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A-382-19

2020 FCA 196

Canadian Association of Refugee Lawyers (*Appellant*)

v.

The Minister of Immigration, Refugees and Citizenship (*Respondent*)

and

The Immigration and Refugee Board (*Intervener*)

INDEXED AS: CANADIAN ASSOCIATION OF REFUGEE LAWYERS V. CANADA (IMMIGRATION, REFUGEES AND CITIZENSHIP)

Federal Court of Appeal, Near, de Montigny and Leblanc JJ.A.—By videoconference, September 16; Ottawa, November 13, 2020.

Citizenship and Immigration — Immigration Practice — Appeal, cross-appeal from Federal Court decision granting in part two applications for judicial review challenging designation of four Jurisprudential Guides (JG) by Chairperson of Immigration and Refugee Board (IRB) — First application concerning designation of three decisions from Refugee Appeal Division (RAD) pertaining to Pakistan, India, China, respectively, as JGs while second application to same effect but with respect to JG pertaining to Nigeria — Federal Court finding that impugned JGs validly enacted pursuant to Immigration and Refugee Protection Act, s. 159(1)(h); that not unreasonable for Chairperson to implicitly construe provision as conferring upon him authority to issue JGs that include factual considerations — Moreover, finding statement of expectation included in policy notes accompanying JGs for Pakistan, India, China unlawful, inoperative — However, Federal Court not finding any issue with JG for Nigeria; also certifying two serious questions of general importance — Main issues whether Chairperson of IRB having authority pursuant to Act, s. 159(1)(h) to issue JGs that include factual determinations (first certified question); whether JGs that Chairperson issued respecting Nigeria, Pakistan, India, China unlawfully fettering discretion of Refugee Protection Division, RAD members to make their own factual findings or improperly encroach upon their adjudicative independence (second certified question); whether cumulative effect of facts, context surrounding promulgation of Nigeria JG giving rise to reasonable apprehension of bias — Federal Court properly finding that Chairperson having authority to issue JGs on issues of fact in accordance with plain words of statutory provision — Chairperson implicitly interpreting Act, s. 159(1)(h) as conferring upon him authority to issue JGs on factual issues, which interpretation reasonable — In case at bar, express statutory grant of authority to Chairperson existing, no limitation confining scope of s. 159(1)(h) to issues of law or mixed fact, law — None of impugned JGs improperly encroaching on Board members' adjudicative independence, not unlawfully fettering Board members'

independence — Regarding Nigeria JG, Federal Court properly dismissing arguments raised by appellant — Manner in which Nigeria JG selected not giving rise to reasonable apprehension of bias — Appellant failing to demonstrate that Federal Court wrong in concluding that decision independently made — Federal Court therefore not erring in answering first certified question affirmatively but did so in answering second certified question affirmatively to extent Pakistan, India, China JGs concerned — Appeal dismissed, cross-appeal allowed.

This was an appeal and cross-appeal from a decision of the Federal Court granting in part two applications for judicial review challenging the designation of four Jurisprudential Guides (JG) by the Chairperson of the Immigration and Refugee Board of Canada (Board or IRB). The first application concerned the designation of three decisions from the Refugee Appeal Division (RAD) pertaining to Pakistan, India and China, respectively, as JGs. The second application was to the same effect but with respect to a JG pertaining to Nigeria. The Federal Court found that the impugned JGs had been validly enacted pursuant to paragraph 159(1)(*h*) of the *Immigration and Refugee Protection Act*. In other words, it was not unreasonable for the Chairperson to implicitly construe that provision as conferring upon him the authority to issue JGs that include factual considerations. However, the statement of expectation included in the policy notes accompanying the JGs pertaining to Pakistan, India and China was found to be unlawful and inoperative to the extent only that it pressured Board members to adopt the RAD's own findings on issues that went beyond the evidence specific to claimants. The Federal Court saw no issue, however, with the JG pertaining to Nigeria which, given its particular emphasis on each claim's specific circumstances, did not fetter the discretion of Board members or improperly interfere with their independence. The Federal Court also certified two serious questions of general importance. The first question was whether the Chairperson of the IRB has the authority pursuant to paragraph 159(1)(*h*) of the Act to issue jurisprudential guidelines that include factual determinations and the second question was whether the JGs that the Chairperson issued respecting Nigeria, Pakistan, India and China unlawfully fetter the discretion of members of the Refugee Protection Division (RPD) and the RAD to make their own factual findings or improperly encroach upon their adjudicative independence.

