

Federal Court



Cour fédérale

Date: 20200129

Docket: IMM-1041-19

Citation: 2020 FC 163

Ottawa, Ontario, January 29, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

**XUEJIA GONG
YUNFU ZHANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The principal applicant, Xuejia Gong, and her husband, Yunfu Zhang, are citizens of the People's Republic of China. They sought refugee protection in Canada on the basis that, as practitioners of Falun Gong, they have a well-founded fear of persecution in China.

[2] The applicants arrived in Canada on August 4, 2015, and entered on valid visitor visas that had been issued on July 23, 2015. They did not submit claims for refugee protection until May 2016. Their claims were heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on October 17, 2017. For reasons dated October 27, 2017, the RPD rejected the claims on credibility grounds.

[3] The applicants appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons dated January 21, 2019, the RAD dismissed the appeal and confirmed the RPD's findings under both sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[4] The applicants now apply for judicial review of the RAD's decision under section 72(1) of the *IRPA*. They contend that the RAD's assessment of the evidence is unreasonable.

[5] As I explain in the reasons that follow, I do not agree. This application for judicial review will therefore be dismissed.

II. BACKGROUND

[6] Ms. Gong and Mr. Zhang were, respectively, twenty-five and twenty-seven years of age when they arrived in Canada. Their son, who was born in July 2009, stayed behind in China.

[7] Ms. Gong claimed that about ten days after their son was born, a series of events caused significant health problems for her. In 2013, a medical doctor diagnosed her with "postpartum

symptoms” and prescribed medication. Ms. Gong did not experience any relief and sought help from a different doctor. However, her health did not improve.

[8] In support of their claim, the applicants filed a copy of what they said was Ms. Gong’s Outpatient Record from the People’s Hospital of Rushan City. The first entry was dated March 11, 2013. The last one was dated August 12, 2013.

[9] In August 2014, Ms. Gong’s friend suggested that she join a Falun Gong practice. Although Ms. Gong was initially hesitant because of the Chinese government’s persecution of Falun Gong practitioners, her friend persuaded her to attend an exercise in the friend’s house.

[10] Ms. Gong began attending practices regularly. For security reasons, the practices were held in the homes of different individuals. In addition to the exercises, Ms. Gong also participated in the study and discussion of Falun Gong philosophy. She felt that she was benefitting from the practice. At her invitation, in December 2014 Mr. Zhang also joined the group practice.

[11] The applicants claim that on June 6, 2015, their group practice was raided by the Public Security Bureau [PSB]. The applicants were able to escape and sought refuge with Ms. Gong’s aunt. The next day, Ms. Gong’s parents called the aunt and informed her that the PSB were looking for the applicants. Ms. Gong’s parents told the aunt that the PSB had left a *chuanpiao* – a summons or subpoena – for them. Ms. Gong’s parents also told the aunt that the PSB had arrested some of the other practitioners who were present at the meeting.

[12] The applicants say they obtained the summons that the PSB had left for them. It was filed in support of their refugee claims on July 21, 2016. The summons was dated June 7, 2015, and was addressed to both of the applicants. It directed them to report to the 4th Criminal Division of the People's Court of Rushan City, Shandong Province, on June 8, 2015. The summons stated that it concerned a case of "being involved in illegal Falun Gong activities, sabotaging the social order."

[13] Ms. Gong's parents called the aunt again on June 9, 2015. They told her that the PSB had inquired about the applicants' whereabouts again and was asking why the applicants had failed to obey the summons. Upon hearing this, Ms. Gong's aunt sought out a smuggler to help the applicants leave China.

[14] With the assistance of the smuggler, the applicants travelled to Vancouver. They left China using their own Chinese passports and, as noted, they entered Canada on valid visitor visas. It is unclear exactly what assistance they required from the smuggler. The applicants claim that they were taken to a farm in British Columbia where they had to work until they had paid off the balance they owed to the smuggler. They were finally permitted to leave the farm in May 2016. The applicants then made their way to Toronto where they submitted claims for refugee protection.

[15] Ms. Gong states in her Basis of Claim [BOC] narrative that at some point after she arrived in Canada, she called her aunt and learned from her that the PSB "continuously" went to her house looking for her and her husband. Ms. Gong does not explain how her aunt knew this.

There is no mention in the narrative of Ms. Gong ever contacting her parents directly (either while she was in China or afterwards) despite the fact that they were the ones the PSB spoke to about the applicants.

[16] At their hearing before the RPD on October 17, 2017, in addition to their account of their experiences in China, the applicants also relied on evidence of Ms. Gong's continued practice of Falun Gong since arriving in Toronto.

