

Federal Court



Cour fédérale

Date: 20240219

Docket: IMM-1424-23

Citation: 2024 FC 267

Ottawa, Ontario, February 19, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

HUAJIE XU

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, the Minister of Citizenship and Immigration [Minister], is seeking judicial review of an Immigration Appeal Division [IAD] decision rendered on January 16, 2023 and amended on February 8, 2023 [IAD decision] in which the panel found that there are no reasonable grounds to believe that the respondent, Mr. Xu, a 43-year-old Chinese national, is

inadmissible to Canada on security grounds pursuant to paragraphs 34(1)(a) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Before coming to Canada, Mr. Xu was a member of the People's Liberation Army [PLA] for 20 years and a lecturer at the PLA Information Engineering University [PLAIEU] for 16 years; the PLAIEU is China's only military academy for cyber and electronic warfare and is reputed to be a centre for information warfare research for the Chinese military. The issue was whether Mr. Xu, as a member of the PLAIEU, was also a member of the units of the PLA which were responsible for cyber espionage and which had direct responsibility and control over the university, and was thus inadmissible to Canada on security grounds.

[3] For the reasons that follow, the application for judicial review is granted.

II. Background and Underlying Decisions

[4] Very few of the facts are in dispute. Mr. Xu was born on April 10, 1980. He enlisted in the PLA in 1998 and attended the Jinan Army College in 2002, from which he graduated with a bachelor's degree in Infantry Command in 2006; the courses he took included, amongst others, physics, applied mathematics, writing, English, army management, Chinese, a course on foreign armies, and a computer course – in other words, what were described as being basic courses for undergraduate military students.

[5] Mr. Xu began as an instructor at the PLAIEU teaching military tactics – field training. As furthering his career at the university and receiving promotions within the PLA required

advancement in his education, Mr. Xu enrolled as a student at the PLAIEU, from which he graduated with a master's degree in Military Education Training in 2009. His master's degree was sufficient to place Mr. Xu at the lower end of the tenure track for teachers at the PLAIEU; he was promoted from instructor to the position of lecturer, and began to teach military theory and strategy within the university's Department of Combat Command, a track said to be unrelated to the PLAIEU's espionage activities. Mr. Xu never attained the rank of assistant professor or of a fully tenured professor before retiring from the university in 2018.

[6] However, although he began his military career as a Lieutenant, he was later promoted to Lieutenant Captain. In 2010, he was promoted to the military rank of Major within the PLA, and then sent abroad to the Combined Arms Academy of the Armed Forces of the Russian Federation, where he studied Military Management and from which he returned to China in 2013. In 2014, Mr. Xu was promoted to Lieutenant Colonel, and continued to serve and teach in the Department of Combat Command at the PLAIEU.

[7] Between 1950 and 2016, the PLA was operated under four general departments: the General Political Department, the General Logistics Department, the General Armaments Department and the General Staff Department [GSD]. According to Mr. Xu, the GSD was not only the technical command headquarters of the PLA, but it was also involved in the greater Chinese society, and ran such operations as factories, hospitals, schools and universities. At the time Mr. Xu was at the PLAIEU – whether it occurred before or after he first arrived at the university is unclear – the university fell under the control of the 3rd Department of the GSD [3/PLA] which, prior to the PLA's restructuring in 2016, was the unit of the PLA responsible for

signal intelligence and dedicated to, and engaged in, cyber espionage; it is uncontested that the 3/PLA has been recognized to have engaged in espionage against Canada and contrary to Canada's interests. With the 2016 restructuring, the bureaus of the 3/PLA were absorbed into the National Security Department [NSD], to which was transferred oversight and control of the PLAIEU; the NSD has also been recognized as engaging in espionage against Canada and contrary to Canada's interests. For its part, the NSD fell under the responsibility and control of the Strategic Support Force's [SSF] Network Systems Department, the space, cyber, political and electronic warfare unit of the PLA which holds the military's signals intelligence capabilities; there is no dispute that, as was the case with the 3/PLA, the NSD and the SSF are engaged in cyber espionage and that the members of these units are inadmissible to Canada.

[8] Mr. Xu remained in the PLA and teaching at the PLAIEU until his decommission as an active military officer and his retirement from the PLAIEU in November 2018 at the age of 38; as stated, he had spent 20 years in the Chinese military, rising to the rank of Lieutenant Colonel. In fact, the issuing authority of Mr. Xu's Certificate of Decommissioned Military Officer was the "Political Works Department, University of Information Engineering, **Strategic Support Force** of Chinese People's Liberation Army" [emphasis added].

