Federal Court  Cour fédérale

**Date: 20200501**

**Docket: IMM-1466-19**

**Citation: 2020 FC 576**

**Ottawa, Ontario, May 1, 2020**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**YANG LIU**
**PEI MI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicants, who are common law spouses, are citizens of the People's Republic of China. They have both sought refugee protection in Canada, although on different grounds.

[2] Their claims were first dealt with in a consolidated hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] in 2016. The Minister intervened in writing on credibility grounds. After their claims were rejected, the applicants successfully judicially reviewed the RPD's decision and a new hearing was ordered: see *Liu v Canada (Citizenship and Immigration)*, 2017 FC 607.

[3] The new hearing took place on November 23, 2018. Counsel for the applicants provided post-hearing written submissions. On February 19, 2019, the RPD rejected the claims again.

[4] The applicants have now returned to this Court, seeking judicial review of the RPD's decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. They raise two grounds for review (among others) which I consider to be determinative: first, that the RPD's decision was improperly influenced by a now-revoked IRB Jurisprudential Guide regarding China [the China JG]; and second, that the RPD unreasonably determined that the summonses on which they relied to support their claims were not genuine.

[5] For the reasons that follow, I have concluded that this application must be allowed and the matters remitted to the RPD for reconsideration.

[6] I agree with the applicants that the RPD's decision was improperly influenced by the China JG. More particularly, the inferences the member drew from the fact that the applicants were able to leave China using their own passports do not reasonably reflect an assessment of the evidence that is independent of the China JG. I also agree that, for a second time, the RPD's

determination with respect to the genuineness of the summonses is unreasonable. Either ground is sufficient to require a new hearing but I will address both because they each raise important issues.

## II. BACKGROUND

### A. *The Applicants' Narratives*

[7] As noted, the applicants relied on different experiences in China to ground their claims for protection.

#### (1) Yang Liu

[8] Mr. Liu was born in May 1984. When he left China, he was living in Zhaozhou Town, Zhao County, Shijiazhuang City, Hebei Province.

[9] Mr. Liu alleged that at the beginning of 2015 he discovered that Zhao County Hospital, where he worked in the pharmacy, was using counterfeit medication. He reported his concerns to his supervisor but he was told that it was none of his business. He was fired from his job in May 2015 after he reported his concerns to "some hospital leaders." Hospital officials warned him not to say anything about what he had learned or his life would be in danger.

[10] On June 18, 2015, Mr. Liu reported his concerns to the Food and Drug Administration. He was told that there would be an investigation.

[11] On July 10, 2015, five men burst into Mr. Liu's home and began to beat him. They told him that this was punishment for revealing what was happening at the hospital. They warned him that he would be beaten to death if he said anything more.

[12] Despite this threat, on July 28, 2015, Mr. Liu went to the hospital, hung up a hand-made scroll in the lobby and shouted that the hospital sold fake medicine to patients. The police were called and Mr. Liu was arrested. He was detained by the Public Security Bureau [PSB]for seven days.

[13] On August 10, 2015, Mr. Liu went to the local petition office to make a complaint about what had happened to him. He was told that his story was too vague to investigate.

[14] On August 20, 2015, Mr. Liu went to the petition office in Shijiazhuang City to report that the local petition office was corrupt and was not protecting civilians. He was told that there would be an investigation.

[15] Mr. Liu decided to travel to Europe to relieve his stress while he was waiting for word from the Shijiazhuang petition office. He obtained a Schengen visa on September 28, 2015. He left China on October 9, 2015, and returned on October 20, 2015.

[16] Mr. Liu decided to go to Beijing to petition since he had not had a response from the Shijiazhuang office. On his way to the train station on October 22, 2015, he received a call from

his family telling him that the PSB had come to his home and accused him of slandering the government. He decided to hide at a friend's home.

[17] While he was in hiding, the PSB went to his home several times looking for him. They threatened his family for covering up for him.

[18] With the assistance of a smuggler, Mr. Liu left China on January 14, 2016. He used his own passport to travel from Beijing to New York City via Honolulu. Mr. Liu entered the United States on a valid visitor's visa that had been issued on December 3, 2015. He made his way from New York City to the United States/Canada border at Buffalo/Fort Erie, where he made a claim for refugee protection on February 4, 2016. His mother lives in Canada as a permanent resident.

