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Dockets: IMM-3433-17
IMM-3373-18

Citation: 2019 FC 1126

Ottawa, Ontario, September 4, 2019

PRESENT: THE CHIEF JUSTICE

Docket: IMM-3433-17

BETWEEN:

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

IMMIGRATION AND REFUGEE BOARD

Intervener

Docket: IMM-3373-18

AND BETWEEN:

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] As far as factual determinations are concerned, the principle that "s/he who hears must decide" is sacrosanct. It is a fundamental pillar of the rule of law. It cannot be sacrificed on the altar of achieving greater consistency and efficiency in administrative decision-making.

[2] Decision-makers on quasi-judicial bodies such as the Immigration and Refugee Board of Canada [the **Board**] must be able to exercise their adjudicative functions independently from improper influence. Such influence can include establishing an expectation that Board members will adopt factual conclusions set forth in a jurisprudential guide [**JG**] issued by the Chairperson

of the Board unless they explain why such conclusions have not been followed. Important factors to consider in assessing whether a JG is likely to improperly influence members of the Board include the nature of the language establishing the expectation, whether it is made clear that each case must be adjudicated on the basis of its specific facts, the extent of monitoring of compliance, and whether a reasonable apprehension arises that adverse consequences would likely result if the JG were not followed.

[3] Among other things, the imposition of an expectation to adopt factual determinations in a JG would fetter Board members' discretion by reducing their freedom to reach different factual conclusions in the absence of providing a justification for why they have done so. It would also undermine their independence and their perceived impartiality. This is because it would give rise to a reasonable apprehension that the Board's members are not entirely free to reach their own factual conclusions, according to their own conscience, without influence from the Chairperson. In addition, it would increase the burden on the party who would otherwise simply have to demonstrate why a different factual conclusion should be reached, without having to also establish why a departure from the JG is justified.

[4] However, a Board JG that simply required or encouraged decision-makers to take account of particular objectively reported facts, legal principles, or factors to consider in deciding issues of law or mixed fact and law would not pose these problems. That is to say, they would not unlawfully fetter Board members' discretion, improperly encroach upon their adjudicative independence, or reduce their perceived impartiality, so long as it is made clear that Board members remain free to reach their own conclusions.

[5] Similarly, a Board JG that merely requires or encourages decision-makers to follow a general assessment framework or approach would not improperly fetter Board members' discretion or improperly encroach upon their adjudicative independence, so long as it is made clear that Board members remain free to reach their own conclusions.

[6] The four JGs at issue in this proceeding, pertaining to the assessment of refugee claims by nationals of Nigeria, Pakistan, China and India, were validly enacted pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**]. That provision authorizes the Chairperson to identify decisions of the Board as JGs, after consulting with the Board's Deputy Chairpersons, to assist members in carrying out their duties. Contrary to the position of the Canadian Association of Refugee Lawyers [**CARL**], paragraph 159(1)(h) authorizes the Chairperson to issue JGs not just on issues of law and mixed fact and law, but also on issues of fact. Moreover, external consultation prior to the issuance of the JGs was not required.

[7] The Nigeria JG does not unlawfully fetter Board decision-makers' discretion or improperly encroach upon their adjudicative independence because it repeatedly refers to the need for each case to be adjudicated on the basis of its particular facts. For the same reason, it does not unfairly increase the burden faced by refugee applicants in establishing their claims. Contrary to CARL's submissions, the Nigeria JG was not improperly "pre-selected."

[8] With respect to the remaining impugned JGs, the factual matters they address can be grouped into three categories: First, facts that are specific to the particular claimant and that were

adduced in his or her evidence; second, facts that are characterized as having been reported in the country documentation or Responses to Information Requests [**RIRs**]; and third, facts that are presented as the Refugee Appeal Division [**RAD**]'s own findings, on issues that go beyond the evidence that was specific to the claimant or claimants in question. The only unlawful fettering of discretion or improper interference with Board members' adjudicative independence is with respect to the third category.

[9] This unlawful fettering or improper interference results from a statement made in each of the policy notes that accompanied the identification of the decisions in question as JGs. That statement states that members of the Board's Refugee Protection Division [**RPD**] and Refugee Appeal Division "are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so." A similar statement was made in the Board's *Policy on the Use of Jurisprudential Guides* and in e-mails the Chairperson and the Deputy Chairperson (RPD) sent to the Board's members at the time three of the JGs were released.

[10] Alternative language that did not include a similar statement and that explicitly left RPD and RAD members completely free to reach their own conclusions on issues of fact would not unlawfully fetter their discretion or improperly interfere with their independence. This is so even if Board members were encouraged to explain why they have reached different factual conclusions in cases with similar facts.

[11] Although some aspects of the principles of natural justice may be displaced where legislation expressly or by necessary implication ousts their application, paragraph 159(1)(h)

does not contain such language in respect of factual determinations that Board members may make. Indeed, subsection 162(2) of the IRPA makes it clear that each division of the Board should operate in accordance with the principles of fairness and natural justice.

[12] However, in authorizing the Chairperson to issue JGs, Parliament implicitly gave the Chairperson the authority to draw Board members' attention to certain matters, and even to encourage them to consider such matters. These include factors to be taken into account in making decisions, relevant legal principles, and facts that are reported in objective sources, such as country documentation or RIRs.

[13] One unavoidable consequence of this is that the evidentiary burden faced by claimants in establishing their case may be easier or more difficult to meet than it would have been if such factors, principles, or facts did not need to be addressed. This impact on the burden faced by claimants is not unfair. It also does not improperly interfere with the presumption established by *Maldonado v Minister of Employment and Immigration* (1979), [1980] 2 FC 302, 31 NR 34 [***Maldonado***] and its progeny that a refugee claimant's sworn testimony is truthful.

[14] The rationale underlying this presumption of truthfulness is that claimants for refugee protection who have come from certain types of exigent circumstances cannot reasonably be expected to have documentation or other evidence to corroborate their claims. Such circumstances can include refugee camps, war-torn country conditions, and situations in which the claimant only had a brief window of opportunity in which to escape their persecutor(s) and cannot subsequently access documents or other evidence from Canada.

[15] However, in cases where a claimant for refugee protection appears to have had opportunities to gather corroboration for his/her claim, either before or after arriving in Canada, the strength of the presumption of truthfulness varies directly with the extent to which such corroboration is provided. Where the claimant simply gives a bald, unsupported assertion that strains credulity when considered together with objective information in the Board's National Documentation Package [**NDP**] or RIR documentation, the strength of the presumption of truthfulness is relatively weak and may be displaced by that objective information. Indeed, it may also be displaced by a failure to reasonably explain an omission to provide corroboration for such assertions.

[16] Maintaining the presumption of truthfulness in circumstances where a bald or thinly supported assertion strains credulity in the face of objective factual information referenced in a JG would weaken the integrity of Canada's immigration system and undermine public confidence in that system. The Court, and indeed the bar and interested organizations such as CARL, have an important role to play in maintaining and cultivating that public confidence.

II. **Background**

[17] These two applications each concern a decision by the Chairperson to designate one or more Board decisions as a JG. IMM-3433-17 concerns the decision to designate RAD decisions pertaining to Pakistan, China, and India, respectively, as JGs. IMM-3373-18 concerns a similar designation in respect of a RAD decision pertaining to Nigeria.

[18] CARL challenges the legality of the four JGs on the following grounds:

1. Paragraph 159(1)(h) does not authorize the Chairperson to issue a JG with respect to issues of fact;

2. The JGs unlawfully fetter Board members' discretion and improperly encroach upon their adjudicative independence;

3. The JGs unfairly enhance the burden of proof on claimants for refugee protection; and

4. The JGs were issued without any external consultation.

[19] In addition, CARL challenges the legality of the Nigeria JG on the basis that the Chairperson improperly pre-selected the decision that became the JG.

[20] The JG with respect to Nigeria was issued to address the issue of the availability of an internal flight alternative [**IFA**] within that country for refugee applicants who have come from there. For that reason, the JG only consisted of paragraphs 13–30 of the decision in question. The JG concluded that an IFA was available to the refugee applicant in that case, in two particular cities. It added that "there are several additional cities in Nigeria where, depending on the individual facts, an IFA would likely be available to those fleeing non-state actors, such as the Appellant." That JG was issued after the RAD's Professional Development and Adjudicative Strategy Committee [the **Committee**] identified a high volume of claims and appeals from Nigeria in which the determinative issue was either credibility or the availability of an IFA. The Committee considered that it would be helpful to focus the analysis solely on the latter issue, to

reduce both the length of hearings and the time spent writing or rendering oral reasons for decision.

[21] The JG with respect to Pakistan was identified with respect to the issues of whether (i) the treatment experienced by persons of Ahmadi ethnicity amounted to persecution, (ii) adequate state protection is available to such persons, and (iii) such persons have a viable IFA within that country. That JG was issued after the Committee noticed that a number of RPD decisions had failed to properly analyse state protection and IFAs for Ahmadi claimants from Pakistan. The conclusions in the JG were favourable to the refugee claimant in that case in respect of both of those issues, as well as in relation to the issue of persecution.

[22] The JG with respect to India was issued with respect to the issue of whether Sikh refugee claimants from Punjab have a viable IFA. Once again, the Committee's objective in recommending the issuance of the JG was to reduce the time required for RPD hearings and to reduce the time required to draft RPD and RAD decisions. The JG concluded that the refugee claimants in question had a viable IFA in Delhi or Mumbai.

[23] The China JG was issued to promote consistency and to provide guidance to RPD and RAD members in respect of a matter that had given rise to a divergence in the jurisprudence of both the Board and this Court. In particular, it was issued to address the issue of whether persons alleging that they are wanted by Chinese authorities are likely to be able to exit that country from an airport using a genuine passport. As with the Nigeria JG, the China JG consisted of only certain paragraphs of the underlying decision, namely paragraphs 12–22 and 25–34. After

reviewing a range of evidence pertaining to China's Golden Shield Project, and observing that the refugee claimant had provided "scant" evidence with regard to how he was able to exit China, the JG concluded that he could not have left that country using his genuine passport and with the assistance of a smuggler, as he had claimed.

[24] At the time the Pakistan, China, and India JGs were issued, the Chairperson characterized those countries as "major source countries" for the Board and noted that the use of JGs was "essential if the IRB is to deal with the significant backlogs and growing intake we are facing today." As noted above, the "high volume of claims" from Nigeria was also an important consideration underlying the identification of the JG in relation to that country.

[25] The JG pertaining to India was revoked as of November 30, 2018, as a result of developments in the Board's country of origin information, in particular as it concerns the issue of the connectivity between police databases across India.

[26] The JG pertaining to China was revoked as of June 28, 2019, after the hearing of this Application, because it contained a finding of fact that was not supported by the Board's National Documentation Package [**NDP**], in particular as it concerned facial recognition technology used on passengers departing from the airport in Beijing.

[27] The policy notes issued in respect of the two revoked JGs contained language stating that RPD and RAD members "are expected to apply [**JG**s] in cases with similar facts or provide

reasoned justifications for not doing so." The same language appears in the policy notes that were issued with the JGs pertaining to the remaining two JGs, which remain in force.

III. **Relevant Legislation**

[28] The Chairperson's authority to issue JGs is set forth in paragraph 159(1)(h) of the IRPA. That provision states as follows:

Duties of Chairperson	**Présidence de la Commission**
Chairperson	*Fonctions*
159 (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson	159 (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :
[…]	[…]
(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties; and	h) après consultation des vice-présidents et en vue d'aider les commissaires dans l'exécution de leurs fonctions, il donne des directives écrites aux commissaires et précise les décisions de la Commission qui serviront de guide jurisprudentiel;
[…]	[…]

IV. **Preliminary Issues**

[29] Prior to the hearing of these Applications, three preliminary issues were raised. First, the Respondent maintained that CARL has no standing to bring the Applications. Second, the Respondent maintained that CARL's challenge with respect to the two revoked JGs, pertaining to India and China, are now moot. Third, CARL sought disclosure of a draft of the Nigeria JG. During the hearing, CARL abandoned that request.

[30] For the record, I will note that CARL also abandoned its position that the JGs contravene s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and s. 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44. Accordingly, these abandoned issues will not be addressed in this decision.

A. *CARL's Standing*

[31] In October 2017, the Respondent brought a Motion to strike CARL as a party from the proceedings in IMM-3433-17, and to consequently strike the proceedings in their entirety. In support of its request, it took the position that CARL is not a proper party to bring an application in respect of the JGs because it is not directly affected by them and does not meet the test for public interest standing.

[32] The following month, Prothonotary Aalto rejected the Respondent's Motion.

[33] The Respondent did not appeal that decision at that time because paragraph 72(2)(e) of the IRPA states that no appeal lies from a decision of the Court with respect to either an application contemplated by that legislation or an interlocutory judgment. Although Rule 51(1)

of the *Federal Courts Rules*, SOR/98-106 [the ***Rules***] permits appeals of orders issued by prothonotaries, Rule 1.1(2) provides that in the event of any inconsistency between those *Rules* and an Act of Parliament or a regulation made under such an Act, that Act or regulation prevails to the extent of inconsistency.

[34] Notwithstanding the foregoing, the Respondent continues to maintain that CARL has no standing to bring the two Applications that are before the Court in this proceeding. In support of its position that an appeal of Prothonotary Aalto's decision remains available, it makes two arguments.

[35] First, it maintains that it is an open question as to whether paragraph 74(d) of the IRPA would permit an interlocutory order to be appealed if a question for appeal was certified in the ultimate judgment pertaining to the related Application. Paragraph 74(d) permits an appeal of a judgment of the Court "if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question."

