Federal Court  Cour fédérale

Date: 20200123

Docket: IMM-1958-19

Citation: 2020 FC 111

Ottawa, Ontario, January 23, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

AIHUI CHEN
CHENGCHUN WEI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD], dated February 26, 2019 [Decision], which

dismissed the Applicants' appeal of the Refugee Protection Division's [RPD] decision denying the Applicants' refugee and person in need of protection claims under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicants, Aihui Chen and Chengchun Wei, are citizens of China. The couple married in October 2016.

[3] They allege that they face persecution from the Chinese government because of their vocal opposition to the expropriation of their land.

[4] In January 2017, the Applicants state that they received a Notice of Land Expropriation, which noted that they must evacuate their homes by March 20, 2017, and would receive 20,000 Yuan in compensation.

[5] On February 1, 2017, the Applicants say they met with their neighbours to discuss how to address the inadequate compensation offered. A few days later, they learnt that the estimated value of their property was 450,000 Yuan. Consequently, the Applicants note that they, along with a few of their neighbours, delivered a petition and appraisal reports to the town Chairman on February 15, 2017.

[6] However, following the town Chairman's refusal to reconsider the matter, the Applicants state that they, and some of their neighbours, met with the Deputy Chairman of the county on

February 28, 2017, and delivered the petition and appraisal reports. However, on March 10, 2017, the Applicants say they were told the compensation would not be adjusted.

[7] As a result of this latest refusal, the Applicants say that they, and some of their neighbours, decided to publicly protest the expropriation and to conduct a roadblock on March 19, 2017. The roadblock escalated the following day resulting in the arrest of six individuals.

[8] The Applicants say that they were able to escape arrest and went into hiding at the home of Ms. Chen's aunt. However, they state that the Public Security Bureau [PSB] visited their home and left a *Chuanpiao* summons accusing them of taking a leading role in the anti-government protest.

[9] The Applicants say they decided to leave China on March 30, 2017, with the help of a smuggler. They arrived in the United States of America [USA] and shortly after entered Canada on April 3, 2017. They submitted their Basis of Claim forms on April 17, 2017. The Applicants state that they entered the USA first because they still had valid visas following their honeymoon there in January 2017.

[10] On November 21, 2017, the RPD found that the Applicants were not refugees or persons in need of protection pursuant to ss 96 and 97 of the *IRPA*. In essence, the RPD found that their claims were not credible given the numerous inconsistencies in their testimony, their documentary evidence, and their application. The RPD found that the Applicants' explanation

for these inconsistencies, Ms. Chen's brain surgery, was not credible given the lack of evidence presented and that their safe departure from China further undermined their claim. As such, the RPD found that these critical issues undermined the supporting documentation submitted, including the *Chuanpiao* summons and the Arrest summons.

[11] The Applicants appealed the RPD's decision to the RAD. Along with their appeal, they submitted several additional documents. These included: (1) a Chinese Resident Identification card; (2) an Acute Illness Diagnosis Certificate; (3) a doctor's note confirming Ms. Chen's brain aneurism and surgery; (4) photographs of Ms. Chen after her brain surgery; and (5) an affidavit from a lawyer at Lewis & Associates stating that the translator had mistakenly stated that Ms. Chen had a brain tumour rather than a brain aneurism.

[12] On February 26, 2019, the RAD dismissed the Applicants' appeal of the RPD's decision.

III. DECISION UNDER REVIEW

[13] The RAD dismissed the Applicants' appeal of the RPD's decision finding that no probative documentation was submitted to support their allegation of being wanted by the Chinese government for their public opposition to the expropriation of their land. In doing so, the RAD rejected the evidence newly submitted by the Applicants as being irrelevant to the determinative issue in this case, and because it could reasonably have been presented for the RPD hearing.

[14] The RAD noted that new evidence must meet the requirements set out in s 110(4) of the *IRPA*: the evidence must either arise after the rejection of the claim and must not have been reasonably available at that time, or the applicant could not have reasonably been expected to submit it at that time. The RAD noted that s 110(4) does not provide an opportunity for an applicant to simply complete a deficient record submitted to the RPD. If the s 110(4) requirements are met, the RAD noted that the Federal Court of Appeal found in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] that new evidence should be considered for its credibility, relevance, newness, and materiality, as per the criteria set out in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385.