[9] Mr. Xu arrived in Canada on July 10, 2021, on the strength of a permanent resident visa issued as part of his spouse's sponsorship application. Between his retirement from the PLAIEU in November 2018 and his arrival in Canada at the age of 41, Mr. Xu was mostly unemployed in China; he declared being self-employed without further detail for about 12 months during that period. Mr. Xu also disclosed his military and teaching background as part of the spousal

sponsorship process – there is no allegation of misrepresentation on the part of Mr. Xu, although the Minister takes issue with the manner in which Mr. Xu purportedly minimized his involvement in the military and his time at the PLAIEU. In any event, after what Mr. Xu describes as a lengthy application process, he was issued a permanent resident visa for Canada. Upon arrival at Vancouver, however, he was detained by the Canada Border Services Agency [CBSA] and questioned by a border services officer for potential inadmissibility, on the grounds of possibly being a member of an organization that had engaged in espionage, *to wit*, the 3/PLA, through his involvement with the PLAIEU; although Mr. Xu arrived in Canada with a valid permanent resident visa and thus did not enter Canada illegally, the CBSA determined that he was nonetheless not authorized to enter Canada, and pursuant to sections 18 and 21, and subsection 55(3), of the IRPA, could be subjected to detention if there were reasonable grounds to believe that he was inadmissible to Canada, thus allowing for an admissibility hearing.

[10] On July 17, 2021, the CBSA prepared a report pursuant to subsection 44(1) of the IRPA [the Section 44 Report] alleging that Mr. Xu is inadmissible to Canada, as per paragraphs 34(1)(a) and (f) of the IRPA, because he was a member of the PLAIEU, “which was subordinate to” the 3/PLA, and because “[t]here are reasonable grounds to believe that the [3/PLA] has engaged in an act of espionage that is against Canada or that is contrary to Canada’s interests”; Mr. Xu was also detained as a danger to the security of Canada. The Section 44 Report was referred to the Immigration Division [ID] of the Immigration and Refugee Board for an admissibility hearing.

[11] Before the ID, the Minister argued that Mr. Xu's employment as a lecturer at the PLAIEU equates to providing material support to the activities of the 3/PLA because he contributed to the training and recruitment of soldiers who would go on to work in the 3/PLA, and because given that the PLAIEU was subordinate to the 3/PLA, Mr. Xu's specific teaching activities made him a member of an organization which engaged in an act of espionage against Canada or that is contrary to Canada's interests.

[12] In a decision rendered on September 24, 2021, the ID found that there were no reasonable grounds to believe that Mr. Xu was inadmissible to Canada. Although the ID accepted that the PLAIEU was subordinate to the 3/PLA and its successor organizations – the NSD and the SSF – and that certain entities and individuals at the PLAIEU provided material support for the cyber espionage efforts of the 3/PLA, the NSD and the SSF, there was “insufficient evidence to find that the PLAIEU itself has engaged in espionage that is against Canada, or contrary to Canada's interests.” After considering factors such as the institutional links between the PLAIEU and the 3/PLA, the NSD, or the SSF; the size and scope of the PLAIEU, the 3/PLA, the NSD, and the SSF; any material support by the PLAIEU to the benefit of the 3/PLA, the NSD, or the SSF; any material support by Mr. Xu to the benefit of the 3/PLA, the NSD, or the SSF; and other non-exhaustive criteria, including Mr. Xu's knowledge of organizations, how he furthers their objectives, his intentions, the duration of his participation, his membership in related supportive groups, and the environment or context in which the participation occurred, the ID concluded that Mr. Xu's employment and role at the PLAIEU did not rise to the level of making him a member of the 3/PLA, the NSD or the SSF within the meaning of paragraph 34(1)(f) of the IRPA.

[13] Specifically as regards the issue of whether Mr. Xu was providing material support for the 3/PLA and its successor organizations, the ID concluded:

[70] The Minister submits that Mr. Xu, a ranking military officer, taught mandatory courses at the PLAIEU and it is reasonable to conclude that some of those students went on to join the 3/PLA or take higher education linked to China's espionage capacity. Therefore, therefore [*sic*] he provided material support by training and recruiting members of the 3/PLA.

[71] I find that the Minister has failed to establish reasonable grounds to believe that Mr. Xu participated in the recruitment of personnel into the PLAIEU for the purpose of furtherance into the 3/PLA, the NSD or the SSF.

[72] As Mr. Xu taught military tactics and strategy courses that are mandatory for all university students in China, it is reasonable to conclude that some of the students he taught may have gone on to employment in the 3/PLA or espionage related research sectors. However, the Minister [*sic*] has not established on reasonable grounds to believe that this was the purpose of Mr. Xu's position or that he would have known he was teaching students destined for the 3/PLA or espionage related sectors, or that the teaching of China-wide mandatory military classes equates to material support to the benefit of the 3/PLA, NSD, or the SSF.