[36] In *Edwards v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 176, at para 10 [***Edwards***], the Federal Court of Appeal explicitly stated that an appeal of an interlocutory order is not possible even if a judge certifies a question. The Respondent acknowledges that ruling, but interprets it as having been directed to the situation where a judge purports to certify a question in rendering the interlocutory order, as opposed to in rendering a final judgment on the related application. The Respondent maintains that *Edwards* left open the possibility of an appeal of an interlocutory decision when a judge certifies a question in the latter type of decision.

[37] I disagree. After stating that an appeal would not be possible even if a judge had certified a question, the Court proceeded to address the very narrow range of situations in which an appeal may be made in respect of an interlocutory decision: *Edwards*, above at paragraph 11. It is readily apparent from that discussion that the Court was not intending to limit its preceding comments in the manner that the Respondent now contends.

[38] In my view, the logic of section 74 of the IRPA indicates that the appeal contemplated in paragraph 74(d) is an appeal of the judgment issued in respect of the application referenced in paragraphs 74(a) and (c), and contemplated by paragraph 74(b). Section 74 does not appear to contemplate interlocutory matters whatsoever. It simply addresses the fixing of a date and place for the hearing of an application, the necessity for that date to be no sooner than 30 days and no later than 90 days after leave was granted (absent an agreement on an earlier date), the disposition of the application without delay and in a summary way, and finally, the circumstances in which an appeal of the judgment can be made. I am reinforced in this view by the French version of paragraph 74(d), which refers to "le jugement consécutif au contrôle judiciare." This makes it abundantly clear that the appeal contemplated by paragraph 74(d) is an appeal of the judgment on the application, and not an appeal of any interlocutory decision that may have been separately issued prior to the hearing of the application.

[39] I will simply add in passing that the Supreme Court of Canada has observed that once a question is certified in a judgment, "[t]he object of the appeal is still the judgment itself, not merely the certified question": *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 25, 160 DLR (4th) 193 (emphasis added). The Court did

not say that the appeal can also extend to any interlocutory rulings made prior to the issuance of a final judgment on an application.

[40] The second argument advanced by the Respondent in support of its position that it can appeal Prothonotary Aalto's decision to grant CARL standing is that a decision with respect to standing constitutes "a separate, divisible, judicial act" from a decision on the merits of an application made under the IRPA. However, after the hearing, the Respondent advised the Court that it had discovered *HD Mining International Ltd v Construction and Specialized Worker Union, Local 1611*, 2012 FCA 327 at paras 16–17. There, the Federal Court of Appeal explicitly rejected the argument that a decision to grant standing is not a "matter arising" under the IRPA and is not therefore not subject to the bar on appeals set forth paragraph 72(2)(e) of that legislation. In rejecting that argument, the Court stated:

> [16] The Appellants submit that the question of standing is not a "matter arising" under IRPA. I disagree. To exclude preliminary procedural questions from the category of matters arising under IRPA would strip section 72 of IRPA of its purpose. Standing is a necessary precondition to any immigration matter brought before the Federal Court. The interests at stake in a particular dispute and the relation of the parties to those interests cannot be divorced from the matter itself. As such, I characterize the issue raised on appeal as a "matter arising" under IRPA.

[41] It follows that the Respondent's position that a decision on the issue of standing can be characterized as a "separate, divisible, judicial act," distinct from the merits of an application brought under the IRPA, must be rejected.

[42] I pause to observe that even if the issue of standing could have been characterized as such a “separate, divisible, judicial act,” the time for appealing Prothonotary Aalto’s ruling has long passed and that ruling has become *res judicata*.

[43] Although Prothonotary Aalto’s decision related solely to the application in IMM-3433-17, I consider it to be appropriate to grant standing to CARL in IMM-3373-18 for essentially the same reasons provided by Prothonotary Aalto, and having regard to the fact that these two applications have been consolidated and raise many common issues.

B. *Mootness*

[44] The general test for mootness was stated in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231 [***Borowski***] as follows:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[45] Regarding the first stage of the analysis, the paragraph preceding the passage quoted above makes it clear that the tangible and concrete dispute in question is the dispute between the parties to the proceeding.

[46] With respect to the second stage of the analysis, the Court identified three principal factors to be considered. Those are: (i) whether an adversarial relationship continues to exist between the parties; (ii) the need to promote judicial economy; and (iii) whether proceeding to determine the merits of the matter might be viewed as intruding into the role of the legislative branch: *Borowski*, above at 358–363.

[47] In its written submissions, the Respondent took the position that the JG pertaining to India should no longer be part of the application in IMM-3433-17 because that aspect of the application has become moot. However, the Respondent did not further elaborate.

[48] Subsequent to the hearing of these applications, the Chairperson revoked the JG pertaining to China. In response to my request for submissions with respect to the mootness of that aspect of IMM-3433-17, CARL submitted that the issues it raised with respect to the China JG remain live because that JG has been applied to numerous cases in respect of which there are decisions pending before this Court or the RAD. CARL asserted that if the Court does not rule now on the issue of the Chairperson's authority to issue JGs on purely factual issues, each individual applicant in the outstanding cases involving the China JG will be required to challenge that purported authority.

[49] In any event, CARL maintains that the fact that issues pertaining to the China JG have already been vigorously argued before the Court in this proceeding is a compelling reason for the Court to exercise its discretion to address those issues. In addition, it asserts that because the Court is still going to have to issue a decision in respect of the Nigeria and Pakistan JGs, judicial

resources will not be spared by declining to address whether the China JG was lawfully issued. CARL added that the Court would not exceed its proper institutional role by ruling on the legality of the China JG. Finally, CARL stated that the issue of whether the Chairperson can issue a purely factual JG is likely to arise in the future, and therefore it is important for the Court to address this issue once and for all.

[50] For its part, the Respondent once again simply asserted its position that the issues pertaining to the China JG have become moot. However, it conceded that the ongoing adversarial context between the parties as well as judicial economy may weigh in favour of the exercise of my discretion to deal with the issues pertaining to the China JG. The Respondent added that "the existence of [several cases currently before the Court in which the China JG is potentially a relevant factor] may be germane in the context of the Court's consideration of" its discretion to entertain an otherwise moot matter.

[51] Turning to the Intervener, its submissions were made solely in respect of the Application in IMM-3433-17. This is because it did not seek leave in relation to IMM-3373-18, (although it was granted certain participation rights at various pre-hearing stages by the case management judge). In brief, the Intervener submitted that the aspect of this proceeding that concerns the China JG has become moot since there is no longer any live controversy in respect of that JG that affects the rights of the parties. In addition, it stated that any legal issues raised by the China JG will be resolved in assessing the legality of the JGs pertaining to Nigeria and Pakistan. With respect to the second stage factors, it acknowledged an adversarial relationship continues to exist

between the parties. However, it maintained that the two other stage two factors identified in *Borowski*, above, weigh in favour of not addressing the issues raised by the China JG**.**

[52] In my view, the aspect of this proceeding that concerns the China JG is not moot. This is because CARL continues to have a live interest in the "several cases currently before the Federal Court in which the China JG is potentially a relevant factor," (see paragraph 50 above). In granting standing to CARL, Prothonotary Aalto observed that "CARL has a genuine interest as its members must deal with and respond to the impugned [JGs] in representing clients in the immigration process:"*Canadian Association of Refugee Lawyers v The Minister of Citizenship and Immigration*, Court Docket IMM-3433-17, November 14, 2017, at 13. A similar observation was made by Justice Boswell in *YZ v Canada (Citizenship and Immigration*), 2015 FC 892 at para 41.

[53] Nothing turns on my conclusion in this regard, as I find that the factors to be considered in exercising my discretion to address the China JG weigh in favour of doing so, even if that aspect of this proceeding has become moot. In particular, I agree with both CARL and the Respondent that the ongoing adversarial relationship between the parties and considerations of judicial economy weigh in favour of my addressing the issues that have been raised with respect to the China JG. Indeed, the public interest in resolving the ongoing uncertainty regarding those issues also weighs in favour of addressing them: *Borowski*, above at 361. I will simply add for the record that the final (stage two) factor to be considered in determining whether to exercise my discretion to address the China JG is not relevant. As the Respondent acknowledged, "it

cannot be said that the Court would be overstepping its proper role" by proceeding to address the issues that have been raised in respect of the China JG.

[54] I pause to add for the record that in reaching my decision to address those issues, I have not considered it necessary to consider the Further Affidavit of Elyse Korman, sworn on July 8, 2019, which was included with CARL's submissions on mootness and which was disputed by the Intervener. I also do not consider it necessary to consider, in dealing with the merits of these Applications, the allegedly "new arguments" made in those submissions and disputed by the Intervener.

V. **Issues**

[55] The issues in dispute in these Applications are as follows:

1. Does the Chairperson have the authority to identify JGs on questions of fact?

2. Do the impugned JGs unlawfully fetter Board members' discretion or improperly interfere with their adjudicative independence?

3. Do the impugned JGs unfairly enhance the burden of proof for applicants for refugee protection?

4. Was the Chairperson required to engage in external consultation before identifying the decisions in question as JGs?

5. Did the Chairperson improperly pre-select the Nigeria JG?

VI. **Standard of Review**

[56] The issue of whether the Chairperson has the authority to identify JGs on questions of fact is a question concerning the interpretation of the Chairperson's "home statute," namely, paragraph 159(1)(h) of the IRPA. Such questions are presumed to be reviewable on a standard of reasonableness, unless that presumption is rebutted: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 27–28 [***CHRC***]. In my view, none of the circumstances in which that presumption may be rebutted apply in the present circumstances: *CRHC*, above at para 28. For greater certainty, this is not one of the "exceptional" circumstances in which "a contextual inquiry shows a clear legislative intent that the correctness standard be applied." CARL did not suggest otherwise. Indeed, it maintained that the other provisions of the IRPA are of no assistance whatsoever in interpreting paragraph 159(1)(a) of that legislation. Although CARL nevertheless maintains that the issue at hand is one of the Chairperson's authority or jurisdiction under paragraph 159(1)(h), this is not one of those "elusive" true questions of jurisdictional *vires*: *CHRC*, above at paras 34–35.

[57] With respect to the "fettering of discretion/improper interference with adjudicative independence" issue that CARL has raised, it is unnecessary to determine whether the standard of review is correctness or reasonableness. This is because the result will be the same under either of those standards, since the fettering of a decision-maker's discretion is *per se* unreasonable: *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 23–24; *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 at para 19.

In my view, the same is true with respect to the improper interference with a quasi-judicial decision-maker's independence to make findings of fact.

[58] The issue that CARL has raised with respect to the unfair enhancement of the burden of proof on refugee applicants was framed as an issue involving both procedural fairness and statutory interpretation. As discussed above, the Chairperson's interpretation of the IRPA is reviewable on a standard of reasonableness. Issues of procedural fairness are ordinarily reviewable on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In assessing such issues, the Court's focus is upon whether an impugned process was or is procedurally fair: see *Mission Institution v Khela*, 2014 SCC 24 at para 90; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 68 at para 54.

[59] The issue that CARL has raised with respect to public consultation was framed as an issue of procedural fairness, and therefore is also subject to review on a standard of correctness. However, in this particular case, this issue can be resolved by looking to the plain language of paragraph 159(1)(h). Accordingly, I consider that this issue is reviewable on a standard of reasonableness.

[60] The final issue raised by CARL, concerning whether the Chairperson improperly pre-selected the Nigeria JG, was cast as an issue of the Chairperson's interpretation of the IRPA. As noted above, such issues are reviewable on a standard of reasonableness, as it concerns the interpretation of the Chairperson's "home statute." Nothing turns on this, as I find that the

evidence does not establish that the Chairperson *de facto* identified the Nigeria JG as a JG at any time before he formally did so, almost two months after the RAD issued the decision in question.

VII. **Analysis**

A. *Does the Chairperson have the authority to issue JGs on questions of fact?*

[61] CARL maintains that each of the four JGs at issue in this proceeding is null and void on the ground that they deal in whole or in part with questions of fact and the Chairperson is not authorized to issue a JG on a question of fact. For this reason, CARL submits that the identification of the four decisions in question as JGs was *ultra vires* the authority paragraph 159(1)(h) of the IRPA confers on the Chairperson. I disagree.

[62] In support of its position, CARL notes that the Chairperson's 2016 policy on the use of JGs states that "[a] decision may be identified as a [JG] on either a question of law or a question of mixed law and fact." CARL relies upon that statement as a strong indication of the manner in which the Chairperson interpreted his authority under paragraph 159(1)(h). CARL further notes that paragraph 159(1)(h) has not been amended since that statement was made, yet the Chairperson now takes the position that JGs can be issued in respect of questions of fact.

[63] I accept the position that the statement quoted immediately above provides *some* indication of the manner in which the Chairperson interpreted his authority under paragraph 159(1)(h). However, it is not the only such indication.

[64] Importantly, in his decision to identify the Pakistan, China and India JGs, the Chairperson explicitly stated that those JGs "are based on findings of fact or mixed law and fact" (emphasis added). Moreover, the policy note that was issued together with the China JG stated: "The key determination in this [JG] is one of fact that may be applicable to a large number of claims, in that it is a determination in relation to an aspect of the Chinese government's public security infrastructure and how it operates" (emphasis added).

[65] To the extent that the China JG is largely confined to facts, the Chairperson's interpretation of paragraph 159(1)(h) can be implied and is entitled to be reviewed for its reasonableness: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 63 (***Agraira***). Put differently, it can be implied from the fact that the China JG primarily addresses factual issues, and from the statement immediately quoted above from the policy note, that the Chairperson interpreted paragraph 159(1)(h) as conferring upon him the authority to issue JGs on issues of fact. The fact that the Chairperson's interpretation was implicit, as opposed to explicit, does not render it any less entitled to be reviewed for its reasonableness: *Agraira*, above at para 63.