[15] In this case, the RAD found that the determinative issue did not relate to the medical documentation submitted, nor to the errors the new evidence was intended to address. Moreover, the RAD specifically noted that the photographs of Ms. Chen after her brain surgery could have reasonably been presented to the RPD. As such, the RAD did not admit these documents as new evidence and did not hold an oral hearing pursuant to s 110(6) of the *IRPA*.

[16] Moving to the merits of the Applicants' appeal, the RAD agreed that the RPD erred by not undertaking a complete evaluation of the *Chuanpiao* summons and the Arrest summons. The RAD therefore conducted its own evaluation of the documents. In doing so, the RAD found that, on a balance of probabilities, both documents were fraudulent and, as such, there was no credible documentation to support the Applicants' claim that they were wanted by the authorities in China. The RAD consequently found that, on a balance of probabilities, the Applicants were not wanted by the Chinese authorities.

[17] Regarding the *Chuanpiao* summons, the RAD noted that it was inconsistent with the samples and information provided in the National Documentation Package [NDP] for China. More specifically, the RAD noted the following inconsistencies: (1) the structure and formatting at the top of the *Chuanpiao* summons; (2) the Chinese characters in the third and fourth boxes; (3) the structure of the instructions at the bottom which lists two categories instead of three; and (4) the omissions in the structure and Chinese characters at the bottom of the document. For these reasons, the RAD found that, on a balance of probabilities, the *Chuanpiao* summons submitted was fraudulent and weighed negatively against the credibility of the Applicants' claim.

[18] Regarding the Arrest summons, the RAD noted that it incorrectly referred to article 59 of the *Criminal Procedural Law of the People's Republic of China,* which notes that a witness statement may be used in deciding a case. Moreover, the RAD stated that it was completely dissimilar to the sample in the NDP for China. As such, the RAD found that, on a balance of probabilities, the Arrest summons submitted was also fraudulent.

[19] Given its negative finding concerning their claim of being wanted by the Chinese authorities, the RAD found that the Applicants could have left China pursuant to their own documentation without difficulty, therefore making their allegation that they used a smuggler not credible.

[20] Finally, although the RAD agreed with the Applicants that the RPD erred in finding that the credibility issues raised were sufficient to undermine the documents submitted in support of

their claim, the RAD noted that its finding concerning the credibility of their claim of persecution by the Chinese government was the determinative issue in this case.

[21] For these reasons, the RAD concluded that, on a balance of probabilities, the Applicants could return to China without fear of persecution by the Chinese authorities.

IV. ISSUES

[22] The issues raised in the present matter are the following:

1. Did the RAD breach the Applicants' right to procedural fairness?
2. Did the RAD err in rejecting the new evidence submitted by the Applicants?
3. Did the RAD err in its assessment of the *Chuanpiao* summons and the Arrest summons?
4. Did the RAD err in failing to give proper weight to evidence that challenged its credibility finding?

V. STANDARD OF REVIEW

[23] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at

para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[24] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[25] Both the Applicants and the Respondent submitted that the standard of review applicable to the issues in this case was that of reasonableness. I agree, but for the issue of procedural fairness.

[26] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to

issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[27] As for the standard applicable to this Court's review of the RAD's Decision to reject the newly submitted evidence by the Applicants as well as the standard applicable to the review of the RAD's assessment of the evidence and its credibility findings, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Digaf v Canada (Citizenship and Immigration)*, 2019 FC 1255 at para 27 concerning the review of the rejection of the newly submitted evidence, and *Wickramasinghe Arachchige Dona v Canada (Citizenship and Immigration)*, 2019 FC 419 at para 15 concerning the review of the RAD's assessment of the evidence and its credibility findings.

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*,

above, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "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). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[29] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Convention refugee	**Définition de réfugié**
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; or	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 ;
(b) not having a country of nationality, is outside the	b) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

Personne à protéger

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, and

(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,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Evidence that may be presented	**Éléments de preuve admissibles**
110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

VII. ARGUMENTS

A. *Applicants*

[30] The Applicants argue that the RAD: (1) breached their right to procedural fairness by raising new issues concerning the genuineness of the summonses submitted; (2) unreasonably rejected the new evidence submitted without considering how it related to the RPD's decision; (3) unreasonably assessed the *Chuanpiao* summons and the Arrest summons; and (4) ignored critical evidence contradicting its credibility findings. For these reasons, the Applicants ask this Court to allow this judicial review, to overturn the Decision, and to either substitute its own positive decision or refer the matter back to the RAD for redetermination by a different decision-maker.

