Federal Court Cour fédérale

Date: 20240318

Docket: IMM-189-23

Citation: 2024 FC 433

Ottawa, Ontario, March 18, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

PEDRO FRUTO GUZMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 30-year-old citizen of Mexico. He sought refugee protection in Canada on the basis of his fear of persecution as a gay man. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) found that the applicant had established with credible evidence his sexual orientation as well as the adverse treatment he recounted having experienced while growing up in Colima State (including at the hands of his father) and

while living in Guadalajara as an adult. The RPD also found, however, that the applicant has a viable internal flight alternative (IFA) in Mexico City. The RPD therefore rejected the applicant's claim for protection.

[2] The applicant appealed the RPD's decision to the Refugee Appeal Division (RAD) of the IRB. The RAD dismissed the appeal in a decision dated December 20, 2022, finding that the RPD correctly concluded that the applicant has a viable IFA in Mexico City.

[3] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). He contends that the RAD's finding that he has a viable IFA in Mexico City is unreasonable.

[4] As I will explain in the reasons that follow, I agree with the applicant that the RAD's decision is unreasonable, although on a narrower basis than he advances. This application for judicial review will, therefore, be allowed and the matter will be remitted to another decision maker for redetermination.

II. STANDARD OF REVIEW

[5] The parties agree, as do I, that the RAD's decision should be reviewed on a reasonableness standard. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*).

Two types of fundamental flaws can render a decision unreasonable: one is a “failure of rationality internal to the reasoning process;” the other is “when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear upon it” (*Vavilov*, at para 101).

[6] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov*, at para 125). Nevertheless, the test of reasonableness and its requirements of justification, intelligibility and transparency apply to an administrative decision maker’s assessment of the evidence and to the inferences the decision maker draws from that evidence (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 46).

[7] The onus is on the applicant to demonstrate that the RAD’s decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov*, at para 100).

III. ANALYSIS

A. *Introduction*

[8] The determinative issue for both the RPD and the RAD was the availability of a viable IFA in Mexico City. Briefly, an IFA is a place in their country of nationality where a party

seeking protection would not be at risk (in the relevant sense and on the applicable standard, depending on whether the claim is made under section 96 or 97 of the *IRPA*) and to where it would not be unreasonable for them to relocate. When there is a viable IFA, a claimant is not entitled to protection from another country. To counter the proposition that they have a viable IFA, a party seeking protection has the burden of showing either that they would be at risk in the proposed IFA or, even if they would not be at risk in the proposed IFA, that it would be unreasonable in all the circumstances for them to relocate there. For the IFA test generally, see *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA); and *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 (CA).

[9] The applicant contends that the RAD's findings with respect to both branches of the IFA test are unreasonable. In making this submission, he relies to a significant degree on information that his counsel on appeal (not Ms. Waldman) did not mention in the appeal submissions. In particular, he relies on country condition information that is included in the September 2022 version of the IRB's National Documentation Package (NDP) for Mexico but which was not in the version of the NDP in place when the appeal was perfected. (The subsequent version of the NDP superseded the earlier one while the appeal was pending). The applicant also relies on two decisions of the RAD that reached the opposite conclusion concerning whether Mexico City is a viable IFA for a gay man. Both decisions pre-date the decision under review but neither was brought to the attention of the RAD by the applicant's counsel on appeal.

[10] The respondent submits that, to the extent that the applicant's arguments depend on material that was not before the decision maker or raise new issues, they exceed the proper scope of judicial review on a reasonableness standard.

[11] It is necessary to resolve these preliminary issues first before considering whether the applicant has demonstrated that the RAD's decision is unreasonable.

B. *Is the applicant relying on new evidence?*

[12] As I will explain, I agree with the applicant that the documents and information in the updated NDP on which he seeks to rely do not engage the general rule against supplementing the record on judicial review.

[13] Some additional background is necessary to put this issue in context.