[66] There are additional indications of the Chairperson's implicit interpretation of paragraph 159(1)(h). Specifically, various references are made to issues of fact in several of the documents that are included in the record in this proceeding. For example, in an e-mail that was sent to Board members at the time the Pakistan, China and India JGs were identified, the Chairperson stated: "Decision-makers are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so." A similar statement was included in the policy notes

issued with the four JGs that are at issue in this proceeding. Likewise, the Board's Policy on the Use of Jurisprudential Guides states:

> A member must **explain in his or her reasoning** why he or she is not adopting the reasoning that is set out in a jurisprudential guide when, based on the facts of the case, he or she would otherwise be expected to follow the jurisprudential guide (emphasis in original).

[67] In the same vein, the policy notes that announced the revocation of the India JG and two JGs pertaining to Costa Rica stated that those JGs had been initially identified because they offered a "sound analysis of the legal and factual issues raised." The policy notes explained that those JGs had been withdrawn because of certain evidentiary/factual developments in the country documentation. The Revocation Notice that was issued in respect of the China JG provided a similar explanation. It stated that the JG was being revoked because it contained "a finding of fact which is not supported by the China Documentation Package (NDP) in effect at the time of the decision" that was identified as the JG.

[68] In my view, the Chairperson's implicit interpretation of paragraph 159(1)(h) is also reasonable because it accords with the plain words of that provision. Moreover, that interpretation is broadly consistent with the provision's legislative history, its apparent purpose, and its statutory context.

[69] With respect to the plain wording of the provision, there is no limitation confining its scope to issues of law or mixed law and fact. Rather, an unlimited authority to identify decisions as JGs was provided "to assist members in carrying out their duties" and "after consulting with the Deputy Chairpersons." Subject to the comments that I will make in the next section of these

reasons below, it is not immediately apparent why JGs addressed to factual issues would not be as helpful as JGs addressed to issues of law or mixed fact and law in assisting Board members to carry out their duties.

[70] Regarding the legislative history and purpose of paragraph 159(1)(h), the explanatory notes in the *Clause by Clause Analysis* of Bill C-11, which repealed and replaced the *Immigration Act*, RSC 1985, c I-2, stated: "The provision gives authority to the Chairperson to identify decisions that would serve as jurisprudential guides that would not be binding on members but would enhance consistency in decision-making." Once again, I consider it to be consistent with this legislative history and stated purpose to interpret paragraph 159(1)(h) as providing the authority to issue JGs on issues of fact, in addition to on issues of law and of mixed fact and law. This interpretation is also consistent with the purpose identified by the Chairperson in his decision to identify the Pakistan, China and India JGs. That purpose was to facilitate "shorter more focused hearings in the RPD and focused reasons requiring less time to draft in both the RPD and the RAD."

[71] In addition to the foregoing, I consider the statutory context to be more supportive of the Chairperson's implied interpretation than it is of CARL's interpretation of paragraph 159(1)(h). While CARL maintains that the other provisions of the IRPA are of no assistance in interpreting that provision, I consider the Chairperson's interpretation to be consistent with the broad authority provided in paragraph 159(1)(g) and with the general objective set forth in subsection 162(2). The former provision provides the Chairperson with the authority to take "any action that may be necessary to ensure the members of the Board carry out their duties efficiently and

without undue delay." The latter requires each division of the Board to "deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." I will return to considerations of fairness and natural justice in the next section of these reasons below. For the present purposes, I consider that an ability to issue JGs in respect of factual issues would be consistent with the broad objective of dealing with all proceedings as informally and quickly as the circumstances permit, so long as this is not contrary to considerations of fairness and natural justice.

[72] I also consider the Chairperson's interpretation of his authority under paragraph 159(1)(h) to be reasonable because it can be very difficult to distinguish between issues of fact and issues of mixed fact and law: *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at paras 35–37, 144 DLR (4th) 1; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at para 39 [***Ellis-Don***]. Moreover, findings on issues of mixed fact and law cannot be made without first making particular factual findings, to which legal tests are then applied. It would be cumbersome, to say the very least, to excise out of JGs all of the factual findings so that only the sentences or paragraphs in which conclusions on issues of mixed fact and law, or on issues of law alone, remained.

[73] CARL further submits that the term "jurisprudential guide" cannot be interpreted as contemplating a guide on issues of fact, because the term "jurisprudence" refers to legal principles, which are set out in the case law or court decisions. In this regard, CARL notes that certain dictionary definitions of the term "jurisprudence" refer, respectively, to "the study of law and the principles on which law is based" and to "the general or fundamental elements of a

particular legal system as opposed to its practical and concrete details" (CARL's emphasis removed). CARL therefore maintains that that term "jurisprudence" does not encompass factual findings. I do not find that submission to be persuasive.

[74] The cases upon which CARL relies to support its interpretation of the word "jurisprudence" are distinguishable from the situation at hand.

[75] Before addressing them, I consider it relevant to note that in *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 90 [***Thamotharem***], the Federal Court of Appeal held that the authority conferred by paragraph 159(1)(h) "is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters" (emphasis added).

[76] Turning to the two cases relied upon by CARL, in *Mujagic v Kamps*, 2015 ONCA 360 at para 9, the Court simply determined that the words "facts arising or discovered after [an order] was made" in Rule 59.06(2)(a) of Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, did not contemplate jurisprudential changes. In this context, the Court determined that "[n]ew facts, like all facts, are found in evidence, not in the statute books or case law."

[77] Likewise, in *Ergen v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 643 at paras 29–30, the Supreme Court of British Columbia rejected the argument that jurisprudence could be relied upon to establish a factual proposition. The Court explained that individual cases do not establish binding factual precedents. This is a far cry from the

Respondent's more modest position that paragraph 159(1)(h) permits non-binding JGs to be issued for the purposes that were identified by the Chairperson. Those purposes were to facilitate "shorter more focused hearings in the RPD and focused reasons requiring less time to draft in both the RPD and the RAD," as explained in the Chairperson's decision to identify the Pakistan, China and India JGs.

[78] CARL submits that the ordinary meaning of the term "jurisprudence" does not contemplate cases that solely consist of factual determinations. In this regard, it maintains that the paragraphs of the decision in respect of which the China JG was identified are entirely confined to factual issues. In particular, those paragraphs contain a discussion of the documentary evidence that explains the details of China's Golden Shield Project and factual findings by the RAD regarding its effectiveness. However, I note for the record that they also contain a discussion of several precedents, which the RAD distinguished based on factual differences between those cases and the case discussed in the JG.

[79] In my view, the ordinary meaning of the term "jurisprudence" contemplates decisions issued by a Court in respect of factual issues, as well as issues of law and of mixed fact and law. That said, it is trite law that factual disputes must be determined on their merits in each case: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32; *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 71;*Huang v Canada*, 2017 FC 762 at para 72. .

[80] Subject to that proviso, I consider that decisions that entirely or largely consist of factual determinations are as much a part of a tribunal's "jurisprudence" as decisions that address issues of law or issues of mixed fact and law. In this regard, I consider it germane to note that the Court's *Notice to the Parties and the Profession – Publication of Court Decisions* was issued after the Court accepted the bar's position that virtually all of its final judgments are of potential precedential value and that it is up to the bar and other external stakeholders, rather than the Court, to determine whether a judgment is of precedential value. The position set forth in that Notice represented a change in position from that which was set forth in the Court's 2015 *Notice to the Parties and the Profession – Publication of Decisions of Precedential Value*. In the latter document, the Court stated, among other things, that the absence of a neutral citation number and that fact that a judgment is not published was "indicative of the presiding judicial officer's view that the decision has no precedential value" (emphasis added). Nevertheless, the document added: "However, this does not preclude a party from taking a different position regarding its precedential value."

[81] CARL further objects to the China JG on the ground that it cannot be properly challenged without knowing the entire record that was before the Board when it rendered the decision in respect of which the JG was issued. In my view, this objection is more appropriately addressed in connection with the issue that CARL has raised regarding the Chairperson's failure to consult with the public before issuing the China JG.

[82] CARL also maintains that it is improper to raise a factual finding to the level of a jurisprudential guide because country conditions are constantly changing. However, the evidence

in this proceeding establishes that the Board monitors the documentary evidence that is relevant to a JG. According to the affidavit sworn by Mr. Gregory Kipling, Director General of Policy, Planning and Corporate Affairs at the Board: "New evidence that may impact the validity of a JG is considered by the Research Directorate and may result in the new document(s) being included in the NDP, rejected, or the JG being revoked by the Chairperson." Indeed, this is why the JGs with respect to India and Costa Rica were withdrawn.

[83] I pause to observe that there is nothing preventing CARL or any other interested party from drawing factual developments, or factual shortcomings in a JG, to the attention of the Board at any time.

[84] Lastly, CARL maintains that a passage in *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 [***Kozak***], at paragraph 9, supports the proposition that a JG cannot be issued in respect of issues of fact. There, the Court observed:

> In addition, a jurisprudential guide is normally intended to be persuasive on questions of law, and mixed law and fact. In contrast, it was intended that lead cases would also establish persuasive findings of fact on country conditions. See further, *Policy on the Use of Jurisprudential Guides*, Policy No. 2003-01 (Ottawa: Immigration and Refugee Board of Canada, March 21, 2003).

[85] However, that passage is from the introductory section of the Court's decision and simply appears to be paraphrasing an aspect of the Board's 2003 policy statement. Taken in its proper context, I do not consider the passage quoted immediately above to have been intended to articulate the principle advanced by CARL. That is to say, it did not establish the principle that paragraph 159(1)(h) of the IRPA does not confer authority upon the Chairperson to issue any

JGs whatsoever with respect to factual issues. My conclusion in this regard is reinforced by the Court's use of the word "normally," in the passage quoted above.

[86] In summary, I consider that it was not unreasonable for the Chairperson to implicitly interpret paragraph 159(1)(h) as conferring upon him the authority to issue JGs in respect of factual issues, in addition to issues of law and of mixed fact and law.

B. *Do the impugned JGs unlawfully fetter the discretion of the Board's members, or improperly interfere with their independence?*

[87] CARL submits that the four JGs at issue in these applications improperly encroach upon Board members' adjudicative independence because they impinge on the members' jurisdiction to make their own findings of fact. Stated differently, by effectively requiring Board members to either adopt the factual conclusions set forth in the JGs or to provide reasoned justifications for not doing so, the JGs unlawfully fetter their discretion or improperly interfere with their adjudicative independence.

[88] To the extent that any of the JGs in question do or did in fact effectively pressure Board members to either adopt factual conclusions or provide a reasoned justification for not doing so, I agree that this would constitute an improper encroachment on their adjudicative independence. However, as discussed below, the Nigeria JG does not suffer from these shortcomings and the other three impugned JGs do so only because of the statement of expectations described at paragraph 9 above.

(1) Adjudicative independence – legal principles

[89] The principle of adjudicative independence is one of the principles of natural justice: *Ellis-Don*, above at para 47. Among other things, it requires that individual adjudicators have complete liberty to hear and decide cases before them, without interference with the way in which a case is conducted or the manner in which a final decision is made: *Beauregard v Canada*, [1986] 2 SCR 56 at 69, 30 DLR (4th) 481.

[90] This does not imply that judges and quasi-judicial decision-makers cannot discuss their cases with colleagues. However, they cannot be compelled to participate in such discussions or to adopt the views expressed by their colleagues. They must maintain the complete freedom to decide their case according to their own conscience. In the course of doing so, they must make their own factual determinations, free from pressure or inducement from others, and must remain impartial, free from a reasonable apprehension of bias or attenuated impartiality: *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 332–335, 73 OR (2d) 676 [***Consolidated-Bathurs***t]; *Ellis-Don*, above at paras 27–29.

[91] Like other principles of natural justice, the principle of adjudicative independence does not have a fixed content, applicable to judicial and quasi-judicial decision makers alike. It can be adapted to take into account the institutional constraints faced by quasi-judicial bodies such as the Board, including their need to deal with heavy caseloads in an efficient manner: *Consolidated-Bathurst*, above at 323–324. However, there are limits on how far such adaptation can be taken.

[92] In my view, those limits are reached at the point where an administrative guideline or other tool goes beyond simply drawing attention to factual information or encouraging Board members to take it into account, and instead requires, induces, pressures, or coerces them to make or to follow particular factual findings.

[93] Put differently, in the administrative law context, it can be entirely appropriate to embrace tools such as guidelines to influence, *in a general way*, the manner in which decisions are reached. In this regard, a legitimate type of general influence can include identifying factors, sources of information, and even particular information that can be helpful to consider. Indeed, I consider it to be permissible to go further and encourage such information to be taken into account, so long as it is made clear that decision-makers remain completely free to reach their own conclusions, based on the facts of each particular case.

[94] In my view, this would be consistent with the principle that administrative tools that do not encroach upon a Board member's freedom to make factual findings can be legitimately used to achieve a degree of coherence that would not otherwise be available: *Consolidated-Bathurst*, above at 340. Such tools include JGs.

[95] However, the line would be crossed when the language used in guidelines may be reasonably apprehended by decision-makers or members of the general public to have the likely effect of either pressuring independent decision-makers to make particular factual findings or attenuating their impartiality in this regard. The same is true where such language may be reasonably apprehended to make it more difficult for independent decision-makers to make their

own factual determinations. This is so even if it has been stated that the guidelines are not binding.