(1) Breach of Procedural Fairness

[31] The Applicants submit that the RAD breached their right to procedural fairness by raising new issues concerning the genuineness of the *Chuanpiao* summons and the Arrest summons without offering them an opportunity to address these concerns. The Applicants note that this Court has found that a decision-maker cannot raise new determinative issues without giving an applicant an opportunity to respond and that a failure to do so constitutes a breach of procedural fairness. The Applicants cite this Court's decisions in *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 75 [*Ching*] and *Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 at para 19 in support.

(2) New Evidence Submitted to the RAD

[32] The Applicants say that the RAD erred in failing to accept the new evidence submitted because it failed to analyze how these documents related to the findings of the RPD. They note that the new evidence submitted directly addresses the RPD's findings concerning the inconsistencies in the *Hukou*, and directly contradicts the RPD's negative findings concerning the Applicants' claim that Ms. Chen had a brain aneurism and subsequent brain surgery. The Applicants submit that this evidence was important and relevant in light of the RPD's findings.

(3) Assessment of the *Chuanpiao* Summons and the Arrest Summons

[33] The Applicants submit that the RAD unreasonably concluded that the *Chuanpiao* summons and the Arrest summons were fraudulent.

[34] The Applicants note that the samples relied upon in the NDP for China by the RAD are from 2013 and that nothing in the NDP indicates that there was no regional variation in the format of summonses after 2015.

[35] Concerning the *Chuanpiao* summons, the Applicants claim that the RAD also made several unreasonable errors when comparing it to the sample in the NDP. First, a review of the characters in the third and fourth boxes reveals that the third box states the same information in a different way, while the characters in the fourth box are identical to those found in the sample. Second, the instructions at the bottom do not necessarily have to list three lines of instructions because the instructions in any given *Chuanpiao* summons may differ according to the circumstances. The Applicants also note that nowhere in the documentary evidence is it stated that each person will be given the same set of three instructions. Third, the Applicants argue that the characters at the bottom of the document will necessarily differ from one *Chuanpiao* summons to another because they are the name of the judge, the name of the county, and the date.

[36] With regard to the Arrest summons, the Applicants state that it is entirely plausible that the PSB employee who prepared the Arrest summons mistakenly referred to article 59. They also say that the document with which the RAD compared the Arrest summons does not appear in the NDP, and that the RAD failed to indicate in what way the Applicants' documentation differed from the sample referred to.

(4) Weighing of Evidence

[37] The Applicants argue that the RAD erred in finding that their claim that they are wanted by the Chinese authorities for their public opposition to the expropriation was not credible due to its findings concerning the *Chuanpiao* summons and the Arrest summons. The Applicants submit that, in doing so, the RAD failed to give weight to the evidence that challenged this credibility finding.

[38] Indeed, the Applicants argue that the RAD ignored evidence such as their petition, their appraisal report, and the psychological assessment for Ms. Chen, all of which support the fact that they were in a conflict with the Chinese government regarding the expropriation of their land. The Applicants argue that these documents were not found to be fraudulent, and despite rejecting the RPD's credibility findings, the RAD failed to analyze this evidence or provide reasons for rejecting these documents.

B. *Respondent*

[39] The Respondent argues that: (1) the Applicants' right to procedural fairness was not breached as the RAD addressed the issues raised by the Applicants; (2) the new evidence submitted by the Applicants simply sought to correct a deficient record; (3) the *Chuanpiao* summons and the Arrest summons contained numerous problems in addition to inconsistencies with the samples in the NDP; and (4) the RAD explicitly considered the expropriation evidence cited by the Applicants. For these reasons, the Respondent argues that the Decision was reasonable and that this judicial review application should be dismissed.

(1) Breach of Procedural Fairness

[40] The Respondent submits that the Applicants' right to procedural fairness was not breached as the RAD did not raise a new issue in this case. The Applicants knew that their credibility and summons documents were at issue before the RAD because they explicitly raised this in their RAD appeal. The Respondent argues that this differs from the situation in *Ching*, above, which the Applicants rely on, where Justice Kane found that the RAD erred in considering the applicant's credibility because the applicant had not raised this issue in their appeal.