[14] The applicant's claim was heard by the RPD on April 22, 2022. The RPD's decision rejecting the claim is dated May 6, 2022. The applicant's counsel before the RPD (an immigration consultant) continued to represent the applicant on the appeal to the RAD. The applicant's appeal record (including detailed written submissions) was filed on August 8, 2022. The RAD's decision dismissing the appeal is dated December 20, 2022.

[15] In rejecting the applicant's claim, the RPD cited and relied on information in two documents in the September 2021 NDP for Mexico:

- Item 1.2 – the 2017 *CIA World Factbook* entry for Mexico; and

- Item 6.4 – an IRB Response to Information Request dated 16 February 2018 concerning the situation of sexual minorities in Mexico, including in Mexico City.

[16] In challenging the RPD's IFA finding, appeal counsel cited and relied on information in three documents in the September 2021 NDP for Mexico:

- Item 6.1 – Mexico: Sexual Orientation and Gender Identity (SOGI) (May 2017), a report prepared by the Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD);

- Item 6.2 – an IRB Response to Information Request dated 18 August 2019 concerning the situation of sexual and gender minorities, including in Mérida (Yucatán) and Monterrey (Nuevo León), including legislation, treatment by authorities and society; state protection and support services available (2017-August 2019); and

- Item 6.4 – see above.

[17] Appeal counsel also tendered as new evidence certain other reports not found in the NDP but none of that information is germane for present purposes.

[18] Even though the NDP for Mexico was updated on September 29, 2022 (while the appeal was still pending), appeal counsel did not seek to draw any new documents in the updated NDP to the attention of the RAD before it rendered its decision.

[19] For its part, in dismissing the appeal, the RAD placed particular emphasis on information drawn from the ACCORD report (Item 6.1), which had been highlighted in appeal counsel's submissions.

[20] On this application for judicial review, the applicant relies to a significant degree on three new documents in the September 2022 NDP for Mexico. He contends that information in these documents calls the reasonableness of the RAD's IFA finding into question. As already noted, none of these documents were brought to the attention of the RAD by appeal counsel.

[21] Specifically, the applicant relies on the following:

- Item 2.1 – an excerpt from the 2021 Annual Report of the Inter-American Commission on Human Rights concerning Mexico (this document replaced a similar excerpt from the 2020 Annual Report found in the September 2021 NDP);

- Item 6.2 – an IRB Response to Information Request dated 8 April 2022 concerning treatment of individuals in Mexico based on their sexual orientation, gender identity and expression, and sex characteristics (this document replaced Item 6.2 cited in paragraph 16, above); and

- Item 6.7 – a Country of Origin Information Report for Mexico dated April 2021 prepared by Capital Rainbow Refuge.

[22] The applicant also relies on three other documents (Items 6.1, 6.4 and 6.5) that are found in both the September 2021 NDP and the September 2022 NDP. No objection is raised to his reliance on these documents.

[23] Since the applicant challenged the RPD's IFA finding in his appeal to the RAD, there is no bar to him challenging the reasonableness of the RAD's IFA determination in this application for judicial review (*Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 at para 6; *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 35). The more difficult question is whether, in bringing this challenge, he can rely on information that was added to the NDP for Mexico after his appeal was perfected and that his appeal counsel did not expressly rely on.

[24] The respondent submits that the applicant cannot rely on this information now because to do so would be tantamount to supplementing the record before the decision maker and none of the recognized circumstances in which this is permissible are present. I do not agree.

[25] The respondent correctly points out that, as a general rule, only material that was before the original decision maker may be considered on an application for judicial review and, further, that none of the recognized exceptions apply here (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9; and *Andrews v Public Service Alliance of Canada*, 2022 FCA 159 at para 18). However, I agree with the applicant that this general rule does not apply here. This is because the RAD should have considered the "new" information on

which he now relies. The IRB's *Policy on National Documentation Packages in Refugee Determination Proceedings* (5 June 2019) states: "The RPD (Refugee Protection Division) and RAD (Refugee Appeal Division) will consider the most recent NDP (National Documentation Package)(s) in support of assessing forward-looking risk." This principle is consistent with the jurisprudence, which has held that the RAD "should consider the most recent information, given that it is assessing risk on a forward looking basis" (*Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at para 54; see also *Singh v Canada (Citizenship and Immigration)*, 2023 FC 1623 at paras 35-36).