[14] The ID also set out the factors that it considered in coming to its decision, some of which tended to support a finding that Mr. Xu was a member of the 3/PLA and its successor organizations and some of which would go to support a finding that Mr. Xu was not. In the end, the ID weighed the various factors and gave more weight to those which suggested that Mr. Xu was not a member of the 3/PLA and its successor organizations, in particular because of the size and scope of the various organizations and the complete absence of information that Mr. Xu had any contact with anyone from those organizations or any information or knowledge of them. The ID found that Mr. Xu's position as a lecturer teaching basic military tactics and strategy classes to students, in a context of cultural secrecy and where every university student in China must

take these classes, does not translate into providing material support to the 3/PLA and its successors.

[15] The Minister appealed the ID's decision to the IAD; the IAD dismissed the Minister's appeal; the main issue before the IAD was whether Mr. Xu's membership and involvement in the PLAIEU equated to membership in the 3/PLA. The IAD first recognized, on the basis of the evidence provided by the Minister, that the 3/PLA has carried out acts of espionage contrary to Canada's interests. While the IAD accepted, as did the ID, the evidence that the PLAIEU was subordinate to the 3/PLA prior to the organizational reform and is now subordinate to the NSD, which falls under the SSF; that some PLAIEU faculty members and students have engaged in cyber espionage; and additionally, that the PLAIEU has trained and recruited individuals to carry out acts of cyber espionage, the IAD was nonetheless not persuaded by the Minister's proposition, at the time, that all students and employees of the PLAIEU were automatically members of the 3/PLA or its successor organizations.

[16] The IAD based much of its findings on the evidence of Mr. Sida Liu, a socio-legal researcher and Associate Professor of Sociology and Law at the University of Toronto; Mr. Liu's primary research area is in Chinese law and society, including China's legal profession, criminal justice system, human rights, rule of law, and other related social and political issues in Chinese society. In addition to setting out the history of the PLAIEU from when it was under the control of the PLA's GSD to present day, Mr. Liu's report and testimony may be summarized as follows:

1. The PLA is well integrated into the Chinese general society, and often runs institutions like universities and hospitals.
2. Although the PLAIEU has been under the jurisdiction of the 3/PLA and its successor organizations, and although it is mainly known for its expertise in information warfare, espionage and computer hacking, on the whole, it is not a military unit of the 3/PLA, but rather a university with a broad mandate and many areas of study that have no links to cyber espionage or to the objectives of the 3/PLA. There are over 70 different majors, including military majors; however, the research and types of courses that are related to espionage make up about 20% of what the university offers. In fact, there are many other areas within the PLAIEU, such as engineering and mathematics, that have nothing to do with espionage.
3. Given its thousands of employees (not only individuals working in the teaching fields, but also regular maintenance workers and kitchen staff) and its over 10,000 students (many of whom obtain civilian rather than military jobs upon graduation), it does not follow that all members of the PLAIEU are also members of the 3/PLA and its successor organizations. In fact, a student can attend the university, get a military-style education, pay tuition if he or she does not also join the PLA, and graduate with the view of obtaining a civilian job.
4. Mr. Xu's promotion to Lieutenant Colonel was routine in nature given the time that he had spent as a lecturer at the PLAIEU, and, rather, an individual's connection with the 3/PLA is ascertained by considering the role that the

individual played – their position and their daily activities – in the university and not necessarily their military rank. In this case, the course that Mr. Xu taught before acquiring his master’s degree was basic military tactics, a course that was taught in every university in China, and was largely composed of physical training; after Mr. Xu obtained his master’s degree, the courses that he taught were not related to espionage but rather to military theory and strategy.

5. As a university, the PLAIEU has multiple tracks. Mr. Xu was part of the command track, which is the track related to teaching individuals training to be army command officers, and not part of the engineering track and the network track, which are the tracks related to network warfare and espionage.
6. Mr. Xu’s profile (his low rank, the nature of the courses that he took, and the courses he taught) does not support his involvement in the areas where the 3/PLA was operating; although it is all secret, it was very unlikely that Mr. Xu was a member of, or had any connection with, the 3/PLA as there was nothing in Mr. Xu’s profile that would signal or that would provide a basis for concluding that he may be a member of the 3/PLA.
7. Someone in Mr. Xu’s teaching position could possibly be aware of the structure and connection between the university and the 3/PLA given that it was generally known that the PLAIEU was specializing in espionage.

[17] During the IAD hearing, the Minister objected to any reliance being placed upon Mr. Liu’s report and testimony. Although the Minister agreed that Mr. Liu has an impressive

background in sociology and the law, the Minister argued that the PLAIEU is not a traditional university but rather a military academy for the secretive cyber warfare department of the PLA; Mr. Liu, who may have some knowledge of how civilian universities work in China, himself admits that the operation of the 3/PLA and its successor organizations, which control the university, is secretive, and for his part, Mr. Liu only has a general knowledge of how military universities work, in particular the internal workings of the PLAIEU. Therefore, argued the Minister, Mr. Liu was speculating in much of what he was saying, as he is not an expert in the field of military training, and was testifying to facts regarding which he has no information and no expertise; as a result, Mr. Liu's testimony regarding the PLAIEU, the recruitment and training process within the military university, how and the reasons why ranking military officers are promoted within that university, and how an officer's profile should be assessed within the military environment of the PLAIEU should be provided minimal weight in determining whether or not Mr. Xu was a member of the 3/PLA.