[96] I pause to observe that neither the Respondent nor the Intervener identified any binding authority where it was held that an administrative guideline or other tool can legitimately fetter or constrain a quasi-judicial decision-maker's freedom to make findings of fact.

[97] The Respondent and the Intervener rely on *Thamotharem*, above, to argue that administrative guidelines can go further in influencing quasi-judicial decision-makers than I have described above. That case concerned a Board guideline that established a standard practice for the Board to question a refugee claimant before the claimant's counsel questioned him or her. The guideline in question also stated that Board members "may vary the order of questioning in exceptional circumstances."

[98] In concluding that the guideline did not constitute an unlawful fettering of Board members' discretion to conduct their hearings, Justice Evans stated the following on behalf of a majority of the Court:

> [89] Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

[99] Before commencing his analysis of the fettering of discretion issue, Justice Evans also made the following general observation:

> [60] The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

[100] Justice Evans' conclusion that the impugned guideline did not constitute an unlawful fettering of discretion was based on his finding that the evidence had not established:

> that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline, the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly by single members.

Thamotharem, above at para 88.

[101] In reaching that conclusion, Justice Evans explicitly found that Guideline 7 did not infringe the independence of Board members by imposing an expectation on them "to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning": *Thamotharem*, above at para 87.

[102] In my view, neither the passages reproduced above nor any other passages in *Thamotharem* stand for the proposition that the Chairperson may issue a JG or other "soft law"

instrument that constrains the complete freedom of quasi-judicial decision-makers to make their own factual determinations, free from pressure or inducement from others. The focus of the Court's assessment of the fettering of discretion issue in that case was on the narrow procedural issue of whether the Board could establish a standard order of questioning that could only be varied in exceptional circumstances.

[103] In the course of dealing with that issue, Justice Evans explicitly recognized "that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board." He then distinguished this from administrative agencies' need to be able to devise processes for ensuring an acceptable level of consistency and quality in their decisions: *Thamotharem*, above at para 83. After then referring to *Consolidated-Bathurst*, above, he reiterated that members of administrative agencies must be free from improper constraints on their ability to decide cases, including such constraints that may be so coercive as to raise a reasonable apprehension of improper influence: *Thamotharem*, above at para 85.

[104] I acknowledge that, in the course of reaching his decision, Justice Evans quoted the following passage from *Maple Lodge Farms Ltd v Government of Canada*, [1982] 2 SCR 2 at 6, 137 DLR (3d) 558 [***Maple Lodge***], in support of the proposition that "guidelines may validly influence a decision maker's conduct:"

> The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; …" does not fetter the exercise of [the Minister's statutory] discretion.

[105] However, *Maple Lodge* concerned statements made in policy guidelines that were alleged to have constrained the Minister's own statutory discretion. In my view, that type of situation is distinguishable from a situation where administrative guidelines may be reasonably apprehended to have the effect of constraining the ability of quasi-judicial administrative decision-makers to make their own findings of fact, or making it more difficult for them to do so.

[106] I also acknowledge that, as in *Thamotharem*, it can be relevant to consider the evidence as to whether decision-makers of the administrative agency in question have in fact considered themselves to be improperly influenced by an impugned guide or set of guidelines. However, this factor needs to be considered with other factors, including the language of the document, whether there are any actual or reasonably perceived sanctions or other adverse consequences for non-compliance, and how the document is likely to be reasonably apprehended by a member of the public.

[107] In recognition of the fact that my interpretation of *Thamotharem* is not free from doubt and concerns a serious question of general importance, I will certify a question for appeal on this issue, so that the Federal Court of Appeal will have an opportunity to address the question.

[108] Before concluding this discussion of general legal principles, it is necessary to address one further point. The Intervener relies on *Ellis-Don*, above at para 49, to maintain that CARL cannot attack the validity of the impugned JGs based on a hypothetical breach of one or more of the principles of natural justice. However, in that case, the Supreme Court of Canada simply rejected the proposition that an "apprehended" breach of the *audi alteram partem* rule was

sufficient to trigger judicial review. In the course of doing so, it explicitly distinguished between an apprehended breach of that rule and an apprehended breach of the rule concerning adjudicative bias. It proceeded to state that "one has to look at the nature of the natural justice problem involved to determine the threshold for judicial review": *Ellis-Don*, above at para 49.

[109] When the issue at hand is an apprehended breach of adjudicative independence or impartiality, it is not necessary to wait until an actual breach has occurred. This is because, "[i]f a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would have been a rare event indeed": *Ellis Don*, above at para 48.

(2) Application of the applicable principles to the impugned JGs

[110] It appears to be common ground between the parties that Board members are independent decision-makers. The Intervener did not suggest otherwise.

[111] There does not appear to be any dispute between the parties as to whether the Chairperson may issue JGs with respect to issues of law and issues of mixed fact and law, and then impose an expectation that findings on such issues will be applied in cases of similar facts, unless a reasoned justification is provided for not doing so. Accordingly, the discussion below will focus on the extent to which, if at all, the impugned JGs unlawfully fetter the discretion of Board members or improperly constrain their adjudicative independence with respect to their determination of the facts in cases assigned to them.

(a) *The Nigeria JG*

[112] As previously noted, the Nigeria JG consists of paragraphs 13–30 of RAD decision TB7-19851.

[113] That section of the decision begins with the statement that the determinative issue "is the finding that there exist viable IFAs for the Appellant to Ibadan and Port Harcourt." It then further notes "that there are several additional cities in Nigeria where, depending on the individual facts, an IFA would likely be available to those fleeing non-state actors": at para 13 (emphasis added).

[114] The JG then provides a summary of the two-pronged IFA test. In the course of doing so, the decision states: "The finding of an IFA must be based on a distinct evaluation of the region for that purpose taking into account the Appellant's personal circumstances": at para 15 (emphasis added).

[115] In the ensuing three paragraphs, the JG draws attention to certain findings that have been made by the RPD, the RAD and this Court with respect to the availability of an IFA in Nigeria. The JG proceeds to identify various large cities in south and central Nigeria "where persons fleeing non-state actors may be able to safely establish themselves, depending on their own particular circumstances": at para 19 (emphasis added). The JG reiterates that "each appeal is dependent on the appellant's arguments, the individual facts and the assessment of the appellant's personal risk": at para 19 (emphasis added).

[116] In the ensuing paragraph, the JG discusses various aspects of the jurisprudence with respect to the first prong of the two-prong IFA test. Once again, the JG repeats that the analysis

"is necessarily fact specific" and requires a "consideration of a particular appellant's specific circumstances and allegations": at paras 20–21 (emphasis added).

[117] In the balance of the JG, the decision discusses the country documentation with respect to transportation and travel, language, education and employment, accommodation, religion, "indigeneship," and the availability of medical and mental health care. In connection with transportation and travel, the JG also notes that consideration must be given to *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

[118] The JG concludes with the statement that "it is my view tha[t] an assessment in line with the framework set out above would be broadly applicable and determinative in a variety of Nigerian claims where the fear is of non-state actors, and as below, would have to be applied in any individual appellant's particular circumstances": at para 30 (emphasis added).

[119] Considering the passages that I have underlined in the various quotes above, I am satisfied that the Nigeria JG does not unlawfully fetter the discretion of Board members or improperly constrain their freedom to decide cases that may come before them according to their own conscience. On the contrary, the JG makes it abundantly clear that each case must be decided on its particular facts. To the extent that Board members are expected to do anything in particular, it is simply to apply the established test for an IFA, to take account of the jurisprudence and the country documentation that is mentioned in the JG, and then to reach their own decisions based on the particular facts of the case.

(b) *The Pakistan JG*

[120] The Pakistan JG was identified in respect of the RAD's decision in TB7-01837. In contrast to the Nigeria JG and the China JG, it was not explicitly confined to specific paragraphs of the decision. However, the policy note that accompanied the JG stated that its "scope" is with respect to whether "the treatment experienced by Ahmadis from Pakistan amounted to persecution and whether state protection and an [IFA] are available." I will therefore confine the following discussion to those parts of TB7-01837. As I have previously noted, the RAD's conclusions on the three issues identified above were all favourable to the refugee claimant.

[121] I pause to observe in passing that the other parts of that decision, which cover its initial 25 paragraphs, are essentially confined to a discussion of the factual background, the RAD's role, and the RPD's finding with respect to the claimant's credibility and subjective fear. To the extent that those address the unique facts of the claimant's situation, they do not raise any issues for the purposes of the present proceeding.

[122] In the remaining 15 paragraphs of the JG, the RAD addresses the issues of persecution, state protection, and the availability of an IFA. In this regard, the RAD discusses: the specific evidence adduced by the Appellant; various errors committed by the RAD in assessing that particular evidence; country documentation that was addressed by the RPD and that reported on abuses, discrimination and/or persecution of religious minorities, including Ahmadi Muslims, in Pakistan; the law with respect to the meaning of "persecution"; important evidence in the record that was not discussed; and the meaning of "freedom of religion."

[123] The RAD then discusses various facts reported in the country documentation that would support the conclusion that Ahmadi's are persecuted in Pakistan, including by agents of the state. The RAD adds: "Even if Ahmadis faced no threat of physical harm – and the evidence indicates that there is indeed such danger – there is considerable evidence to support the argument that they experience religious persecution": at para 35.

[124] In the final six paragraphs of the JG, the RAD begins by stating that the RPD wrongly applied an overly narrow definition of persecution. It then explains why it considered that the claimant in question faced serious restrictions on the practice of her religion. It did so by reference to the specific evidence that she had adduced.

[125] The RAD then makes additional observations regarding the requirements of the law.

[126] Having regard to all of the foregoing, the RAD concludes: that the claimant faced a serious possibility of persecution in Pakistan due to her Ahmadi religion; that she could not expect adequate state protection, because the Pakistan state is one of the leading agents of persecution; and that she could not avail herself of an IFA because persecutory laws, measures, and practices exist in all areas of Pakistan.

[127] The factual issues discussed in the Pakistan JG can be grouped into three categories: (i) facts that are specific to the particular claimant and that she adduced in her evidence; (ii) facts that are characterized as having been reported in the country documentation; and (iii) facts that

appear to be presented as the RAD's own findings on issues that go beyond the evidence that was specific to the claimant.

[128] The facts in the first category do not pose a potential problem for the purposes of the present proceeding, because they are unique to the refugee claimant in TB7-01837.

[129] The facts in the second category also do not pose a potential problem because, for the purposes of the JG, the implication is simply that those facts should be taken into account in future cases. The facts referred to are not presented as factual findings made by the RPD or the RAD, but rather as information in the country documentation that was relevant to consider and was inconsistent with a conclusion the RPD reached on a question of mixed fact and law – namely, whether the claimant in question faced a serious possibility of being persecuted. In my view, the Chairperson's communication of an expectation to follow the JG or to provide a reasoned justification for not doing so would simply have the likely effect of influencing Board members to consider and then come to grips with the information in question. Such influence would not materially constrain the complete freedom of Board members to decide a case according to their own conscience or their ability to make their own factual determinations, free from pressure or inducement from the Chairperson.

[130] I will turn now to the facts in the third category. As I have noted, those appear to be factual findings made by the RAD. For the most part, they are set forth in the following paragraph of the JG:

> [33] Ahmadis are marginalized and excluded from the political system because, in order to register as a voter, they are required to

> sign a declaration about the finality of the prophet Muhammad, with which they cannot agree. Students applying for university must, if identifying themselves as Muslim, sign a similar declaration, which excludes Ahmadis. University teachers have called for the killing of Ahmadis, and students who objected to this were expelled. The Pakistani government proactively victimizes Ahmadis socially, economically, and educationally, to the point where livelihoods become difficult.

[131] In addition, the RAD appeared to adopt as its own finding the fact that Ahmadis do not enjoy freedom of religion in Pakistan.

[132] I have not included in this third category of factual findings the ultimate findings made by the RAD with respect to the serious possibility of persecution, the unavailability of adequate state protection, and the unavailability of an IFA, as these are all findings of mixed fact and law. As such, they are not within the scope of these Applications, notwithstanding CARL's position that findings with respect to the availability or unavailability of an IFA are findings of fact rather than findings of mixed fact and law.

[133] In the context of the JG, the factual findings in the third category discussed above are problematic for the present purposes because of the statement that "RPD and RAD members are expected to apply JGs in cases with similar facts or provide reasoned justifications for not doing so." Given that statement, Board members would be subject to an explicit expectation to adopt the above-mentioned findings, unless they were prepared to provide reasoned justifications for failing to do so. In cases with similar facts, it is reasonable to expect that some Board members who might be unable or unwilling to provide such justifications may very well feel pressured to adopt the factual findings in question because of the instruction that this is what Board members

are expected to do. This is particularly so in light of the fact that the statement of expectation has been conveyed to the Board's members repeatedly, including in its Policy on the Use of Jurisprudential Guides, an e-mail from the Chairperson dated 21 July 2017, and an e-mail of the same date from the Deputy Chairperson (RPD). In my view, the specific language of the expectation, together with the fact that it has been repeatedly communicated, give it a distinct mandatory aspect.

[134] Although there is no evidence that Board members would face sanctions or other adverse consequences for not applying any of the impugned JGs, common experience would suggest that at least some Board members would feel pressured by such repeated statements of expectation from their superiors regarding how they should conduct themselves. Indeed, internal Board documentation indicates that the acceptance rate for Ahmadi claimants from Pakistan increased from 93% to 98% after the issuance of the JG.