[26] The RAD rendered its decision on the applicant's appeal on December 20, 2022. At that time, the most recent NDP for Mexico is the one dated September 2022. Thus, pursuant to the IRB's policy, it should have been considered by the RAD member. The RAD member may, therefore, be presumed to have considered all the evidence in the record, including any new information in the most recent NDP (*Siddique v Canada (Citizenship and Immigration)*, 2022 FC 964 at para 24). This distinguishes the present case from *Vaamonde Wulff v Canada (Citizenship and Immigration)*, 2023 FC 566, where the applicant was precluded from relying on documents from an NDP that post-dated the decision under review.

[27] In sum, since the RAD member is expected to have considered the September 2022 NDP, the new documents relied on by the applicant should be considered part of the record before the decision maker, even if no one expressly referred to them. Accordingly, it is open to the applicant to rely on those documents now in seeking to impugn the reasonableness of the RAD's decision. Whether he has succeeded in that effort will be addressed below.

[28] On the other hand, since the prior RAD decisions are not evidence (*Mansour v Canada (Citizenship and Immigration)*, 2022 FC 846 at para 26), the applicant's reliance on them does not engage the general rule against supplementing the record. Instead, it engages the question of whether the applicant is raising a new issue. I turn to this next.

C. *Is the applicant raising a new issue?*

[29] In support of his challenge to the reasonableness of the RAD's decision, the applicant relies on two other decisions from the RAD: one in TB8-19175 (reported as 2019 CanLII 143555 (CA IRB)); the other in MB9-05881(reported as 2020 CanLII 122894 (CA IRB)). Both decisions concerned a claim for protection by a gay man from Mexico. Both set aside negative determinations by the RPD and granted the appellants refugee protection. In doing so, both panels found that Mexico City is not a viable IFA for a gay man. Neither of these decisions were referred to in appeal counsel's submissions to the RAD, nor are they mentioned in the RAD's decision.

[30] Relying on *Ramirez Cueto v Canada (Citizenship and Immigration)*, 2021 FC 954 (which also concerned a claim for refugee protection by a citizen of Mexico on the basis of sexual orientation) and *Kajenthiran v Canada (Citizenship and Immigration)*, 2023 FC 1474, the applicant submits that the RAD's decision is unreasonable because other RAD panels had granted refugee protection in similar circumstances but the panel whose decision is now under review failed to explain why a different result had been reached in the applicant's case.

[31] I have serious reservations about whether it is appropriate for the applicant to be making this argument for the first time on judicial review. Unlike in *Kajenthiran*, where submissions to the RAD had devoted "considerable detail" to the RAD precedents on which the applicant in that case was relying (see *Kajenthiran*, at para 28), the question of the significance of the prior decisions was not even hinted at in appeal counsel's submissions in the case at bar.

[32] Generally, courts will not consider a new issue on judicial review where the issue could have been, but was not, raised before the administrative decision maker (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23-26; *Firsov v Canada (Attorney General)*, 2022 FCA 191 at para 49). This is because, among other things, "courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known" (*Alberta Teachers' Association*, at para 24). Accordingly, this Court has consistently held that issues and arguments should be raised before the RAD to create a basis for judicial review (*Essel v Canada (Citizenship and Immigration)*, 2020 FC 1025 at para 10; *Sami-Ullah v Canada (Citizenship and Immigration)*, 2022 FC 1525 at para 26; *Gonzalez Perez v Canada (Citizenship and Immigration)*, 2024 FC 69 at paras 39-42; *Singh v Canada (Citizenship and Immigration)*, 2023 FC 1457 at para 15). This reflects the respective roles of the RAD and the reviewing court as well as the nature of reasonableness review.

[33] Reasonableness review "is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of

judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov*, at para 13).

