F(b), this serious crime is to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee."[19] In this case, the state of refuge is Canada. According to the *UNHCR Handbook:* "The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed serious common crime…"[20]

Seriousness of the Crimes

[22] Subsection 101(2)(b) of the IRPA states that a claim is not ineligible by reason of serious criminality under Article 1(f), unless "in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. [21] In the case of a crime committed outside Canada, subsection 101(2)(b) makes the length of the sentence actually imposed by a foreign government, irrelevant.

[23] The Federal Court of Canada has considered the issue of what constitutes a "serious, non-political crime." In *Chan*[22] the Court presumed, "without deciding, that a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada." However, as indicated by Mr. Justice Kelen in the *Xie*[23] decision, that benchmark is not the end of the analysis and adopting Mr. Justice Robertson's guideline in *Chan* "does not preclude an examination of all the relevant surrounding circumstances…"

[24] The Federal Court of Appeal, in *Ramirez*[24] held that the term "serious reasons for considering" imposed a lower than civil standard of proof. Further elaboration is provided in *Zrig*[25] and *Sivakumar*,[26] where the standard of proof to be met by the Minister is described as being well below that required in criminal law (beyond a reasonable doubt) or of civil law (balance of probabilities). The Court has held that the standard of proof requires more than suspicion or conjecture.

[25] Therefore, there is a measure or standard to apply to determine firstly, whether there are serious reasons for considering in the first part of Article 1F(b).

[26] The original charges against the claimant in regard to the theft and use of credit cards are applicable under section 342 of the *Criminal Code of Canada*.[27] This is a hybrid offence, which may be prosecuted summarily or by indictment. However, it is the maximum sentence for the indictable offence that must be considered to determine whether the presumption of seriousness comes into play. In this case, it does.

[27] Minister's counsel argues that had the claimant committed the alleged crime theft of credit card and fraudulent use of credit card in Canada, she could have received the maximum penalty ten years of imprisonment and, thus, under Article 1F(b), is excluded from claiming refugee protection in Canada.[28]

[28] The first determination to be made is whether there are "serious reasons for considering," and what evidence there is to support such a consideration. Minister's Counsel maintains that court records and the warrant for the claimant's arrest issued by the same courts in New Jersey, are indisputable documentary evidence of the claimant's criminal activity in the United States. Minister's Counsel argues that this documentation is *prima facie* evidence as "serious reasons" for considering. Justice Richards in the *Lai*[29] decision indicated:

> …it was established that an 'exclusion' hearing under Article 1F(b) is not in the nature of a criminal trial where guilt or innocence must be proven by the Minister beyond a reasonable doubt. Rather, the onus upon the Minister is to establish, based on the evidence presented to the Board, that there are "serious reasons for considering" that [the claimants] committed serious non-political crimes… prior to their arrival in Canada.

[29] The Supreme Court of Canada (SCC) in the *Ezokola* rules that the standard of evidence to be applied to this threshold is higher than a mere suspicion but lower than proof on the civil balance of probabilities.[30]

[30] Minister's counsel submits that based on the court records from New Jersey, the acknowledgement of the court records by the claimant in sworn testimony, and the acknowledgement that she committed the crimes, except for the one alleged attempt of theft from a car, there is evidence that a *prima facie* case has been satisfactorily established that there is sufficient information for the Board to find that there are "serious reasons for considering."

[31] I am mindful that the United States of America is a highly democratic nation, governed by a president chosen in multiparty elections. Civilian authorities maintain control of the security forces, the country has not been invaded, there is no civil war and the United States is otherwise in control of its own territory. It is against this background, along with the arguments and testimony provided, that I must determine the "serious reasons for considering." I am satisfied that based upon the warrant for the claimant's arrest, along with the court records from New Jersey, issued by a democratic country, that it carries enough weight as evidence sufficient for "serious reasons" for considering. It is not my responsibility to determine her guilt or innocence with respect to the charges laid against the claimant in New Jersey. It is only my responsibility to determine if there is more than a mere suspicion that there are "serious reasons for considering" that there were such charges.

[32] I find, based upon the production and acknowledgement of the outstanding warrant from the United States of America, a democratic nation, together with the claimant's admission of the crimes, that there are "serious reasons for considering" under Article 1F(b).