With respect to the Chairperson's decision to identify four decisions of the RAD as JGs, three of these guides were issued in 2017 and involved an RAD decision concerning a Pakistani refugee claimant (Pakistan Guide); an RAD decision concerning a Chinese refugee claimant (China Guide); and an RAD decision concerning an Indian refugee claimant (India Guide). The fourth guide, which was issued in 2018, concerned an RAD decision involving a Nigerian refugee claimant (Nigeria Guide). At the time the Federal Court rendered its decision, the JGs pertaining to India and China had been revoked (in 2018 and 2019 respectively). The JG pertaining to Nigeria was later revoked in light of developments in the country of origin information. As a result, of the four JGs that were the subject of the appeal, only the JG pertaining to Pakistan was still in force.

The main issues were whether the Chairperson of the IRB has the authority pursuant to paragraph 159(1)(*h*) of the Act to issue JGs that include factual determinations (first certified question); whether the JGs that the Chairperson issued with respect to Nigeria, Pakistan, India, and China unlawfully fetter the discretion of members of the RPD and the RAD to make their own factual findings or improperly encroach upon their adjudicative independence (second certified question); and whether the cumulative effect of the facts and context surrounding the promulgation of the Nigeria JG give rise to a reasonable apprehension of bias.

Held, the appeal should be dismissed and the cross-appeal should be allowed.

The Federal Court properly found that the Chairperson had the authority to issue JGs on issues of fact in accordance with the plain words of the statutory provision. The Chairperson implicitly

interpreted paragraph 159(1)(*h*) of the Act as conferring upon him the authority to issue JGs on factual issues, and that implicit interpretation was reasonable. In the case at bar, there is an express statutory grant of authority to the Chairperson. Moreover, as properly noted by the Federal Court, there is no limitation confining the scope of paragraph 159(1)(*h*) to issues of law or mixed fact and law. On the contrary, the authority of the Chairperson to issue JGs is conferred in the broadest terms, as long as their purposes are to assist members in carrying out their duties, and with the only requirement that their issuance be preceded by consultation with the Deputy Chairperson. The breadth of this power aligns with the context in which paragraph 159(1)(*h*) is found. As well, sections 170 and 171 provide guidance to members in conducting proceedings and make clear that Parliament's intention was to promote efficiency and consistency while taking into account considerations of fairness and natural justice. Paragraph 159(1)(*h*) cannot be interpreted in a vacuum. The legislative context in which it is found is consistent with the broad interpretation that the Chairperson has given to that provision, namely to ensure that Board members carry out their duties efficiently and without undue delays. Thus, the first certified question was answered in the affirmative.

None of the impugned JGs improperly encroach upon Board members' adjudicative independence. This is so, in particular, because Board members remain free to decide cases on the basis of their own assessment of the facts and the evidence before them. The Federal Court's finding of improper pressure on Board members rested on a constellation of factors but some of the comments made were disputable. The evidence, as it was presented by the Federal Court, did not establish on a balance of probabilities that Board members feel pressured as to how they should conduct themselves. The impugned JGs do not unlawfully fetter the Board members' independence. They simply put claimants on notice that the current existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing their particular circumstances. JGs on findings of fact are fraught with risks and difficulties, as the repeal of three of them abundantly showed. Country conditions, by their very nature, are bound to change with potentially dramatic consequences for refugee claimants. This is why the decision to designate a JG should be taken with the utmost caution.