[135] I pause to observe that related documentation concerning the impact of the China JG and the India JG is more ambiguous, as it does not compare results between the pre-issuance and post-issuance period. However, it indicates that a substantial percentage of the Board's members are following those JGs. In particular, out of a sample of 80 RPD decisions finalized after the China JG was identified in July 2017, the JG was explicitly applied in 22% of relevant cases and implicitly applied in 39% of the cases. (The latter were decisions that made no mention of the JG, but used the Board's NDP to perform the same analysis of the claimant's exit from China). In another study that examined how RAD and RPD members applied the China JG during that same period, in cases where the JG was explicitly cited, it was determined that the JG was

applied in the course of rendering a negative decision in 68% of the cases. Insofar as the India JG is concerned, out of a sample of 80 RPD cases in which that JG was explicitly referenced in the period July 2017 to January 2018, the JG was applied in 51% of the cases to support a finding that an IFA was available.

[136] I acknowledge that these statistics also implicitly demonstrate that not all Board members are blindly following the JGs. However, that is not the point. The point is that it is reasonable to apprehend that at least some Board members are likely to feel pressured to adopt the factual determinations in the JGs.

[137] In any event, at least some members of the public would likely reasonably apprehend that the likely effect of the repeated instructions to RAD and RPD members would be that at least some of those members would feel pressured to adopt the factual determinations in the JG. Given the fact that the factual findings in this third category go to the core of the issues that would be at stake in cases with similar facts, this is particularly problematic.

[138] Indeed, to the extent that members of the public would likely reasonably apprehend the existence of at least some improper interference with some factual determinations by the Board's members, this cannot be countenanced. Among other things, this would violate the sacrosanct principle that "he who hears must decide" (*Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 31 [***Adams***]) and undermine public confidence in the Board and the rule of law. Were it otherwise, the government of the day could simply appoint a Chairperson who holds particular views about matters that are likely to be the subject of important factual disputes, on the

understanding that such person would take steps to impose those views on the Board's members, including by repeatedly communicating to them that they are expected to adopt such views. It is difficult to conceive of anything that would be more detrimental to the public's confidence in the Board.

[139] In contrast to the Nigeria JG, the Pakistan JG does not underscore or even mention that each case must be determined on the basis of its own particular facts. If a member of the RPD or the RAD were to look to the Board's general *Policy on the Use of Jurisprudential Guides* for reassurance on this point, s/he would not find it. Indeed, while the Board's *Policy on the use of Chairperson's Guides* explicitly states that the Board's guidelines are not binding, the *Policy on the Use of Jurisprudential Guides* does not state anywhere that JGs are not binding on the Board's members. Those members would have to look to distant sources, such as the legislative history discussed at paragraph 70 above, or the jurisprudence on this particular point, to learn or be reminded of that fact.

[140] Given the foregoing, I consider that at least some Board members in a future case with facts similar to those in the Pakistan JG would not feel completely free to decide the case according to his or her own conscience. On the contrary, some Board members are likely to feel pressure to adopt as his or her own findings the factual determinations the RAD appears to have made at paragraph 33 and in the first two sentences of paragraph 35 of the JG. As a result, their discretion to make factual findings would be unlawfully fettered and their adjudicative independence would be improperly constrained or encroached upon. In brief, those Board members would not be entirely free to make determinations with respect to the facts in question,

completely free and in accordance with his or her own conscience. Moreover, at least some members of the public would likely reasonably apprehend that some members of the Board would feel pressured in this way and would therefore not be entirely impartial.

[141] It bears underscoring that the problem with the third category of factual matters discussed above is not with the determinations made by the RAD in TB7-01837. Rather, it is with respect to the statement in the policy note that accompanied the Pakistan JG, which states that "RPD and RAD members are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so." It is the imposition of this expectation and corresponding obligation to justify a decision to not follow the JG in cases with similar facts that gives rise to the improper pressure on Board members to adopt the factual determinations made by the RAD in TB7-01837 as their own. This is particularly so given the extent to which the communication of this expectation has been repeated, and the absence of any clear statement that each case must be decided based on its specific facts.

[142] As I have observed, it would be entirely legitimate for the Chairperson to encourage Board members to take the JG into account in cases with similar facts dealing with the issues of persecution, the availability of state protection, and the availability of an IFA for Ahmadis in Pakistan. I consider that it would also be legitimate for the Chairperson to encourage Board members to follow the JG, so long as it was also made very clear that they are completely free to depart from the JG based on the particular facts of the case before them. There would not be anything wrong with a Board member voluntarily applying the JG in such circumstances: *Koroz v Canada (Citizenship and Immigration)*, 261 NR 71 at para 3, 9 IMM LR (3d) 12.

[143] However, the tension between the expectation that the Chairperson has communicated and the complete freedom of Board members to make their own factual findings according to their conscience is too great for the principle of adjudicative independence to bear, even in the administrative law context. The sacrosanct principle of "s/he who hears must decide" on the facts in dispute cannot be sacrificed on the altar of achieving greater consistency and efficiency in decision-making.

[144] I recognize that the conclusion I have reached above is different from the conclusion reached by Justice Harrington in *Barrantes Barrantes v Canada (Minister of Citizenship and Immigration)*, 2005 FC 518 at paras 5–15. Although Justice Harrington expressed his unease with the language of the statement of expectation, he did not accept the applicant's submission that the statement placed undue institutional pressure on the Board's members and left the applicants with the impression that their hearing was not fully impartial. However, it does not appear that Justice Harrington's attention was drawn to the jurisprudence from the Supreme Court of Canada that I have discussed at paragraphs 89–90 above.

[145] Two other cases relied upon by the Intervener can also be distinguished. In the first, *Araya Atencio v Canada (Minister of Citizenship and Immigration)*, 2006 FC 571 at para 20 [***Araya Atencio***], Justice Pinard stated: "This is not a situation where the Board failed to demonstrate its independence, but rather, an instance where the Board considered the guidelines and thereby ensured consistency in the decisions rendered by the Board for similarly situated asylum claims" (citation omitted). This statement was confined to the issue of whether the specific board member in question had demonstrated his independence. It does not appear that

the JG to which Justice Pinard referred was challenged, or that his attention was drawn to the jurisprudence that I have discussed at paragraphs 89–90 above.

[146] The second additional case relied upon by the Intervener is *Feng v Canada (Citizenship and Immigration)*, 2019 FC 18 at para 29 [***Feng***]. There, Justice Gleeson rejected the argument that the RAD had fettered its discretion by applying the China JG. He did so after concluding that the RAD had reached its own conclusion on the issue in dispute before turning to the JG and stating that it was supportive of the conclusion reached in the JG. Considering the foregoing, I do not consider this case to stand for the proposition that the China JG does not fetter Board members' discretion or improperly interfere with their independence, as I have found.

[147] I recognize that some aspects of the principles of natural justice may be displaced where legislation expressly or by necessary implication ousts their application: *Adams*, above. However, there is no express or implied expression of Parliamentary intent in paragraph 159(1)(h), or elsewhere in the IRPA, in respect of factual determinations. In fact, subsection 162(2) of the IRPA explicitly requires each division of the Board to "deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." Having regard to that provision, and in the absence of the express or implied language discussed above, it cannot be said that the Chairperson has been authorized to issue JGs that effectively require Board members to either adopt conclusions on factual issues set forth therein or to provide a reasoned justification for not doing so.

[148] That said, I consider that it is necessarily implicit from the inclusion of the authority to issue JGs in paragraph 157(1)(h) that the Chairperson can draw to Board members' attention, and even encourage them to consider, particular assessment factors, legal principles, and facts reported in objective sources in reaching their decisions. However, in so doing, the Chairperson must make it clear that Board members are free to make their own decisions based on the particular facts in each case.

[149] The Respondent submits that it is legitimate for the Chairperson to establish an expectation to follow JGs and to require Board members to provide a reasoned justification where they do not do so because this court has stated that administrative decision-makers should do these things in appropriate situations: see for example *Higbogun v Canada (Citizenship and Immigration*, 2010 FC 445 at para 57. As an example, the Respondent points to this Court's jurisprudence with respect to *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* [the ***SOGIE Guidelines***]. The Respondent maintains that there should not be a double standard. In other words, it should not be improper to impose such an obligation in respect of guidelines or JGs that may make it more difficult for refugee claimants to advance their claim if it is entirely proper to impose such an obligation where the guidelines or JGs are intended to benefit refugee claimants.

[150] In my view, this submission misses the important point that it matters <u>how</u> JGs or a guideline issued by the Chairperson may influence a Board member. In the case of the *SOGIE Guidelines*, they simply provide guidance concerning various general themes. These include: how to better understand the unique challenges faced by individuals with diverse SOGIE in

presenting evidence pertaining to SOGIE; the importance of avoiding stereotyping and inappropriate assumptions when making findings of fact; the manner in which language can have negative connotations; how to assess credibility in this unique context; and the various ways in which a refugee claimant may have a nexus to a recognized ground for refugee protection. While certain provisions of the *SOGIE Guidelines* require Board members to take certain matters into account in reaching their decision, they do not impose either an expectation that factual conclusions will be adopted or a requirement to provide a reasoned justification as to why such conclusions were not adopted. For the present purposes, that is a critical difference between the *SOGIE Guidelines* and what CARL alleges with respect to the impugned JGs.

[151] In summary, I find that the statement of expectations in the policy note that accompanied the issuance of the Pakistan JG unlawfully fetters Board members' discretion and improperly interferes with their independence in respect of the factual determinations set forth at paragraph 33 and in the first two sentences of paragraph 35 of that JG. The considerations that support that finding include the mandatory aspect of the language in the statement, the extent to which similar statements have been repeatedly communicated to the Board's members, the absence of language that makes it clear that the Board's members are free to make their own findings based on the particular facts in each case, and the absence of any indication or reminder that the JG is not binding. I will simply add in passing that the fact that available data regarding the outcome of the Board's decisions following the issuance of the JG does little to alleviate my concerns regarding the extent to which it may be improperly interfering with Board members' adjudicative independence.

(c) *The India JG*

[152] The India JG was identified in respect of RAD decisions MB6-01059/MB6-01060, which dealt with the applications of two refugee claimants who were husband and wife. Like the Pakistan JG, it was not confined to specific paragraphs of the decision, and there is nothing outside the articulated "scope" of the JG that is relevant for the present purposes. The policy note that accompanied the JG identified that scope to be the availability of an IFA in India for claimants from the Punjab region of that country. This was identified to be the determinative issue in the appeal before the RAD and was therefore the sole focus of the RAD's analysis. As I have previously noted, the JG concluded that the refugee claimants in question had a viable IFA in Delhi or Mumbai, and the JG was revoked as of November 30, 2018.

[153] As with the Pakistan JG, the factual issues discussed in the India JG can be grouped into the following three categories: (i) facts that are specific to the particular claimants and that they adduced in their evidence; (ii) facts that are characterized as having been reported in the country documentation; and (iii) facts that are presented as the RAD's own findings, on issues that go beyond the evidence that was specific to the claimants.

[154] The RAD's treatment of the facts falling into the first two categories do not pose a potential issue for the present purposes for essentially the same reasons I have discussed at paragraphs 128–129 above, in respect of the Pakistan JG. I will simply add for the record that in view of the fact that the RAD's decision was unfavourable to the refugee claimants, the factual findings that fell within the first category generally concerned the insufficiency of the specific evidence tendered by the claimants and the absence of evidence to support particular aspects of their claim or submissions. The factual matters that fell within the second category generally

concerned information from the documentary evidence or RIRs that the RAD quoted or paraphrased.

[155] The factual matters falling within the third category pose a problem for the same reasons that I have provided at paragraphs 132–143 and 151 above, in respect of the Pakistan JG. This is because those matters appear to consist of factual findings that were made by the RAD.

[156] There were five such findings in the JG:

1. Sikhs do not generally face difficulties recolcating to other areas of India: at para 36.

2. In order for the Punjab police to track down suspects who move to other states in India, they must have the cooperation of the police in the other state. Police would likely only collaborate and track someone in extreme cases: at para 36.

3. The tenant verification process will not lead the police in Delhi or Mumbai to communicate or cross-check information with the police in Punjab: at para 36.

4. It is plain to see that the documentary evidence points to the fact that the police in Delhi or Mumbai would not contact the Punjab police in the course of the tenant registration process: at para 40.

5. Sikhs throughout India face little discrimination: at para 47.

[157] The forgoing factual findings all appeared to be well supported by the documentary evidence cited by the RAD. However, that is not the point. By imposing an expectation that these findings be followed unless a reasoned justification is provided, a Board member may very well have considered that his or her freedom to make different factual findings in cases involving similar facts was less than it would have been in the absence of the statement of expectation (see paragraphs 133–134 and 139–141 above). Moreover, as discussed at paragraph 138 above, a member of the public might very well also have reasonably apprehended that this would be the likely effect of the JG. This is particularly problematic given that the RAD's factual findings (listed at paragraph 156 above) went to the core of whether an IFA would be available in Delhi or Mumbai for persons of Sikh ethnicity from Punjab.

[158] As with the Pakistan JG, I did not include the RAD's paramount finding with respect to the availability of an IFA in Delhi and Mumbai among the factual findings in the third category discussed immediately above because that finding is a determination on a question of mixed fact and law. It is therefore not within the scope of these Applications.

(d) *The China JG*

[159] The China JG was identified in respect of RAD decision TB6-11632. The scope of the JG was confined to the "[a]nalysis of whether a person wanted by the authorities in China can exit that country via an airport using a genuine passport." In this regard, the JG was limited to paragraphs 12–22 and 25–34 of the decision in TB6-11632. At the outset of the RAD's discussion of this issue, it expressed its agreement with the RPD's conclusion that the refugee claimant could not have left China using his genuine passport given his allegations that the

Public Security Bureau [**PSB**] wanted to arrest him. In taking issue with the RPD's conclusion in this point, the refugee claimant maintained before the RAD that it was reasonable to assume that the smuggler he had retained to assist him had the means of either avoiding detection or ensuring the consent of the necessary airport officials. That assumption was based on the fact that the smuggler's business was based on assisting individuals to leave China.

