

Federal Court



Cour fédérale

**Date: 20230324**

**Docket: IMM-9253-21**

**Citation: 2023 FC 415**

**Ottawa, Ontario, March 24, 2023**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**GUSTAVO HERNANDEZ PLATA  
YERANIA DARYLL LOPEZ GARRIDO  
LARISSA HERNANDEZ LOPEZ  
MATIAS RENE HERNANDEZ LOPEZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Gustavo Hernandez Plata, his wife Yerania Daryll Lopez Garrido, and their children Larissa Hernandez Lopez and Matias Rene Hernandez Lopez [collectively the Applicants], are

citizens of Mexico. They seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD confirmed the determination of the Refugee Protection Division [RPD] of the IRB that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicants claim to fear persecution by Los Zetas, a criminal organization in Mexico. The RPD found the Applicants to be generally credible, but held they had an internal flight alternative [IFA] in Mérida or Mazatlán. The RPD therefore concluded that the Applicants were not in need of Canada's protection, and dismissed their refugee claims.

[3] The Applicants appealed to the RAD. Before the appeal was heard, Larissa submitted an affidavit in which she alleged she would face persecution in Mexico due to her sexual orientation. The RAD again found that the Applicants had viable IFAs, but this time in Mexico City or Guadalajara. The RAD held that the Applicants had not established that any discrimination or harassment Larissa might face in Mexico City would rise to the level of persecution.

[4] The RAD failed to meaningfully grapple with the key issues or central arguments raised by the Applicants concerning Larissa's sexual orientation, and her particular circumstances as a school-aged adolescent with a documented history of anxiety. Nor did the RAD meaningfully grapple with the *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* [SOGIE Guidelines].

[5] The application for judicial review is allowed.

## II. Background

[6] Yerania's father has been an investigative journalist in Mexico for more than 20 years. Some of his published articles have been critical of Los Zetas and corruption in Mexico's government. In February 2017, Yerania's father received death threats from Los Zetas, together with demands that he stop writing about political subjects. He refused to comply. On April 14, 2017, a correspondent working at the same newspaper as Yerania's father was assassinated.

[7] In May 2017, the Applicants began to receive threatening phone calls that included accurate information regarding the places they frequented and the school both children attended.

[8] In June 2017, the car Yerania was driving was forced to stop and she was told to get out. Two men carrying guns identified themselves as members of Los Zetas. They threatened Yerania and told her to stop her father from criticizing the government.

[9] In July and August 2017, the Applicants visited Tlaxcala during the children's school break. Despite being almost 700 kilometers away from home, they still received threatening phone calls with detailed references to their locations and activities.

[10] In November 2017, Yerania was again confronted when she got into her car. A man with a gun asked her for identification. He referred to her as the "journalist's daughter" and threatened

her father. Afterwards, the Applicants repeatedly noticed the same truck following them and stopping beside their vehicle in a threatening manner. Yerania developed a stress and anxiety disorder that required psychological attention and medication in Mexico.

[11] The Applicants travelled to Canada in August 2018 and sought refugee protection upon arrival. The RPD considered the Applicants' claims on May 6, 2021 and rejected them on June 10, 2021. The RAD dismissed the Applicants' appeal on November 24, 2021.

### III. New Evidence before the RAD

[12] The RAD accepted as new evidence an affidavit sworn by Larissa and a psychologist's report, together with another affidavit, two newspaper articles, and a letter from a social worker employed by a community health centre. In her affidavit, Larissa deposed that she had not been open about her same-sex attraction in Mexico because of the widespread homophobia in that country. With the help of the psychologist and the support of her family and school friends, she was able to start living her life freely in Canada.

[13] The RAD acknowledged that Los Zetas had the means to track the Applicants in the IFAs, but found the cartel no longer had a motivation to locate them. The RAD based this finding on the lack of evidence suggesting that anyone had attempted to find the Applicants where they last resided in Mexico. Nor had Los Zetas attempted to harm either Yerania's father or other family members who continue to live in Mexico.

[14] Although this is not made explicit in the RAD's ruling, it is reasonable to infer that the RAD considered IFAs in Mexico and Guadalajara, rather than Mérida or Mazatlán, in light of Larissa's sexual orientation. The RAD concluded as follows:

What I take from the evidence contained in the most recent NDP for Mexico is that, while there exists widespread discrimination and at times violence against members of the LGBTQ community in Mexico, the situation is worse outside large cities such as Mexico City. While this does not mean that there is no discrimination and violence against members of the LGBTQ community in Mexico City, the predominant view in the evidence is that members of the LGBTQ community can live safely in these two cities and that the situation there continues to improve.

[15] The RAD found it would be reasonable for the Applicants to relocate to the proposed IFAs of Mexico and Guadalajara. Yerania did not adduce any new evidence of her anxiety disorder. Despite her testimony, there was nothing to corroborate her assertion that her psychological condition would deteriorate if she returned to Mexico. Nor did the Applicants establish that they were unable to obtain adequate psychological support in the IFAs.