[18] In finding as it did, the IAD weighed certain factors and had to assess whether membership in the 3/PLA could be inferred from activities within the university that materially supported the 3/PLA. The IAD acknowledged that Mr. Xu was a soldier who spent his entire military career at the PLAIEU, earned a master's degree from the PLAIEU, was promoted to Lieutenant Colonel within the military ranks, and taught combat command courses, including military intelligence and military tactics, after returning from studying abroad at the Combined Arms Academy of the Armed Forces of the Russian Federation for two years. However, the IAD concluded that Mr. Xu's limited teaching role at the PLAIEU, which did not include any courses in cyber espionage, did not constitute material support for the 3/PLA. While the IAD accepted

that the PLAIEU is “subordinate to the SSF/NSD and was formerly subordinate to the 3/PLA, ... that it has staff and faculty members who are 3/PLA officers”, and that “part of the university’s mandate is most likely to graduate military officers and civilian cadres who can engage in espionage and cyber warfare, it is also a comprehensive university with many areas of study completely unrelated to espionage and other 3/PLA objectives.” Consequently, the IAD concluded that the PLAIEU was not a military unit of the PLA and that “[t]here are not reasonable grounds to believe that the PLAIEU itself engages in cyber espionage or is directly linked to 3/PLA units that have engaged in cyber espionage.”

[19] In the end, the IAD determined that although Mr. Xu was a member of the PLAIEU and although the university was subordinate to the 3/PLA and its successor organizations, given the evidence and taking into account the criteria for membership, it was not prepared to find that Mr. Xu’s positions at the PLAIEU “as an instructor teaching field tactics or as a lecturer teaching combat command rais[e] reasonable grounds to believe that he was a member of the 3/PLA”; consequently, it was determined that Mr. Xu had “established that there are not serious grounds to believe that he is inadmissible” under paragraphs 34(1)(a) and (f) of the IRPA.

[20] The IAD decision is the subject matter of the Minister’s application for judicial review.

III. Standard of Review

[21] The parties agree, and so do I, that the standard of review in this case is one of reasonableness. The Minister bears the onus of demonstrating that the decision is unreasonable, in that it does not meet the requisite degree of justification, intelligibility and transparency

(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 100; *Al Ayoubi v Canada (Citizenship and Immigration)*, 2022 FC 385 at para 15). In addition, as the Supreme Court recently reminded us in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*], reasonableness review is concerned with both the administrator’s decision-making process as well as outcome and begins with the reasons of the decision-maker; furthermore, the failure of a decision-maker to engage with the central aspects raised by a party is generally sufficient to set the decision aside (*Mason* at paras 58, 60, 74).

IV. Legal Framework

[22] The relevant provisions of the IRPA state as follows:

Security	Sécurité
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	34 (1) Empoignent interdiction de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada’s interests;	a) être l’auteur de tout acte d’espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
...	[...]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	f) être membre d’une organisation dont il y a des motifs raisonnables de croire qu’elle est, a été ou sera l’auteur d’un acte visé aux alinéas a), b), b.1) ou c).

V. Preliminary Matter

[23] The present proceeding was instituted naming as applicant the Minister of Public Safety and Emergency Preparedness. The correct name for the applicant is the Minister of Citizenship and Immigration, pursuant to subsection 4(1) of the IRPA and the *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*. Therefore, the style of cause will be amended to name the Minister of Citizenship and Immigration as applicant.

VI. Issues

[24] The main issues in this application for judicial review are:

- A. Did the IAD apply an incorrect test for membership?
- B. Is the IAD's assessment of the evidence and Mr. Xu's personal circumstances on the issue of whether he was a member of the 3/PLA unreasonable?
- C. Did the IAD improperly rely on non-expert opinion to determine membership?

VII. Analysis

[25] Given the manner in which I find as regards the other issues, I need not deal with the issue of whether the IAD improperly interpreted the test for membership under paragraphs 34(1)(a) and (f) of the IRPA. Suffice to say that there does not seem to be a serious dispute between the parties as to the test for membership; both parties accept that the Federal Court of Appeal in *Poshteh v Canada (Minister of Citizenship and Immigration)* (FCA), 2005 FCA 85 (CanLII), [2005] 3 FCR 487 [*Poshteh*], made it clear that Parliament intended the term "member" in subsection 34(1) of the IRPA to be interpreted in a broad and unrestricted manner, and although formal membership alone may well lead to a finding of inadmissibility (*Saleh v*

Canada (Citizenship and Immigration), 2010 FC 303, 363 FTR 204 at para 19), formal membership in the organization, significant level of integration within the organization, knowledge of the organization's espionage activities, or intended contribution to or complicity with such activities is not necessarily required to support a finding of inadmissibility under section 34 of the IRPA.

