

Federal Court



Cour fédérale

**Date: 20200304**

**Docket: IMM-1296-19**

**Citation: 2020 FC 337**

**Ottawa, Ontario, March 4, 2020**

**PRESENT: The Honourable Mr. Justice Pamel**

**BETWEEN:**

**TING CAO  
NING LI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] This case concerns the manner in which the Refugee Appeal Division of the Immigration and Refugee Board [RAD] relied on the Immigration Refugee Board Chairperson's China Jurisprudential Guide TB6-11632 (November 30, 2016) [the Jurisprudential Guide].

[2] This is an application for judicial review of a decision of the RAD dated December 13, 2018, which confirmed the decision of the Refugee Protection Division [RPD] that the Applicants are neither Convention refugees nor persons in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The RAD concluded that the Applicants are not genuine adherents of The Church of Almighty God (sometimes referred to as Eastern Lightning), a Christian religious movement established in China. Based on this determination, the RAD found that there was no serious possibility that they would be persecuted should they return to China. Further, the RAD found that the Applicants would not, on a balance of probabilities, be subjected personally to a risk to life, risk of cruel and unusual treatment, or a danger of torture, if they returned to China.

[4] For the reasons that follow, I would allow the application for judicial review.

## II. Background

[5] The Principal Applicant, Ting Cao, and her husband, Ning Li [collectively, the Applicants], are citizens of China. The Applicants claim to fear persecution in China based on their religious adherence to The Church of Almighty God. The Chinese government has banned this religion.

[6] According to the Principal Applicant, she was introduced to The Church of Almighty God religion in July 2015 by a friend of hers. She had been struggling with depression after

failing to bear children and being accordingly taunted by her mother-in-law. The Principal Applicant claims that she knew that the government had banned the religion but found the practice beneficial to her life.

[7] On February 21, 2016, while she was at a prayer group at an illegal house church, the Chinese Public Security Bureau [PSB] raided the premises; the Principal Applicant went into hiding.

[8] The PSB discovered her name and that she was someone who had attended the house church and went to the Principal Applicant's house in search of her. They confiscated pictures of her, interrogated her husband, and warned her husband that two members of the church had been arrested and had identified the Principal Applicant as having attended the prayer group.

[9] The PSB returned to the house with a summons on February 25, 2016. They did not find the Principal Applicant.

[10] In March 2016, the Principal Applicant was dismissed from her place of work as the PSB had contacted her employers and advised them of her activity in the church and the fact that she was wanted by the authorities.

[11] The Applicants left China on May 21, 2016, using their own passports, with the assistance of a smuggler. The Principal Applicant claims that the PSB sought her whereabouts

approximately seven or eight times before she fled China and continued to do so after she arrived in Canada.

[12] The Applicants allege that they continue to practise The Church of Almighty God religion in Canada.

[13] The Applicants' hearing before the RPD was held on October 2, 2017. The Applicants testified that their smuggler had bribed airport officials, that they had entered the Beijing airport through a VIP entrance with boarding passes obtained by the smuggler, and that their passports were never scanned by airport security.

[14] The RPD rejected their claim, finding they had not established that the Principal Applicant is wanted by the authorities in China for practising The Church of Almighty God religion and further finding that the Applicants are not genuine practitioners of the faith.

[15] The Applicants appealed this decision to the RAD. In a decision dated December 13, 2018, the RAD confirmed the RPD's decision.

### III. Issues

[16] There are two issues:

- (1) Did the RAD err in its assessment of the Applicants' credibility?
- (2) Did the RAD err in its assessment of the Applicants' religious identity and practice in Canada?

IV. Standard of Review

[17] The parties submit that the standard of review for the RAD's determination of Convention refugee status is reasonableness. I agree (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]).

[18] To determine whether the decision was reasonable, this Court must ask whether the RAD decision “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). The Applicants bear the burden of satisfying the Court that any shortcomings are sufficiently central or significant to the decision to render it unreasonable (*Vavilov* at paras 100–101).