[19] Mr. Liu fears that, if he returns to China, he will be persecuted by the PSB for having exposed what was happening at the hospital.

[20] At his hearings before the RPD, Mr. Liu provided a detention certificate issued on July 28, 2015, which stated that he had been detained for disrupting the social order and slandering the government. The period of detention was recorded as July 28, 2015, to August 4, 2015.

[21] Mr. Liu also provided a PSB summons that had been issued on October 22, 2015. It accused him of slandering the government and commanded him to surrender himself to the Public Security Bureau of Zhao County, Cheng District Subdivision, the next day.

[22] Finally, among other documents, Mr. Liu provided written confirmation of his employment at the Zhao County Hospital and of the termination of that employment.

(2) Pei Mi

[23] Ms. Mi was born in September 1989. When she left China, she was living in Zhaozhou Town, Zhao County, Shijiazhuang City, Hebei Province.

[24] Ms. Mi alleged that in 2014, while she was working as an accountant for the finance department of Zhao County, a local magistrate raped her and forced her into a relationship with him.

[25] During the affair, Ms. Mi learned that the magistrate was corrupt and was using his government position for personal gain. In June 2005, Ms. Mi discovered that she was pregnant. The magistrate forced her to have an abortion. After the abortion, Ms. Mi was in "poor health" and could not work effectively so the magistrate fired her.

[26] Afterwards, out of anger towards the magistrate, Ms. Mi posted information about him on a website, including details about their affair and the magistrate's corruption.

[27] In August 2015, a group of more than ten men came to her home and warned her about slandering the government with things she had been posting on the internet. One of the men pushed her to the ground and kicked her severely. Ms. Mi was warned that the next time she would be beaten to death. Despite this threat, Ms. Mi continued to post information about the magistrate.

[28] In September 2015, the magistrate called Ms. Mi and threatened that he would have her jailed if she continued to post information about him.

[29] Ms. Mi decided to go abroad for a vacation. She obtained a Schengen visa on September 28, 2015. She left China for Europe on October 9, 2015, and returned on October 20, 2015.

[30] Once back in China, Ms. Mi "couldn't leave the case alone." She decided to go to the municipal government for help. When she arrived at the office, her family called her to tell her that the PSB had come to her home looking for her. They left a summons for her to attend for questioning on a charge of slandering the government.

[31] Ms. Mi hid at a friend's home.

[32] With the assistance of a smuggler, she left China on January 14, 2016. She used her own passport to travel from Beijing to New York City via Honolulu. Ms. Mi entered the United States on a valid visitor's visa that had been issued on December 2, 2015. She made her

way from New York City to the United States/Canada border at Buffalo/Fort Erie, where she made a claim for refugee protection on February 4, 2016.

[33] Ms. Mi fears that, if she returns to China, she will be persecuted by the PSB for having exposed the magistrate's behaviour.

[34] At her hearings before the RPD, Ms. Mi provided a PSB summons that had been issued on October 26, 2015. It accused her of slandering the government and commanded her to surrender herself to the Public Security Bureau of Zhao County, Xiezhuang Police Station, the next day.

[35] Finally, among other documents, Ms. Mi provided written confirmation of her employment with Zhao County and of the termination of that employment.

(3) The Claims for Refugee Protection

[36] Ms. Mi and Mr. Liu arrived in Canada together. They admitted to being common law spouses in their interviews with the Canada Border Services Agency, stating that they had been living together for two years. They both submitted their Basis of Claim forms on February 19, 2016, but neither mentioned the other as family members or in their original narratives. However, about a month later, both submitted amended narratives in which each explained that they were common law spouses, that they had travelled to Europe together in October 2015, and that they had fled China for Canada together on January 14, 2016. As a result, their claims were consolidated and they have been dealt with together ever since.

B. *The China Jurisprudential Guide*

[37] Under paragraph 159(1)(h) of the *IRPA*, the Chairperson of the IRB "may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties."

[38] Acting pursuant to this authority, on July 18, 2017, the Chairperson designated certain parts of Refugee Appeal Division [RAD] Decision TB6-11632 (dated November 30, 2016) as a jurisprudential guide. As Chief Justice Crampton explained in *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 23 [*CARL*], this jurisprudential guide "was issued to promote consistency and to provide guidance to RPD and RAD members in respect of a matter that had given rise to a divergence in the jurisprudence of both the Board and [the Federal] Court. In particular," the Chief Justice noted, "it was issued to address the issue of whether persons alleging that they are wanted by Chinese authorities are likely to be able to exit that country from an airport using a genuine passport" (*ibid.*).