[34] Moreover, in conducting reasonableness review, a court must take a "reasons first" approach that evaluates the administrative decision maker's justification for its decision (*Vavilov*, at para 84; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 60). Among other things, the reviewing court must "read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" (*Vavilov*, at para 94). An important part of this history and context is the submissions provided by the parties to the administrative decision maker. This factor is of particular significance in the context of the RAD, which sits as an appellate body reviewing the decisions of the RPD (*Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at para 26). The principles of justification and transparency require that the decision maker's reasons "meaningfully account for the central issues and concerns raised by the parties" (*Vavilov*, at para 127). Conversely, an administrative decision maker generally cannot be faulted for failing to address an issue that was not raised before it (*Shaibu v Canada (Citizenship and Immigration)*, 2022 FC 109 at para 8).

[35] Despite these reservations, I am not prepared to preclude the applicant from relying on the apparent inconsistency between the RAD's decision in the case at bar and the decisions in the other two cases to support his argument that the RAD's decision is unreasonable. The applicant contends that the fact that the other RAD panels reached different conclusions regarding whether Mexico City is a viable IFA on the basis of some of the same evidence as was before the present panel calls the reasonableness of the decision under review into question. While it is a close call,

I see this as a new argument rather than a new issue. The issue of whether Mexico City is a viable IFA was squarely before the RAD. The applicant is not attempting to use the other decisions to challenge the RPD's IFA finding, which would constitute an improper end run around the RAD (*Dahal*, at para 25). Rather, he is using them to impugn the reasonableness of the RAD's IFA determination. In challenging the reasonableness of that determination, the applicant obviously cannot be limited to the arguments he made on appeal when challenging the RPD's decision, as long as his arguments now relate to issues that were raised before the RAD.

[36] As I will explain below, I am not persuaded that the other RAD decisions have the significance the applicant seeks to attribute to them. However, the applicant should be permitted to make this argument. While it would certainly have been better if the RAD had had an opportunity to address the other decisions, allowing the applicant to make this argument now would not subvert either the RAD's role in deciding the merits of the appeal or this Court's role on judicial review.

D. *Is the RAD's IFA finding unreasonable?*

[37] The applicant sought protection on the basis of his fear of persecution in Mexico as a gay man. To rebut the proposition that he has a viable IFA in Mexico City, he had to establish, on a balance of probabilities, a serious possibility of persecution there. If he failed in this respect, he could still seek to establish, on a balance of probabilities, that it would be unreasonable in all the circumstances for him to relocate there. See *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paras 42-45, as well as the jurisprudence cited in paragraph 8, above. The RPD

concluded that the applicant had failed in both respects. The RAD agreed with the RPD, finding on the basis of its review of the record that the applicant has a viable IFA in Mexico City.

[38] In reaching this conclusion, the RAD "completely accept[ed] that the [applicant] fears going back to Mexico and that he has mental scars from his past experiences in Colima and Guadalajara." The determinative issue, therefore, was whether these fears were well-founded with respect to Mexico City.

[39] The RAD found that the applicant had not established that the prospect of persecution in Mexico City at the hands of his father rose above the level of a mere possibility. The applicant does not contest this finding on review.

[40] The RAD also found that, unlike other areas in Mexico, conditions in Mexico City did not give rise to a serious possibility of persecution on the basis of the applicant's sexual orientation. This finding was based to a large extent on information drawn from one NDP document in particular, the ACCORD report (Item 6.1), a document that had been cited in appeal counsel's submissions to the RAD.

[41] From its review of the evidence, the RAD found that gay men in Mexico City "live within a framework that supports their freedom and their identities." According to a June 2015 *New York Times* article on developments concerning same-sex marriage in Mexico, Mexico City is a "large liberal island" in a socially conservative country. Same-sex relationships are legal in Mexico City and, in 2009, the city became the first jurisdiction in Latin America to legalize

same-sex marriage. The city's constitution prohibits discrimination based on sexual orientation. The city's Civil Code permits the adoption of children by same-sex couples. Same-sex couples are also entitled to the same social benefits as opposite-sex couples. Under the Federal District's Criminal Code, crimes motivated by the victim's sexual orientation or gender identity are considered hate crimes and are punished accordingly.