[33] The next element of exclusion is to consider whether or not the claimant "committed a serious non-political crime." I rely on the decisions of *Xie*[31] and *Jayasekara*[32] with respect to what is considered a serious non-political crime. The factors to be considered include:

- The nature of the act;
- The harm inflicted;
- The form of procedure used to prosecute the crime;
- The nature of the penalty for the crime; and
- Whether most jurisdictions would consider the act in question to be a serious non-political crime.

The nature of the act

[34] The claimant admitted in the hearing room that she stole credit cards and cash from the lockers in the gym she belonged to over a period of several months, and that she fraudulently used those credit cards to buy clothes and a purse. The theft of the credit cards and their fraudulent use are acts that would be contrary to subsection 342(1) of the *Criminal Code of Canada*,[33] carrying

each a maximum penalty of 10 years if persecuted by indictment. As a result of the claimant's actions, several persons were victimized by having personal property stolen, and were also victimized by having their personal space and privacy invaded.

The harm inflicted

[35] There is no persuasive evidence before the Board that anyone was physically harmed by the claimant's actions. However, the victims of the claimant's crime suffered financial harm and possible emotional harm by having their space invaded.

Form of procedure used to prosecute the crime

[36] The claimant was not prosecuted because she absconded and came to Canada, instead of attending court. The victims, therefore, had no form of redress.

The nature of the penalty for the crimes

[37] Theft of and fraudulent use of credit cards is considered a serious offence in Canada. In Canada, persons committing this offence can face up to 10 years in prison

Whether most jurisdictions would consider the act in question to be a serious non-political crime

[38] No persuasive evidence was placed before the Board to indicate that the claimant committed the offence(s) to overthrow the government of the United States or to change a government policy of that country. The evidence placed before the Board indicates that the crimes committed were committed for financial gain and no other reason. Therefore, the crimes committed were non-political crimes.

Mitigating and aggravating circumstances

[39] Minister's counsel submits that there are several aggravating factors to consider. The claimant did not take responsibility for her crimes. She did not appear before the courts in New Jersey and instead, fled the lawful jurisdiction of the American courts and is now wanted in the United States. When she came to Canada she was also not forthright in that she denied she ever lived in the US, and denied any criminality until faced with the biometric data and the existence

of the bench warrant from New Jersey. The claimant therefore exhibits a history of not taking responsibility. She showed no remorse.

[40] The victims were women from the athletic gym she belonged to. While the victims exercised, the claimant targeted their lockers. The claimant admitted to stealing credit cards and cash from the lockers. She confirmed that she stole cash from five victims and credit cards from six victims. She used three of the stolen credit cards. I find that these circumstances are an aggravating factor as the claimant violated the trust of these women, who had a right to expect that their property would be safe while they were exercising among fellow members.

[41] The claimant's excuse for committing these crimes is that her mother needed immediate cash for medical treatment in China. At the same time, the claimant testified in the hearing room that she used the credit cards to buy clothes and a purse. I do not find that the claimant was compelled to steal money and credit cards for this purpose, as she had a younger brother working in the US who could have helped the claimant, if she needed to financially assist her ill mother. Furthermore, her brother allegedly borrowed $3,000 so the claimant could return to China. As well, the claimant stated that she was desperate for cash, but was able to purchase a plane ticket to China as she feared being deported from the US, where she had been living and working illegally since the age of 17. The Minister submits that the claimant did nothing to pay restitution to the victims and the fact that she absconded deprived the victims of being able to face the perpetrator and the ability to seek restitution.

[42] The claimant was not a minor at the time of the crimes and she was not motivated by political gain.

[43] After a careful review of both counsel's and Minister's counsel's submissions, I find no mitigating factors apply to this claim.

Supreme Court of Canada (SCC) decision

[44] As Justice de Montigny wrote in Jung,[34] "the presumption that a crime is 'serious' under Article 1F(b) if , were it committed in Canada, it would be punishable by a maximum of at least 10 years' imprisonment, was consistently applied by the courts."

[45] However, I note that in the decision of the Supreme Court of Canada decision in *Febles* the court made comments regarding the test applicable to determine the seriousness of the criminality under s. 98 of IRPA and Article 1F(b) of the Refugee Convention that are determinative in this case.