#### IV. Issue

[16] The Applicants challenge the reasonableness of the RAD's decision on numerous grounds. One of these is determinative. The application for judicial review must be allowed because the RAD failed to meaningfully grapple with the key issues and central arguments raised by the Applicants concerning Larissa's sexual orientation.

V. Analysis

[17] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "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).

[18] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[19] The test for a viable IFA is well-established (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) at paras 5-6, 9-10): first, the IRB must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA to exist; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. Both prongs of the test must be satisfied.

[20] A claimant bears the onus of establishing with objective evidence that the proposed IFA is unreasonable. This means establishing that there is a serious possibility of persecution in the proposed IFA, or that the conditions in the proposed IFA make it unreasonable to relocate there,

taking into consideration all the circumstances, including their personal circumstances (*Haastrup v Canada (Citizenship and Immigration)*, 2020 FC 141 [*Haastrup*] at para 29). As Justice Catherine Kane explained in *Haastrup* (at para 30):

In order to find that an IFA is not reasonable in their particular circumstances, a refugee claimant must establish more than the undue hardship resulting from loss of employment, separation from family, difficulty to find work, and a reduction in the quality of life. While circumstances that jeopardize the life and safety of a refugee claimant clearly point against the proposed IFA, other types of undue hardship may not meet the very high threshold. The dividing line will vary.

[21] The Applicants' written submissions to the RAD included the following:

14. [...] Larissa as [a] 15-year-old will reasonably endure more anxiety than a person with more life experience in the context of prevalent homophobia. That anxiety already manifested itself in self-harm.

15. The anxiety that Larissa will endure by trying to live openly as a 15-year-old gay individual makes an IFA to either Mexico City or Guadalajara unreasonable. This is especially so since being able to live openly in Canada has started to relieve that anxiety. [...]

17. The inability of Larissa to live openly as a gay person because of the prevalence of homophobia across all of Mexico amounts to persecution for Larissa. The SOGIE Guidelines state:

8.5.1.1 It is well established in law that being compelled to conceal one's SOGIE constitutes a serious interference with fundamental human rights that may therefore amount to persecution, and a claimant cannot be expected to conceal their SOGIE as a way to avoid persecution in their country of reference.

18. Larissa as a 15-year-old gay individual will endure anxiety in coming out because of the prevalence of homophobia and will reasonably be fearful to live openly if she returns to Mexico. In these circumstances even in Mexico City or Guadalajara she will face persecution because of the need to conceal her sexual orientation.

[22] The RAD stated in paragraph 6 of its decision that it had taken into account the SOGIE Guidelines in deciding the appeal. However, the SOGIE Guidelines were never mentioned subsequently in the decision.

[23] While the RAD acknowledged Larissa's young age twice in its decision, at paragraphs 28 and 33, it failed to grapple meaningfully with the implications of a school-aged gay adolescent returning to Mexico. The RAD's analysis of the risk of persecution was more suited to an adult than to a child.

[24] The RAD cited a report by the director of a non-profit organization that raises awareness about LGBTQ issues, which indicated that the treatment of LGBTQ individuals varies from state to state, and in the main cities there are "gay friendly" zones where members of the LGBTQ community feel safe. Cities such as Mexico and Guadalajara were said to be quite gay friendly, although this did not mean there was no violence against the LGBTQ community. The RAD nevertheless concluded that hate crimes against gay people are almost unheard of in Mexico City.

[25] According to the psychologist's report tendered on behalf of Larissa:

She shared with me that she was gay and wanted to come out to her parents however felt very worried to share this information with them. Larissa shared that she had at this point told some of her friends she made here in Canada at her school, and they were supportive and was hopeful that if she could tell her family she would feel better.

I met twice more with Larissa after our initial appointment. The second time I met with her she shared that she had disclosed her



sexual orientation to her parents and brother and that this went well. Larissa shared that she felt both proud of herself for sharing this very important information with them and relieved that they had a positive and supportive response towards her.

[26] The RAD failed to meaningfully grapple with the key issues or central arguments raised by the Applicants respecting Larissa's sexual orientation, and her particular circumstances as a school-aged adolescent with a documented history of anxiety. Nor did the RAD meaningfully grapple with the SOGIE Guidelines. As the Supreme Court of Canada held in *Vavilov*, this calls into question whether the RAD was actually alert and sensitive to the matter under consideration (at para 128).

[27] Larissa's claim for protection was inextricably linked to those of her parents and brother. None of the parties suggested that the family should return to Mexico without Larissa. Accordingly, the application for judicial review must be allowed for all of the Applicants.

## VI. Conclusion

[28] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for redetermination. None of the parties proposed that a question be certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for redetermination.

“Simon Fothergill”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-9253-21

**STYLE OF CAUSE:** GUSTAVO HERNANDEZ PLATA, YERANIA  
DARYLL LOPEZ GARRIDO, LARISSA HERNANDEZ  
LOPEZ AND MATIAS RENE HERNANDEZ LOPEZ v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 23, 2023

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** MARCH 24, 2023

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