V. Analysis

A. *Did the RAD err in its assessment of the Applicants' credibility?*

[19] In rejecting the Applicants' claim, the RAD made a number of adverse credibility findings relating to three main issues: (1) the Applicants' assertion that they were able to depart from China aboard a flight from the Beijing airport using their own passports; (2) the summons that was tendered in support of the assertion that the Principal Applicant was wanted in China was fraudulent; and (3) the RPD's finding of a lack of religious knowledge on the part of the husband of the Principal Applicant.

[20] The negative credibility finding played a significant role in the RAD determining that, on the balance of probabilities, the Principal Applicant was not wanted by the PSB or any authorities in China. In addition, the RAD made it clear that the lack of credibility regarding being wanted by the authorities in China was a determinative issue in its conclusion to reject the Applicants' claim.

[21] Foremost in the RAD's determination on credibility was its finding that, on the balance of probabilities, the Principal Applicant's personal information would have been entered into the security database operated by the authorities in China and thus the departure from China using their own passports would constitute an implausible series of events.

[22] It seems clear that the RAD, in making its plausibility finding, relied heavily on the Jurisprudential Guide. In its decision, the RAD stated the following:

[13] The RAD finds that the preponderance of the documentary evidence contained in the record indicates that it is not possible for a person who is wanted by authorities to exit China. The RAD is supported in this finding through the issuing of the jurisprudential guide from the IRB Chairperson.

[14] Members are expected to follow the reasoning in a decision identified as a jurisprudential guide to the extent set out in the accompanying statement, unless there is reason not to do so, where the facts underlying the decision are sufficiently close to those in the case being decided to justify the application of the reasoning in the jurisprudential guide.

[Emphasis added.]

[23] It should be kept in mind that the Jurisprudential Guide contains an analysis of whether a person wanted by the authorities in China can exit that country through a commercial airport using his or her own passport.

[24] There is no doubt that the RPD and the RAD have complete jurisdiction to determine plausibility, and as long as the inferences drawn by the tribunals are “not so unreasonable as to warrant” the intervention of the court, their findings are not open to judicial review (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA), [1993] FCJ No 732 (QL) at para 4 [*Aguebor*]). In addition, the burden is on the applicant to show that such inferences could not reasonably have been made (*Aguebor* at para 4).

[25] However, here, the Jurisprudential Guide upon which the RAD based its implausibility finding was revoked on June 28, 2019 [Revocation Notice], some six months following the RAD decision. It was revoked because it contained a finding of fact that was not supported by the Immigration and Refugee Board’s National Documentation Package on China [China NDP] in effect at the time of the decision and because there had been numerous updates to the China NDP since the designation of the Jurisprudential Guide.

[26] Specifically, paragraph 22 of Jurisprudential Guide TB6-11632 cites Response to Information Request CHN105049.E [RIR] in support of its finding that facial recognition technology is used to take photos of passengers departing from the Beijing airport. However, the RIR actually stated that this type of technology was no longer in use at the Beijing airport at the time it was published.

[27] The Revocation Notice in respect of the Jurisprudential Guide states the following:

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.

[Emphasis added.]

[28] The Applicants argue that the RAD mistakenly relied on the Jurisprudential Guide and submit that the *Policy Note regarding the identification of TB6-11632 as a RAD Jurisprudential Guide*, which states that RAD members “are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so”, unlawfully influences how RAD members adjudicate appeals. The Applicants further argue that the Jurisprudential Guide’s reasoning was outdated at the time the RAD considered it.

[29] I accept the Applicants’ argument on this point. This Court has found that the policy notes accompanying the Jurisprudential Guide constitute an improper interference with the RAD’s adjudicative independence.

[30] In *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 [CARL], a number of jurisprudential guides that were being relied upon by the RPD were challenged.