[46] In *Febles*, the majority of the Supreme Court stated:[35]

> Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(*b*) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery. These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner. [footnotes omitted]

[47] The Minister submits that the SCC comments in *Febles* are merely *obiter*; I, however, find the comments persuasive and also note that the reasoning was followed by Justice de Montigny in *Jung*[36] and Justice Gleason in *Tabagua*.[37]

[48] The offence in Canada under s. 342 is a hybrid offence. The Minister did not provide me with any documentation as to what range of sentence the claimant would likely get in Canada, considering that there is no evidence except for the claimant's testimony that the use of a stolen credit card was for approximately $1000 US dollars. It is my judgement that the claimant's sentence would not approach the maximum of 10 years, since the amounts in question were relatively small, there were no serious aggravating factors and no violence.

[49] I, therefore, find on a balance of probabilities, that the offences would not be considered serious enough in Canada to cause the claimant to be excluded under Article 1F(b).

Identity Theft

[50] Following the claimant's testimony that she purchased a social security card for $1,000 US in order to obtain a driver's license in the US, the Minister added the additional crime of identity theft, pursuant to s. 403 of the CCC.[38]

[51] The claimant testified that she purchased a social security card in the US which she used to obtain a driver's license. I find that there is no evidence that the name on the social security card is that of a living or dead person, and therefore does not fit the definition of identity theft as per s. 403 of the CCC. There is also no evidence that the aliases the claimant used in the United States were those of real people, alive or dead.

[52] Therefore, I find that the claimant would not be found guilty in Canada of identity theft as per the CCC.

[53] Thus, I find that the claimant is not excluded from claiming refugee protection in Canada.

CREDIBILITY

[54] The claimant testified that she came on false passport to the United States in 2002, when she was 17 years old. She obtained the passport from a smuggler. She came "just for fun" and was not concerned she was using fraudulent documents. She remained in the US, working illegally, as her parents had told her that she did not have to return to China. The claimant also obtained a driver's license by purchasing a social insurance card. The claimant also used several aliases in the US.

[55] When the claimant came to Canada in 2011 she was not forthright with Canadian immigration officials about her time residing in the US. It was only when she was shown the fingerprint evidence and the warrant that she finally admitted that she had lived in the US for nine years.

[56] The claimant broke criminal laws in the US over a period of six months, by engaging in theft and credit card fraud.

[57] I find that the claimant has shown that she is not a person who respects the rules and regulations of a democratic state and that she is ready to lie to authorities. Therefore, I find that, on a balance of probabilities, the claimant lacks general credibility and her testimony is suspect.

Falun Gong

[58] I find that the claimant has not provided sufficient credible evidence that she was a FG practitioner in China.

[59] The claimant allegedly left the United States, where she had been living illegally since she was 17 years old and returned to China in order to get medical treatment for her headaches and insomnia. She testified that she returned to China with a fraudulent passport and came to Canada with a different fraudulent passport, which were both supplied by smugglers.

[60] I find that the claimant's reason for allegedly going to China for medical treatment does not make sense. The claimant alleges that she suffered from severe headaches and insomnia while in the US and could not get treatment for them because she could did not have medical insurance. However, the claimant did not try to go to a Chinese medicine doctor in the US. I do not find it credible that the claimant, who worked in a Chinese restaurant and lived one hour from Chinatown, could not get a referral to Chinese medicine practitioners. All she did when she went to China is go to a Chinese medicine doctor, as I believe she could have done in the US. The claimant was asked why she did not go to see a western medicine doctor while in China. The claimant said that she did not go because she had already tried Tylenol, which was not helpful. I do not believe that the claimant is so naïve that she does not know Western doctors have a larger arsenal of treatment than just Tylenol. I also find it not credible that the claimant began practicing FG, which she knew was illegal in China, without first approaching western medicine doctors, if the Chinese medicine treatment was not helpful. In addition the claimant has no documentary evidence that she ever visited any doctor in China.

[61] The claimant also does not have any documentary evidence that she actually returned to China from the United States, before coming to Canada to make her refugee claim. She allegedly used a fraudulent passport to return to China and a different fraudulent passport to come to Canada. She did not submit either of these passports. Further, the claimant has no documentary evidence that she came to Canada directly from China, as she alleges.