[26] In addition – and unlike other IRPA provisions that base inadmissibility on individual culpability for committing an offence or engaging in specific activities, for example a person's own participation in or contribution to any specific offences or activities – membership in the context of paragraph 34(1)(f) of the IRPA is based on a person's association with an organization that engages in such activities; the assessment of membership is highly factual and generally focuses on the nature of the individual's involvement with the organization, their degree of commitment to the organization, and the length of time that they were associated with the organization. In short, what is required is an assessment of a series of factors in order to determine whether or not the individual is sufficiently involved in the organization to be considered a member; although one may consider an individual's knowledge of or involvement in the specific offences or activities, requiring such knowledge of or involvement in such specific offences or activities for the purposes of determining membership is a reviewable error (*Poshteh* at paras 27 to 31; *Canada (Public Safety and Emergency Preparedness) v Ukhueduan*, 2023 FC 189 at para 22; *Khan v Canada (Citizenship and Immigration)*, 2017 FC 397 at paras 21 and 29; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 (CanLII), [2018] 2 FCR 344 at paras 91 to 97; *Kanagendren v Canada (MCI)*, 2015 FCA 86, [2016] 1 FCR 428, leave to appeal to the SCC dismissed 2015 CanLII 75966 at para 22; *Nassereddine v Canada (Citizenship*

and Immigration), 2014 FC 85, [2015] 2 FCR 63 at paras 50 to 61; *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146, [2013] FCJ No 1266 at para 29).

[27] As regards the remaining issues, the Minister argues that the IAD decision is internally inconsistent and legally incorrect, as the IAD did not properly assess Mr. Xu's personal circumstances in the determination of whether he was a member of the 3/PLA and as it improperly relied on non-expert evidence to support its conclusions on that issue, without even addressing the objections raised as to the relevance and weight to be given to Mr. Liu's report and testimony.

[28] During the hearing before the IAD, the Minister objected to any significant reliance being placed upon the report and testimony of Mr. Liu; the Minister stated that the PLAIEU was not a university in the traditional sense, but rather a military academy for the secretive cyber warfare department of the PLA, and that in light of this, Mr. Liu is testifying to facts regarding which he has no actual knowledge or information, and is mostly speculating as he is not an expert in military training given that he only has, as he himself admitted, a general understanding of military universities. As a result, his testimony as to the PLAIEU and the military recruitment and promotion process should be given minimal weight; the context of the PLAIEU is different from the reality about which Mr. Liu is testifying, and although he has extensive education in sociology, that is not the issue before the IAD. The Minister stated that the issues before the IAD are very narrow and lie outside the expertise of Mr. Liu, who has admitted to not being familiar with the 3/PLA or, more recently, with the SSF. In fact, when asked to which person or

department Mr. Xu reported, Mr. Liu stated that he would have to be speculative in answering that question.

[29] For my part, the difficulty that I have with the IAD decision is, in essence, an overlap of all three of those issues; I find that the IAD improperly assessed Mr. Xu's personal circumstances by limiting such assessment to the context in which Mr. Liu's expertise was provided, expertise which had limited relevance to those very circumstances, and did so without addressing either the objections of the Minister as regards Mr. Liu's evidence or the evidence which directly contradicted such an assessment. Overall, the premise upon which the IAD assessed Mr. Xu's personal circumstances is that of a lecturer in a university not unlike any other, and that although the PLAIEU's "mandate is most likely to graduate military officers and civilian cadres who can engage in espionage and cyber warfare", it is also a comprehensive university which has many areas of study completely unrelated to espionage and other 3/PLA objectives. Much of the IAD's assertions found support in the evidence of Mr. Liu, who testified as a sociologist with only general knowledge of the internal workings of military universities and the PLAIEU in particular, but whose evidence the IAD relied on with respect to many of its key findings in its assessment of Mr. Xu's personal circumstances. However, that seems to have missed the point that the Minister was making. The Minister is in essence asserting that the IAD's assessment of the evidence was undertaken through the prism of Liu's narrative of the PLAIEU being a comprehensive university first, and a cyber intelligence epicentre second, and that such a narrative belies the evidence on record and taints the manner in which the IAD assessed Mr. Xu's personal circumstances.

[30] From the Minister's perspective, the PLAIEU is first and foremost the centre of cyber espionage research and training in China – which incidentally also offers studies in areas such as engineering, mathematics and computer science for students who are not interested in pursuing a military career but who wish to nonetheless pursue a military education. Putting aside the admittedly restricted perspective of Mr. Liu's report and testimony, which is, it must be acknowledged, non-military based, the assessment of Mr. Xu's personal circumstances should have been made against the backdrop of a university whose stated goal, as supported by the university's own website, is primarily the development of talent so as to further the objectives of the cyber espionage unit of the PLA; although the PLAIEU may also graduate students in unrelated areas such as engineering and mathematics, the role of teachers of military rank within the university teaching military courses should have been assessed with those stated objectives in mind, hence the objection by the Minister to the evidence of Mr. Liu, an objection which does not seem to have been addressed by the IAD.