[39] Only certain paragraphs of the RAD decision were identified as jurisprudential guides. As summarized by the Chief Justice in *CARL* (at para 163), these paragraphs included the following six factual findings based on country documentation (along with the evidence that supported them):

a) The claimant could not have left China using his genuine passport given his allegation that the PSB wanted to arrest him (para 12);

b) Given the importance of the Golden Shield system in China, it is reasonable to expect that the use of the apparatus is also monitored and that there are redundant systems in place to prevent the system from being compromised by a single individual (para 28);

c) The objective evidence concerning the Golden Shield system and other border controls in place in China is compelling and convincing. While it might be possible for a smuggler to bypass some of the security controls, it is highly unlikely that the claimant could have bypassed all of the security controls in place (para 32);

d) While there is documentary evidence that indicates that corruption exists within the police in China and that authorities in China do not always apply regulations evenly, the preponderance of the documentary evidence states that Chinese authorities at borders conduct thorough screenings (para 33);

e) It is highly improbable that the smuggler allegedly retained by the claimant would have prior knowledge of whom to bribe in order to facilitate the claimant's safe travel through each of the multiple checkpoints at the airport (para 34);

f) Given the claimant's allegation that he was wanted by the Chinese authorities, and in light of the evidence of the vigorous pursuit of the PSB, it is reasonable to expect that the local authorities would have entered his information into the Golden Shield database to further their efforts to apprehend him (para 34).

[40] The policy note which identified TB6-11632 as a jurisprudential guide stated that "RPD and RAD members are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so."

[41] The Chairperson of the IRB revoked this jurisprudential guide on June 28, 2019. The notice of revocation gave the following reasons for doing so:

> This China Jurisprudential Guide analyses Chinese exit control procedures and the ability for those being sought by the authorities to exit China via an airport using a genuine passport.
>
> The China Jurisprudential Guide is being revoked as it contains a finding of fact which is not supported by the China National Documentation Package (NDP) in effect at the time of the decision. In particular, paragraph 22 of Decision TB6-11632 cites Response to Information Request (RIR) CHN105049.E in support of its finding that facial recognition technology is used to take photos of passengers departing from Beijing Airport. However, that document states that although such technology was previously used for passengers at the Beijing Airport, it was no longer in use at that airport at the time of publication of the RIR.
>
> Additionally, there have been a number of updates to the China NDP since the time of designation of the jurisprudential guide which has diminished the value of the jurisprudential guide going forward.

[42] More particularly, the Response to Information Request in question was dated September 22, 2015. It included information provided by a Canadian embassy official on January 30, 2015, concerning security practices at Beijing Airport. This official stated: "Chinese border officials do not take photographs of passengers upon international departure at every airport in China. In Beijing, photographs were taken in the past, but are not taken now" (emphasis added).

[43] I share the view of my colleague Justice Pamel that, while the notice of revocation makes specific reference to the erroneous finding of fact concerning the use of facial recognition technology at Beijing Airport, its wording leaves open the possibility that other aspects of the

China JG are also in error or, at least, are of diminished value: see *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 44.

## III. DECISION UNDER REVIEW

[44] The RPD concluded that the applicants were neither Convention refugees nor persons in need of protection. The determinative issues were credibility and whether their alleged fear of persecution was well-founded.

[45] Given the disposition of this application for judicial review, it suffices to summarize only two aspects of the RPD's decision: first, the member's findings concerning the applicants' ability to leave China using their own passports; and second, her findings concerning the summonses and the detention certificate.

[46] Looking first at the applicants' departure from China, the RPD member stated that in assessing the credibility of the applicants' claims in this regard she had considered the China JG but had also undertaken her own "independent assessment of the claimant's circumstances and evidence." As noted, the RPD's decision was made before the China JG was revoked.

[47] The member made the following findings concerning the applicants' exit from China:

- The applicants had no difficulty leaving China through Beijing Airport on January 14, 2016, using their own passports.
- The passports contained exit stamps.