[42] The RAD noted that there is evidence of the police abusing their authority by detaining and mistreating LGBTQ individuals who show public displays of affection but found that, as seriously as it should be taken, there was no evidence that this occurs "with any regularity" in Mexico City. Similarly, while there were instances of hate crimes against LGBTQ persons (including hate-motivated homicides), the RAD found that the record did not include statistics on the number of hate-related murders of gay men in Mexico City in particular. The RAD also noted: "The evidence is clear that gay men do face a higher risk of crime, including violent crime, than their heterosexual counterparts. However, the rate of crime needs to be considered in the context of a population of approximately 130 million people across Mexico."

[43] The RAD accepted that discrimination against LGBTQ individuals persists, even in Mexico City. However, it found that there are effective legal modes of redress, such as through complaints to the Council for the Prevention and Elimination of Discrimination in Mexico City (COPRED), an organization created to resolve complaints of public and private sector discrimination, including on the basis of sexual orientation.

[44] In sum, the RAD found that "the large weight of country condition evidence supports that [Mexico City] is a progressive, tolerant place with a vibrant gay community and equality under the law." While the RAD accepted that gay men face a higher than average risk of crime, including violent crime, and that they also face a higher than average risk of discrimination, "the weight of the Appellant's evidence suggests that the current risk does not rise above the level of a mere possibility." The RAD therefore agreed with the RPD that Mexico City meets the first branch of the IFA test.

[45] The applicant challenges the reasonableness of the RAD's assessment of information in the 2021 NDP for Mexico but his main argument is based on the updated NDP. He submits that the RAD's finding under the first branch of the IFA test is unreasonable because it overlooked or failed to account for new and significant information that is capable of supporting the applicant's position. I agree.

[46] The updated NDP contains new and significant information that is contrary to the RAD's finding that, despite there being some problems there, on the whole Mexico City is a safe and secure place for gay men. The updated Response to Information Request (RIR) (Item 6.2) has a section dealing specifically with Mexico City that addresses many salient issues. While citing characterizations of Mexico City as "by far" the most progressive city in Mexico (including with respect to LGBTQ rights), it also notes that a substantial majority of respondents to an August 2021 government survey (81.8 %) believed that there was discrimination against gay men there. Similarly, the April 2021 report by Capital Rainbow Refuge (Item 6.7 in the updated NDP) noted that, while Mexico City is perceived internationally as "gay friendly", a 2017 report

found homophobic and transphobic discrimination to be pervasive there. Consistent with this, a majority of LGBTIQ individuals surveyed in Mexico City in 2015 (68%) reported having been discriminated against at some point in their lives. Almost one-quarter reported not being able to speak openly about their sexual orientation or their gender identity or expression (SOGIE). As well, almost one-third of respondents reported that they would not make a formal complaint of discrimination based on their SOGIE because of perceived state corruption in favour of the perpetrator, the unlikelihood of state action, and the bureaucratic requirements of the complaint process. The Capital Rainbow Refuge report also sets out a number of reasons why rights violations of SOGIE-diverse individuals in Mexico as a whole are likely to be under-reported to a significant degree.

[47] Furthermore, the updated RIR notes the opinion of a lawyer from Identity, Diversity, Legality (a legal clinic specializing in SOGIE matters in Mexico) that, at least as of February 2022, there was a "crisis" regarding the treatment of individuals of diverse SOGIE by society and public authorities as well as by law enforcement in Mexico City (among other places). The same lawyer reported in February 2022 that COPRED had been without a leader for two years and its executive had not "made any declarations or advanced a policy of inclusion and diversity for the LGBTQ+ community." The updated RIR also recounts a heavy-handed police response to an assembly of LGBTQ+ individuals in Mexico City in September 2021 protesting hate-motivated attacks against members of their community. This is in the context of a history of police harassment of LGBTQ+ individuals in that city. This information is contrary to the RAD's finding that the "vibrant and open gay community" in Mexico City is able to assemble freely.