With respect to the Nigeria JG, the arguments raised by the appellant, which for the most part were arguments made before the Federal Court, were properly dismissed by the Federal Court, and the manner in which the Nigeria JG was selected did not give rise to a reasonable apprehension of bias. When viewed from the objective perspective of the reasonable person, the circumstances referred to by the appellant would not create a reasonable apprehension of bias. The Federal Court appropriately found that there was no evidence to suggest that the Chairperson made any attempt to identify the decision as a JG before it was finalized or to interfere with the Board member's discretion in coming to her own conclusions. Indeed, the decision was identified as a JG long after the member issued her decision. There was no evidence that the Board member in question did not reach her decision independently of any influence or that there was improper consultation. Thus, the appellant failed to demonstrate that the Federal Court was wrong in concluding that the decision was independently made and that the Board member at issue was not the subject of any kind of pressure or influence in arriving at her conclusions. There was also no indication in the record tending to show that the Board member improperly consulted other members while she was deliberating or that the circulation of draft reasons to other members for their comments was not voluntary. The Chairperson's objectives in issuing the Nigeria JG were perfectly legitimate and rationally linked to the selected decision. As found by the Federal Court, nothing suggested that the expressly stated goal of conducting "more focused hearings", in particular, were a disguised attempt at reducing the rate of acceptance of refugee claims by persons of Nigerian origin. There was no evidence that the Board was looking for quick dismissals of refugee claims by persons of Nigerian origin as opposed to streamlining the process. As well, the lack of consultation with the immigration and refugee bar prior to the issuance of the Nigeria JG was not contributive of an appearance of bias.

Therefore, the Federal Court did not err in answering the first certified question affirmatively but did so in answering the second certified question affirmatively to the extent that the Pakistan, India and China JGs were concerned.

STATUTES AND REGULATIONS CITED

Bill C-86, *An Act to Amend the Immigration Act and other Acts in consequence thereof*, 34th Parl., 3rd Sess., 1992.

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 72, 74(d), 159(1)(g),(h), 162(2), 170, 171.

CASES CITED

APPLIED:

Mahjoub v. Canada (Citizenship and Immigration), 2017 FCA 157, [2018] 2 F.C.R. 344; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, (1982), 137 D.L.R. (3d) 558.

DISTINGUISHED:

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, 73 O.R. (2d) 676; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 F.C.R. 377.

CONSIDERED:

Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration), IMM-3433-17, Aalto P., order dated November 14, 2017 (F.C.); *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176, 335 N.R. 181; *HD Mining International Ltd. v. Construction and Specialized Worker Union, Local 1611*, 2012 FCA 327, 442 N.R. 325; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, (1993), 105 D.L.R. (4th) 385; *Barrantes v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 518, 272 F.T.R. 164; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259.

REFERRED TO:

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 15 C.P.R. (4th) 289; *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, 439 D.L.R. (4th) 159; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 35 Imm. L.R. (4th) 1; *Canada (Attorney General) v. Rapiscan Systems, Inc.*, 2015 FCA 96, 385 D.L.R. (4th) 170; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3;

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Danyi v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170; *Wsáneć School Board v. British Columbia*, 2017 FCA 210, [2018] 4 C.N. L.R. 295; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146; *Therrien v. Canada (Attorney General),* 2017 FCA 14, 24 Admin. L.R. (6th) 46; *El-Helou v. Canada (Courts Administration Service)*, 2016 FCA 273; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179, 11 Admin. L.R. (6th) 187; *Henri v. Canada (Attorney General)*, 2016 FCA 38, 395 D.L.R. (4th) 176; *Abi-Mansour v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 135; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, (1995), 121 D.L.R. (4th) 385; *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358

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Canada. Immigration and Refugee Board. *Policy on the Use of Jurisprudential Guides*, Policy No. 2003-01, as amended December 2019.

Canada. Parliament. House of Commons. *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-86*, 34th Parl., 3rd Sess., Issue No. 10 (September 15, 1992).

Canada. Parliament. Senate*. Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 34th Parl., 3rd Sess., Issue No. 17 (September 4, 1992).