- According to the documentary evidence, the PSB monitors citizens' exits from China and maintains a computer database of people wanted by the authorities (the Golden Shield Project). Specifically, passports and travellers are thoroughly examined at airports in China and facial recognition technology is used at Beijing and Guangzhou airports;

- The member also noted that documentary evidence indicated that "authorities in airports have access to computer systems allowing them to see if the person applying for exit is wanted by authorities;"

- Based on the documentary evidence, had the applicants been wanted by the PSB as they claimed, they would have been discovered by authorities when they left China using their own passports;

- While the applicants testified that a smuggler had facilitated their travel, including assisting them get through security at the airport, the member "prefer[red] the documentary evidence which indicates that citizens' exits from China are closely monitored;"

- The member noted that "there is systematic corruption in China and that airport officials can be bribed." The member also noted that "the documentary evidence does indicate that authorities in China do not always apply regulations evenly." However, the member found that "the preponderance of evidence does state that authorities at airports and at borders conduct thorough screening of passengers;"

- The member "prefer[red] the unbiased country condition evidence to the [applicants'] testimony;"

- The member therefore concluded on a balance of probabilities that the applicants are not wanted by Chinese authorities.

[48] Turning to the summonses and the detention certificate, the member concluded on a balance of probabilities that none of these documents were genuine. This conclusion rested on the following considerations:

- The documents "do not have security features and could have been produced by using a printer and a stamp with red ink." These types of documents – namely, single-page documents with black ink and red stamps and without security features – are "easily made by anyone, anywhere;"

- The member noted – and quoted from – documentary evidence indicating that "fraudulent documents are readily available in China;"

- The applicants had "enlisted the assistance of a smuggler and provided documents and information of unknown provenance" in order to obtain their US visitor visas. "As such, it would be reasonable to believe that the [applicants] would have access to similar documents to establish and support a claim as someone wanted by the authorities."

[49] For the sake of completeness, I note that the member also made a number of adverse findings concerning whether the applicants' alleged fears of political persecution were well-founded.

[50] Finally, the member gave little weight to the expert opinion evidence tendered by the applicants concerning corruption in China because their expert did not have specific knowledge of the officials mentioned in the applicants' narratives.

[51] On the basis of her analysis of the evidence before her, the RPD member concluded that the applicants had failed to establish that they are Convention refugees or persons in need of protection.

## IV. STANDARD OF REVIEW

[52] As set out above, this application raises two main issues.

[53] First, I must determine whether the RPD's decision was improperly influenced by the China JG. This is the test articulated by the Chief Justice in *CARL* (at para 229) for cases, like the present one, that were decided before that decision was released – indeed, before the China JG was revoked – and which have now come before this Court on judicial review. As the Chief Justice explained, the flaw in the China JG was that the statement of expectations that accompanied its issuance fettered the discretion of decision makers and unfairly increased the burden of proof for refugee claimants in respect of certain factual determinations (namely, those which I have set out in paragraph 39, above): see *CARL* at paras 3, 9, 88, 133-43, 151, 163-68, 172-73 and 175-77. When such cases come before the Court, "each case will need to be assessed individually" to ascertain whether the RPD or the RAD (as the case may be) "reached its own conclusion, without any improper influence from the statement of expectations" found in the China JG (*ibid.*).

[54] This issue is engaged for the first time here. Obviously, the RPD member never turned her mind to this question (nor could she have been expected to given that when she made her decision the China JG was still in effect and *CARL* had not been decided). As a result, it makes little sense to speak of applying a standard of review to a determination by the RPD. Nevertheless, since I must conduct my own analysis and provide what I judge to be the right answer to the question of whether the RPD's decision was improperly influenced by the China JG, this is functionally the same as applying the correctness standard of review: see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 34 and 50; and *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 54. On the other hand, the member does state that she "considered" the China JG but had "also undertaken an independent assessment of the claimants' particular circumstances and evidence concerning their exit from China." This statement bears directly on the issue of whether her decision was improperly influenced by the China JG and it may call for at least some deference from a reviewing court. In the end, however, it is unnecessary to decide whether the issue of improper influence should be assessed on a correctness or a reasonableness standard. As I explain below, even under the more deferential reasonableness standard, the member's statement that she undertook an "independent assessment" of the evidence before her does not withstand scrutiny.