[31] In *CARL*, the Chief Justice held, in particular, that it is possible that reliance upon a jurisprudential guide could create an unfair burden of proof for an applicant, and that the statement of expectations that accompany a jurisprudential guide could potentially unlawfully



fetter the adjudicative independence of the decision-maker. However, as conceded by the Applicant, that does not mean that it always does, and we need to assess the matter in each case.

[32] The decision in *CARL* held that the statement of expectations in the policy note that accompanied this particular Jurisprudential Guide (TB6-11632) is unlawful and inoperative as it relates to factual determinations on the use of passports to exit China, the Chinese Golden Shield system, and corruption in the Chinese border security infrastructure. This holding was justified on the belief that the Jurisprudential Guide specifies factual determinations that unlawfully interfere with the RAD's discretion in making its own factual findings with respect to specific refugee claimants (*CARL* at paras 1-9).

[33] In the case before me, the RAD relied on the very factual determinations that were found to be unlawful in the *CARL* decision (at paras 163, 165), namely:

1. The claimant could not have left China using his genuine passport given his allegation that the PSB wanted to arrest him.
2. 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.
3. 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.
4. 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.

5. It is highly improbable that the smuggler allegedly retained by the applicant would have prior knowledge of whom to bribe in order to facilitate the claimant's safe travel through each of the multiple checkpoints at an airport.

6. Given the claimant's allegation that he was wanted by 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.

[34] In this case, the RAD made factual findings that are essentially identical to points 1, 3, 4, and 6 above and based these findings at least in part on the Jurisprudential Guide, which the RAD found described circumstances that are similar to the circumstances at hand in this case.

[35] The RAD specifically noted the impugned policy, whereby members are expected to follow the reasoning in the Jurisprudential Guide unless there is reason not to do so, and went on to apply the reasoning in it. As was discussed by the Chief Justice in *CARL*, it is reasonable to apprehend that some board members may feel pressured to adopt the factual determinations in the Jurisdictional Guide.

[36] As was made clear in *CARL*, such findings of fact by the RAD are problematic, primarily because they were in relation to issues that would be of significance to an assessment of whether the Applicants could leave China by air using their own passports (*CARL* at para 165).

[37] Here, the RAD relied on the Jurisprudential Guide to support its position that a "covert facial recognition system" was in use at the Beijing airport at the time the Applicants departed China. A review of the record shows that the China NDP does not describe the use of covert

facial recognition systems at the Beijing airport. In relying on this finding, the RAD effectively made the same error that ultimately led to the revocation of the Jurisprudential Guide.

[38] In any event, this Court has held that where the decision-maker expressly adopted the findings in the Jurisprudential Guide, the revocation of the Jurisprudential Guide weakens the decision-maker's finding on this issue (*Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10).

[39] In my view, this is a sensible approach. While the Jurisprudential Guide was in force at the time of the RAD's decision, that is, in December 2018, the subsequent revocation of the Jurisprudential Guide undermines the support for the RAD's finding on this issue.

[40] Where, as is the case here, an applicant is using the assistance of a smuggler to defeat the security protocols so as to be able to exit China, the RPD and the RAD have an obligation to explain why the assistance of the smuggler could not overcome those security features. In this case, the RAD attempted to do so, but concluded that "even if a bribe was paid at the airport by the smuggler, it does not account for the additional level of screening conducted by the airline at the gate and for how the Appellant was able to by-pass the covert facial recognition system" [emphasis added].

[41] In light of this Court's findings in *CARL* that the statement of expectations in the policy note on the use of the Jurisprudential Guide constitutes an unlawful fettering or an improper interference with RAD members' discretion, I find that there is a risk that the RAD member's

adjudicative independence may have been interfered with (*CARL* at paras 8-9). Considering the RAD's repeated reliance on the Jurisprudential Guide and the importance of the factual determinations that resulted from that reliance, I find that the entire RAD decision must be set aside and reviewed.