APPEAL and CROSS-APPEAL from a Federal Court decision (2019 FC 1126, [2020] 1 F.C.R. 273) granting in part two applications for judicial review challenging the designation of four Jurisprudential Guides by the Chairperson of the Immigration and Refugee Board of Canada (*X (Re)*, 2017 CanLII 46496; *X (Re)*, 2016 CanLII 105520; *X (Re)*, 2018 CanLII 52123; *X (Re)*, 2016 CanLII 105520). Appeal dismissed, cross-appeal allowed.

APPEARANCES

Lorne Waldman, *Steven Blakey* and *Lobat Sadrehashemi* for appellant.
James Todd and *Margherita Braccio* for respondent.

Darren McLeod and *Keith Reimer* for intervener.

SOLICITORS OF RECORD

Waldman & Associates, Toronto, and *Embarkation Law Corporation*, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

Immigration and Refugee Board of Canada, Vancouver, for intervener.

The following are the reasons for judgment rendered in English by

[1] DE MONTIGNY J.A.: The Canadian Association of Refugee Lawyers (CARL or the appellant) appeals, and the Minister of Citizenship and Immigration (the respondent) cross-appeals, from a decision of the Federal Court (*per* Chief Justice Crampton) dated September , 2019 (2019 FC 1126, [2020] 2 F.C.R. 273) (Reasons), which granted in part, two applications for judicial review challenging the designation of four Jurisprudential Guides (JG) by the Chairperson of the Immigration and Refugee Board of Canada (the Board or the I.R.B.). The first application (IMM-3433-17) concerned the designation of three decisions from the Refugee Appeal Division (RAD) pertaining to Pakistan, India and China, respectively, as JGs. The second application (IMM-3373-18) was to the same effect, but with respect to a JG pertaining to Nigeria.

[2] The Federal Court found that the impugned JGs had been validly enacted pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In other words, it was not unreasonable for the Chairperson to implicitly construe that provision as conferring upon him the authority to issue JGs that include factual considerations.

[3] That said, the statement of expectation included in the policy notes accompanying the JGs pertaining to Pakistan, India and China was found to be unlawful and inoperative to the extent only that it pressured Board members to adopt the RAD's own findings, on issues that went beyond the evidence specific to claimants. The Court saw no issue, however, with the JG pertaining to Nigeria which, given its particular emphasis on each claim's specific circumstances, did not fetter the discretion of Board members or improperly interfere with their independence.

[4] The Federal Court [at paragraph 240] certified the two following serious questions of general importance, as contemplated by paragraph 74(d) of the IRPA:

> 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 guidelines 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?

[5] For the reasons that follow, I am of the view that the Federal Court did not err in answering the first question affirmatively, but did so in answering the second question affirmatively, to the extent that the Pakistan, India and China JGs were concerned. Accordingly, I would dismiss the appeal and grant the cross-appeal.

I. Factual background

[6] This appeal concerns the Chairperson's decision to identify four decisions of the RAD as JGs, pursuant to paragraph 159(1)(h) of the IRPA. Three of these guides were issued on July 18, 2017: RAD decision TB7-01837 [*X (Re)*, 2017 CanLII 46496 (I.R.B.)], concerning a Pakistani refugee claimant (Pakistan Guide); RAD decision TB6-11632 [*X (Re)*, 2016 CanLII 105520 (I.R.B.)], concerning a Chinese refugee claimant (China Guide); and RAD decision MB6-01059/MB6-01060 [*X (Re)*, 2017 CanLII 43112 (I.R.B.)], concerning an Indian refugee claimant (India Guide). The fourth guide, which was issued on July 6, 2018, concerned RAD decision TB7-19851 [*X (Re)*, 2018 CanLII 52123 (I.R.B.)] involving a Nigerian refugee claimant (Nigeria Guide).