[55] There is another reason why it is unnecessary to decide which standard of review applies. Where an administrative decision maker has provided reasons, those reasons are "the means by which the decision maker communicates the rationale for its decision" (*Vavilov* at para 84). When conducting reasonableness review, the focus "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome"

(*Vavilov* at para 83). A reviewing court must begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). In the present case, I must read the RPD's reasons in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). Those reasons deserve "close attention" and must be read "holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[56] These statements all pertain to judicial review on a reasonableness standard but, in my view, they would apply with equal force if the issue of improper influence were to be determined on a correctness standard. When the question is whether the member's reasoning is flawed because of improper reliance on the factual determinations in the China JG, the reasons given must be examined closely and respectfully to see whether, in fact, the decision is flawed in the manner alleged by the applicant. Thus, I would approach the member's reasons in the same way whether the issue of improper influence is assessed under a correctness or a reasonableness standard.

[57] Finally, since the nub of the issue is whether the RPD's decision making discretion with respect to factual questions was fettered or improperly interfered with by the China JG, the result will be the same whether the standard of review is correctness or reasonableness. The fettering of a decision maker's discretion and the improper interference with a quasi-judicial decision maker's independence to make findings of fact are both *per se* unreasonable: see *CARL* at para 57.

[58] The burden is on the applicants to demonstrate that the RPD member's decision was improperly influenced by the China JG in the sense the member placed undue reliance on the factual propositions set out therein and failed to make her own, independent determinations. As I have said, I will assess this issue by applying a reasonableness standard to the member's factual determinations. This includes taking into account the member's statement that she undertook an "independent assessment of the claimants' particular circumstances and evidence concerning their exit from China." That statement in particular must be assessed in the context of the decision as a whole and in light of the member's actual findings.

[59] Second, the applicants challenge the RPD's adverse determinations with respect to the summonses they relied upon in support of their claims. It is well-established that the RPD's assessment of the evidence before it is reviewed on a reasonableness standard (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at para 4, 160 NR 315 (CA); *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7, 228 FTR 43; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 41-46). This standard applies to the RPD's factual findings, including its credibility determinations, its findings concerning the genuineness of documents, and its interpretation of documentary evidence: see *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at para 17; *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 21; *He v Canada (Citizenship and Immigration)*, 2019 FC 2 at para 17; and *Idimogu v Canada (Citizenship and Immigration)*, 2019 FC 375 at para 9.

[60] That this is the applicable standard of review has been reinforced by *Vavilov*. There, the majority set out a revised approach for determining the standard of review with respect to the merits of an administrative decision. Reasonableness is now the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[61] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). Many of the principles the majority emphasized were drawn from prior jurisprudence, particularly *Dunsmuir*. The parties in the present matter did not have the benefit of *Vavilov*. Nevertheless, the footing upon which they advanced their respective positions concerning the reasonableness of the RPD's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the RPD's determination with respect to the summonses is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[62] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[63] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner

that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[64] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). While deferential review has never meant "blind reverence" for or "blind submission" to statutory decision makers (*Dunsmuir* at para 48; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41), in *Vavilov* "the Court re-emphasized that judicial review considers not only the outcome, but also the justification for the result (where reasons are required)" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29). An assessment of the reasonableness of the decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). The reasonableness standard is meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[65] Where, as in the present case, reasons have been given, the inquiry into the reasonableness of the decision must begin there. The reasons must be approached in the manner described in paragraph 55, above.

[66] The burden is on the applicants to demonstrate that the RPD's decision is unreasonable. They must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency"

(*Vavilov* at para 100) or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

## V. ANALYSIS

[67] The cornerstone of the applicants' claims for refugee protection is the allegation that they are wanted by the PSB. The fate of their claims thus turns largely on whether they can establish this fact on a balance of probabilities. The RPD member concluded on a balance of probabilities that the applicants were not wanted by the PSB. Crucial to the member's reasoning in support of this conclusion are the analysis of the fact that the applicants were able to leave China using their own passports and the analysis of the summonses and the detention certificate. As I will explain, neither analysis is reasonable.

### A. *The Ability of the Applicants to Leave China*

[68] I am satisfied that, notwithstanding the RPD member's statement that she had undertaken an "independent assessment of the claimants' particular circumstances and evidence concerning their exit from China," the decision was improperly influenced by the China JG. I have reached this conclusion for the following reasons.