[48] The RAD member states that he does not have statistics on the number of hate-related murders of gay men in Mexico City specifically but this is incorrect. Item 6.4, an RIR dated February 16, 2018 (which was included in the September 2021 NDP) provides such statistics for Mexico City for the years 2014, 2015, 2016 and the first quarter of 2017. Moreover, the Capital Rainbow Refuge report notes that Mexico City has one of the highest LGBTIQ-targeted murder rates in the country. While several of the examples mentioned in the report are murders of trans women, several other examples are murders of gay men. The same report also notes that Zona Rosa, the "gay village" in Mexico City "has often been described as a safe space for SOGIE-diverse individuals in Mexico" but "violence and discrimination against LGBTIQ persons and establishment[s] within Zona Rosa are frequent." While the statement in the 2021 report of the IACHR (Item 2.10 in the updated NDP) that 2021 had been "a particularly violent year for LGBTI people" was based on reported incidents across the country, this included incidents in Mexico City.

[49] All of this information is potentially probative of the central issue of whether there is a serious possibility that a gay man like the applicant would be persecuted in Mexico City. None of it was addressed by the RAD in its decision. I agree with the applicant that, because of this, the RAD's decision lacks justification, transparency and intelligibility (*Vavilov*, at para 126; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1998] FCJ No 1425 at paras 14-17; *Demir v Canada (Citizenship and Immigration)*, 2014 FC 1218 at para 12; *Gill v Canada (Citizenship and Immigration)*, 2020 FC 934 at para 40; *Barril v Canada (Citizenship and Immigration)*, 2022 FC 400 at para 17; *Torres Araque v Canada (Citizenship and Immigration)*, 2023 FC 69 at para 13).

[50] On the other hand, I do not agree with the applicant that the RAD's decision is unreasonable because it fails to explain why it did not reach the same conclusion on whether Mexico City is a viable IFA for a gay man as the other two RAD decisions cited by the applicant.

[51] According to the applicant, it is significant that, in granting refugee protection to gay men from Mexico, the other RAD panels had relied on some of the very same evidence his counsel had cited in support of his appeal – namely, Items 6.1, 6.2 and 6.4 (see paragraph 16, above) – to conclude that Mexico City is not a viable IFA. In a nutshell, the applicant submits that the similarities between his case and those considered in TB8-19175 and MB9-05881 placed a justificatory burden on the RAD to explain its departure from the results in those cases.

[52] I am unable to agree.

[53] Consistency in decision making and the value of treating like cases alike are important goals that promote the rule of law (*Vavilov*, at para 129). It goes without saying that outcomes ought not to depend on the identity of the decision maker. However, "'a lack of unanimity is the price to pay for the decision-making freedom and independence' given to administrative decision makers" (*Vavilov*, at para 129, quoting *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 800). Particularly in the area of fact-finding, perfect uniformity cannot be expected or required (*Qayyem v Canada (Citizenship and Immigration)*, 2020 FC 601 at para 20).

[54] As has often been noted, all refugee claims arise out of uniquely personal circumstances and they must always be assessed in their particular contexts (*Sami-Ullah*, at para 31). Refugee status must always be determined on a case by case basis. The IRB is not bound by the result in another claim, even if the claim involves a relative and is based on the same or substantially similar allegations (*Bakary v Canada (Citizenship and Immigration)*, 2006 FC 1111 at para 10; *Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 296 at para 11). An issue such as the first branch of the IFA test for a given location might appear to be more susceptible to consistent answers because it seems to turns less on the circumstances of the individual claimant and more on objective country conditions; however, it must still be answered in a each case in accordance with the decision maker's assessment of the evidence before them. Each claimant bears the onus of rebutting the first branch of the test; the fact that a claimant succeeded does not entail that the next one must as well. The decision maker may not know the full extent and nature of the evidence put forward and considered in the other cases or the submissions made, even when some of this is referred to in the earlier decisions (*Qayyem*, at para 18). Moreover, the evidence may be far from clear and unequivocal and reasonable decision makers can draw different conclusions from it. A decision maker may even find that the other decisions are simply incorrect (*Bakary*, at para 10) or, at least, not convincing in their analysis. As well, country conditions are not necessarily static; they may improve or worsen with the passage of time (*Mansour*, at para 28). All this can explain why there may be divergent outcomes in apparently similar cases.