[42] The Respondent suggests that although it is correct that the Jurisprudential Guide was revoked subsequent to the RAD decision, it was revoked solely as regards its determination in relation to the covert facial recognition capabilities used at airports in China.

[43] That may technically be correct, however, the Revocation Notice continued:

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.

[44] To me, this leaves open the possibility that there were other aspects of the Jurisprudential Guide, in addition to the purported use of covert facial recognition technology, that may have been updated, modified or amended and may have otherwise been incorrect at the time the Jurisprudential Guide was being relied upon by the RAD.

[45] The Respondent further argues that "plausible" does not mean "probable", and that although the RAD decision mentioned the facial recognition features as one of the factors leading to the conclusion that it was implausible for the Applicants to have departed China in the way they profess to have done, there were other, legitimate reasons which reasonably led the RAD to determine that the Applicants' story as to how they got out of China was improbable.

[46] I accept that it was open to the RAD to find that the Applicants are not credible or that the evidence provided by the Applicants simply did not meet the burden upon them to establish their claim, on the balance of probabilities. However, that is not the point.

[47] Here, the RAD's negative credibility finding had cascading effects which led the RAD to give little weight to other portions of the Applicants' story and documentary evidence. I am not suggesting that the Applicants have made out their case, on a balance of probabilities, as to their ability to avoid the police screening process at the airport or that they have established that their fear of persecution is justified.

[48] My finding is limited to a determination that the RAD's finding of implausibility with respect to the Applicants' assertion of having exited China in the way they did was in itself not reasonable as it was tainted by what seems to me to be a reliance on the now revoked Jurisprudential Guide, one of the reasons for such revocation being specifically one of the factors relied upon by the RAD to make its finding on credibility.

[49] While I do not necessarily have to make a determination on this issue, I am of the opinion that the reliance on the Jurisprudential Guide may have fettered the RAD's decision, and where such a risk exists, the decision is tainted and should be set aside.

[50] The Respondent cites *Singh v Canada (Citizenship and Immigration)*, 2018 FC 561, as a case which puts the use of jurisprudential guides in context and in which it is made clear that such guides are meant as a mechanism to ensure consistency in decision-making; although they

are not binding, board members are expected to follow the guidelines unless “compelling or exceptional reasons exist to depart from them”.

[51] The RAD decision was rendered on December 13, 2018. The Jurisprudential Guide was revoked on June 28, 2019. The Jurisprudential Guide was properly in effect at the time of the RAD decision, and it is not possible to say if there were any inaccuracies in the Jurisprudential Guide at the time it was being relied upon by the RAD other than the issue of the use of facial recognition technology at the Beijing airport.

[52] However, it seems to me that the mere prospect that such may have been the case, coupled with the emphasis placed by the RAD on the Jurisprudential Guide in its plausibility finding, which led to a negative credibility finding, is enough to require that the decision be set aside and returned to the RAD for redetermination without any consideration of the Jurisprudential Guide.

[53] Reliance on the Jurisprudential Guide in this context risks doing an injustice to the Applicants.

[54] As such, I make no further finding or determination in respect of any other aspect of the RAD decision and leave the RAD to reassess the Applicants’ claim without reference to the Jurisprudential Guide.

[55] Given my finding on the first issue, which I find determinative with respect to the present application, I need not deal with the second issue regarding whether the RAD erred in its assessment of the Applicants' religious identity and practice in Canada.

VI. Conclusion

[56] I would allow the application for judicial review considering the risk that the RAD decision may have been unduly fettered by the Jurisprudential Guide, which has since been revoked.

**JUDGMENT in IMM-1296-19**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed.
2. The decision is set aside and the matter is remitted to a different panel for redetermination, in line with my reasons.
3. There is no question for certification.

“Peter G. Pamel”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1296-19

**STYLE OF CAUSE:** TING CAO, NING LI v THE MINISTER OF  
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