[69] First, the member makes the very same error concerning the use of facial recognition at Beijing Airport that led to the China JG being revoked, stating: "The documentary evidence indicates that passports and travellers are thoroughly examined at airports in China and that facial recognition technology is used at Beijing and Guangzhou airports." What's more, the

member actually quotes from the September 22, 2015, Response to Information Request, including the statement from the Canadian embassy official that (as of January 30, 2015) photographs were no longer being taken at Beijing Airport. It is difficult to understand how an "independent" assessment of the evidence could lead to exactly the same error despite the information demonstrating that error being in the very part of the Response to Information Request the member quotes.

[70] Second, another of the member's findings is almost word-for-word identical to a finding in the China JG. Specifically:

| **Finding in Jurisprudential Guide** | **Decision Under Review** |
|---|---|
| [33] While there is documentary evidence that indicates that corruption exists within the police in China and that authorities in China do not always apply regulations evenly, the RAD finds that the preponderance of the documentary evidence does state that authorities at borders conduct thorough screenings. | [20] The panel also notes that there is systematic corruption in China and that airport officials can be bribed. The panel acknowledges that the documentary evidence does indicate that authorities in China do not always apply regulations evenly.<br><br>[21] The panel finds however that the preponderance of the documentary evidence does state that authorities at airports and at borders conduct thorough screening of passengers […]. |

[71] While in principle the RPD member could have reached this conclusion from her own assessment of the evidence, the striking similarity between the wording of her finding and the wording of the China JG, and the absence of any explanation for how the RPD member herself reached this conclusion independently, strongly suggest that her decision was improperly influenced by the factual finding in the China JG.

[72] Third, the only evidence from the National Documentation Package [NDP] that the RPD member cites to support her conclusions is evidence that was cited in the China JG – indeed, the member and the China JG cite the very same paragraphs of the same Responses to Information Requests. The member does not address in any meaningful way information in the record that is inconsistent with her conclusions. While not necessarily determinative in and of itself, this additional close correspondence between the member's decision and the China JG also strongly suggests that the former was improperly influenced by the latter.

[73] *Dunsmuir* and, now, *Vavilov* emphasize the importance of justification, transparency, and intelligibility to the reasonableness of administrative decisions. Despite the RPD member's statement that she conducted an "independent assessment" of the evidence, the manner in which her findings line up with those of the China JG and the absence of any indication of how she actually conducted this independent assessment lead me to conclude that her decision was improperly influenced by the China JG. Put another way, the member's "independent assessment" of the evidence is lacking justification, transparency, and intelligibility because there is no explanation for her findings apart from what is found in the China JG.

[74] This is not meant as a criticism of the RPD member. When she decided this matter, the China JG was still in effect and members were expected to apply it to cases – like the present one – with similar facts "or provide reasoned justifications for not doing so." The problem is that two important things have happened since then. One is that the China JG has been revoked. The other is that *CARL* has explained how an expectation like the one associated with the China JG can fetter a decision maker's discretion and can unfairly increase the burden on refugee

claimants when establishing the facts to support their claims. The member made a specific finding of fact which the IRB has now acknowledged is incorrect. More generally, the revocation of the China JG weakens the support for the member's findings to the extent that they track those of the jurisprudential guide (*Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10; *Cao* at para 38). Most importantly, for the reasons set out above, I am not satisfied that the member's analysis of the evidence avoided the problems with the China JG identified by the Chief Justice in *CARL* – namely, that the statement of expectations regarding the factual findings in the China JG fettered the member's discretion and unfairly increased the burden of proof on the applicants in relation to the implications of their ability to leave China using their own passports. As a result, the member's assessment of the significance of the fact that the applicants were able to leave China using their own passports is unreasonable.

B. *The PSB Summonses*

[75] The PSB summonses tendered by the applicants were a material aspect of their claims for protection. If genuine, they provided strong corroboration for their claim to fear persecution at the hands of the PSB. On the other hand, if they are not genuine, the grounds for the applicants' claims for protection largely collapse.

[76] My colleague Justice Elliott also noted the importance of the PSB summonses when she set aside the 2016 RPD decision. She wrote: "The question of whether there was a summons issued against each of the Applicants was significant. It was the foundation of their fear of persecution" (*Liu* at para 13). She described these documents as "highly probative" and

"critical" evidence (*Liu* at para 28). Of course, this all depends on whether they are genuine summonses or not.