[41] In this case, the Respondent submits that the RAD was simply addressing the very issues raised by the Applicants. The Respondent notes that this Court has found that the RAD does not raise a new issue when it reviews and assesses evidence afresh (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at para 30; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at para 37); nor does it do so when finding additional evidence in the record to undermine an applicant's credibility when their credibility is already at issue (*Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at paras 13-15).

(2) Evidence Newly Submitted to the RAD

[42] The Respondent argues that the RAD did not err in rejecting the Applicants' newly submitted evidence as the Applicants were simply attempting to correct the deficient record they submitted before the RPD. See *Singh*, above, at paras 49 and 54.

[43] The Respondent also submits that the Applicants were represented by counsel and chose to submit an illegible Acute Diagnosis Certificate and insufficient evidence of Ms. Chen's alleged brain surgery before the RPD. As such, they cannot seek to adduce new evidence simply to fix these deficiencies identified by the RPD. Moreover, the photographs and medical documentation are not new as they did not provide a fact that was unknown to them at the time of the RPD hearing.

(3) Assessment of the *Chuanpiao* Summons and the Arrest Summons

[44] The Respondent argues that the RAD did not err in finding that the *Chuanpiao* summons and the Arrest summons were fraudulent. The RAD identified numerous problems with these documents as well as several inconsistencies when compared with samples provided in the NDP for China.

[45] The Respondent particularly disagrees with the Applicants' argument that the sample document in the NDP with which the RAD compared the Arrest summons does not exist. The Respondent cites Item 9.6 of the NDP in response. The Respondent also disagrees with the

Applicants' statement that the samples referred to by the RAD are from 2013; the samples provided at Item 9.6 of the NDP include samples from 2014 to 2016.

(4) Weighing of Evidence

[46] The Respondent argues that the RAD properly weighed the expropriation evidence in this case when assessing the Applicants' risk of harm or persecution should they return to China. In fact, the Respondent notes that the RAD explicitly considered this evidence at paras 50-53 of its Decision but found that the documents were insufficient to establish the determinative issue in this case: whether the Applicants are wanted by the Chinese authorities for their public opposition to the expropriation of their land.

VIII. ANALYSIS

[47] Notwithstanding their written submissions, both parties agreed before me at the hearing of this matter in Toronto on December 5, 2019 that the determinative issue is whether the RAD's assessment of the *Chuanpiao* summons and the Arrest summons was reasonable. I agree that the Decision stands or falls on this issue.

[48] The core of the Decision is as follows:

> [42] Given this fraudulent documentation, the RAD finds, on a balance of probabilities, that the Appellants were not wanted by the PSB or the authorities in China as alleged. Given that there is no credible documentation given to support their allegations of being wanted by the authorities, the RAD finds the Appellants are not credible witnesses about the determinative issue of their claim and the allegations of their hiding after allegedly escaping the police after their alleged protest.

> [43] A determinative basis of their claim, i.e. being wanted by the authorities in China for their alleged illegal protest is not credible. Given this finding, the RAD finds that the Appellants could have left China on their own documentation without difficulty, and that the allegations that they used a smuggler to facilitate leaving China are not credible.

[49] The basis for this conclusion was the RAD's own evaluation of the *Chuanpiao* summons, a court-issued subpoena, and an Arrest summons that the Applicants placed in evidence before the RPD and the RAD.

[50] The RAD agreed with the Applicants that the RPD's evaluation of this documentation was incomplete, and went on to provide its own assessment:

> [34] The RAD agrees with the Appellant's submissions regarding the incomplete evaluation of the government issued summons. As a result the RAD will evaluate the government issued documentation that was submitted to support the Appellants' allegations that they were wanted by the PSB for their alleged illegal protest of their land being expropriated.
>
> [35] A court-issued subpoena, *Chuanpiao*, referenced above, was submitted in documentation, to verify that the Appellant was wanted by the Chinese authorities. In observing the National Documentation Package (NDP), the RAD notes the following: "there has been no variation in the format of summonses and subpoenas since 2003 (ibid. 22 June 2013)." The documentation goes on to quote that such forms are supposed to be used throughout the country and that "regional variations are not meant to exist". Observing the summons submitted in documentation and comparing it to the samples in the NDP documentation, the RAD finds that structure and format of the summons is not consistent with the documentation.
>
> [36] The structure and formatting of the top of the summons are inconsistent with the documentation. The identifier of the case and date are missing from the top right hand corner of the subpoena. This identifier is located below the identification of the issuing authority and above the body of the summons.