[160] As noted at the outset of these reasons for judgment, the JG pertaining to China was revoked as of June 28, 2019 due to the fact that it contained a finding of fact which was not supported by the Board's NDP. That fact concerned facial recognition technology used on passengers departing from the airport in Beijing.

[161] As with the Pakistan and India JGs, the factual matters addressed in the China JG can be grouped into the following three categories: (i) facts that are specific to the particular claimant and that he adduced in his evidence; (ii) facts that are characterized as having been reported in the country documentation; and (iii) facts that are presented as the RAD's own findings on issues that go beyond the evidence that was specific to the claimant.

[162] The RAD's treatment of the facts falling into the first two categories do not pose a potential issue for the present purposes for essentially the same reasons I have discussed at paragraphs 128–129 above, in respect of the Pakistan JG. For the record, I will note that the findings in the first category included the determination that the claimant's evidence with respect to how he was able to exit China on his own passport was "scant" and "not credible." In addition,

the bulk of the discussion of factual matters consisted entirely of references to and quotes from the country documentation in the NDP, without further comment.

[163] Turning to the third category, it consisted of the following six factual findings made by the RAD:

1. The claimant could not have left China using his genuine passport given his allegation that the PSB wanted to arrest him: at para 12.

2. Given the importance of the Golden Shield system in China, it is reasonable to expect that the use of the apparatus is also monitored and that there are redundant systems in place to prevent the system from being compromised by a single individual: at para 28.

3. The objective evidence concerning the Golden Shield system and other border controls in place in China is compelling and convincing. While it might be possible for a smuggler to bypass some of the security controls, it is highly unlikely that the claimant could have bypassed all of the security controls in place: at para 32.

4. While there is documentary evidence that indicates that corruption exists within the police in China and that authorities in China do not always apply regulations evenly, the preponderance of the documentary evidence states that Chinese authorities at borders conduct thorough screenings: at para 33.

5. It is highly improbable that the smuggler allegedly retained by the applicant would have prior knowledge of whom to bribe in order to facilitate the claimant's safe travel through each of the multiple checkpoints at an airport: at para 34.

6. Given the claimant's allegation that he was wanted by Chinese authorities, and in light of the evidence of the vigorous pursuit of the PSB, it is reasonable to expect that the local authorities would have entered his information into the Golden Shield database to further their efforts to apprehend him: at para 34.

[164] I acknowledge that this Court has found some of the findings set forth above to have been reasonable on several occasions: see for example *Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at para 32; *Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 17; *Cao v Canada (Citizenship and Immigration)*, 2015 FC 315 at para 19; *Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 at paras 20–21; *Li v Canada (Citizenship and Immigration)*, 2018 FC 877 at paras 20–21; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 148 at paras 37–39; *Han v Canada (Citizenship and Immigration)*, 2019 FC 858 at paras 31–36 **[*Han*]**. But that is not the point.

[165] For the purposes of the present Applications, the foregoing factual findings by the RAD are problematic for the reasons set forth at paragraphs 132–143 and 151 above. This is especially so because the findings were in relation to issues that would be of significant importance to an assessment of whether a refugee applicant could leave China by air using a genuine passport.

[166] The China JG also contains a discussion of this Court's jurisprudence that is problematic for the reasons set forth at paragraphs 133–141 and 151 above. Specifically, at paragraphs 31 and 32 of the JG, the RAD stated the following:

> [31] The RAD finds that, while the Federal Court, in *Yao* [citation omitted], found that it was possible for a wanted person to exit China safely using the services of a smuggler, there are a number of Federal Court decisions which support the RAD's finding in this regard. In particular, the RAD notes the [RAD's] decision of *X (Re)* [citation omitted] addressing similar circumstances:
>
> [quotation omitted]
>
> [32] This finding is also supported by Federal Court decisions [citations omitted], in which the Federal Court has supported findings that traveling unimpeded through Chinese exit controls is inconsistent with being wanted by Chinese authorities.

[167] To the extent that the foregoing passage can be reasonably apprehended as reducing a Board member's complete freedom to follow the *Yao* case mentioned in the quote above, rather than following the other line of jurisprudence that was preferred in the JG, it is as problematic as the factual findings in the third category, discussed at paragraph 163 above.

[168] It bears underscoring that I do not consider a JG which deals with factual issues to be problematic, in and of itself. This is so even where, as with the China JG, the JG in question deals almost exclusively with factual issues. The problem is posed by the statement of expectation that the JG should be applied in cases with similar facts unless reasoned justifications are provided. This problem could be avoided by simply encouraging Board members to take a JG into consideration, or even to follow it, in cases with similar facts, so long as it is also clearly communicated that Board members are free to reach their own conclusions based on the particular facts in each case.

[169] I would be remiss if I did not pause to acknowledge that in *Jiang v Canada (Citizenship and Immigration)*, 2018 FC 1064, I observed that the statement of expectation that was included in the policy note that accompanied the China JG was not unreasonable. However, that statement was made in the course of assessing whether the RAD had unreasonably concluded that the applicant would not have been able to exit China with her own passport if she had been wanted by Chinese authorities. The parties in that case did not raise the issue of whether the statement of expectation in the policy note constituted an unlawful fettering of discretion or an improper interference with adjudicative independence. The same appears to be true with respect to several other cases of this Court in which the use of the China JG by a member of the RPD or the RAD was effectively found to have been reasonable: *Li v Canada (Citizenship and Immigration)*, 2019 FC 454, at paras 22-24; *Han*, above.

[170] Considering the foregoing, the cases in which this Court has endorsed the use of the China JG are not particularly helpful or germane.

(e) *Summary*

[171] For the reasons that I have discussed, the Nigeria JG does not unlawfully fetter Board members' discretion to make their own factual findings, and it does not improperly interfere with Board members' independence or reduce their perceived impartiality.

[172] However, the factual findings made in paragraph 33 and in the first two sentences of paragraph 35 of the Pakistan JG do have this effect. The same is true with respect to factual findings that were made in the now revoked India and China JGs, and that are identified at

paragraphs 156 and 163 above. In each case, those findings relate to matters that go beyond the evidence that was very specific to the claimant or claimants in question and therefore may well arise in other cases.

[173] The problem arises not because of the findings made by the RAD, but because of the statement of expectation that was made in the policy notes that accompanied the publication of each of the Pakistan JG, the India JG and the China JG, as well as in the *Board's Policy on the Use of Jurisprudential Guides* and in e-mails dated July 21, 2017 from the Chairperson and the Deputy Chairperson (RPD).

[174] I recognize that the language used in the *Board's Policy on the Use of Jurisprudential Guides* is somewhat different than the language in the policy notes, as it states that the Board's members "are expected to follow the reasoning" (emphasis added) in a decision identified as a JG, in cases of similar facts, unless there is a reason not to do so. In the policy notes, the corresponding language is that "RPD and RAD members are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so" (emphasis added). In my view, the actual and perceived effect would be essentially the same. It is reasonable to infer that someone who is expected to apply the reasoning in a JG would adopt the key factual findings in the JG. This is particularly so given that the statement of expectation has been repeatedly communicated to the Board's members.

C. *Do the impugned JGs unfairly enhance the burden of proof for claimants for refugee protection?*

[175] CARL submits that the JGs unfairly enhance the burden of proof for claimants for refugee protection. It maintains that, instead of being required to establish how the claimant left China solely through his/her evidence, the claimant must also overcome the factual determinations in the JG. Relying on *Maldonado*, above, and its progeny, CARL asserts that this frustrates the presumption that a claimant's sworn testimony is presumed to be credible and truthful. In the case of the China JG, it is said to do so by effectively instructing the Board's members to adopt the presumption that it is implausible for an individual who claims to be wanted by Chinese authorities to leave that country by air using his/her own passport. CARL states that had Parliament desired to hold claimants to a heightened evidentiary standard, it would have explicitly provided for this in the IRPA. However, it did not do so.

[176] To the extent that CARL's submissions concern the factual determinations that were made in the India JG and the China JG, and are identified at paragraphs 156 and 163 above, I accept that CARL has a valid point. That point is that, as a practical matter, a refugee claimant may have to adduce more evidence than he/she would have had to adduce in the absence of the JG. This is likely to be the case in a hearing where the Board member has decided to adopt the factual determinations in the JG. However, for the reasons discussed beginning at paragraph 181 below, I am not persuaded by the position it has advanced with respect to *Maldonado*.

[177] My agreement with CARL is limited to the revoked China and India JGs because the Nigeria and Pakistan JGs do not operate so as to enhance the burden on refugee claimants. The Nigeria JG makes it very clear that each case must be decided on its own particular facts, while

the Pakistan JG *assists* refugee claimants to make their claim, rather than making it more difficult for them to do so.

[178] To the extent that the problem with the (revoked) China and India JGs concerned the statement of expectation made in the policy notes that accompanied those JGs and in the Board's *Policy on the Use of Jurisprudential Guides*, I have already dealt with it above. Accordingly, it does not need to be addressed again in this additional context. This is because I have already found that the statement of expectation unlawfully fetters the discretion of RPD and RAD members to make their factual findings completely free from influence and improperly interferes with their adjudicative independence.

[179] Apart from this problem, which solely concerns the factual findings that go beyond facts that are specific to a refugee claimant, the impugned JGs do not *unfairly* enhance the burden on claimants for refugee protection. I recognize that some of the information in the country documentation and RIRs cited in the JGs *may* make it more difficult for refugee claimants to make their case before the RPD or the RAD. Faced with particular facts from country documentation or other objective sources referenced in a JG, an applicant may very well consider it necessary to provide more evidence than s/he otherwise would have provided in support of his/her claim for refugee protection. However, that does not create any procedural *unfairness*, because Parliament gave the Chairperson the authority to issue JGs, and by necessary implication, that authority includes the authority to reference information in the Board's NDP or RIRs. It also includes the authority to draw attention to assessment factors or legal principles that may be either unfavourable or favourable to refugee claimants.

[180] Indeed, as I have noted, that authority also extends to encouraging Board members to take such factors or principles into consideration. If doing so happens to make it more difficult for refugee applicants to make their case before the RPD or the RAD, that is not procedurally unfair, particularly in the context of an inquisitorial process. Quite the contrary. By identifying a JG, the Chairperson provides fair notice to future claimants for refugee protection of the additional issues and information that may need to be addressed in legal submissions and evidence.

[181] Insofar as *Maldonado* is concerned, that case simply stands for the principle that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness": *Maldonado*, above at 305 (emphasis added).

[182] It follows that where there is any reason to doubt the truthfulness of allegations made in a refugee claimant's sworn affidavit or testimony, the presumption of truthfulness falls away. To the extent that information in a JG may provide such reason, the presumption of truthfulness would no longer apply.

[183] The rationale underlying this presumption of truthfulness is that claimants for refugee protection who have come from certain types of exigent circumstances cannot reasonably be expected to have documentation or other evidence to corroborate their claims: see, for example, *Chunza Garcia v Canada (Citizenship and Immigration)*, 2014 FC 832 at para 17 [***Chunza Garcia***]. Such circumstances can include refugee camps, conditions in war-torn countries or

situations in which the claimant only had a brief window of opportunity in which to escape their persecutor(s) and cannot subsequently access documents or other evidence from Canada.

[184] However, in cases where a claimant for refugee protection appears to have had opportunities to gather corroboration for his/her claim, either before or after arriving in Canada, the strength of presumption of truthfulness discussed above varies directly with the extent to which such corroboration is provided. Where the claimant provides nothing other than a bald, unsupported assertion that strains credulity when considered together with objective information in the Board's NDP or RIR documentation, the strength of the presumption of truthfulness is relatively weak and may be displaced by that information. Indeed, it may also be displaced by a failure to reasonably explain an omission to provide corroboration for such assertions: *Tellez Picon v Canada (Citizenship and Immigration)*, 2010 FC 129 at para 12; *Ramos Aguilar v Canada (Citizenship and Immigration)*, 2019 FC 431 at paras 44–45; *Chunza Garcia*, above.

[185] The Respondent provided a hypothetical example during the hearing of these applications. In that example, the refugee applicant claimed to have escaped East Berlin by walking to West Berlin. However, the country documentation stated that there was a high concrete wall between the two parts of that city and that there were land mines on the eastern side of that wall, infrared sensors along the wall, and machine gun nests at various intervals. The documentation also reported that no one had escaped East Berlin for approximately three years. Having regard to those facts, it would strain credulity for the applicant to simply maintain that a smuggler helped him to travel between the two parts of the city. In the absence of additional

evidence from the claimant explaining how the smuggler was able to overcome all of these obstacles, the presumption of truthfulness would fall away.

[186] I agree. Indeed, this appears to have been precisely what happened in TB6-11632, where the applicant appears to have advanced the thinly supported narrative that he used a smuggler to leave China using his own passport. I and other members of this Court have found the rejection of that narrative by the RPD or the RAD to have been reasonable on multiple occasions where the applicant was unable to reconcile his/her narrative with the country information referenced in the China JG: see e.g., *Jiang*, above at paras 20–26, and the cases referenced therein.

[187] In summary, I agree with CARL that the revoked India JG and the revoked China JG unfairly raise the burden of proof for claimants for refugee protection. However, my agreement is limited to the factual determinations that were identified at paragraphs 156 and 163 above. Stated differently, I agree that the JGs unfairly increase the burden faced by refugee applicants, because Board members are expected to adopt those factual determinations or to explain why they have not done so.