[7] The policy notes accompanying the issuance of the JGs stress that the fair and efficient determination of refugee claims before the Refugee Protection Division (RPD) and the RAD is of "great importance" to the Board, and is "essential" to the Board dealing with a "significant backlog" in the refugee determination continuum. They go on to state that these JGs are meant to facilitate decision-making "in a manner that meets the twin requirements of fairness and efficiency". Indeed, it is clear from internal memos that significant backlogs and growing intake volumes were part of the rationale for issuing the disputed JGs.

[8] All of the policy notes also explain that "RPD and RAD members are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so" (appeal book, pages 1735, 1755, 1776 and 1793). They add that the JGs are meant to assist RPD and RAD members in narrowing the issues to be determined, and to promote fairness, consistency and efficiency in writing reasons. Finally, the policy notes accompanying the issuance of the China, India and Pakistan JGs specifically set out the requirement that the Research Directorate of the Board must monitor and report to the RAD Deputy Chairperson any developments in the country of origin information that could have an impact on the factual foundation of the JGs.

[9] The Policy Note accompanying the identification of TB6-11632 as a JG for China (Policy Note China) states that the decision was chosen for its detailed, clear, and sound analysis of Chinese exit control procedures and the ability for those being sought by the authorities to exit China via an airport using a genuine passport. That issue had given rise to conflicting jurisprudence both at the Board level and at the Federal Court. The analysis at paragraphs 12–22 and 25–34 of the RAD decision forms the basis of this JG. The Policy Note specifies that the key determination "is one of fact that may be applicable to a large number of claims … in relation to an aspect of the Chinese government's public security infrastructure and how it operates" (appeal book, page 1756). After reviewing evidence with respect to China's Golden Shield Project and security apparatus, the RAD found on a balance of probabilities that it was unlikely that a wanted person could have left China from an international airport using a passport with his own name, date of birth and photograph.

[10] The Policy Note accompanying the designation of decision TB7-19851 as a JG (Policy Note Nigeria) recognized the decision, and more particularly its paragraphs 13–30, as a detailed, clear and sound analytical framework to address the viability of an internal flight alternative (IFA) in Nigeria, for individuals fearing non-state actors. The Policy Note provides that the JG deals with a question of mixed fact and law, and establishes that there are several large, multilingual, multiethnic 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. The Policy Note also encourages RPD and RAD members, in appropriate circumstances, to proceed directly to an IFA analysis without having first to decide the credibility of a claimant's allegations of persecution.

[11] The JG with respect to decision MB6-01059/MB6-01060 was issued with respect to the issue of whether Sikh refugee claimants from Punjab have a viable IFA. As in the case of Nigeria, the Policy Note identifying that decision as a JG (Policy Note India) reinforces the objective of conducting more focused hearings and issuing more focused reasons. RPD and RAD members are encouraged to proceed directly, in appropriate circumstances, to an IFA analysis within India. Given that the existence of an IFA would be determinative, members would not necessarily have to decide first the credibility of the claimant's allegations of persecution. After reviewing the evidence, the RAD member determined in that decision that Punjab police would only track an individual from state to state in extreme cases, and that neither India's tenant registration system, nor the Zipnet police computer system, would facilitate the inter-state tracking of a wanted person.

[12] Finally, the Policy Note identifying decision TB7-01837 as a JG for Pakistan (Policy Note Pakistan) formally identifies the key determination as one of mixed law and fact, the scope of which being whether the treatment experienced by Ahmadis from Pakistan amounted to persecution, and whether state protection and an IFA are

available. In that case, the RAD member found that the claimant faced a serious possibility of persecution because of her Ahmadi religion and could not expect state protection or avail herself of a viable IFA.

[13] At the time the Federal Court rendered its decision, the JGs pertaining to India and China had been revoked on November 30, 2018 and June 28, 2019 respectively. The former had been revoked due to developments in the Board's country of origin information. It appears that the JG was not revoked because of actual changes that had occurred in India since its issuance, but rather as a result of changes in the documentation available on the issue. As for the latter, it was revoked because a finding of fact drawn from the Board's National Documentation Package (NDP) was ultimately found to be unsupported by the same document, as it stood at the time of the decision.