[62] There were several inconsistencies that go to the heart of the claim with regard to the claimant having been a FG practitioner in China. I do realize that it has been a long time since the claimant came to Canada and that her memory may not be as accurate as when she first came to Canada in XXXX of 2012. However, it would be expected that the claimant would remember the most important features of her alleged practice. The claimant testified that she attended a FG group practice for a few months. However, her PIF[39] indicates that she attended the group for only three weeks, from mid-January of 2012 to February 5, 2012. The claimant's only explanation for the discrepancy is that she forgot. I find that it not credible that the claimant would make such a significant mistake, especially given her testimony that she was in China for only a few months.

[63] The claimant testified that the group practice was held at the organizer, Mr. XXXX house, when it was raided by the PSB on February 5, 2012. However, in her PIF,[40] the claimant indicated that the group practice was at Mr. XXXX home when the raid occurred. When faced with the inconsistency, the claimant insisted that it was at Mr. XXXX home the night of the raid, even though they sometimes practiced at Mr. XXXX home. The claimant did not explain why the name was different in the PIF. It would be expected that since she went to the group practice for three weeks, that she would recall where she was when the raid occurred.

[64] The claimant also gave confusing testimony as to where she was when the PSB came to her home to search for her. When asked the question of where she was when the PSB came to her home, she testified that she was at Mr. XXXX house. When the question was repeated for her, she gave the same answer, although she testified that after the raid, she went to her cousin's house as per the PIF. As noted above, the claimant indicated in her PIF that the raid was at Mr. XXXX house.

[65] In her PIF, the claimant indicated that the PSB searched her house and found a photo of her with her friend who introduced her to FG, XXXX XXXX XXXX XXXX who was one of the three arrested FG members. The PSB confiscated the photos. However, at the hearing, the claimant testified that when the PSB came, they searched the whole house and only took some clothes. To explain the inconsistency, the claimant said that she forgot because it has been a long time. The clothes have nothing to do with being a FG practitioner, but the photos do. I find that the claimant would not likely have forgotten about the PSB finding the photos of her with her friend, the introducer if the PSB had truly confiscated the photos..

[66] The claimant has no documentary evidence that she is wanted by the PSB, such as a summons or a warrant.

[67] Based on the totality of the above negative findings, I find that, on a balance of probabilities, the claimant was not a FG practitioner in China.

Falun Gong practice in Canada

[68] The claimant testified that, once in Toronto, she continued to practice Falun Gong. She testified that she does the exercises in a group on Sundays at Milliken Park and that she reads Zhuan Falun every evening. She did not indicate that she attends any FG events and demonstrations. She did not submit any documentary evidence of her involvement in a group practice, such as letters from fellow practitioners.

[69] I find that the claimant has little knowledge of FG philosophy and exercises. She was only asked a few questions, but was not able to answer any appropriately. The claimant admitted that she does not know the verses that are said before each exercise. The courts have held that a FG practitioner should be expected to know these 5 verses, which are simple, rhyme, and are extremely short.[41] The claimant testified that she can recite them only a little bit. I note that the claimant has allegedly been a FG practitioner for over seven years, and would be expected to know the verses.

[70] The claimant could not explain what is meant by "evil cultivation" and she did not know what is meant by "sending out righteous thoughts."

[71] I note that claimant's counsel did not ask the claimant any questions regarding her knowledge or practice of FG.

[72] Moreover, having found that claimant's story of his alleged Falun Gong practice in China not to be credible, there is no reason for me to believe that she is now a practitioner of Falun Gong in Canada. In reaching this conclusion, I am guided by the dicta of the Federal Court in *Jiang*.[42] Per Zinn, J., "the Board must be entitled to import its credibility findings into its assessment of [a claimant's] *sur place* claim."[43] I find that, on a balance of probabilities, the claimant is not a FG practitioner in Canada, and would not continue the practice Falun Gong if she returns to China.

Family Planning Jeopardy

[73] The claimant is married to a Canadian citizen and has two children who were born in Canada. They are not claimants and are not required to return to China. It is the claimant's and her husband's choice whether the children would move to China.