[188] However, any increase in the burden that claimants for refugee protection may face as a result of having to buttress their narrative to deal with facts referenced from the Board's NDP or RIR is not unfair. I consider that the same is true with respect to any increase in the burden that may result from any assessment factors or legal principles that may be identified in a JG. By providing the Chairperson with the authority to issue JGs that would reasonably include such matters, Parliament can be taken by necessary implication to have recognized that such JGs

might affect the ease or difficulty with which an individual could establish his or her claim for refugee protection.

[189] For the record, I will pause to observe that the Applicant has also submitted that the impugned JGs create an unfair process because, by requiring Board members to follow the JG, they usurp the role of the member and violate the principle that s/he who hears the case must decide upon the facts in dispute. I consider that this argument is another way of stating that the impugned JGs unlawfully fetter the discretion of the Board's members to reach their own factual findings, or improperly interfere with their actual or perceived independence. As this issue was addressed in section VII.B of these reasons above, it is unnecessary to revisit it here.

D. *Was the Chairperson required to engage in external consultation before identifying the decisions in question as JGs?*

[190] CARL submits that the Chairperson did not have the authority to issue the impugned JGs without public consultation. It maintains that, in the absence of such public consultation, the issuance of the JGs was unfair, in part because refugee applicants and refugee organizations have no way of knowing what information that is not addressed in the JGs may have been before the Board. CARL adds that the failure to seek input from interested parties violated the notice requirement of natural justice. Finally, CARL asserts that where the issues addressed in a JG are largely factual, as is the case with the China JG, it is especially important that there be a broad consultative process to ensure the JG reflects the fullest possible record.

[191] I disagree.

[192] The simple response to CARL's submissions is that paragraph 159(1)(h) explicitly addresses the extent of the consultation that is required before the Chairperson identifies a JG. In this regard, it provides that the Chairperson may "identify decisions of the Board as [JGs], after consulting with the Deputy Chairpersons, to assist members in carrying out their duties" (emphasis added). It is reasonable to interpret these words as implicitly indicating that Parliament did not consider that any other consultation was required. Stated differently, having addressed its mind to the extent of consultation required before a JG could be identified, it is not unreasonable to conclude that Parliament, by necessary implication, considered that consultation with other persons or organizations was not required. This is sufficient to overcome any procedural fairness right to advance notice that refugee applicants, the refugee bar or other interested parties may have had prior to the enactment of paragraph 159(1)(h) in its current form: *Adams*, above.

[193] For greater certainty, the Chairperson's interpretation of paragraph 159(1)(h) in the manner described above is reflected in section 7 of the Board's *Policy on the Use of Jurisprudential Guides*, which explicitly states: "External consultation shall take place only in exceptional situations, which shall be determined at the discretion of the Chairperson."

[194] I will simply add that the legislative history of paragraph 159(1)(h) provides some support for the Chairperson's interpretation of that provision. In brief, at the time the predecessor provisions of that paragraph, subsections 65(3) and (4) of the *Immigration Act*, RSC 1985, c I-2**,** were being debated in 1992, Ms. Barbara Jackman recommended to the relevant legislative committee on behalf of the Law Union of Ontario that those subsections be amended to include a

requirement for consultation with the bar prior to the issuance of guidelines: House of Commons, Legislative Committee on Bill C-86, An Act to amend the Immigration Act and other Acts in consequence thereof, *Minutes of Proceedings and Evidence*, 34-3, No 11 (16 September 1992) at 11:42 (Ms. Barbara Jackman). That recommendation was not adopted.

[195] I acknowledge that s. 65 of the *Immigration Act* simply provided for the issuance of guidelines, as opposed to JGs. It appears that the issue of public consultation with respect to the issuance of JGs did not get raised at the time the authority to issue JGs was included in s. 159(1)(h). As a result, the only legislative history is that which predated the inclusion of the authority to identify JGs in paragraph 159(1)(h). In my view, that legislative history has limited significance for the present purposes. But it cannot be ignored.

[196] In summary, I do not agree with the submissions that CARL has made regarding public consultation. It was not unreasonable for the Chairperson to conclude that such consultation was not required prior to the issuance of the JGs. Indeed, a plain reading of paragraph 159(1)(h) would suggest that such consultation was not in fact required.

E. *Did the Chairperson improperly pre-select the Nigeria JG?*

[197] CARL submits that the decision in respect of which the Nigeria JG was identified (TB7-19851) was impermissibly pre-selected to be the subject of a JG before it was finally decided, so that the final decision could be engineered to serve as a JG.

[198] CARL maintains that the pre-selection of decisions to serve as a JG is impermissible for two principle reasons. First, it is impermissible under paragraph 159(1)(h), which provides the Chairperson with the authority to "identify decisions of the Board as [JGs], after consulting with the Deputy Chairpersons." CARL asserts that this authority is clearly retrospective, as it speaks to "decisions of the Board," rather than pending cases that have not been finalized. Second, CARL maintains that by pre-selecting TB7-19851 to become a JG before it was completed, the Board compromised the independence of the refugee determination process.

[199] In support of its submissions, CARL relies upon the following:

1. An email dated 9 May 2018, from Lauren Gamble, the RAD member who drafted the decision in TB7-19851, to the Acting Deputy Chairperson (RAD), the Assistant Deputy Chairperson (RAD), and a legal counsel at the Board. In that e-mail, Member Gamble stated: "Upon further consultation, I have made some changes to the draft that you have previously reviewed (the one that could be designated as a JG going forward). … Thank you all for your input and feedback, it is much appreciated."

2. An e-mail dated 10 May 2018, from the Acting Deputy Chairperson (RAD) to the Chairperson, which attached a draft of the policy note that ultimately was issued together with the JG. That e-mail stated the following:

   > First draft for your comments. The faded parts are standard language taken from the existing JG policy notes, not sure if we still want all that. The darker font is what Valerie drafted in reference to the new JG.

Lori's comments on Lauren's general sections were ok, [REDACTED] Lauren will have the final draft for us tomorrow. [Let me know] if you want to see the latest draft with Lori's comments this evening.

3. An e-mail dated 15 September 2017, from Ms. Suzanne Legace to several Board members, which states as follows:

Further to a meeting yesterday with RAD ADC, this is to inform you that a RAD decision has been identified as a jurisprudential guide (JG) for Turkey. As soon as I have the rationale from the RAD ADC, I will start working on the policy note. The decision will be finalized next week.

Please note that

- EXCOM and DC RPD are aware.
- RAD and RPD decisions will have to be translated and sanitized.
- A comms strategy will be required.
- NDP will have to be amended.
- RAD and RPD members will have to be notified.
- Deadline is asap, but no later than end of October.

As soon as I have more details, I will get in touch with you.

Also, there will likely be two other RAD decisions that will be identified as JGs this fall.

4. A portion of paragraph 13 of the Nigeria JG, where Member Gamble observed that in addition to viable IFAs in Ibadan and Port Harcourt for the refugee claimant, "I would further note that there are several additional cities in Nigeria where, depending on the individual facts, an IFA would likely be available to those fleeing non-state actors, such as the [claimant]."

5. A passage in a document entitled *Identification of Decision TB7-19851 as a Jurisprudential Guide*, dated June 15, 2018, which explains that the decision "addresses the issue of IFA in Nigeria, which is of particular importance to the Board given the current high volume of Nigerian claims."

[200] CARL's purpose in referring to the document mentioned at point 3 above was simply to rely on that document as evidence that the Board was operating under the assumption that pre-selection is permissible. I will pause to note that the decision referred to therein ultimately was not identified as a JG by the Chairperson.

[201] In my view, the other documents mentioned immediately above do not support CARL's claim that TB7-19851 was impermissibly pre-selected. I also do not agree with CARL's submission that the independence of the refugee determination process was compromised by the involvement of other members of the Board in reviewing and providing comments on one or more drafts of Member Gamble's decision.

[202] There is no evidence that the Chairperson made a final or even a tentative decision to identify TB7-18951 as a JG prior to July 6, 2018, when the decision was in fact so identified. This was approximately two months after Member Gamble issued the decision, on May 17, 2018. Therefore, even if I were to accept CARL's position that paragraph 159(1)(h) does not authorize the Chairperson to prospectively identify as a JG a decision that has not yet been completed, CARL has not established that the more limited authority to identify past decisions as

JGs was exceeded. Consequently, it is unnecessary for me to consider whether it would be reasonable to interpret paragraph 159(1)(h) as conferring that authority.

[203] Notwithstanding the foregoing, CARL objects to the involvement of *other* senior managers and legal counsel of the Board in reviewing and providing comments on the decision in TB7-19851 prior to its finalization by Member Gamble. In this regard, it relies on *Ellis Don*, above, and *Kozak*, above. In my view, *Ellis-Don* permits what appears to have been done in this case, while *Kozak* is distinguishable.

[204] *Ellis-Don* concerned a case in which a draft decision that was favourable to the appellant was changed to a decision that was unfavourable to the appellant following an internal meeting of the Ontario Labour Relations Board [OLRB]. It appears that the meeting was convened to discuss the policy implications of the draft decision. After the issuance of the final decision, the Appellant applied for judicial review of the OLRB's decision on the ground that the rules of natural justice had been breached.

[205] In the course of dismissing the appeal, the Supreme Court of Canada noted that the decision in *Consolidated-Bathurst*, above, had "recognized the legitimacy of institutional consultations to ensure consistency between decisions of different adjudicators or panels within an administrative body": *Ellis-Don*, above at para 28. The Court then proceeded to summarize the basic principles to be followed to ensure that there is no improper interference with a quasi-judicial decision-maker's independence or impartiality, and to ensure that the *audi alteram*

partem rule is respected. With respect to independence and impartiality, the Court distilled the following three principles from its prior decision in *Consolidated-Bathurst*:

> 1. The internal consultation cannot be imposed by a superior level of authority within the administrative hierarchy, but must be requested by the adjudicators themselves.
>
> 2. Consultation has to be limited to questions of policy and law, and must proceed on the basis of the facts as stated by the members who actually heard the evidence.
>
> 3. Even on questions of law and policy, administrative decision-makers must be free to take whatever decision they consider appropriate according to their conscience and understanding of the facts and the law. They cannot be compelled to adopt the views expressed by other members of their tribunal.

Ellis-Don, above at para 29.

[206] With respect to *audi alteram partem*, the Court stated that the mere fact that issues already litigated between the parties might be discussed again internally would not amount to a breach of that rule. However, if any new issue is raised during such discussions, the parties to the legal dispute must be notified and provided an opportunity to respond in an effective manner: *Ellis-Don*, above at para 32.

[207] The Court added that if the foregoing rules were complied with, the presumption of regularity of administrative procedures would apply, even if the draft decision that was the subject of discussions was modified as a result of those discussions: *Ellis-Don*, above at para 33.

[208] There is no evidence to suggest that the internal Board exchanges that took place in relation to the Nigeria JG breached any of the foregoing principles. In particular, there is no evidence to suggest that anyone within the Board imposed on Member Gamble the exchanges that took place regarding one or more drafts of her decision.

[209] There is also no evidence to suggest that the exchanges went beyond issues of policy and law, or that they did not proceed on the basis of the facts as determined by Member Gamble. While some changes were made to the draft as a result of the exchanges, there is no evidence to suggest that any of those changes concerned Member Gamble's factual determinations. For greater certainty, if, as a result of those exchanges, Member Gamble voluntarily added a general observation to her decision to note that its *framework of analysis* could apply to other types of claims from Nigeria, depending on the particular facts of the case, this would not violate any of the principles confirmed in *Ellis-Don*. The same would be true if Member Gamble added language to note that an IFA (which is a question of mixed fact and law) might be available in other cities.

[210] There is no evidence to suggest that Member Gamble may have been prevailed upon to include such general observations in her decision, including those that appear at paragraphs 13 and 16 of her decision. Indeed, I disagree with CARL's characterization of the impugned

language in paragraph 13 as "gratuitous." That language explicitly noted that the availability of an IFA in additional cities would likely be available to those fleeing non-state actors, "such as the Appellant," depending on the individual facts (emphasis added).

[211] In addition to the foregoing, there is no evidence to indicate that Member Gamble may not have remained free at all times to make her own determinations with respect to the issues of policy and law, including issues of mixed fact and law.

[212] Finally, there is no evidence to suggest that any new issues were raised in the exchanges.

[213] Accordingly, the presumption of regularity of the Board's administrative procedures applies: *Ellis-Don*, above at para 33.

[214] Turning to *Kozak*, above, CARL relies on that case to support its submission that the exchanges that took place with respect to one or more drafts of decision TB7-19851 compromised the independence of the Board's refugee determination process. However, that case is distinguishable. In that case, the Federal Court of Appeal concluded that the manner in which a particular "lead case" was developed and ultimately adjudicated gave rise to a reasonable apprehension of bias or attenuated impartiality. However, that conclusion was based on the Court's finding that one of the two panel members who heard the case:

> may have been predisposed towards denying the appellants' claims since he had played a leading role in an exercise that may seem to have been partly motivated by a desire by [Citizenship and Immigration Canada] and the Board to produce an authoritative, if non-binding legal and factual "precedent", particularly on the adequacy of state protection, which would be used to reduce the

> percentage of positive decisions in claims for refugee status by Hungarian Roma.

Kozak, above at para 65

[215] With the foregoing in mind, the Court observed: "The panel may reasonably be seen to have been insufficiently independent from Board management and thus tainted by the Board's motivation for the leading case strategy." *Kozak,* above at para 65.