[17] For reasons dated October 27, 2017, the RPD rejected the claims. The RPD accepted that the applicants were who they claimed to be but rejected the claims on credibility grounds. In brief, the member made the following key findings:

- Ms. Gong did not have a credible explanation for why entries in the medical history booklet she tendered to corroborate the medical complaints that she said led her to take up Falun Gong began only in 2013 when she claimed her problems began in 2009. Further, a document such as this could be fabricated easily. The medical history booklet therefore had no value as corroboration for Ms. Gong's claim to have suffered medical problems that eventually led her to seek out relief through Falun Gong.
- The applicants had provided inconsistent accounts of how often the PSB had come looking for them.
- Discrepancies between the summons tendered by the applicants and examples of genuine ones in the IRB National Documentation Package [NDP] led the RPD to conclude that the one tendered by the applicants is "an unreliable document." Consequently, the

applicants failed to establish that the PSB had left a summons for them or that the police were looking for them because of their involvement in Falun Gong.

- Given evidence of the treatment of family members of Falun Gong practitioners in China, the applicants' acknowledgment that their son had been able to attend school in China without difficulty was inconsistent with their claim to be wanted by the authorities as Falun Gong practitioners.
- Information from Ms. Gong about her practice of Falun Gong in Canada was inconsistent with information contained in a letter from an alleged co-practitioner here.
- The applicants' responses to the RPD's questions about Falun Gong doctrine and practice were "rehearsed" or "memorized," leading the RPD to conclude that the applicants were not genuine practitioners, whether in China or Canada. The RPD concluded that the applicants did not have a "grasp of, true connection or commitment to the philosophy of Falun Gong" and "knowledge [that the applicants] had acquired was for the purpose of advancing and bolstering their refugee claims."
- Finally, the RPD concluded that photographs showing the applicants practicing Falun Gong in Canada were insufficient to overcome the credibility concerns that they were not genuine Falun Gong practitioners.

[18] In summary, the RPD concluded that the applicants had failed to establish that they were genuine practitioners of Falun Gong, that they were wanted in China, or that they were at risk of persecution if they were to return to China.

III. DECISION UNDER REVIEW

[19] The applicants appealed this decision to the RAD. While their written submissions made reference to new evidence, none was provided. The RAD member concluded that this reference to new evidence was an error. The applicants do not challenge this finding.

[20] The applicants submitted that the RPD erred in the following respects:

- a) in its assessment of the applicants' supporting documents (i.e. the summons and the medical history booklet);
- b) by failing to assess the genuineness of the applicants' adherence to Falun Gong properly and imposing too high a threshold to demonstrate knowledge of the tenets of Falun Gong;
- c) by misconstruing the evidence relating to PSB visits to the applicants' home; and
- d) in its assessment of the evidence relating to the applicants' child's school attendance in China.

[21] The RAD member instructed herself in accordance with *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]. She specifically noted that in assessing issues involving the credibility of oral testimony, "the RAD may give deference to the RPD depending on the circumstances of the case." It does not appear, however, that any of the issues raised on appeal were resolved against the applicants on the basis of deference to the RPD.

[22] First, with respect to the summons, the RAD member affirmed the RPD's finding that it was not a reliable document because it was inconsistent with the example in the NDP. The RAD member did agree with the applicants that the RPD had provided no details to substantiate its conclusion that there were material differences between the applicants' document and the example in the NDP so the RAD member conducted her own analysis of the document. She explained that she found the structure and format of the summons were inconsistent with the NDP sample. According to the NDP, however, a standard format is used for this document and it had not changed since 2003. The RAD member also pointed to several specific issues with the format of the applicants' document, namely: (i) "the identifier and the date were missing from top right corner above the enclosed box;" (ii) the Chinese characters and wording in the third and fourth box were inconsistent with the sample documentation; (iii) the case number on the first box of the enclosed body did not appear in the samples; and (iv) the instructions at the bottom of the subpoena were inconsistent with the structure of the NDP sample.

[23] The RAD member went on to note that, according to information in the NDP, since January 2013, any failure to comply with a summons would result in the issuance of a "compelled appearance notice." Since the applicants never claimed to have received one, this cast further doubt on their claim to have received a genuine summons.

[24] The RAD member also noted that the applicants were able to leave China using their own passports despite the fact that, as they claimed, the PSB had issued summons against them. Following the Jurisprudential Guide in TB6-11632, the member concluded that, in the absence of an explanation for how the applicants were able to get through the screening procedures at the

airport using their own passports even though the PSB wanted them for questioning, this cast further doubt on their claim to have received a genuine summons.