[14] The Chairperson has subsequently announced that the JG pertaining to Nigeria was revoked as of April 6, 2020, in light of developments in the country of origin information. As a result, of the four JGs that are the subject of this appeal, only the JG pertaining to Pakistan is still in force.

II. The Impugned Decision

[15] Before the Federal Court, the respondent raised two preliminary issues. First, the Attorney General submitted that the appellant lacked standing to bring the two applications for judicial review, since the central issues were not evasive of review and could have been pursued by a litigant with a more direct stake in the issues. Second, the respondent took the position that the JG pertaining to India (and subsequently China) should no longer be part of the application in IMM-3433-17 [*Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)* (November 14, 2017)], to the extent that the issue of their validity was now moot as a result of their revocation.

[16] With respect to the public interest standing issue, the Court found the question to be *res judicata* as it pertained to IMM-3433-17, to the extent that a motion to strike the appellant as a party from that proceeding was rejected in an interlocutory order of Prothonotary Aalto. The respondent was precluded from appealing this decision by virtue of paragraph 72(2)(e) of the IRPA, but claimed that an appeal from Prothonotary Aalto's decision was available if, pursuant to paragraph 74(d) of the IRPA, the Federal Court certifies a serious question of general importance in the ultimate judgment relating to the application. Relying on a decision of this Court in *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176, 335 N.R. 181 (*Edwards*), the Federal Court rejected that argument and concluded that the appeal contemplated in paragraph 74(d) is an appeal only of the judgment issued in respect of the application for judicial review, and not of interlocutory matters. The Federal Court also rejected the respondent's argument that a decision with respect to standing constitutes a separate and divisible judicial act, this Court having explicitly dismissed that argument in *HD*

Mining International Ltd. v. Construction and Specialized Worker Union, Local 1611, 2012 FCA 327, 442 N.R. 325 (*HD Mining*). CARL having been granted standing in IMM-3433-17, also ought to be granted standing in IMM-3373-18.

[17] On the issue of mootness, the Federal Court found that the China Guide, though it had been revoked, could still be a factor in ongoing litigation concerning past refugee decisions in which the China Guide was followed. The same reasoning would presumably apply to India. In any event, the Chief Justice determined that the factors to be considered in exercising his discretion to address the China JG in spite of the matter being moot, as set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231, weighed in favour of doing so. Specifically, the ongoing adversarial relationship between the parties, judicial economy and the public interest in resolving the uncertainty regarding those issues were of particular relevance, in his view.

[18] Turning next to the substantive issues, the Chief Justice first considered whether the Chairperson had the authority to issue JGs on questions of fact. Applying the standard of reasonableness, he found that it was not unreasonable for the Chairperson to have implicitly interpreted paragraph 159(1)(h) of the IRPA as conferring upon him the authority to issue JGs on factual determinations. The Chief Justice first noted that, in light of the plain wording of the provision, the Chairperson's authority was not formally restricted to the issuance of JGs on issues of law or mixed fact and law. Such a reading was supported, in his view, by the legislative history and stated purpose of that provision, and by the purpose identified by the Chairperson, all of which reflected an intent both to enhance consistency in decision-making, while at the same time facilitating more focused hearings and reasons.

[19] Regarding the statutory context, the Chief Justice saw in paragraph 159(1)*(*g) and subsection 162(2), which respectively set forth the Chairperson's broad authority and the Board's general objective, further support for the authority to issue JGs that include factual determinations. He also noted that the difficulty to distinguish between issues of fact and issues of mixed fact and law, and the fact that findings on the latter cannot be made without first making findings on the former, favoured the implicit interpretation given by the Chairperson to paragraph 159(1)(h).

[20] Finally, he rejected CARL's argument that the term "jurisprudential guide" cannot be interpreted as contemplating a guide on issues of fact because the term "jurisprudence" refers to legal principles only and does not encompass factual findings. While not disputing that factual disputes must be determined on their merits in each case, the Federal Court expressed the view that the ordinary meaning of the term "jurisprudence" contemplates decisions issued by a court in respect of both factual issues and issues of law and of mixed fact and law.