[55] In the case at bar, after a detailed review of the evidence, the RAD concluded that the applicant had failed to discharge the burden on him to rebut the first branch of the IFA test. The

RAD recognized that there was evidence supporting the applicant's position but nevertheless concluded that the weight of the evidence was against the applicant. While the other RAD panels had reached the opposite conclusion, each decision turned on its own facts and the decision makers' assessment of the evidence, even if that evidence was substantially the same as what the RAD panel expressly considered in the case at bar. As such, the other RAD decisions are not the type of decision that would give rise to a justificatory burden on the RAD to explain a departure from previous decisions (*Vanam v Canada (Citizenship and Immigration)*, 2022 FC 1457 at para 23; *Sami-Ullah*, at para 36). Certainly, if the other decisions had been brought to the RAD's attention in the applicant's appeal, it would have been incumbent on the member to explain why he had reached a different conclusion concerning Mexico City as a viable IFA. But this is not what happened.

[56] This is not to suggest that it is always necessary to raise the issue of consistency with past decisions expressly for it to be incumbent on a decision maker to explain why a question in common has been answered differently. As *Vavilov* holds, "Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable" (at para 131). As a result, "Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable" (*ibid.*). When it comes to the "longstanding practices" or "established internal authority" of a tribunal, it may be presumed that the decision maker would or should have been aware of these constraints, even if the parties did not bring them to the decision maker's attention. This, in turn,

gives rise to a responsibility on the part of the decision maker to explain why a longstanding practice or established internal authority was being departed from.

[57] That, however, is not the case here. The applicant has not established that the two decisions on which he relies represent longstanding practices or established internal authorities of the IRB. Nor is there any other reason to think that the RAD would (or should) have been aware of them. On the contrary, as Justice McHaffie observed in *Kumar v Canada (Citizenship and Immigration)*, 2023 FC 1279: "From a practical perspective, it is effectively impossible for each member of the RAD to be aware of every decision issued by every other member. It is unrealistic to impose on the RAD, as the applicants propose, an obligation to be aware of all of its other decisions, let alone cite them or distinguish them, particularly in a case where they have not been raised" (at para 20). In short, there is simply no basis to suggest, as the applicant does, that the RAD "ignored" the earlier decisions.

[58] To repeat, the prior decisions were not binding on the RAD member. Regardless of the findings in those cases, it was incumbent on the member to make his own determination as to whether Mexico City is a viable IFA for a gay man like the applicant. The mere fact that different panels had assessed the same evidence differently and, consequently, had reached different conclusions does not point to a fundamental flaw in the RAD's analysis of that evidence. Nor does this circumstance alone give rise to any sort of justificatory burden on the RAD *vis-à-vis* those other decisions.

[59] For these reasons, I respectfully do not find the Court's analysis in *Ramirez Cueto* compelling. Consequently, even assuming for the sake of argument that the RAD should have been aware of that decision (despite the fact that appeal counsel did not mention it), I cannot agree with the applicant that it was a reviewable error for the RAD to fail to follow it.

[60] Finally, I would note for the sake of completeness that, since the matter must be reconsidered, it is not necessary to address the applicant's submission that the RAD's determination under the second branch of the IFA test is unreasonable.

IV. CONCLUSION

[61] For the reasons set out above, the application for judicial review will be allowed. The decision of the Refugee Appeal Division dated December 20, 2022, is set aside and the matter is remitted for redetermination by a different decision maker.

[62] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-189-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated December 20, 2022, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-189-23
STYLE OF CAUSE:	PEDRO FRUTO GUZMAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 1, 2023
JUDGMENT AND REASONS:	NORRIS J.
DATED:	MARCH 18, 2024

APPEARANCES:

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