

Federal Court



Cour fédérale

**Date: 20210713**

**Docket: IMM-7133-19**

**Citation: 2021 FC 739**

**Ottawa, Ontario, July 13, 2021**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**JOSE ANTONIO MAURICIO BERRIOS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Jose Antonio Mauricio Berrios (the applicant), is a citizen of Mexico. He is challenging the Refugee Appeal Division (RAD) decision dated October 31, 2019 (the Decision) that found he is neither a Convention refugee nor a person in need of protection.

[2] The applicant claims to fear the Sinaloa cartel in Mexico after refusing to carry out electrical work for the organization. The RAD found the applicant had an internal flight alternative (IFA) in Mérida.

[3] For the reasons that follow, this application is granted.

## II. **Relevant Facts**

[4] The applicant lived in Durango with his wife and children. He was self-employed as an electrician. He claims to fear the Sinaloa cartel because he refused to do work for them on a safe house. He was then forced into a car at gunpoint, physically assaulted, and threatened with his and his family's death.

[5] The applicant testified at the RPD hearing that he identified his assailants as members of the El Chapo cartel. The RAD noted that he feared people belonging to the Chapo Guzman cartel. On reviewing the National Documentation Package for Mexico (NDP), the RAD found that Joaquin "El Chapo" Guzman Loera was said to have been a senior leader of the Sinaloa cartel.

[6] The applicant and his family relocated three times to avoid detection before the applicant alone arrived in Canada and made a refugee claim on May 21, 2018. His family remains in hiding in Mexico.

### III. **The Decision**

[7] The RAD found the determinative issues were credibility and the presence of an internal flight alternative (IFA).

[8] After reviewing the evidence before the RPD, the RAD found that it had made overriding errors when assessing the applicant's credibility. The RAD found the applicant's allegations of being targeted by the Sinaloa Cartel, experiencing threats and physical assault by the cartel were credible.

[9] The RAD requested submissions on Mérida as an IFA. While this issue was canvassed at the RPD hearing, it was not considered in the RPD decision because the credibility findings were determinative. The applicant provided submissions together with additional documentary evidence.

[10] Two of the documents were accepted by the RAD as new evidence.

[11] Five other documents were found to be inadmissible because they were public documents that were reasonably available prior to the rejection of the claim by the RPD.

[12] The RAD found there was a viable IFA in Mérida, Yucatan.

### IV. **Issues**

[13] The applicant raises two issues:

1. Whether the RAD's refusal to accept new evidence was reasonable.

2. Whether the RAD's conclusion that the applicant had an IFA was unreasonable.

V. **Standard of Review**

[14] The applicant submits that the RAD's assessment of all the evidence is an example of procedural unfairness and is reviewable for correctness.

[15] I disagree.

[16] In *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] the Federal Court of Appeal set out in some detail the nature of the role of the RAD when reviewing a decision of the RPD. The conclusion was that the RAD reviews the RPD decision on a standard of correctness. However, on judicial review, reasonableness is the standard to be applied by this Court to a decision of the RAD: *Huruglica* at paras 30 and 35.

[17] More recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[18] It is still the case that a decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[19] *Vavilov* also confirmed, citing *Dunsmuir*, that a reasonable decision is not only one that displays justification, transparency and intelligibility and, on review, the focus must be on the decision actually made, including the justification or rationale offered for it and not on the conclusion the court itself would have reached. Both the reasoning process and the resulting outcome of the decision are to be considered: *Vavilov* at paragraphs 15, 83 and 87.

## VI. The IFA test

[20] In *Khan v Canada (Citizenship and Immigration)*, 2020 FC 1101 Mr. Justice McHaffie succinctly articulated the test that is applied when considering whether a viable IFA exists:

[10] In assessing whether there is a viable IFA, the decision maker must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a “serious possibility” standard), or a danger or risk described in section 97 (on a “more likely than not” standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there: *Thirunavukkarasu* at pp 595–597, paras 12–15; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12. Once the potential for an IFA is raised, the claimant bears the onus of establishing that an IFA is not viable: *Thirunavukkarasu* at pp 594–595, para 9.

[21] I agree that this is an apt synopsis of the test.

[22] The applicant need only defeat one of the two prongs in order to show that a proposed IFA is not viable for them: *Aigbe v Canada (Citizenship and Immigration)*, 2020 FC 895 at para 9.