[25] Based on these considerations, the RAD member concluded that the RPD did not err in giving the summons no weight. On the basis of her own analysis, the RAD member agreed with the RPD's conclusion that the summons is not a genuine document and, further, that this justified drawing a negative inference regarding the applicants' credibility. Given that the summons had been found to be fraudulent, and given that the applicants, by their own admission, were able to exit China using their own passports, the RAD member found that the applicants are not wanted by the PSB, as they alleged. The member further found that in fact the applicants were not in attendance when the PSB raided a Falun Gong practice group.

[26] Second, turning to the medical history booklet, the RAD member confirmed the RPD's finding that this document was unreliable. The applicants had argued that there was no evidence to show that the booklet was fraudulent on its face, that there was no evidence showing their willingness to provide fraudulent documentation, and that the RPD had accepted their identity documents as authentic. The applicants also submitted that the RPD's determination that the medical history booklet was fraudulent was speculative and arbitrary and that any negative inferences drawn from Ms. Gong's failure to recall a doctor's name was based on minor discrepancies that were peripheral to the claim.

[27] The RAD member rejected these submissions. She noted that the cover page of the booklet indicated that it was issued in 2013, when Ms. Gong was twenty-three years of age. Ms.

Gong provided no evidence that she had had another booklet previously, despite the fact that it is mandatory to have one and despite the fact that she had had a child. The member also found it suspect that the only notations in the booklet concerned the alleged postpartum symptoms that Ms. Gong claimed had led her to take up the practice of Falun Gong. Finally, the member noted that the RPD rejected Ms. Gong's explanation that her visits prior to 2013 were short and, therefore, were not recorded. Weighing these considerations, the RAD member concluded that, on a balance of probabilities, the medical history booklet was prepared simply to support the refugee claim and, further, that this justified a negative inference regarding the applicants' credibility.

[28] Third, the RAD member found that the RPD did not err in finding that the applicants had failed to establish on a balance of probabilities that they were genuine Falun Gong practitioners in China or in Canada. The applicants had argued that the RPD erred in assessing the evidence and that their answers about the basic tenets of the religion should have been sufficient to establish the genuineness of their adherence to the practice. The RAD member disagreed, finding that, on the whole of the evidence, the applicants had failed to establish on a balance of probabilities that they were Falun Gong practitioners in China. The member also rejected the applicants' *sur place* claims, finding that the applicants had engaged in Falun Gong activities in Canada for the purpose of advancing their refugee claim and that what knowledge they had of Falun Gong had been acquired solely for this purpose.

[29] Fourth, the RAD member found that the RPD did not err in finding that Ms. Gong's account of the PSB visits was inconsistent and, therefore, not credible. The applicants had

argued that the RPD had focused on a minor semantic point and had failed to appreciate that when Ms. Gong described the PSB's visits as "continuous" she did not mean to suggest that there were numerous visits, which admittedly would be inconsistent with her testimony. The RAD member rejected this explanation. The member noted that the narrative attached to Ms. Gong's BOC dated May 20, 2016, described two visits from the PSB before she left China. The narrative then stated the following: "I called my aunt and learned from her that the PSB continuously went to my house looking for my husband and me." While no date is given for this call, it is clear from the context that it was made from Canada. However, Ms. Gong testified before the RPD that the PSB had come to her house only once after she left China – in July 2016. This, however, was after the BOC narrative was completed. The RAD member concluded that the RPD had not focused on a minor "semantic" point. Rather, the RPD had properly identified a direct contradiction between Ms. Gong's BOC narrative and her testimony before the RPD.

[30] Finally, the RAD member agreed with the applicants that the RPD had erred in finding that the fact that the applicants' son did not face persecution in China was evidence that the applicants were not genuine Falun Gong practitioners. The applicants had argued that the RPD erred in interpreting the documentary evidence to conclude that all family members of Falun Gong practitioners are mistreated. They also pointed to documentary evidence to show that such mistreatment was not uniform. The RAD member reviewed the *Response to Information Request* that the RPD had cited in this connection and found that it did not establish that it was always the case that the family members of Falun Gong practitioners were persecuted. Nevertheless, the RAD member concluded that this error was not fatal given the RPD's other negative credibility findings, which the RAD had upheld.

[31] For these reasons, the RAD dismissed the appeal and upheld the RPD's determinations.

IV. STANDARD OF REVIEW

[32] It is well-established that the RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Huruglica*, at para 35).

[33] That this is the appropriate standard has recently been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Applying *Vavilov*, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review of the RAD's decision.

[34] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the RAD's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the RAD's decision is reasonable; however, the result would have been the same under the *Dunsmuir* framework.

[35] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this

reason, an administrative decision maker has a responsibility “to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion” (*Vavilov* at para 96). A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Here, the onus is on the applicant to demonstrate that the RAD’s decision is unreasonable. Before the decision can be set aside on this basis, I must be satisfied that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

V. ISSUE

[36] The applicants challenge the RAD’s decision on a number of grounds but they all resolve to a single question: Is the RAD’s decision unreasonable?

VI. ANALYSIS

A. *The Summons*

[37] The applicants argue that the RAD member’s finding that the summons was not genuine is neither justified nor intelligible. I do not agree.

[38] It was open to the RAD to question the authenticity of the applicants’ summons based on differences – even small ones – between it and an authentic counterpart: see *Zhuang v Canada*

(*Citizenship and Immigration*), 2019 FC 263 at para 17 [*Zhuang*] and the cases cited therein. As the Chief Justice observed in *Jiang v Canada (Citizenship and Immigration)*, 2018 FC 1064 at para 31 [*Jiang*], it is in the details where a forgery may well be exposed. The RAD is owed deference in its assessment of such documents: see *Zhuang* at para 17. Even to the untrained eye, the format of the applicants' summons differs in obvious ways from that of the example of a genuine summons in the NDP. As well, while some of the pre-printed Chinese characters are the same in both, others are different. Contrary to the applicants' submissions, it is not necessary to know Chinese to be able to see these differences. Unlike the RPD, the RAD member specifically mentioned the discrepancies she observed. This gives her finding that the applicants' summons is not genuine the requisite degree of transparency and intelligibility and, together with the fact that a standard form of summons is used, the requisite degree of justification. This distinguishes the present case from *Feng v Canada (Citizenship and Immigration)*, 2019 FC 18, where the RAD had concluded that a subpoena was fraudulent without engaging in any analysis of the document itself (see para 31).

[39] It was also open to the RAD member to find further support for the conclusion that the summons was not genuine in the fact that a compelled appearance notice had not been issued for the applicants despite their failure to respond to the summons on June 8, 2015, and despite the applicants' claim that the PSB continued to be interested in them: see, for example, *Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 at para 23, and *Lin v Canada (Citizenship and Immigration)*, 2019 FC 854 at para 24.

[40] The RAD's determination that the summons is not genuine is in turn reasonably capable of supporting a negative finding about the applicants' credibility more generally given the centrality of that document to the applicants' own narrative. The summons was not offered merely as a piece of corroborative evidence. It, along with the alleged calls from Ms. Gong's parents (of which there is no evidence apart from the applicants' own second-hand recounting), is the cornerstone of their claim. They claim that it was the summons that caused them to fear persecution because it showed that they had been identified by the PSB as involved in the practice of Falun Gong. This was why they left China. Their failure to establish that the summons is a genuine document reasonably gives rise to serious doubts about their narrative as a whole.

B. *The Medical History Booklet*

[41] The applicants submit that the RAD erred in holding that the medical booklet was not genuine. They argue that the RAD's finding that a medical booklet must be presented at every medical appointment was not supported by the documentary evidence. They also argue that the RAD erred in drawing a negative credibility inference based on the fact that Ms. Gong did not have a medical history booklet prior to 2013.

[42] I do not agree.

[43] The Response to Information Request relied on by the RAD member states:

- Outpatient medical records are listed in a small booklet called the “Outpatient and Emergency Medical Record for Hospitals and Clinics,” which contains a written listing of the patient’s symptoms by a doctor.
- The booklet is “distributed on a mandatory basis” and is kept by patients, not the hospital. In contrast, records for hospitalized patients are kept by both the hospital and patient.

[44] Based on this information, it was reasonable for the RAD member to question why Ms. Gong did not have a pre-2013 medical booklet. It was also reasonable for the member to reject Ms. Gong’s explanation that all her pre-2013 visits with doctors were simply short outpatient visits and, as a result, were not recorded. Further, it was open to the member to conclude that the contents of the medical history booklet tendered by the applicants raised doubts about the genuineness of the document. Finally, while the RAD noted that fraudulent documents are easily available in China, this was not treated as an independent ground for finding the booklet to be fabricated. Rather, this fact simply did not dispel the doubts the RAD otherwise had about the genuineness of the document. This was a reasonable determination in the circumstances.

[45] In their Memorandum of Argument the applicants suggested that Ms. Gong was not asked at the RPD hearing about whether she had ever had another medical history booklet or why she did not have any medical documentation relating to her pregnancy or the birth of her son. This claim was not supported by an affidavit from Ms. Gong or any other evidence. Quite properly, it was not pursued at the hearing of this application.

C. *The Ability of the Applicants to Exit China*

[46] The Applicants submit that the RAD member erred in finding that their ability to leave China using their own passports despite the fact that they had received a summons from the PSB supported an inference that the summons was not genuine. Crucially, they contend that the RAD member erred in failing to consider that they had only been summonsed as witnesses and not as suspects. They were not wanted for arrest. The RAD member should not have assumed that it would have been as difficult for the applicants to evade detection as the Jurisprudential Guide suggested it was for those who are wanted by the police as suspects or defendants. The applicants submit that this error is determinative of their application because all the other adverse findings about their credibility flow from it.

[47] I do not agree.

[48] I begin by noting that the Jurisprudential Guide relied on by the RAD member was revoked by the Chairperson of the IRB on June 28, 2019, because it was based (in part) on erroneous or outdated information relating to screening of air passengers departing from China. This happened after the applicants applied for leave to proceed with this application but before leave was granted. Despite having had the opportunity to raise any additional issues flowing from the RAD member's reliance on a now-revoked Jurisprudential Guide, the applicants have not alleged that the member erred in any other way than that set out above.

[49] With respect to the merits of their argument, in my view the RAD member did not err in relying on the Jurisprudential Guide as she did. The applicants correctly point out that, unlike the party whose case gave rise to the Jurisprudential Guide, they did not allege that the PSB were actively pursuing them as fugitive criminals. However, they did allege that the PSB were actively pursuing them in connection with a criminal investigation. Most importantly, even accepting for the sake of argument that, as the applicants contend, there is a valid distinction to be drawn in this case between being a suspect or defendant in a criminal case and being a mere witness, the applicants have not pointed to any evidence that suggests that the two are treated any differently by the PSB when it is investigating individuals suspected of engaging in the practice of Falun Gong or in relation to the operation of the Golden Shield or other airport security measures.

[50] In any event, even if the RAD member should not have presumed that the applicants would have been treated just like suspects or defendants in a criminal case when assessing the significance of their having been able to leave China using their own passports, this is far from determinative. The RPD did not make any findings concerning the Golden Shield or the ability of the applicants to leave China. As a result, no grounds of appeal in relation to this were raised by the applicants. Rather, the RAD member raised this herself as an additional reason to doubt the genuineness of the summons tendered by the applicants. The member's other reasons for doubting its genuineness – reviewed above – are capable on their own of supporting this as a reasonable conclusion, with all of the implications this finding reasonably has for the applicants' credibility.

D. *The Applicants' Sur Place Claim*

[51] The RAD member reasoned that since the applicants were not Falun Gong practitioners in China and they were not wanted by the authorities there for the practice of Falun Gong, their documented practice of Falun Gong in Canada and their knowledge of its doctrines had been undertaken “only for the purpose of supporting a fraudulent refugee claim.” The applicants submit that this determination is unreasonable because it was made in the absence of direct evidence of their fraudulent intent. I do not agree.

[52] The applicants' *sur place* claim was a secondary element of their claim for protection. Their primary reason for seeking refugee protection was what they claimed had happened to them in China. On a balance of probabilities, the RAD member rejected their account of their experiences in China, finding that the applicants had not been practicing Falun Gong there and finding that they were not wanted by Chinese authorities for having done so. The RAD may assess the *sur place* aspect of a claim in light of any credibility concerns it has regarding the original claim: see *Li v Canada (Citizenship and Immigration)*, 2019 FC 454 at para 24; *Li v Canada (Citizenship and Immigration)*, 2018 FC 877 at para 29; and *Jiang*, at paras 26-28. Further, when assessing a *sur place* claim, the RAD may consider the claimant's motivation for engaging in the activities in question: see *Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at paras 17-18. Even in the absence of direct evidence of a fraudulent motive, it was reasonably open to the RAD member, having regard to the entirety of the evidence and the member's reasonable findings of fact on that evidence, to conclude that the applicants' practice

of Falun Gong in Canada had been undertaken not because of sincere adherence to the doctrine but rather to buttress a fraudulent claim for protection.

E. *The Frequency of Visits by the PSB*

[53] In their Memorandum of Argument, the applicants also challenged the RAD's determination with respect to the inconsistency between the BOC narrative and Ms. Gong's testimony concerning the frequency of visits by the PSB. This ground was not pursued in oral argument. It is without merit.

VII. CONCLUSION

[54] For these reasons, this application for judicial review will be dismissed.

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

JUDGMENT IN IMM-1041-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: XUEJIA GONG ET AL v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 30, 2019

JUDGMENT AND REASONS: NORRIS J.

DATED: JANUARY 29, 2020

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