[31] The Minister concedes before me that not all members of the PLA, and certainly not all ranking lieutenant colonels in the PLA, are members of the 3/PLA. In addition, the Minister concedes that the very employment alone at the university, without any other considerations, is not enough to render a person a member of the 3/PLA. The Minister's position, however, is that given Mr. Xu's ranking as a Lieutenant Colonel in the PLA and the fact that he was a teaching member of the PLAIEU – which is a military university that is geared towards supporting the 3/PLA and its successor organizations and that is now controlled by the SSF, being the lead unit for cyber warfare for China – even if Mr. Xu was not directly involved in the activities of espionage, given the many factors that surround his employment, it was unreasonable to

conclude that his personal circumstances were insufficient to find reasonable cause to believe that he was a member of the 3/PLA, and even though he may purportedly not have had direct knowledge of the work of the 3/PLA, given his role at the PLAIEU, Mr. Xu was actively contributing and committed to the objective of cultivating high-level talent in the field of information warfare for the modernization of China's national defence and military.

Consequently, argues the Minister, Mr. Xu was furthering the goals and activities of the 3/PLA and its successor organizations by actively engaging in the study and teaching of information warfare.

[32] Although it is uncontested that Mr. Xu did not teach courses on cyber security or cyber warfare, the Minister argues that Mr. Xu's minimizing of his senior rank in the PLA by stating that he was a simple lecturer at the PLAIEU teaching basic introductory military command courses belies the evidence as to the nature of the courses that he took during his studies, including Informational Warfare and Command, Information Security and Confidentiality Information, Network Countermeasures, and Methods of Network Confrontation, and the importance of his role within this particular military university. As an example, the Minister points to an extract from the interview between Mr. Xu and a CBSA officer where Mr. Xu admits to being only "a simple ordinary lecturer who is teaching very simple introductory military education" and states that regarding "information warfare, I know very little." What is also clear is that Mr. Xu taught military command, and although it is not clear how many students taking Mr. Xu's classes were in programs such as mathematics, computer science and engineering, the argument of the Minister is that the courses taught by Mr. Xu were geared to

students taking a military path, and thus supported the activities of the key division of the 3/PLA which undertook cyber attacks – and which, from the evidence, controlled the PLAIEU.

[33] Mr. Xu, for his part, does not deny the importance of the PLAIEU to supporting the cyber espionage units of the PLA, and says that there is no dispute that some of the students who graduate from the university eventually enter the area of cyber warfare and may well work for the SSF, but he asserts that he was an employee of the PLAIEU tantamount to a non-ranking civilian lecturer such as a teacher in the areas of engineering or mathematics or tantamount to an employee such as a cook or a janitor who, although employed by the PLAIEU, was not associated with and did not have knowledge of the side of the university known for its expertise in, and used by the 3/PLA for, cyber espionage. I should mention, however, that the situation here is different from the situation in *Geng v Canada (Citizenship and Immigration)*, 2023 FC 773, [2023] FCJ No 753 at paras 1 and 3, cited by Mr. Xu, where Mr. Geng, a civilian university professor who taught English to prospective spies at the Luoyang Foreign Languages Institutes, was found not to be inadmissible under paragraph 34(1)(f) of the IRPA; here, the situation is that of Mr. Xu joining the PLA, in which he was a senior military officer with the rank of Lieutenant Colonel and held a position as a lecturer in the Department of Combat Command of the PLAIEU; he did not simply teach English.

[34] As for the reliance placed by the IAD on the report and testimony of Mr. Liu, Mr. Xu takes the position that the IAD accepted his expertise as a sociologist and specialist in Chinese law and society, and that it only relied upon Mr. Liu's evidence within the scope of Mr. Liu's expertise in those areas. It would seem uncontested by the parties that Mr. Liu is not an expert in

the PLA nor in the area of the Chinese military, and although he may, as a sociologist, be very familiar with civilian universities in China, he is not an expert in military universities, admitting to not having published any articles on the PLA and to only having a general understanding of military universities such as the PLAIEU. In fact, so as to prepare his report, he had to undertake 20 or 30 hours of research on the PLAIEU and military universities in general. The PLAIEU seems to have multiple facets, and primarily on the basis of the evidence of Mr. Liu and the testimony of Mr. Xu, the IAD found that the courses related to espionage take up 20 percent of the research part of the PLAIEU, and that there are other areas, such as engineering, that have nothing to do with espionage and in which the university is well recognized. But again, I think this misses the mark and the argument that the Minister was making.