> [37] The Chinese characters, and therefore the wording of the third and fourth boxes of the subpoena are inconsistent with the documentation.
>
> [38] The physical structure of the instructions at the bottom of the subpoena is inconsistent with the documentation and only lists two categories, not three.
>
> [39] The structure and Chinese characters at the bottom of the subpoena are inconsistent with the documentation in that portions are missing. The Chinese characters below the body of the summons are inconsistent with the NDP documentation samples.
>
> [40] The RAD finds, on a balance of probabilities, that the summons submitted is fraudulent, and it draws a negative inference regarding the Appellant's credibility in submitting a fraudulent document to support her case.
>
> [41] The Arrest Summons, referenced above, were also submitted by the Appellants to verify that they were wanted by the Chinese Authorities for anti-government activities. According to the documents submitted, Article 59 of the Criminal Procedural Law of the People's Republic of China was quoted in the documents as the basis for the arrest summons. In reviewing the NDP documentation on the Criminal Procedure Law of the People's Republic of China (2012 Amendment), the RAD finds that Artiste 59 refers to a witness statement that may be used in deciding a case. The RAD finds, on a balance of probabilities, that the Arrest Summons issued are fraudulent. In addition, the RAD referenced NDP documentation, CHN 106128.E and finds that its finding is supported in that the documentation submitted is completely dissimilar to NDP documentation.
>
> [Footnoted omitted.]

[51] The Applicants say that the RAD committed a range of errors in this analysis that render the Decision unreasonable.

A. *The Chuanpiao Summons*

[52] The Applicants allege that the RAD made several factual errors in its assessment of this court-issued subpoena.

(1) No Regional Variation in Documents

[53] First, the Applicants say the samples referenced by the RAD in making its comparisons were from 2013, and while item 9.3 of the NDP notes that there was no regional variation in the format of summonses up to 2015, this does not indicate that there could be no variation after that time. The Applicants' subpoena is dated 2017.

[54] I have no evidence before me to assess whether variations were permissible when the Applicants were issued with their summons. The onus is on the Applicants to produce any evidence of permissible variations, but it is difficult to see how they could have done this in the circumstances of this case. The Research Directorate information relied upon by the RAD advised that standard terms "are supposed to be used," and "regional variations are not meant to exist" but this is not evidence that they do not exist, and the RAD should have kept this in mind when comparing the Applicants' summons with the samples produced by the Directorate.

[55] Another problem with the Research Directorate information is that when it refers to "no variation in the format" it does not advise as to what would be considered a "variation." For example, if the "Person to be Subpoenaed" Box on a form has 5 characters, is it a format variation if the same box says the same thing in 4 characters? And if it has to have 5 characters,

do they always have to be the same characters? The advice also warns that "This response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection." It is unclear what this caveat means. Does it mean that a variation in format need not be conclusive in any particular case even if there are variations? It is strange that the RAD does, in fact in the present case, treat the Research Directorate's response as conclusive and uses "format" as the sole ground to pronounce the *Chuanpiao* summons fraudulent.

(2) Boxes 3 and 4 of the *Chuanpiao Summons*

[56] Second, the Applicants say that the Chinese characters in the third and fourth boxes were not inconsistent with the sample. They say they are, in fact, identical with the sample.

[57] This is not accurate. In Box 3, the sample shows 5 characters while there are 4 in the Applicants' *Chuanpiao* summons. In Box 4 the sample shows 8 characters while the *Chuanpiao* summons has 7.

[58] However, because the RAD is relying entirely on format (i.e. the number of characters) it is not possible to tell whether there is any difference in substance.

[59] If Boxes 3 and 4 in the sample and the summons both mean "Person to be Subpoenaed" and "Address" respectively, it is not clear whether this would be considered a variation in accordance with the Research Directorate's information.

(3) Number of Lines at the Bottom of the *Chuanpiao Summons*

[60] Thirdly, the Applicants say the instructions at the bottom of the *Chuanpiao* summons list two lines of instructions and not three. But this fails to take account of the fact that any given *Chuanpiao* summons can differ in that the same instructions may not be given to every person. They say it was unreasonable for the RAD to assume that every person summoned will be given the same three set of instructions. PSB officers have the freedom to provide individualized instructions.