[23] Neither the RAD nor the RPD dealt with the second prong of the test. It will not be necessary that I address it either.

## VII. Analysis

### A. *New evidence was reasonably rejected*

[24] The two documents the RAD accepted as new evidence were: the Examining Officer's May 28, 2018 notes of a follow-up interview with the applicant and a news article from the Yucatan Times dated February 16, 2017. The article was headed "Alleged Sinaloa cartel boss re-arrested in Merida".

[25] The Officer's notes were accepted by the RAD as they were not part of the RPD record. The news article was accepted on the basis that it would be considered in the assessment of the IFA.

[26] The applicant submits that evidence supporting the presence of the cartel was one of the documents accepted by the RAD.

[27] The reasons submitted by the applicant urging the acceptance by the RAD of the ultimately rejected new evidence were these:

- (e) The new documentary evidence is relevant and probative, going to the heart of the issue of IFA. The evidence was not provided earlier, since IFA was not raised as an issue in the RPD Reasons for Decision and the claimant, who was self-represented, did not realise the requirement to request or provide any documentary evidence going to the issue of the proposed IFA either at the hearing or in his post-hearing submissions.

(f) Under s. 171(a.2) of the IRPA, the RAD is not bound by any legal or technical rules of evidence, and therefore, it is respectfully requested that the RAD take this piece of documentary evidence into account.

(Applicant Response to RAD Request dated October 2, 2019, CTR page 105, Items 3(e) and (f))

[28] In this application the applicant adds that not only was he previously self-represented, he did not speak English as his first language. He says it was not reasonable to expect that he provide English language documents as they were not reasonably available to him.

[29] The RAD noted that at the beginning of the RPD hearing that the applicant was offered an adjournment to allow time to find another counsel. The applicant declined. During the hearing all questions were answered with the assistance of a Spanish interpreter. At the conclusion of the hearing the RPD provided the applicant with a two week adjournment to review the documentary evidence and provide final submissions in writing.

[30] In rejecting the five documents the RAD found that the five articles concerning the Sinaloa cartel could reasonably have been expected to have been put before the RPD since the applicant's fear of the Sinaloa cartel was a key issue. Other post-hearing documentary evidence was provided to the RPD which they accepted.

[31] The applicant submits that the RAD unreasonably failed to take into account that they did not speak English as a first language and they were assisted by a Spanish interpreter at the hearing. The applicant adds that the fact that the written submissions were in English is not an indication of the applicant's ability to speak English or search for English language documents for the purposes of establishing the claim, particularly when self-represented.

[32] I note there is abundant caselaw to the effect that while a certain amount of flexibility is to be granted to it self-represented litigants, they are not entitled to special treatment because they are self-represented: *Curtis v Canada (Human Rights Commission)*, 2020 FCA 149 at para 31. It is also true that “[i]mplicit in the decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training.”: *Wagg v Canada*, 2003 FCA 303 at para 25.

[33] Acknowledging that being self-represented does not remove a claimant’s burden of establishing their claim, in this case the applicant maintains that it is clear the documents in question were not reasonably available and the RAD unreasonably and incorrectly rejected their admission.

[34] While it is true that the fact that evidence pre-dates rejection of an applicant’s claim is not determinative of inadmissibility, it is still incumbent on the applicant to demonstrate that the proposed new evidence was not reasonably available to be put before the RPD.

[35] I am not persuaded that the RAD erred in rejecting these documents. Other than noting the applicant was self-represented and does not speak English as a first language, the applicant did not explain how the refused documents were unavailable.

[36] I have already addressed the self-represented argument.

[37] The RAD observed that the documents were all publicly available at the time of the RPD hearing. I observe that someone helped the applicant prepare written submissions in English. The



applicant therefore was not without the resources to locate an English speaking person to assist them to search for supportive documents online.

[38] For all the reasons set out above, I find the difficulties raised by the applicant do not establish the rejected documents were not reasonably available prior to the rejection of the claim by the RPD.

[39] The RAD reasonably rejected the new evidence.