[35] The IAD relied upon Mr. Liu's evidence to determine, for example, that "while researchers and lecturers at PLA universities are typically promoted to higher military ranks over time, they are not necessarily involved in PLA military objectives, or related to activities such as espionage", and that Mr. Xu's "ultimate promotion to Lieutenant Colonel in 2014 and position as a lecturer in the Department of Combat Command does not amount to reasonable grounds to believe that he was a member of the 3/PLA." Mr. Xu argues that the Minister acknowledged Mr. Liu's expertise in sociology; that the IAD accepted his expertise as a sociologist and specialist in Chinese law and society, and, as stated earlier, only relied upon Mr. Liu's evidence within the scope of such expertise; and that when Mr. Liu was expressing his view that Mr. Xu's promotion to Lieutenant Colonel was only routine and expected given his years of service, he was speaking about the normal promotion of lecturers within a university setting, which is something within his expertise as a sociologist. Mr. Xu continued by arguing that the IAD took

into consideration the Minister's objections and therefore, on the basis of those objections, only relied on Mr. Liu's testimony in areas where there was no dispute, i.e., Chinese law and society. I disagree and must side with the Minister; putting aside for the moment that the IAD did not address the Minister's objections to the testimony of Mr. Liu, Mr. Liu is giving testimony on how PLA officers are promoted within the military and, more importantly, within the context of military universities, a context that Mr. Liu concedes only having limited knowledge about, in particular given his other concession that the 3/PLA's involvement and activities in the university are secret. This is not a question of reweighing of the evidence, nor is it a question of the IAD having missed a relevant factor in the determination of membership; rather, it is a question of the improper characterization of evidence as being able to support propositions that it admittedly cannot.

[36] The IAD also found as "reliable and persuasive" Mr. Liu's opinion that Mr. Xu "is highly unlikely to have been involved in 3/PLA military objectives or cyber espionage". Again, the difficulty that I have is that Mr. Liu is making his assertions based on his background as a sociologist, and not with any expertise in the PLA or its cyber espionage unit, and with only general knowledge of the inner workings of a military university subordinate to that unit. He also is making these assertions while having admitted that it would be speculative on his part to say to whom or to what department Mr. Xu reported. Consequently, I cannot agree with Mr. Xu that the IAD only relied upon Mr. Liu's testimony within the scope of his expertise, and must agree with the Minister that the IAD committed a reviewable error in relying upon testimony from someone who clearly does not have the expertise on the issues upon which reliance is placed.

[37] No doubt Mr. Liu has an impressive pedigree, with a doctorate and expertise in sociology and Chinese society; however, I do not see how he is qualified to be relied upon as regards the manner in which the NSD/SSF operate the PLAIEU, in particular regarding to what extent those who teach at the university are involved in the primary goal of the university – being, as stated earlier, the development of talent so as to further the objectives of the cyber espionage unit of the PLA – or regarding the proposition that the “majority of faculty and students have not been involved in studies or research related to computer network operations or the 3/PLA’s cyber espionage objectives.” There is no evidence that Mr. Liu has collaborated with the PLAIEU in the past or that he has met with or interviewed anyone who attended the university; although Mr. Liu has published on the subject of legal education in China which allowed him to undertake research in different kinds of universities, and higher education generally in China, he has not conducted any previous research on the PLAIEU and has only a general understanding of that university, as with many other higher-level universities in China. Also, as mentioned, Mr. Liu conceded that the 3/PLA’s activities within the PLAIEU in the area of cyber espionage were secret, and he also did not know to whom or to which department Mr. Xu reported while he was teaching at the PLAIEU.

[38] It may very well be that the IAD accepted that Mr. Liu had limited knowledge in cyber technology and espionage, but that is not the point. From my reading of the IAD decision, the IAD found support in Mr. Liu’s testimony on issues with respect to which clearly he had only limited or no knowledge; the issue is not whether a janitor or a cook at the PLAIEU was a member of the 3/PLA, but rather whether a ranking Lieutenant Colonel who was teaching military command in the main centre for cyber espionage in China was a member. As stated

earlier, from what I can tell from the record, Mr. Liu simply did not know which members of the teaching staff at the PLAIEU were integrated into the 3/PLA and its successor organizations, and to what extent. Both Mr. Xu and Mr. Liu admitted that the structure of the 3/PLA is secret.

[39] In this case, the lack of qualification of a person tendered for his or her expertise is sufficient to either refuse to admit the evidence or give it little weight. Although the IAD is not necessarily bound to follow the technical or legal rules of evidence (paragraph 175(1)(b) of the IRPA), it seems to me that to give such evidence more than minimal weight, or for the IAD to accept evidence which engages in speculation and inference drawing, as seen from the record before me, is unreasonable and a reviewable error (*Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 (CanLII), [2019] 4 FCR 331 at paras 56 and 63; *Suchon v Canada*, 2002 FCA 282, [2002] 3 CTC 547 at paras 31 and 32).

[40] Just as importantly, nowhere do I read in the IAD decision that the IAD addressed or in any way grappled with the Minister's objection to any reliance being placed upon Mr. Liu's testimony before stating that Mr. Liu's testimony rebuts the Minister's allegations that attending or working for the PLAIEU equates to 3/PLA membership, or before finding that Mr. Liu's testimony supports the conclusion that the "PLAIEU is not a military unit" of the PLA, but rather a comprehensive university which happens to only have "some institutional linkage" with the 3/PLA and its successor organizations. This is notwithstanding the contradictory evidence before the IAD that the PLAIEU itself is controlled by the very units of the PLA dedicated to cyber espionage, and specializes in hacking, cryptography and espionage, with its goal of "cultivating high level talents in the field of information for the modernization of national defence and

military”; this is also notwithstanding the PLAIEU’s own website identifying the university as “a military academy” and subordinate to the NSD, “specialized in military trades training and technical skill integration.” The failure to address the objections of the Minister and the failure to grapple with evidence which contradicted the IAD’s findings that the PLAIEU is first a comprehensive university rather than first being a military college, which would possibly require a different approach to the assessment of Mr. Xu’s personal circumstances, are reason alone to find the IAD decision unreasonable (*Mason* at paras 58, 60, 74).

[41] I accept that after the restructuring in 2016, Mr. Xu only spent the last two years of his career at the PLAIEU and was then decommissioned. However, the evidence is that as a division of the GSD, the 3/PLA controlled the PLAIEU while Mr. Xu taught at the university. The IAD only said that the nature and extent of the control prior to the restructuring was not clear, and focused on the general student output at the PLAIEU. I think such a focus missed the mark. The IAD should have been focused on the extent, if at all, to which the teaching efforts of Mr. Xu supported the 3/PLA by training the core students who, without such training, could not undertake their roles for the 3/PLA. It may well be that the courses that Mr. Xu taught were also taught at other universities, or that in the Department of Combat Command track rather than in a technical track, Mr. Xu was teaching freshman officers about command and not giving specialists technical training in cyber espionage, but what is not clear from the analysis is whether what Mr. Xu was doing at the PLAIEU was a vital and necessary piece in the development of the recruits for the 3/PLA so as to make him a member of the 3/PLA and its successors, on a reasonable grounds to believe basis – that is, whether Mr. Xu, through his activities, his commitment level, his knowledge, and his involvement and contribution, did

enough so as to show that there are reasonable grounds to believe that he was a member of the cyber espionage unit of the PLA.

[42] I accept that when there are competing versions of the facts, even on a reasonable grounds threshold, the IAD had to make findings of fact (*Almrei (Re)*, 2009 FC 1263 (CanLII), [2011] 1 FCR 163 at para 101); however, in assessing the two versions of facts in this case, I would agree with the Minister that the IAD did not properly evaluate Mr. Xu's personal circumstances within the context in which Mr. Xu was undertaking his activities, and steered clear of making any assessment outside the admitted expertise of Mr. Liu. In short, the personal circumstances around Mr. Xu's employment in the PLAIEU and its connection to the 3/PLA, and later the NSD and the SSF, were addressed by the IAD through the prism of the testimony which Mr. Liu was qualified to give, and not the prism of the internal reality of the PLAIEU, which Mr. Liu admitted knowing very little about.

[43] All in all, I find the reasoning of the IAD unintelligible as regards the assessment of Mr. Xu's personal circumstances, which was clearly influenced by a report and testimony of a proffered expert who had limited expertise in the context in which such an assessment should have taken place, and this without addressing the very objection of the Minister which highlighted the problem inherent in such reliance. Therefore, I find the IAD decision unreasonable. For these reasons, this application for judicial review will be granted.

[44] Finally, Mr. Xu makes the argument that the Section 44 Report, the foundation of the Minister's case, says only that Mr. Xu was a member of the PLAIEU, and that it was the

PLAIEU which was subordinate to the 3/PLA; the word “subordinate” does not mean membership in the 3/PLA, so, argues Mr. Xu, as the Section 44 Report does not even assert membership, and given that the Minister is no longer asserting that membership in the PLAIEU alone would be sufficient for a determination of inadmissibility, there is no basis to conclude inadmissibility. From my perspective, that is an issue to be determined by the IAD as it considers the remaining issues that are the subject matter of the present application for judicial review.

JUDGMENT in IMM-1424-23

THIS COURT'S JUDGMENT is that:

1. The style of cause will be amended to name the Minister of Citizenship and Immigration.
2. The application for judicial review is allowed.
3. The decision rendered on January 16, 2023 and amended on February 8, 2023 is set aside, and the matter is remitted back to the Immigration Appeal Division for redetermination by a different panel.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1424-23

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v HUAJIE XU

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: OCTOBER 11, 2023

JUDGMENT AND REASONS: PAMEL J.

DATED: FEBRUARY 19, 2024

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