[77] Justice Elliott set aside the 2016 decision because she found that the RPD's analysis of the summonses was unreasonable. The RPD had concluded that the applicants had not established that the summonses were genuine for two reasons: first, there was no reporting address or contact information shown on either of the summonses; and second, fraudulent Chinese documents are easily obtained and blank precedents of documents like these are widely available online. Justice Elliott concluded that neither determination reasonably supported the conclusion that the summonses were not genuine. Given the importance of the summonses to the applicants' claims, a new hearing was required.

[78] The RPD member's reasons for the decision now under review do not mention the lack of a reporting address and contact information as a reason to doubt the genuineness of the summonses. However, in my view, the three considerations she does rely on do not reasonably support the conclusion that the summonses (and the detention certificate, for that matter) are not genuine.

[79] First, the member's reliance on the fact that fraudulent documents are readily available in China simply repeats one of the errors that led Justice Elliott to set aside the RPD's earlier determination: see, in particular, *Liu* at para 24.

[80] Second, as will be discussed further below, the fact that a document could be fabricated easily (because, for example, it lacks sophisticated security features) is not affirmative evidence that it is, in fact, fabricated.

[81] Third, it was pure speculation for the member to find that, because the applicants had "enlisted a smuggler and provided documents and information of unknown provenance in order to obtain a US visa," they would "have access to similar documents to establish and support a claim as someone wanted by the authorities." In fact, there was no evidence as to what, if anything, was used to obtain the US visitor visas apart from the applicants' own passports.

[82] Only Ms. Mi was asked about the process of obtaining the visas. The member asked: "Was the US visa obtained with false information?" Ms. Mi replied: "That I don't know it was this person applied [*sic*]." The member confirmed that Ms. Mi was referring to the smuggler. The member then asked Ms. Mi to tell her "what exactly" the smuggler did, "starting at the beginning." The following exchange then occurred (*sic* throughout):

> **MS. MI:** We just handed our passports to him and he did everything to for us.
>
> **MEMBER**: So, tell me the process of getting a US visa?
>
> **MS. MI**: When we met him he just asked for both of us passports to give to him and then he said he will arrange everything for us as long as just we listen to him.
>
> **MEMBER**: Okay, so then how did you get the visa?
>
> **MS. MI**: Maybe he provided some information in the application forms then we went to for the interview, they didn't even ask us any questions and gave us the visa.

[83] There was no evidence that "documents and information of unknown provenance" were used to obtain the US visitor visas. More to the point, there was no evidence that fraudulent documents or false information was used to obtain the visas. Even assuming for the sake of argument that it could reasonably be inferred that someone who used fraudulent documents to obtain a valid visa "would have access to similar documents to establish and support a claim as someone wanted by the authorities," there was no evidence the applicants did any such thing.

[84] Given that the matter is returning to the RPD for another redetermination and that the RPD has twice fallen into reviewable error with respect to the PSB summonses, it may be appropriate to reiterate some general principles concerning foreign documents like the summonses and the detention certificate.

[85] Like any party relying on a foreign public document, the applicants are assisted in establishing the factual basis of their claims for protection by the principle that documents purporting to be issued by a competent foreign public authority should be accepted as what they purport to be – and, thus, as evidence of their contents – unless there is a valid reason to doubt their authenticity. This principle is simply an extension, as a matter of comity, of the presumption of regularity – i.e. "*omnia praesumuntur rite et solemn-iter esse acta donec probetur in contrarium*" or "all things are presumed to have been done rightly and with due formality unless it is proved to the contrary" – to the acts of foreign states: see *Ramalingam v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7241 at para 5 (FC). This Court has consistently recognized the validity of this principle: see, among many other cases, *Manka v Canada (Citizenship and Immigration)*, 2007 FC 522 at para 8; *Chen v Canada*

*(Citizenship and Immigration)*, 2015 FC 1133 at para 10; *Adesida v Canada (Citizenship and Immigration)*, 2016 FC 256 at para 19; and *Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 40.

[86] As the maxim itself states, the presumption of regularity is rebuttable. It can be displaced by good reasons, grounded in evidence, for concluding that what purports to be a foreign public document is not genuine and, therefore, that it should not be accepted as evidence of its contents.