[61] The RAD does not consider this issue and, relying purely upon form over substance, does not explain the significance of the differences in the context of possible variations made necessary by the context and the persons being summoned. For example, if the RAD had examined what the 3rd line actually said, it might have been clear that it had no relevance to the Applicants and was left off for that reason.

(4) Different Characters at the Bottom of the *Chuanpiao Summons*

[62] Next, the Applicants say the RAD was wrong to rely on the fact that the characters at the bottom of the *Chuanpiao* summons were different from the sample summons. These include the name of the judge, the name of the country, and the date. So obviously these characters would not match the sample.

[63] Once again, without further explanation from the RAD on this issue, it is not possible to tell why it felt safe relying upon mere form in this area of the subpoena.

(5) The Arrest summons

[64] The RAD noted that the documents submitted by the Applicants referenced Article 59 of the *Criminal Procedural Law of the People's Republic of China* as the basis for the Arrest summons, but the NDP documentation reveals that Article 59 refers to a witness statement that may be used in deciding a case.

[65] Since the hearing of this matter in Toronto on December 5, 2019, Respondent's counsel has advised the Court in writing as follows:

> Following the conclusion of the hearing, Applicant's counsel mentioned to me that there had been a translation error with the Arrest Summons. She informed me that the Chinese version of the Arrest Summons refers to Article 79 of the Criminal Procedural Law of the People's Republic of China, whereas the English translation incorrectly translated it as Article 59 of the Criminal Procedural Law of the People's Republic of China. I am satisfied that Applicant's counsel is correct.
>
> The Refugee Appeal Division's (RAD) decision had drawn an adverse inference from the fact that the Arrest Summons had referred to Article 59. This is because Article 59 was about witness statements, which was irrelevant to the Applicants' account. Applicant's counsel located Article 79 of the Criminal Procedural Law of the People's Republic of China. Article 79 refers to the arrest of a criminal suspect, which cannot be said to be irrelevant to the Applicants' account.
>
> While the Respondent recognizes that paragraph 41 of the RAD's decision was reasonable based on the record before it, that the incorrectly translated document was provided by former Applicant's counsel, and that this Court and the Federal Court of Appeal have cautioned that new evidence cannot be used to overturn the merits of an administrative decision-maker's decision in a judicial review, the Respondent will no longer be relying on paragraph 41 of the RAD's decision to support the reasonableness of its decision.
>
> [Footnotes omitted.]

[66] Paragraph 41 of the Decision provides the reasons why the RAD considered the Arrest summons to be fraudulent, and this had a great deal to do with the mistranslation of the article of the *Criminal Procedural Law* that was relied upon. It now appears that it should have been Article 79 and not Article 59, and the Respondent now concedes that Article 79 cannot be considered as irrelevant to the Applicants' assertion that they are wanted by the Chinese authorities.

[67] Had this mistake not been made, it is difficult to see how the RAD could have found this Arrest summons to be fraudulent. However, the incorrect translation of Article 79 was provided by the Applicants through their former counsel. The RAD also referenced NDP documentation and found that "the documentation submitted is completely dissimilar to NDP documentation." It is not possible to tell, however, whether the RAD would have found the Arrest summons to be fraudulent if Article 79 had been correctly translated. Without some detail as to what the RAD thought the dissimilarities were, it is not possible to assess the reasonableness of this finding.

[68] The correct translation of Article 79 was not before the RAD for no other reason than a mistake by Applicants' former counsel, and there is no explanation before me as to how this mistake occurred.

[69] The RAD's conclusions on the determinative issues were based upon its findings that both the *Chuanpiao* summons and the Arrest summons were fraudulent. If the Respondent is no longer relying upon paragraph 41 to support the reasonableness of the Decision, I think there are

sufficient problems with the RAD's conclusions about the *Chuanpiao* summons to render the Decision unsafe and unreasonable.

[70] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-1958-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is referred back to a differently constituted RAD for reconsideration.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1958-19
STYLE OF CAUSE:	AIHUI CHEN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2019
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JANUARY 23, 2020

APPEARANCES:

Stephanie Fung	FOR THE APPLICANTS
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT