Federal Court  Cour fédérale

Date: 20230602

Docket: IMM-1374-22

Citation: 2023 FC 773

Ottawa, Ontario, June 2, 2023

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LIPING GENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Is a university professor who may have taught English to prospective spies thereby inadmissible under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]? That is the question raised in this application for judicial review of the decision of an Immigration Officer at the Consulate General of Canada in Hong Kong [the

Officer], dated January 17, 2022, refusing the Applicant's application for permanent residence under the Family Class.

[2] For the reasons that follow, the application is granted and the matter will be remitted for reconsideration by a different visa officer.

II. **Facts**

A. *Background*

[3] The Applicant is a 68-year-old citizen of China, where he currently resides. His wife is a Canadian citizen and together they have one daughter, also a Canadian citizen. As a young man, the Applicant was a member of the People's Liberation Army [PLA] during which he completed the equivalent of a Bachelor's degree program in Chinese, English, Maths and Current Events from the Luoyang Foreign Languages Institutes [LFLI]. According to notes in the Global Case Monitoring System [GCMS], prior to a 2015 restructuring of the PLA, one of its departments, known as the 3/PLA, was responsible for signals intelligence. The LFLI trained students in foreign languages for the 3/PLA as well as other branches of the government of China.

[4] After graduation, the Applicant worked as a teacher and assistant lecturer in English at the LFLI between 1975 and 1987. The Applicant also completed a Master's degree in English Literature from Fudan University between 1982 and 1985. After his employment at the LFLI, the Applicant worked at the Beijing University of International Business and Economics for two years.

[5] In 1989, the Applicant was accepted into the University of Toronto where he studied for nine years and completed a Master's degree and a PhD in English Literature. During that time, the Applicant and his family were approved for permanent residence in Canada and became citizens in 1995. The Applicant taught English Literature at both the University of Toronto and Memorial University in Newfoundland and Labrador.

[6] In 2007, the Applicant decided his full-time employment prospects were better in China and returned there. He renounced his Canadian citizenship as China does not recognize dual citizenship. According to GCMS notes from an interview at Pearson Airport with a visa officer in July 2017, and his own evidence, the Applicant applied for and received visas to return to Canada every year following his return to China, including a ten-year multiple entry visa, to visit his family. He held a similar visa to visit his daughter in the United States after she had married and moved there.

[7] In 2019, after retirement, the Applicant wanted to reunite with his family permanently and so his wife applied to sponsor him for permanent residence. She did this without the assistance of counsel.

[8] Without the knowledge of the Applicant, two reports were drafted in October 2020 and April 2021, respectively, by the Security Screening Branch/Canadian Security Intelligence Service [CSIS] and the Canada Border Services Agency [CBSA]/National Security Screening Division [NSSD].

[9] The CSIS report noted that the Applicant had been an English teacher at the LFLI where he taught officers of the 3/PLA, that the 3/PLA is the Chinese military's signals intelligence branch and that the LFLI is a military training institute where officers and foreign affairs officials receive language training including for the purpose of being assigned to listening posts. The CSIS report also noted that in 1997, in an interview with CSIS, the Applicant acknowledged that the LFLI trains 3/PLA officers and that his responsibility was to teach English to students some of whom would be assigned to 3/PLA posts and China's foreign missions. That 1997 interview did not result in an inadmissibility determination against the Applicant.

[10] The NSSD security assessment indicates that it contains information extracted from the CSIS report. It also relies on a number of open sources, including reports found on the Internet, to conclude that the LFLI falls within the organizational structure of the 3/PLA and that many graduates are assigned to 3/PLA monitoring and control stations including those targeting the United States and Canada.

[11] The NSSD assessment states:

> The following analysis will demonstrate that, as a result of his employment as a Lecturer with the LFLI, there are reasonable grounds to believe that the applicant is a member of an organisation, the 3/PLA, that has engaged in acts of espionage that are against Canada and contrary to Canada's interests, as described in paragraphs 34(l)(f) and 34(1)(a) of IRPA, respectively. Additionally, the analysis will demonstrate that there are also reasonable grounds to believe that the applicant himself has engaged in espionage, as described in paragraph 34(1)(a).

[12] The assessment acknowledges that the LFLI is a distinct organization in its own right but asserts the view that being a member of the LFLI and of the 3/PLA are not mutually exclusive. The assessment also relied on a statement made by the Applicant during an interview at Pearson airport on July 16, 2017 that he held the rank of "Deputy Commander" with the PLA between 1969 and 1987, before he moved to Canada. This, the Applicant now says, was when he was pressed by the interviewer to provide an equivalency between his status as a professor and a military rank. He was at that time subject to a "lookout" for possible inadmissibility. However, having contacted other offices, which expressed no concerns, the interviewing officer concluded on that occasion that the Applicant was admissible.

[13] On November 22, 2021, the Applicant received a procedural fairness letter [PFL] indicating that:

> *After careful and thorough consideration of all aspects of your application, I have concerns that you do not meet the requirements for a permanent resident visa to Canada and would like to give you an opportunity to address them.*
>
> *In particular, there are reasonable grounds to believe that you are a member of the inadmissible class of persons described in section 34(1)(f) of the Immigration and Refugee Protection Act.*
>
> *Specifically, based on the totality of the evidence before me, including information you yourself have provided and information that is available in the open source, I have concerns that there are reasonable grounds to believe that by way of studies and employment as a language instructor at the PLA Luoyang Foreign Languages Institute, you have been a member of the PLA's General Staff Department's 3rd department (3/PLA). Open sources support that the PLA Luoyang Foreign Languages Institute is subordinate to the 3/PLA. According to open sources, 3/PLA is China's primary communications intelligence agency, and it has targeted Canada and its allied nations for political, economic and military-related intelligence.*

[14] The PFL cited two sources for this information. One source was a report dated November 11, 2011 from the Project 2049 Institute entitled “The Chinese People’s Liberation Army Signals Intelligence and Cyber Reconnaissance Infrastructure” . The Project 2049 Institute web site indicates that it is a non-profit research organization based in Arlington, Virginia “focused on promoting American values and security interests in the Indo-Pacific region.” The second source was a report dated March 7, 2012 prepared for the U.S.-China Economic and Security Review Commission by Northrop Grumman Corporation and entitled “Occupying the Information High Ground: Chinese Capabilities for Computer Network Operations and Cyber Espionage”.

[15] A day following receipt of the PFL, the Applicant submitted a response outlining his education, employment history in China and Canada and his immigration history. He also clarified that his work at the LFLI was in his capacity as a civilian teacher and he did not have a military rank. The Applicant added that he was questioned by CSIS and immigration officials in the past regarding his employment at the LFLI but that his immigration applications were approved.

[16] On January 17, 2022, the Applicant’s application for permanent residence was refused. This is the decision under review.

B. *Decision under review*

[17] The Officer rejected the application on the grounds that “based on your employment history, there are reasonable grounds to believe that you are member of an inadmissible class of persons described in paragraph 34(1)(f) of the Immigration and Refugee Protection Act”.

[18] In the accompanying GCMS notes, which form part of the reasons, the Officer noted that open sources support that the LFLI is subordinate to the 3/PLA, which is China's primary communications intelligence agency that has targeted Canada and its allied nations for intelligence.

[19] The Officer considered the Applicant's response to the PFL but concluded that it had not disabused them of their concerns that he is a person described in section 34(1)(f) of *IRPA*. The Officer writes that the evidence continues to support that, through the Applicant's declared studies at the LFLI followed by his nine years of employment as an instructor there, it is reasonable to believe he has been a member of an organization that has engaged in acts of espionage against Canada or contrary to Canada's interests. The Officer noted that the Applicant confirmed his work history at the PLA LFLI between 1975 and 1987 and that he was a teacher with no military rank. The Officer however noted that, during an examination at a port of entry in July 2017, the Applicant declared he was a "Deputy Commander" for the PLA. The Officer concluded that in his PFL response the Applicant minimized the linkage between his work as a teacher at the LFLI and the 3/PLA by stating he was not involved in work with a military connection.

[20] The Officer noted that "credible open sources have reported that the LFLI is subordinate to the 3/PLA and trains officers/cadets in the monitoring of foreign military intelligence". The Officer also noted that a former English instructor at the LFLI who "appears to have held the same position as Mr. Geng" has publicly stated that he taught English to spies at LFLI.

[21] Based on this, the Officer found that it was reasonable to believe that, given the Applicant's position, he was involved in the training of officers/cadets in monitoring of foreign military intelligence and thus would have furthered the objectives of the 3/PLA. The Officer also found that given his position as a deputy commander, the Applicant would have been aware of and knowingly participated in the 3/PLA's espionage mandate.

[22] The Officer remarked that the Applicant underwent background checks previously in applications dating back to the 1990s, but that based on current immigration laws and available open source information, the Officer's concerns that the Applicant is/was a member of 3/PLA have not been alleviated. As such, there are reasonable grounds to believe the Applicant is a person described in para 34(1)(f) of *IRPA*.

III. **Issues and standard of review**

[23] The parties submit, and I agree, that the Application raises two substantive issues:

A. Whether the Officer's decision was reasonable; and

B. Whether the Officer has breached the Applicant's right to procedural fairness.

[24] By way of an interlocutory motion under s 87 of the *IRPA*, the Respondent sought an order to protect certain information in the Certified Tribunal Record [CTR] that otherwise would be disclosed to the Applicant. In addition to the public Notice of Motion, the Respondent filed classified material including affidavit evidence on December 15, 2022. The Applicant opposed the Respondent's motion in written representations but did not seek a public hearing. The

Respondent advised the Applicant and the Court that it would not rely on any of the information, for which protection was being sought, on the merits of this application.

[25] Having reviewed the materials filed on the motion, including the classified affidavits, as well as the relevant portions of the CTR and the text of the proposed redactions in clear, I was satisfied that disclosure of the redacted information would harm national security or endanger human safety. I was also satisfied that the information would not assist the applicant on judicial review as it neither supported nor undermined his application. An Order to that effect was issued on January 24, 2023.

[26] In its written submissions, the Respondent raised a preliminary objection concerning new evidence contained in the Applicant's affidavits. The Respondent submits that both of the Applicant's affidavits are "rife with inadmissible statements" that either go to the merits of the inadmissibility finding or provide new evidence that was not put before the Officer. Thus, the Respondent objected to the use of paragraphs 19-24 of the Affidavit at leave and para 19-32 of the further Affidavit.

[27] At the outset of the hearing, I questioned whether the impugned paragraphs might be admissible under one or more of the recognized exceptions to the general principle that new evidence could not be submitted on judicial review: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-28. I also expressed the view that to the extent that the affidavits contained inadmissible argument, contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106, they could be disregarded. In the result, the impugned paragraphs did not affect the outcome in my view.

[28] Reasonableness is the presumptive standard of review of administrative decisions on their merits: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*]. There is no basis for departure from that presumption in this matter.

[29] To determine whether the decision is reasonable, the reviewing court must ask "whether the 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 paras 86 and 99. Thus, a decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" : Dunsmuir v New Brunswick*, 2008 SCC 9* at para 47.

[30] In conducting a reasonableness review of factual findings, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor: *Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 at para 112; *Vavilov* at para 96. It is not for the Court to transform a review on the reasonableness standard to correctness review: *Canada (Citizenship and Immigration) v Mason,* 2021 FCA 156 at paras 36-40. The party challenging the decision bears the burden of showing that it is unreasonable: *Vavilov* at para 100. Respect for the role of the administrative decision maker requires a reviewing court to adopt a posture of restraint on review: *Vavilov*, paras 24, 75.

[31] The standard applicable to issues of procedural fairness is whether, "having regard to all of the circumstances and focusing on the nature of the substantive rights involved and the

consequences for the individual affected", the procedure followed by the decision-maker was fair: *Canadian Pacific Railway Company v Canada (Transportation Agency),* 2021 FCA 69 at paras 46-47. This standard involves no deference to the decision-maker.

IV. **Analysis**

A. *Applicant's submissions*

[32] The Applicant argues the decision cannot stand primarily for two reasons: 1) there were no reasonable grounds to believe that the LFLI was an organization that engaged in espionage; and 2) the Officer breached procedural fairness in failing to provide the requisite specificity in the PFL issued to the Applicant, and by failing to disclose sources of information relied upon that were not publicly available.

[33] On the first issue, the Applicant submits the decision was unreasonable as the Officer made "unfounded inferences and ignored critical evidence" in making their finding that the LFLI was an organization that engaged in espionage and in misunderstanding the Applicant's role at the LFLI.

[34] The Applicant submits that in order to make a finding under section 34(1)(f) of *IRPA*, the Officer was required to determine 1) whether there are reasonable grounds to believe that the LFLI engaged in espionage, and 2) whether the Applicant is inadmissible for having been a member of the LFLI: *Yamani v Canada (Public Safety and Emergency Preparedness),* 2006 FC 1457 at para 10; *Yihdego v Canada (Public Safety and Emergency Preparedness),* 2020 FC 833

at para 13. The applicable standard of proof for findings under section 34 is “reasonable grounds to believe”, which is a “bona fide belief in a serious possibility based on credible evidence”, and credible, objective and compelling evidence is required: *Ghazala Asif Khan v Canada (Citizenship and Immigration)*, 2017 FC 269, at para 24; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 208 at paras 67-71 [*Sellathurai*]; *Jalil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 246, at paras 35-40; *Bajraktari v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1136, at para 27.

[35] The Applicant submits that a review of the sources cited by the Officer suggests that it is unclear upon what basis the Officer made the connection between the LFLI and the Third Department of the PLA. It is argued that the Officer erred in relying solely on the evidence of those “open sources” to ground the inadmissibility finding, as the only references these documents make to the LFLI are very brief and in passing.

[36] The Applicant notes that the first document linked in the PFL letter, the Project 2049 Institute, states, without citing any authority or source, that training and education “for Third Department personnel are generally conducted at one of two institutions. Most linguists assigned to Third Department bureaus and [Technical Reconnaissance Bureaus] receive language training at the PLA University of Foreign Languages in Luoyang” which, the document states, is roughly equated to the American Defense Language Institute in Monterey, California. The Applicant argues that this passage does not suggest that every student of the LFLI goes on to engage in espionage.

[37] The second document linked, the report prepared by Northrop Grumman Corporation, an American defence contractor, refers once in passing to the LFLI when talking about the educational background of one former member of the military, who did not work for the 3/PLA, who had studied there. With regards to the other sources found in the Officer's GCMS notes, the Applicant argues that none of them confirmed that the LFLI engaged in espionage or that employees of the LFLI were employed by the 3/PLA.

[38] The Applicant submits the allegations against him are based on an alleged but unestablished connection between the LFLI and the Third Department. As such, it was unreasonable for the Officer to hold that the LFLI is an espionage organization simply because a few reports claim that former LFLI students have gone on to pursue careers in 3/PLA. The Applicant adds that no international organizations, government body or international court decision has determined that LFLI is an organization engaging in espionage. Therefore, the Applicant argues it cannot be said that there was "an objective basis for the belief which is based on compelling and credible information" that the LFLI itself engaged in espionage: *Sellathurai* at para 67.

[39] Additionally, the Applicant submits that *Peer v Canada (Citizenship and Immigration),* 2010 FC 752 and *Qu v Canada (Citizenship and Immigration* [2000] 4 FC 71 relied on by the Officer in their notes, do not apply because those cases involved applicants that had either been confirmed to be a member of an intelligence agency, or were found to be directly engaging in acts of espionage themselves.

[40] Replying to the Respondent's written argument, the Applicant submits the test is not whether or not the Applicant "must have known" he was training future spies, but rather whether he was a member of an organization engaged in espionage: *Al Ayoubi v Canada (Citizenship and Immigration)*, 2022 FC 385 at para 21.

[41] On the second issue, the Applicant argues procedural fairness is breached when an officer fails to provide prior notice of specific concerns, including disclosure of sources relied upon during the assessment, and that a procedural fairness letter "must state the decision maker's concerns with sufficient clarity and particularity so that the affected party has a meaningful opportunity to address them": *Mohammed v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 326, at paras 25-31 [*Mohammed*]; *Asanova v Canada (Citizenship and Immigration)*, 2020 FC 1173 at paras 29, 32; *Brhane v Canada (Citizenship and Immigration)*, 2018 FC 220 at para 19.

[42] The Applicant submits that the PFL lacked specificity, as there was more to the Officer's concerns than what was outlined in the letter: the Officer was concerned that the Applicant was a "Deputy Commander" for the 3/PLA. The Applicant argues that had he been aware of the Officer's concerns regarding this statement he made in 2017, he would have explained that he did not declare he was a Deputy Commander, but was pressed to provide an equivalent of his civilian position, and suggested "Deputy Company Commander". The Applicant did not contemplate, he argues, that a statement made several years ago, taken out of context and unrelated to his application would be misconstrued and used against him. The Applicant states he

has never been a Deputy Commander in the PLA and could have provided more evidence if he had been made aware of this concern.

[43] Moreover, the Applicant argues that his procedural fairness rights were breached when the Officer failed to disclose documents (the CSIS and CBSA reports) that were relied upon in the decision as they drove the decision-making process: *Mohammed* at paras 29, 31. The PFL included links to two open sources on which the Officer relied upon, but the Applicant was not given the opportunity to respond to the other sources that led to the refusal. In fact, the Applicant became aware of the CSIS and CBSA reports only after receiving the CTR.

[44] The Applicant notes that he has undergone extensive background checks in the pasts, from the 1990s and most recently in 2017, and no inadmissibility findings were ever made against him. Additionally, his alleged declaration that he was a "Deputy Commander" in 2017 did not result in a refused entry into the country. The Applicant argues that the Officer has ignored the fact that he has been entering Canada recently and frequently.

[45] Finally, the Applicant opposes the Officer's use and treatment of the open-source information, notably the sources relating to a New Zealand MP, Mr. Yang, who the Officer said "held the same position as Mr. Geng", and had "publicly stated that he taught English to spies at LFLI". The Applicant notes that according to the links provided by the Officer, Mr. Yang has never admitted to teaching spies, rather his quote was taken out of context and misinterpreted. Even so, the Applicant submits there is no link between a few spies being potentially in a

classroom at LFLI, to everyone in the classroom being spies or that it was a classroom *for* spies. The Applicant argues that if he had been given those open-sources links and given an opportunity to respond, he could have added that Mr. Yang was found to be of no risk by the New Zealand Security Intelligence Service and was re-elected.

[46] The Applicant believes the Officer also erred in their assessment of the Chinese military structure. The LFLI and the 3/PLA (both now defunct) were separate entities and students enrolled at the LFLI were not required to work for 3/PLA on graduation nor were they required to be in training to be spies. The Applicant submits he also could have clarified to the Officer that it is not possible to be a civilian staff member and a military officer at the same time and thus he could not have held the rank of Deputy Commander, which does not even exist in the Chinese army.

[47] Thus, the Applicant submits that the Officer made a series of fatal errors and erroneous findings and that there were no reasonable grounds to believe the LFLI was an organization that engaged in espionage.

B. *Respondent's submissions*

[48] The Respondent argues that it was reasonable for the Officer to rely on open-source information and previous admissions by the Applicant to Canadian officials to conclude that there were reasonable grounds to believe that the Applicant was a member of an organization that engages in espionage. According to the Respondent, the evidence demonstrates that

"everyone who attended the institution where the Applicant taught was in or was linked to Chinese military intelligence" and that the teachers were actively engaging in espionage. The PFL sent to the Applicant did not lack specificity and he had a meaningful opportunity to participate in the review of the application.

[49] The Respondent submits that section 33 of *IRPA* provides that the standard of proof on inadmissibility is "reasonable grounds to believe" that facts have occurred, are occurring or may occur. The standard is more than mere suspicion and exists where there is an objective basis for the belief which is based on compelling and credible information: *Mugesera v Canada (Minister of Citizenship and Immigration),* 2005 SCC 40 at paras 114-117; *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163 at para 40. The Respondent adds that "membership" under section 34(1)(f) does not require formal membership or actual participation in any acts of the organization: *Khan v Canada (Citizenship and Immigration),* 2017 FC 397 at paras 29-30.

[50] On the first issue, reasonableness, the Respondent submits that the finding that there were grounds to believe that 3/PLA and LFLI engaged in acts of espionage was reasonable as the evidence demonstrates that the 3/PLA was responsible for spying on Canada and that the LFLI trained linguists who engaged in espionage. On top of the open-source evidence, the Respondent argues that the Applicant himself confirmed the connection between the LFLI and the 3/PLA when interviewed in 1997.

[51] The Respondent notes that in his application form, the Applicant qualified his early experience not as that of a civilian, but as Military and/or Paramilitary Service for which he had a commanding officer, and provided a "Details of Military Service" form in which he included his employment for the LFLI. The Respondent also notes that the Applicant stated he was "demobilized" at the end of this service with the PLA. The Applicant also told Canadian officials in the 2017 interview that he was a Deputy Commander. The Respondent points out that the Applicant is relying solely on his memories of the interviews in 1997 and 2017, compared to notes taken contemporaneously by the officers.

[52] On the second issue, the Respondent first submits that the Applicant has failed to demonstrate that he was denied the opportunity to meaningfully participate in the process. The Respondent submits that procedural fairness does not require that applicants be provided with all the information in the possession of immigration authorities, especially when the information raises national security concerns. The right of an individual to procedural fairness may need to be balanced against the duty to protect national security: *Amiri v Canada (Citizenship and Immigration)*, 2019 FC 205 at paras 31-36 [*Amiri*].

[53] The Respondent argues the PFL did not lack specificity but provided detail about the nature of the allegations as it pertained to his activities and those of the organizations with which he was affiliated. The Respondent contends the PFL and the links therein disclosed the following information to the Applicant:

1. The allegation that the Applicant may be inadmissible per section 34(1)(f);

2. That this allegation is based on information provided by the Applicant and in open sources;

3. There are reasonable grounds to believe that his employment at the LFLI makes him a member of the 3/PLA;

4. Open sources support that the LFLI is subordinate to 3/PLA;

5. 3/PLA is China's primary communications intelligence agency;

6. 3/PLA has targeted Canada and its allied nations;

7. The content of the two linked reports, including the statement that 3/PLA linguists receive language training at the LFLI.

[54] The Respondent argues that the Applicant's reply to the PFL was almost entirely unresponsive to the concerns, as it was silent on almost all of the allegations and did not provide any document to refute them. This is important, the Respondent submits, because in his further Affidavit, the Applicant raises issues and arguments he claims he would have provided to the Officer, but did not. For example, the Respondent notes that in his affidavit, the Applicant states that the Officer erred concerning the military structure. However, the PFL explicitly discusses the relationship between the 3/PLA and the LFLI, which the Applicant did not address. Similarly, the Respondent notes that the Applicant could have provided, as stated in his Affidavit, his demobilization certificate and letters of support from former peers along with his response to the PFL where he claims he had no military rank. Thus, the Respondent argues the PFL provided was amply sufficient to allow the Applicant to respond to the concerns of the Officer.

[55] Secondly, the Respondent submits that the non-disclosure of the CBSA and CSIS reports was not a breach of procedural fairness. It is argued that the relevant question is not whether the

document was provided to the Applicant, but whether the information was disclosed to the Applicant: *Gebremedhin v Canada (Citizenship and Immigration),* 2013 FC 380 at para 9; *Magharoui v Canada (Citizenship and Immigration),* 2013 FC 883 at paras 22-27. Similarly, the Respondent points to my decision of *Karahroudi v Canada (Citizenship and Immigration),* 2016 FC 522 at paras 30-34, in which I wrote that the failure to provide the specific documents to the applicant does not constitute a breach of procedural fairness. What matters is whether the Applicant had sufficient knowledge of the information relied upon: *A.B. v Canada (Citizenship and Immigration),* 2020 FC 461 at para 31 [*A.B.*].

[56] It is evident, the Respondent submits, from the Applicant's own affidavits, that much more information could indeed have been put to the Officer and the Applicant was able to meaningfully participate in the process but failed to provide an adequate response.

[57] The Respondent argues the Applicant seeks to reweigh the evidence as he complains about the Officer's treatment of the open source information. The Respondent submits the open source evidence demonstrates links between the LFLI and the 3/PLA and that contrary to the Applicant's assertion, the New Zealand MP Mr. Yang did admit to teaching spies at the institution. Moreover, two of the articles rely on expert opinion in asserting that the LFLI is linked to Chinese intelligence and that people working for the LFLI were actively engaged in espionage even if not in uniform.

[58] Finally, on the Applicant's previous immigration history, the Respondent notes that immigration officers are not barred from reconsidering the admissibility of a person previously found admissible.

C. *Analysis*

[59] In applying the reasonableness standard, a reviewing court must start with the decision-maker's reasons and assess whether they justify the outcome: *Vavilov* at para 99. The court is also instructed to consider the consequences of the decision on the affected individual. The decision maker has a heightened responsibility to justify the decision when the consequences may be severe. A failure to grapple with such consequences may be unreasonable: *Vavilov* at paras 133-135.