[87] Without in any way suggesting that this is an exhaustive list, such reasons often take one of the following forms:

a) Discrepancies on the face of the document that one would not reasonably expect to find on a validly issued public document (e.g. spelling mistakes or formatting flaws);

b) Alterations or modifications that appear on the face of the document;

c) Inconsistencies with standard templates for the type of document in question;

d) Other credible or trustworthy evidence that is inconsistent with the contents of the document in question (e.g. credible or trustworthy evidence that a party used a valid passport with a nationality, name, and date of birth that are different from the nationality, name, and date of birth recorded on a birth certificate the same party has tendered in a proceeding); and

e) Doubts about the credibility or trustworthiness of other evidence that says the same thing as the document whose genuineness is in issue (e.g. the testimony of a party).

[88] On the other hand, generic information that fraudulent versions of certain types of foreign public documents are common or widely available is not a reason to conclude that a particular document of that type is not genuine. At best, this information is consistent with that conclusion; it does not establish it. Similarly, the fact that a foreign public document of a certain type lacks sophisticated security features and, therefore, could easily be fabricated is not a reason for concluding that a particular document of that type is not genuine. Again, at best, this fact is consistent with that conclusion; it does not establish it. Put another way, having a good reason to approach a foreign public document with caution because, for example, it would be easy to fabricate, is not a reason for concluding that it is not genuine. This Court has had many opportunities to point out the error of treating such considerations as a reason for concluding that an ostensible foreign public document is not genuine: in addition to Justice Elliott's earlier decision regarding the present applicants, see, for example, *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224 at para 7; *Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at paras 53-54; *Chen* at paras 10-14; *Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 24; and *Adesida* at para 20.

[89] The potential sources for valid reasons to doubt the genuineness of a foreign public document set out above are not mutually exclusive; more than one can be engaged in any given case. They are, however, analytically distinct and it is important for a decision maker not to conflate them. As well, in the refugee determination context, while all must be approached with a degree of care that is commensurate with the importance of the matter for someone seeking protection (cf. *Vavilov* at paras 133-35), the last source noted above can be especially challenging for decision makers. This is because of the risk that corroborative evidence will be

rejected because of concerns about the credibility or trustworthiness of the evidence it is tendered to corroborate when, had the corroborative evidence been assessed properly, it could have alleviated the concerns about the evidence it was offered to corroborate. Like any potentially corroborative documentary evidence, as a general rule the question of the genuineness of a foreign public document should be examined independently of general concerns about a claimant's credibility before it is rejected (*Yu v Canada (Citizenship and Immigration)*, 2015 FC 1138 at paras 31-37; *Lu v Canada (Citizenship and Immigration)*, 2016 FC 846 at paras 33-35). Otherwise, the decision maker risks reasoning in a way that begs the very question at issue: the corroborative evidence is not believed simply because the claimant is not believed (*Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12).

[90] When supported by the evidence in a given case, this risk can be avoided by grounding a finding of inauthenticity on one or more of the other types of considerations set out in paragraph 87, above. Nevertheless, this Court has held that a general finding of lack of credibility on the part of a claimant can affect the assessment of other relevant evidence submitted by that claimant, including documentary evidence, and can ultimately cause the claim to be rejected: see *Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at para 28 and the cases cited therein. Thus, it is possible in a given case that the reasons for doubting the credibility or trustworthiness of a claimant's testimony are so strong that they can reasonably support the inference that a foreign public document offered to corroborate that testimony is not genuine. (Obviously, this conclusion could also be supported by valid concerns about the document itself.) However, to repeat, where such concerns about the credibility of a claimant's testimony are extended to potentially corroborative documentary evidence, the decision maker

must ensure that he or she does not reject the corroborative evidence through circular reasoning. If there are no other reasons to doubt the genuineness of a document, this may be a reason for concluding that the problems with the evidence it is offered to corroborate are more apparent than real.

[91] Finally, where a foreign public document is central to a claim and, if it is genuine, it would have high probative value, any doubts about its genuineness should be stated expressly rather than disguised as assessments of weight: see *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 10; *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27; and *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 at para 53.

## VI. CONCLUSION

[92] For these reasons, the application for judicial review is allowed, the decision of the RPD dated February 19, 2019, is set aside, and both matters are remitted to the RPD for redetermination.

[93] The parties have not suggested any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

**JUDGMENT IN IMM-1466-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated February 19, 2019, is set aside and the matters are remitted for redetermination.
3. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1466-19 |
| **STYLE OF CAUSE:** | YANG LIU ET AL V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 19, 2019 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | MAY 1, 2020 |

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