[74] The claimant fears that if she returns to China she would be forced to wear an intrauterine device (IUD) and that she would be put in prison because she gave birth to more than one child. She also testified that she wants to have more children.

[75] The claimant is not presently pregnant and it is speculative whether she will have more children.

[76] As of January 2016, the one child policy has been replaced and all couples are permitted to have two children. The documentary evidence indicates that Chinese authorities have implemented the new law and also that more than two children may be allowed in some circumstances.[44]

[77] I note that even before the Chinese government changed its one child policy, social compensation fees were imposed for children born out of plan.[45] I also note that forced abortions are illegal in China.[46]

[78] In fact, current documentary evidence indicates that Chinese authorities are concerned about a declining birth rate and are therefore discussing ways to encourage women to have more children. The Congressional-Executive Commission on China states the following:[47]

> According to a May 2018 Bloomberg News report, central government authorities were considering and may have reached a decision to end birth limit policies due to demographic concerns of a declining birth rate, an aging population, and a shrinking workforce. The report also cited international criticism of the policies as a factor in the decision. Chinese authorities reportedly may replace the existing birth limit policies with one of ''independent fertility,'' allowing couples to decide for themselves the number of children to have.38 According to the report, a decision may be announced toward the end of 2018 or in 2019… [footnotes omitted]

[79] I have reviewed the *Regulations of Fujian Province on Population and Family Planning*, including the February 2016 amendments and I note the following:[48]

> Article 10 When both the husband and wife are Chinese returned from overseas, whose children were born overseas and are residents of foreign countries before they return to China shall not be counted towards the number of children in the regulations.
>
> …
>
> Article 16 In order to practise family planning, couples who already have children may choose to adopt safe, effective and appropriate contraceptive and birth control measures to prevent and reduce the incidence of unwanted pregnancies.

[80] Further country document evidence[49] indicates that Fujian province, where the claimant is from, has amended its family planning regulations in response to the new two-child policy.

[81] This document states as well that the *National Population and Family Planning Commission* indicates that a choice is available as to contraceptive methods, and this is reiterated in Article 16 of Fujian's *Regulations of Fujian Province on Population and Family Planning*, as noted above.

[82] I cite country document evidence in a Response to Information Request (RIR) concerning the implementation of the two-child policy, which indicates that according to a professor at the Institute of Population and Labour Economics, Chinese Academy of Social Sciences, "all children born should be registered, no matter if they are second or third or higher births, prior to or after the regulations."[50]

[83] Since the claimant has only two children, I find that, on a balance of probabilities, the claimant would not be at risk of forced sterilization if she were to return to China, in the context of the lack of any evidence that Fujian family planning officials utilize forced measures after the implementation of the two-child policy, the context of Fujian policy requiring a social compensation fee as to the birth of additional children out of the , and also the widely reported Chinese government recognition that constraints on child-bearing have created a significant demographic problem as to needed population growth in the future.

[84] With regard to being forced to wear an IUD, the United States Department of State's (DOS) "China 2017 Human Rights Report"[51] indicates that the law is such that "couples of child-bearing age shall voluntarily choose birth planning contraceptives and birth control measures to

prevent unwanted pregnancies."

[85] This document further states that "[a]fter the transition to a two-child limit, the available mix of contraceptives shifted from mainly permanent methods like tubal ligation and IUDs toward other reversible methods.[52]

[86] I acknowledge that previously, the insertion of an IUD was the preferred contraceptive method in many provinces. There is, however, no evidence before me that the IUD was ever the only method used, and no evidence in particular, that it was the only method used in Fujian province. I note that both Article 19 in the *National Population and Family Planning Commission* and Article 16 in Fujian's regulations clearly allow flexibility in the choice of contraceptive methods and make no specific IUD requirement.

[87] In sum, I find that since the two children born in Canada would not be counted in the number of children the claimant would be allowed to have, the claimant would be allowed to have two more children in China without negative consequences. If she is allowed to have two more children, then it follows that she would not be sterilized or forced to wear an IUD if she returns to China for that reason alone.

[88] In this case, I have considered the Chairperson's Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution.*[53] However, I find that the *Guideline* does not constrain my findings regarding family planning in Fujian province.