B. *The IFA finding by the RAD was unreasonable*

[40] The RAD described the Sinaloa cartel this way:

The Sinaloa cartel is described as Mexico's oldest and most established drug trafficking organization. An August 2019 report from the US Congressional Research Service describes that “Sinaloa operatives control certain territories, making up a decentralized network of bosses who conduct business and violence through alliances with each other and local gangs. Local gangs throughout the region specialize in specific operations and are then contracted by the Sinaloa DTO network.” The Sinaloa cartel is now under pressure and its future remains unclear. Some analysts describe that it remains dominant while others indicate that it is in decline as Sinaloa rivals keep an eye on a formidable drug empire. The shape of the cartel in the current criminal landscape is evolving, however, as Sinaloa's rivals eye a formidable drug empire.”

[41] The RAD then refers to the Stratfor 2019 report in the NDP titled *Tracking Mexico's Cartels*. The report stated that Mérida is under the influence of the Tamaulipas criminal group comprised of the remnants of the Los Zetas and Gulf cartels. The Sinaloa cartel was not known to have a presence in Mérida. The applicant testified that he did not believe the Sinaloa cartel would risk coming into a territory under the influence of Los Zetas to find him.

[42] Regarding physical presence of the Sinaloa in Mérida, the RAD accepted the new evidence that a leading member of the Sinaloa cartel had recently been apprehended in Mérida. The RAD indicated it was accepted on the basis that it would be considered in the assessment of the IFA.

[43] The applicant specifically pointed the RAD to this evidence to show that the Sinaloa had a physical presence in Mérida. When subsequently addressing this evidence the RAD mentions it but does not otherwise discuss it:

Counsel has provided a 2017 news article which reports that a leading member of the Sinaloa cartel was apprehended in Mérida. However, Stratfor's 2019 report *Tracking Mexico 's Cartels*, states that Mérida (located in the South-east part of Mexico) is under the influence of the Tamaulipas criminal group which includes the Los Zetas remnants and Gulf Cartel remnants. The Sinaloa group does not have a presence in Mérida. Rather, it is noted to dominate the northern and western regions of Mexico.

[44] It appears from this finding by the RAD that they conflated the concepts of “presence” and “influence”.

[45] The RAD stated the Sinaloa does not have a presence in Mérida. That statement appears to be based on the Stratfor report on the influence of cartels. The RAD does not explain why the newspaper clipping reporting the actual physical presence in Mérida of a high-level Sinaloa boss is trumped by a generic map showing a different criminal group has influence in Mérida, as opposed to presence.

[46] Nor did the RAD address the evidence it mentioned earlier that the Sinaloa cartel had “a decentralized network of bosses who conduct business and violence through alliances with each

other and local gangs. Local gangs throughout the region specialize in specific operations and are then contracted by the Sinaloa DTO network.” That is a presence.

[47] There is no logical requirement that the Sinaloa cartel personally carry out their misdeeds in Mérida. Borrowing from the legal concepts of principal and agent or employer and employee, I find that an alliance with another cartel or a group or an individual who, for a contract price, will take the necessary action at the behest of the Sinaloa cartel, is the same as the cartel itself being physically present. It is certainly more than mere influence.

[48] I find that it was not reasonable for the RAD to conclude there is no serious possibility of risk to the applicant on relocating to Mérida. The RAD confirmed that the Sinaloa cartel is known to have a decentralized network of bosses and maintains alliances with local gangs, contracting with them to carry out the cartel’s objectives: NDP at Item 7.2. By not addressing that evidence in the context of the arrest of the boss and the presence of other gangs in Mérida the reasons are not transparent, intelligible or justified.

[49] Having found the RAD’s determination on the first prong of the IFA test to be unreasonable, it is not necessary to address the submissions on the second prong.

## VIII. **Conclusion**

[50] For all the foregoing reasons, this application is granted, without costs.

[51] The application will be returned for a fresh determination by a differently constituted RAD panel.

[52] No question for certification was proposed by either party nor does one arise given the very fact specific circumstances of this matter.

**JUDGMENT in IMM-7133-19**

**THIS COURT'S JUDGMENT is that:**

1. The application is granted and this matter is returned for redetermination by a differently constituted RAD panel.
2. There is no serious question of general importance for certification.
3. No costs.

"E. Susan Elliott"

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Judge

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

**DOCKET:** IMM-7133-19

**STYLE OF CAUSE:** JOSE ANTONIO MAURICIO BERRIOS v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY WAY OF VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 11, 2021

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** JULY 13, 2021

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