[60] In the present matter, the Applicant is a 68-year-old retired language professor who was once accepted as a landed immigrant and granted citizenship in Canada and now wants to return here to share his retirement years with his wife and daughter, both of whom are Canadian citizens. He has been repeatedly granted admission to Canada including on a long term visitor's visa. The consequences of the decision to deny him admission in these circumstances are particularly harsh. In my view, the Officer failed to adequately grapple with those considerations.

[61] I agree with the Respondent that an officer is not barred from reconsidering the admissibility of a person previously found to be admissible. But in choosing to do so, it was incumbent on the Officer, in the circumstances of this case, to justify that decision in light of the previous decisions to the contrary, especially the decision in 2017 when the interviewing officer

arguably had cause to deny the Applicant admission but chose not to do so. The law had not changed and the open sources referenced by the Officer in the decision were from 2011 and 2012 respectively. The brief remarks by the Officer do not explain why it was decided to depart from the previous decisions. On the face of this matter, it is unclear why Canadian officials had no concerns with the Applicant coming and going for many years but that changed when his wife sponsored him to return here to retire.

[62] It is not for the Court to substitute its own view of the evidence for that of the decision-maker. However, the sources relied upon by the Officer do not fully support the conclusions reached in the decision. The sources, for example, do not support the conclusion that the Applicant held a military rank, described as “Deputy Commander”, while teaching at the LFLI between 1969-1987. That conclusion appears to have been taken solely from the July 2017 port of entry interview notes and does not conform to the description of the PLA command structure described in the two open sources cited by the Officer. Had the Officer carefully considered that structure as described in those sources, the notion that the Applicant was a PLA “Deputy Commander” would have been implausible.

[63] The Applicant argues that he mentioned the rank as a rough equivalency of his academic level as a professor. The notes of the July 2017 interview, unlike many the Court has seen, do not include the questions asked and the answers provided. Rather they are a synopsis of the interview and thus of limited value as a record of what was said on that occasion.

[64] The Officer failed to consider the full content of the two open sources relied upon which provide considerable detail about the organization and command structure of the 3/PLA. Based on that information, it is difficult to understand how the Applicant could be found to be a senior officer of the 3/PLA while working as a language professor at the LFLI.

[65] Moreover, I note that the information obtained from CSIS which was extracted and included in the SSSD report includes notes from an interview the Service had with the Applicant in 1997. At that time, according to the report, he acknowledged that the LFLI is a PRC military institute used for training PLA officers, including members of the 3/PLA, and described his role as a civilian with no military rank.

[66] In my view, both the NSSD assessment and the Officer's reasons for decision demonstrate an overzealous effort to establish that the Applicant was a member of the 3/PLA and, as such, inadmissible. The NSSD assessment goes further and states that "there are also reasonable grounds to believe that the applicant himself has engaged in espionage, as described in paragraph 34(1)(a)". This assertion is based on a dubious analysis of the concept of facilitation in the context of espionage, supported by one sentence in a 1992 oral judgment for which no authority is provided: *Shandi (Re)* (1992), 51 F.T.R. 252 (F.C.T.D.) at para 17.

[67] The decision maker in this instance may not have relied upon this assertion as no mention is made of it in the reasons provided. But for future reference and greater certainty, in my view there is no merit to the notion that the Applicant engaged in espionage merely by teaching English to members of the 3/PLA who were later assigned to monitor intercepted

communications at listening posts in China or abroad. Whatever meaning facilitation may have in the context of espionage, which remains to be determined in another case, this was overreaching.

[68] The Officer found that the Applicant's employment as an academic staff member in the LFLI amounted to membership in the 3/PLA, relying in part on his years in the PLA as a student. It is not clear from the reasons that the Officer took into account the evidence that pointed away from that finding such as the Applicant's long academic career in China and abroad, including in Canada, and the observation by the NSSD that the LFLI was a distinct organization in its own right even if membership in one does not preclude membership in the other.

[69] Also of concern is the Officer's reliance on news reports about comments attributed to a New Zealand M.P., which appear to have been taken out of context and misinterpreted. This in itself would not constitute a reviewable error. However, the cumulative effect of this error along with my concerns about the Officer's reliance on the other open sources leads me to conclude that the decision does not meet the standard of reasonableness. Deference does not require me to ignore what I consider to be serious failings in this decision.

[70] On the procedural fairness issue, I agree with the Applicant that he was not provided with sufficient information to understand the allegations against him. In the PFL, the Officer refers only to the two third-party open source documents mentioned above, neither of which provide credible and compelling evidence that the LFLI engages in acts of espionage.

[71] Accepting that the content of the duty of procedural fairness owed to visa applicants is at the lower end of the spectrum and the amount of information provided may need to be balanced against national security considerations, what was provided here in the PFL fell short in my view and no deference is called for.

[72] Justice Fothergill in *A.B.*, cited by the Respondent, wrote that:

> [30] Even at the lower end of the spectrum, procedural fairness generally requires that applicants be provided with the information on which a decision is based so they can present their version of the facts and correct any errors or misunderstandings. Procedural fairness does not, however, require that applicants be provided with all information in the possession of immigration authorities (Amiri at para 33). Furthermore, an individual's right to have a visa application determined and to have that decision reviewed in accordance with law, including the norms of procedural fairness, may need to be balanced against the state's duty to protect national security (*Karahroudi v Canada (Citizenship and Immigration)*, 2016 FC 522 [*Karahroudi*] at para 27).
>
> [31] Full disclosure of information in the Minister's possession may not be required, provided that the content or gist of the concerns are raised and conveyed to the applicant (*Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 105). What matters is whether the applicant had sufficient knowledge of the information relied upon, and an opportunity to meaningfully participate in the decision-making process (Karahroudi at para 33; *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22).
>
> [Emphasis added]

[73] The PFL in this instance was not specific enough. The Officer wrote that he had concerns "based on the totality of the evidence before me". The PFL was misleading with regards to what this "totality of evidence" consisted of. For example, the PFL states that open sources were consulted, but cites only two open sources, whereas the GCMS notes refer to at least seven

different documents relied on by the Officer. In addition to those sources, the Officer used 1) statements made by the Applicant in 1997; 2) statements made by the Applicant in 2017; 3) a CSIS report from October 2020; and 4) a NSSD inadmissibility assessment from April 2021. The failure to disclose those reports was problematic because those documents "drove the decision making process" per Justice Mactavish in *Amiri* at para 31.

[74] The Applicant was not given a meaningful and fair opportunity to engage with the Officer's concerns. I agree with the Respondent that fairness does not require disclosure of each document relied upon by the decision maker, but it does demand that the Applicant be given an adequate understanding of the gist of the concerns. That did not happen in this instance. For example, as the Applicant argued, he could not have expected that comments he made years or decades ago, that he probably forgot he made, would be used against him in this application. He was not given the opportunity to address the concerns arising from those statements, particularly the remark attributed to him that he had been a "Deputy Commander" of the PLA in the July 2017 interview notes. As indicated above, I regard that remark as implausible in light of the evidence about the PLA command structure.

V. **Conclusion**

[75] There is no dispute that the 3/PLA was a department of the Chinese Army which collected signals intelligence and for that purpose required employees who understood foreign languages in much the same way as similar agencies do in other countries including Canada. Nor is there any dispute that the LFLI trained linguists who were employed by the 3/PLA for that purpose. The controversy in this matter is whether by teaching English to LFLI students,

including some who may have been employed by the 3/PLA, the Applicant thereby was a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of espionage against Canada or that is contrary to Canada's interests. While membership is an expansive concept in the context of *IRPA* s 34, it can't be stretched infinitely.

[76] In my view, the reasons provided for the decision under review failed to justify the outcome particularly in light of the severe consequences to the Applicant. The decision does not bear the hallmarks of reasonableness – justification, transparency and intelligibility. I am also satisfied that the Applicant was denied procedural fairness in that the PFL did not provide him with an adequate basis to understand the Officer's concerns about his admissibility. In the result, he was denied an opportunity to fully respond to those concerns.

[77] For these reasons, the application will be allowed, the decision quashed and the matter remitted for reconsideration by a different officer.

[78] The parties did not propose any serious questions of general importance and none will be certified. This case turns on its very particular facts.

JUDGMENT in IMM-1374-22

THIS COURT'S JUDGMENT is that the application is granted and the matter remitted for reconsideration by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1374-22
STYLE OF CAUSE:	LIPING GENG v MCI
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 1, 2023
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	JUNE 2, 2023

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