



EDITOR'S NOTE: This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

CITIZENSHIP AND IMMIGRATION

STATUS IN CANADA

Convention Refugees and Persons in Need of Protection

Application for judicial review of Immigration and Refugee Board (IRB), Refugee Appeal Division (RAD) decision dismissing applicant's appeal of Refugee Protection Division (RPD) decision rejecting applicant's claim for refugee protection — Applicant, 30-year-old citizen of Mexico, sought refugee protection in Canada on basis of his fear of persecution as gay man — RPD found that applicant had established with credible evidence his sexual orientation as well as adverse treatment he recounted having experienced while growing up in Colima State (including at hands of his father), and while living in Guadalajara as adult — RPD also found, however, that applicant had viable internal flight alternative (IFA) in Mexico City; therefore rejected applicant's claim for protection — Determinative issue for both RPD, RAD was availability of viable IFA for applicant in Mexico City — IFA is place in country of nationality where party seeking protection would not be at risk, to where it would not be unreasonable for them to relocate — When there is viable IFA, claimant is not entitled to protection from another country — Applicant contended that RAD's findings with respect to both branches of IFA test were unreasonable — Relied on information that his counsel on appeal did not mention in appeal submissions, in particular, on country condition information that is included in September 2022 version of IRB's National Documentation Package (NDP) for Mexico but which was not in version of NDP in place when appeal was perfected — Applicant also relied on two decisions of RAD that reached opposite conclusion concerning whether Mexico City is viable IFA for gay man — Both decisions pre-dated decision under review but neither brought to attention of RAD by applicant's counsel on appeal — Preliminary issues were whether applicant relied on new evidence; whether applicant raising new issue — RAD rendered its decision on applicant's appeal on December 20, 2022, at which time most recent NDP for Mexico was one dated September 2022 — Thus, pursuant to IRB's policy of considering most recent NDP in support of assessing forward-looking risk, September 2022 NDP should have been considered by RAD member — Therefore, was open to applicant to rely on those documents on judicial review in seeking to impugn reasonableness of RAD's decision — Applicant's reliance on two other decisions of RAD not submitting new issue but rather new argument — Issue of whether Mexico City is viable IFA was squarely before RAD — Applicant not attempting to use other decisions to challenge RPD's IFA finding; rather, he was using them to impugn reasonableness of RAD's IFA determination — While it would have been better if RAD had had opportunity to address other decisions, allowing applicant to make such argument at this point would not subvert either RAD's role in deciding merits of appeal or Court's role on judicial review — Main issue whether RAD's IFA finding unreasonable — Applicant's main argument based on updated NDP; submitted that RAD's finding under first branch of IFA test unreasonable because it overlooked new, significant information capable of supporting applicant's position — Indeed, updated NDP contained new, significant information that was contrary to RAD's finding that, despite there being some problems there, on whole Mexico City is safe, secure place for gay men — Such additional information was potentially probative of central issue of whether there was serious possibility that gay man like applicant would be persecuted in Mexico City — However, none of it was addressed by RAD in its decision — Because of this, RAD's decision lacked

justification, transparency, intelligibility — Applicant's argument that RAD's decision unreasonable because it failed to explain why RAD not reaching same conclusion on whether Mexico City was viable IFA for gay man as other two RAD decisions applicant cited was rejected — While consistency in decision making, value of treating like cases alike are important goals that promote rule of law, lack of unanimity is price to pay for decision-making freedom, independence' given to administrative decision makers — In area of fact-finding, perfect uniformity cannot be expected or required — Divergent outcomes in apparently similar cases can exist since refugee claims arise out of uniquely personal circumstances, must always be assessed in their particular contexts — In case at bar, after detailed review of evidence, RAD concluded that applicant had failed to discharge burden on him to rebut first branch of IFA test — Applicant not establishing that two decisions on which he relied represented longstanding practices or established internal authorities of IRB — Nor was there any other reason to think that RAD would or should have been aware of these decisions — Thus, prior decisions were not binding on RAD member — Was incumbent on member to make his own determination as to whether Mexico City was viable IFA for gay man like applicant — Different conclusions panels reaching after assessing same evidence not pointing to fundamental flaw in RAD's analysis of that evidence — Decision of Refugee Appeal Division set aside, matter remitted for redetermination by different decision maker — Application allowed.

GUZMAN V. CANADA (CITIZENSHIP AND IMMIGRATION) (IMM-189-23, 2024 FC 433, Norris J., reasons for judgment dated March 18, 2024, 24 pp.)