[89] Therefore, I find that, on a balance of probabilities, and in the context of the analysis above and the lack of any evidence in country document evidence or disclosed by the claimant to support the claimant's allegation that Fujian family planning officials would force her to wear an IUD, that alternative contraceptive methods would be available to the claimant; if she were to return to Fujian province, then there is only a mere possibility that she would be forced to wear an IUD.

CONCLUSION

[90] I find that the claimant would not face a serious possibility of persecution on a Convention ground, and that, on a balance of probabilities, she would not personally be

subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture upon return to China.

[91] I, therefore, find that the claimant is neither a Convention refugee nor a person in need of protection. The Refugee Protection Division rejects her claim.

(signed) **"R. Andrachuk"**

R. Andrachuk

July 25, 2019

Date

[1] The *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c.27, as amended, sections 96 and 97(1).
[2] Exhibit 2, Personal Information Form (PIF), received May 4, 2012.
[3] Exhibit 7, PIF Addendum, received May 15, 2018.
[4] IRPA, *supra*, Schedule (Subsection 2(1)), Sections E And F Of Article 1 Of *The United Nations Convention Relating To The Status Of Refugees*, Article 1F(b).
[5] Exhibit 9, ID Documents, received May 17, 2018; Exhibit 10, Minister's Notice of Intervention and Evidence, received August 23, 2012.
[6] Exhibit 10, Minister's Notice of Intervention and Evidence, received August 23, 2012; Exhibit 12, Amended Notice of Minister's Intervention, received June 28, 2018.
[7] IRPA, *supra*, Schedule (Subsection 2(1)), Sections E And F Of Article 1 Of *The United Nations Convention Relating To The Status Of Refugees*, Article 1F(b).
[8] United Nations High Commissioner for Refugees (UNHCR), *Convention and Protocol Relating to the Status of Refugees*, Article 1F(b).
[9] Exhibit 10, Minister's Notice of Intervention and Evidence, received August 23, 2012.
[10] *Criminal Code* (R.S.C., 1985, c. C-46).
[11] IRPA, *supra*, section 98(1).
[12] Ibid., Schedule (Subsection 2(1)), Sections E And F Of Article 1 Of *The United Nations Convention Relating To The Status Of Refugees*, Article 1F(b).
[13] *Moreno, Jose Rodolfo v. M.E.I.* (F.C.A., no. A-746-91), Robertson, Mahoney, McDonald, September 14, 1993. **Reported:** *Moreno v. Canada (Minister of Employment and Immigration*, [1994] 1 F.C. 298 (C.A.); (1993), 21 Imm. L.R. (2d) 221 (F.C.A.).
[14] *Zrig, Mohamed v. M.C.I.* (F.C.A., no. A-33-02), Décary, Létourneau, Nadon, April 7, 2003, 2003 F.C.A. 178. **Reported:** *Zrig v. Canada (Minister of Citizenship and Immigration*), [2003] 3 F.C. 761 (C.A.), at para 129; *Moreno, Jose Rodolfo v. M.E.I.* (F.C.A., no. A-746-91), Robertson, Mahoney, McDonald, September 14, 1993. **Reported:** *Moreno v. Canada (Minister of Employment and Immigration*, [1994] 1 F.C. 298 (C.A.); (1993), 21 Imm. L.R. (2d) 221 (F.C.A.).
[15] *Feimi, Erik v. M.C.I.* (F.C., no. IMM-5890-11), Martineau, February 27, 2012, 2012 FC 262, at para 22.
[16] *Gil, Goody v. M.E.I.* (F.C.A., no. A-375-92), Hugessen, Desjardins, Décary, October 21, 1994. **Reported:** *Gil v. Canada Minister of Employment and Immigration*), [1995] 1 F.C. 508 (C.A.); (1994), 25 Imm. L.R. (2d) 209 (F.C.A.).
[17] Exhibit 10, Minister's Notice of Intervention and Evidence, received August 23, 2012.
[18] United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, reedited January 1992, at para 155.
[19] United Nations High Commissioner for Refugees (UNHCR), *Convention and Protocol Relating to the Status of Refugees*, Article 1F(b).