[216] In contrast to the situation reflected in the foregoing quotes, there is no evidence that the Chairperson or others at the Board had any predisposition to reduce or alter in any way the rate of acceptance of refugee claims by persons of Nigerian origin. On the contrary, their objectives were entirely legitimate.

[217] According to Mr. Kipling's uncontested affidavit, prior to the identification of TB7-19851 as a JG, the Board's Professional Development and Adjudicative Strategy Committee considered it necessary to find a way to deal more efficiently with the high volume of claims from that country, by focusing on the availability of an IFA. Among other things, it was considered that this would reduce the need to address issues related to credibility, and thereby reduce the length of hearing time as well as the time spent writing or rendering oral reasons.

[218] Accordingly, the Committee searched for and considered several finalized RAD decisions addressing the availability of IFAs in Nigeria. However, it was unable to find a decision that was likely to have broad application within the RPD and the RAD. In the course of that process, one e-mail exchange that is included in the record before this Court reflects that one

of the Board's members voluntarily offered two decisions as candidates for an IFA. This was consistent with the practice of other Board members, who have volunteered to write decisions as potential candidates for JGs for a variety of reasons. Indeed, in the e-mail that the Chairperson sent to the Board's members on June 21, 2017 in relation to the other three JGs that are at issue in this proceeding, he actively encouraged the Board's members to assist in identifying good candidates for a JG. He also strongly encouraged the Board's members to circulate drafts of their candidate decisions for comment by other members. In this regard, he added that the process of circulating and commenting is "entirely voluntary." Some corroboration for this is provided in an e-mail from the Acting Deputy Chairperson (RAD) to the Chairperson, dated May 12, 2017, identifying the decision that ultimately was identified as the Pakistan JG as being the one that the RAD decision-maker intended to put forth as a JG.

[219] Mr. Kipling's affidavit also states:

> [W]hen an issue of importance is considered, the deciding member is fully independent in assessing the appeal and determining the outcome. Neither the Committee nor management has any interest in the outcome or involvement in determining the merits of the decision before the assigned member.

[220] CARL has not adduced any evidence to suggest otherwise. For greater certainty, the language in the e-mail dated 9 May 2018 and mentioned at paragraph 199 above suggests that Member Gamble voluntarily made some changes to her prior draft, based on the input and feedback that she received.

[221] In summary, the RAD's TB7-19851 decision was not impermissibly pre-selected to be the subject of a JG before it was finally decided. There is no evidence to suggest that the

Chairperson made an actual or *de facto* decision to identify that decision as a JG at any time prior to the issuance of that decision on May 17, 2018.

[222] The exchanges that took place between some members of the Board's management and Member Gamble were entirely legitimate and did not give rise to a reasonable apprehension that Member Gamble might not be impartial or that the Board's management had improperly interfered with her independence.

VIII. **Conclusion**

[223] For the reasons that I have provided, paragraph 159(1)(h) of the IRPA authorizes the Chairperson to issue a JG with respect to issues of fact, as well as with respect to issues of law and issues of mixed fact and law. No public consultation was required in respect of the Chairperson's identification of the four JGs challenged in this proceeding.

[224] The Nigeria JG does not unlawfully fetter Board members' discretion or improperly encroach upon their adjudicative independence because it repeatedly refers to the need for each case to be adjudicated on the basis of its particular facts. For the same reason, that JG does not unfairly increase the burden faced by refugee applicants in establishing their claims. Contrary to CARL's submissions, the Nigeria JG was not improperly "pre-selected."

[225] Of the remaining three JGs in question, only the Pakistan JG remains in force. As a result of the statement of expectation made in the policy note that was issued with that JG, the discretion of RPD and RAD members is unlawfully fettered and their adjudicative independence

is improperly encroached upon. This is because the statement reduces the freedom of those decision-makers to make their own factual determinations in cases with similar facts, unless they provide reasoned justifications for not applying the JG. Those factual determinations concern matters addressed in paragraph 33 and the first two sentences of paragraph 35 of the JG. Those matters go beyond the specific factual evidence adduced by the refugee claimant in RAD case TB5-01837 and may well arise in future cases. The statement of expectations is unlawful and therefore inoperative in respect of those matters.

[226] As for cases involving the Pakistan JG that may currently be before the RAD or the Court, each case will have to be assessed individually to ascertain whether the RPD or the RAD, as the case may be, reached its own conclusion without any improper influence from the statement of expectation as it relates to paragraph 33 and the first two sentences of paragraph 35 of the JG: *Araya Atencio*, above; *Feng*, above.

[227] Going forward, the obvious solution to this is to remove the statement of expectations from the policy note that was issued with the Pakistan JG, at least in respect of the factual determinations made in the JG at paragraph 33 and in the first two sentences of paragraph 35.

[228] The conclusions summarized in the three immediately preceding paragraphs above also apply to the revoked India and China JGs. The factual determinations in question are those identified at paragraphs 156 and 163 above. Of course, no action is required with respect to the statement of expectations that was made in their respective accompanying policy note, as those JGs have been revoked.

[229] Regarding CARL's submission that the impugned JGs unfairly enhance the burden of proof on claimants for refugee protection, I have concluded that this is not so with respect to the Nigeria JG and the Pakistan JG. With respect to the China JG and the India JG, I agree with CARL, but only to a limited degree. Specifically, I consider that the statement of expectations that accompanied the issuance of those JGs unfairly enhanced the burden of proof for refugee claimants only in respect of the factual determinations identified at paragraphs 156 and 163 above. Once again, no action is required on the part of the Board, as those JGs are no longer in force. With respect to cases that are currently before the RAD or this Court, each case will need to be assessed individually to ascertain whether the RPD or the RAD, as the case may be, reached its own conclusion, without any improper influence from statement of expectations as it relates to the factual determinations identified at paragraphs 156 and**[**163 above.

[230] Given the foregoing, I do not consider it to be appropriate to grant the relief that CARL has requested, namely, declarations that the RAD's decisions TB7-01837, TB7-19851, TB6-11632 and MB6-01059/MB6-01060 were not lawfully enacted and are of no force or effect.

[231] Instead, I will grant the more limited relief of declaring the statement of expectation in the policy note that was issued with the Pakistan JG to be unlawful and inoperative in respect of the factual determinations made in paragraph 33 and the first two sentences of paragraph 35 of the JG.

[232] I will also declare the statement of expectation made in the policy notes that accompanied the India JG and the China JG, respectively, to have been unlawful and inoperative as it related to the factual determinations identified at paragraphs 156 and 163 above.

IX. **Questions for Certification**

[233] At the end of the hearing of these Applications, the Respondent proposed four questions for certification and CARL proposed three. After I expressed a reluctance to certify four questions in light of past comments made by the Federal Court of Appeal (see for example *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras 28–29), each of the parties withdrew one of their questions. In so doing, the Respondent conceded that its withdrawn question was not potentially a serious question of general importance, as required by paragraph 74(d) of the IRPA.

[234] The three remaining questions proposed by the Respondent are as follows:

1. Does the Board's use of JGs issued pursuant to section 159(1)(h) of the IRPA fetter Board Members' independence?

2. Does the Chairperson of the Board have the authority pursuant to section 159(1)(h) of the IRPA to issue JGs on questions of fact?

3. Does section 159(1)(h) of the IRPA require the Chairperson to conduct consultations with external stakeholders prior to issuing a JG?

[235] The first of the three questions identified above was similar to the question that CARL withdrew. The two remaining questions suggested by CARL are as follows:

1. Does the Chairperson have the authority pursuant to section 159(1)(h) of the IRPA to issue JGs that include factual determinations?

2. Can the Chairperson select a claim as a JG prior to the decision being rendered?

[236] As formulated by the Respondent, its first question is more of a very broad reference question than a question that arises from the issues in these Applications. Such questions are not eligible for certification: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46. CARL's submissions with respect to the fettering of discretion issue concerns the factual assertions and determinations made in the impugned JGs, taken together with the statement of expectation set forth in the policy notes that accompanied the issuance of the JGs. CARL maintained that this statement effectively instructs a member to adopt the factual determinations in the JGs. In my view, this is a serious question of general importance that arises on the facts of these Applications. Accordingly, I will certify a question on that issue.

[237] Turning to the second question proposed by the Respondent, I consider that it would be more appropriate to certify the corresponding question proposed by CARL. (See the first of the two questions proposed by CARL above). This is because important parts of three of the four JGs challenged in these Applications focused on questions of law (e.g., the test for an IFA) and questions of mixed fact and law (e.g., the availability of an IFA). Only the China JG solely focused on a question of fact.

[238] Regarding the third question proposed by the Respondent, I do not consider this to rise to the level of being a serious question of general importance. This is because it is implicit from the plain language of paragraph 159(1)(h) of the IRPA that consultations with external stakeholders are not required prior to when the Chairperson identifies a JG.

[239] With respect to the two questions posed by CARL, I have already addressed its first question. This leaves its second question. I consider that to be a reference question because it does not arise from the facts of this case. This question was raised in respect of the Nigeria JG. The uncontested evidence is that that JG was formally identified as a JG approximately two months after the RAD issued its decision in TB7-19851. No evidence was adduced to demonstrate that the Chairperson informally or *de facto* identified that decision as a JG prior to its issuance.

[240] Considering the foregoing, I will certify the following two questions:

1. Does the Chairperson of the Immigration and Refugee Board have the authority pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* to issue jurisprudential guides that include factual determinations?

2. Do the Jurisprudential Guides that the Chairperson issued with respect to Nigeria, Pakistan, India, and China unlawfully fetter the discretion of members of the Refugee Protection Division and the Refugee Appeal Division to make their own factual findings, or improperly encroach upon their adjudicative independence?

JUDGMENT in IMM-3433-17 & IMM-3373-18

THIS COURT'S JUDGMENT is that these Applications are granted in part:

1. The Chairperson of the Immigration and Refugee Board [the Board] has the authority under paragraph 159(1)(h) of the IRPA to issue jurisprudential guides [JGs] that include factual determinations.

2. The Chairperson was not required to engage in consultation with external stakeholders prior to identifying the JGs pertaining to Nigeria, Pakistan, India, and China.

3. The JG that was identified with respect to Nigeria does not unlawfully fetter the discretion of members of the Board's Refugee Protection Division [RPD] or its Refugee Appeal Division [RAD] to make their own factual determinations. Nor does it improperly encroach upon the adjudicative independence of RPD or RAD members or unfairly increase the burden faced by refugee applicants in establishing their claims. That JG was not improperly pre-selected.

4. The statement of expectation included in the policy note that was issued together with Chairperson's identification of the RAD's decision in TB7-01837 as a JG pertaining to Pakistan was unlawful and inoperative as it relates to the factual determinations set forth in paragraph 33 and in the first two sentences of paragraph 35 of that JG. The remainder of the policy note, together with the text of the JG itself, do not unlawfully fetter the discretion of the Board's members,

improperly encroach upon their adjudicative independence, or unfairly increase the burden faced by refugee applicants in establishing their claims.

5. The statement of expectation made in the policy notes that were issued together with Chairperson's identification of the RAD's decisions in MB6-01059/MB6-01060 and TB6-11632 as JGs pertaining to India and China, respectively, was unlawful and inoperative as it related to the factual determinations identified at paragraphs 156 and 163 of the attached Reasons for Judgment. The remainder of those policy notes, together with the text of the JGs themselves, did not unlawfully fetter the discretion of the Board's members, improperly encroach upon their adjudicative independence, or unfairly increase the burden faced by refugee applicants in establishing their claims.

6. The following two questions are certified as serious questions of general importance, as contemplated by paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

   i) Does the Chairperson of the Immigration and Refugee Board have the authority pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* to issue jurisprudential guides that include factual determinations?

   ii) Do the Jurisprudential Guides that the Chairperson issued with respect to Nigeria, Pakistan, India, and China unlawfully fetter the discretion of members of the Refugee Protection Division and the Refugee Appeal Division

to make their own factual findings, or improperly encroach upon their adjudicative independence?

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27:

Application	*Application*
72 (2) The following provisions govern an application under subsection (1):	72 (2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
[…]	[…]
(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.
[…]	[…]
Duties of Chairperson	**Présidence de la Commission**
Chairperson	*Fonctions*
159 (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson	159 (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :
[…]	[…]
(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties; and	h) après consultation des vice-présidents et en vue d'aider les commissaires dans l'exécution de leurs fonctions, il donne des directives écrites aux commissaires et précise les décisions de la Commission qui serviront de guide jurisprudentiel;
[…]	[…]

Federal Court Rules (SOR/98-106)

Application	**Champ d'application**
Application	*Application*
1.1 (1) These Rules apply to all proceedings in the Federal Court of Appeal and the Federal Court unless otherwise provided by or under an Act of Parliament.	1.1 (1) Sauf disposition contraire d'une loi fédérale ou de ses textes d'application, les présentes règles s'appliquent à toutes les instances devant la Cour d'appel fédérale et la Cour fédérale.
Inconsistency with Act	*Dispositions incompatibles*
(2) In the event of any inconsistency between these Rules and an Act of Parliament or a regulation made under such an Act, that Act or regulation prevails to the extent of the inconsistency.	(2) Les dispositions de toute loi fédérale ou de ses textes d'application l'emportent sur les dispositions incompatibles des présentes règles.
[…]	[…]
Appeals of Prothonotaries' Orders	**Appel des ordonnances du protonotaire**
Appeal	*Appel*
51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédéral
[…]	[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3433-17 IMM-3373-18
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PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	SEPTEMBER 4, 2019

APPEARANCES:

Lorne Waldman Steven Blakey	FOR THE APPLICANT
James Todd Margherita Braccio	FOR THE RESPONDENT
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