[20] *UNHCR Handbook*, *supra*, at para 151.
[21] IRPA, *supra*, section 102(b).
[22] *Chan, San Tong v. M.C.I.* (F.C.A., no. A-294-99), Isaac, Robertson, Sharlow, July 24, 2000. **Reported:** *Chan v. Canada (Minister of Citizenship and Immigration*), [2000] 4 F.C. 390 (C.A.), at para 9.
[23] *Xie, Rou Lan v. M.C.I.* (F.C., no. IMM-923-03), Kelen, September 4, 2003, 2003 FC 1023. **Reported:** *Xie v. Canada (Minister of Citizenship and Immigration*), [2004] 2 F.C.R. 372 (F.C.).
[24] *Ramirez, Saul Vicente v. M.E.I.* (F.C.A., no. A-686-90), Stone, MacGuigan, Linden, February 7, 1992. **Reported:** *Ramirez v. Canada (Minister of Employment and Immigration*), [1992] 2 F.C. 306 (C.A.), at para 6.
[25] *Zrig, supra*.
[26] *Sivakumar, Thalayasingam v. M.E.I.* (F.C.A., no. A-1043-91), Mahoney, Linden, Henry, November 4, 1993. **Reported:** *Sivakumar v. Canada (Minister of Employment and Immigration*), [1994] 1 F.C. 433 (C.A.).
[27] *Criminal Code* (R.S.C., 1985, c. C-46). s.342.
[28] Post-hearing written submissions from Minister's Counsel, paragraph 11.
[29] *Lai, Cheong Sing v. M.C.I.* (F.C.A., no. A-191-04), Malone, Richard, Sharlow, April 11, 2005, 2005 FCA 125, at para 23.
[30] *Ezokola v. Canada (Citizenship and Immigration*), 2013 SCC 40, [2013] 2 S.C.R. 678, at para 101.
[31] *Xie, supra*.
[32] *Jayasekara, Ruwan Chandima v. M.C.I.* (F.C., no. IMM-1603-07), Strayer, February 21, 2008, 2008 FC 238; *Jayasekara, Ruwan Chandima v. M.C.I.* (F.C.A, no. A-140-08), Létourneau, Sharlow, Pelletier, December 17, 2008, 2008 FCA 404; **Reported**: *Jayasekara v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 F.C.R. 164 (F.C.A.).
[33] *Criminal Code* (R.S.C., 1985, c. C-46). s.342(1).
[34] *Jung, Myung Soo v. M.C.I.* (F.C., no. IMM-1086-13), de Montingny, April 15, 2015, 2015 FC 464, at para 32.
[35] *Febles, Luis Alberto Hernandez v. M.C.I., 2*014 SCC 68, [2014] 3 S.C.R. 431, at para 62.
[36] *Jung, supra*.
[37] *Tabagua, Rusudan v. M.C.I.* (F.C., no. IMM-2549-14), Gleason, June 4, 2015, 2015 FC 709.
[38] *Criminal Code* (R.S.C., 1985, c. C-46), s.403.
[39] Exhibit 2, PIF, Narrative, received May 4, 2012.
[40] Ibid.
[41] *Lu, Di v. M.C.I.* (F.C., no. IMM-6250-05), von Finckenstein, October 16, 2006, 2006 FC 1233.
[42] *Jiang, Sumei v. M.C.I.* (F.C., no. IMM-13-12), Zinn, September 11, 2012, 2012 FC 1067.
[43] Ibid., at para 27.
[44] Exhibit 3, National Documentation Package (NDP) for China (December 21, 2018), item 5.13, RIR CHN105499.E
[45] Ibid., s.2.
[46] Ibid., item 5.14, s.1.
[47] Ibid., item 2.3, Population Control – Implementation of the Universal Two-Child Policy and Institutional Developments.
[48] Ibid., item 5.11.
[49] Ibid., item 5.5, s.2.3.
[50] Ibid.,, item 5.13, s.2.
[51] Ibid., item 2.1, s.6 – Women – Coercion in Population Control.
[52] Ibid.
[53] Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution:Update*, Guideline Issued by the Chairperson Pursuant to section 65(3) of the *Immigration Act*, IRB, Ottawa, November 25, 1996, as continued in effect by the Chairperson on June 28, 2002, under the authority found in section 159(1)(h) of the *Immigration and Refugee Protection Act*.