[21] The next substantive issue examined by the Federal Court was CARL's submission that the four JGs at issue unlawfully fettered the discretion of the Board members. On that issue, the Chief Justice declined to determine whether the standard of review was that of correctness or reasonableness because, in any case, fettering of a

decision maker's discretion is *per se* unreasonable. He then summarized the requirements of adjudicative independence, which at its root means that judges and quasi-judicial decision makers must be at liberty to hear and decide cases without interference. Relying on *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 73 O.R. (2d) 676 (*Consolidated-Bathurst*) and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 (*Ellis-Don*), he stated [Reasons, at paragraphs 93 and 95]:

> 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.
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> …
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> 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. [Emphasis in original.]

[22] Applying these principles to each of the JGs, the Chief Justice found that the Nigeria JG did not unlawfully fetter Board members' discretion to make their own factual findings or improperly constrain their freedom to decide cases that may come before them, given how it was made abundantly clear that each claim was to be decided on its particular facts.

[23] The same could not be said, in his view, of the JGs pertaining to Pakistan, India and China. In all of these cases, the Chief Justice found that the facts that are specific to the particular claimant do not pose a potential problem nor do the facts that are characterized as having been reported in the country documentation. The former are unique to the refugee claimant, and the latter are not presented as factual findings made by the RPD or the RAD, but rather as information in the country documentation that was relevant and that should be taken into account in future cases. It is the facts that are presented as the RAD's own findings on issues that go beyond the evidence specific to the claimant that were considered more problematic. In the Chief Justice's view, the statement of expectations in the policy notes that accompanied the issuance of these three JGs, by which "RPD and RAD members are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so", are troubling. At the very least, some Board members would not feel completely free to decide cases with similar facts according to their own conscience, and some members of the public would likely have a reasonable apprehension that those members of the

Board would feel pressured and would therefore not be entirely impartial. As the Chief Justice stated [at paragraph 141]:

> …. It is the imposition of this expectation [to apply the JGs] 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 … 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.

[24] It bears noting that in the Chief Justice's opinion, encouraging Board members to take the JGs into account or to follow them in cases with similar facts would be entirely legitimate, "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" (Reasons, at paragraph 142).

[25] The third issue in dispute before the Federal Court was whether the impugned JGs unfairly enhanced the burden of proof for applicants for refugee protection. To the extent that the problem relates to the statement of expectation made in the policy notes with respect to the factual findings that go beyond the facts specific to a refugee claimant, the Court considered that this argument is just another way to say that the impugned JGs unlawfully fetter the discretion of the Board members. Apart from that specific problem, the Court found that 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 is not unfair. By providing the Chairperson the authority to issue JGs, Parliament must be understood to have recognized, by necessary implication, the authority to reference country documentation and other objective sources in a JG.

[26] With regard to the issue of whether the Chairperson was required to engage in external consultation before identifying the decisions in question as JGs, I need not say much as this aspect of the Federal Court decision has not been appealed. Suffice it to say that the Federal Court quickly disposed of that argument by referring to paragraph 159(1)(h), according to which the Chairperson is given the authority to identify decisions of the Board as JGs "after consulting with the Deputy Chairpersons". This provision, in the Court's view, could reasonably be interpreted as implicitly indicating that consultation with any other persons or organizations was not considered to be required by Parliament.

[27] The last issue to be decided by the Federal Court had to do with the Nigeria JG. CARL submitted that the decision in respect of which the Nigeria JG was identified was impermissibly pre-selected to be the subject of a JG before it was finally decided, thereby contravening paragraph 159(1)(h) and compromising the independence of the refugee determination process. The Federal Court disagreed, and held, on a standard of reasonableness, that there was no evidence to suggest that the Chairperson had *de facto* designated the decision in question as a JG before the issuance of that decision. The Court further found that there was no evidence that the concerned Board member's

impartiality had been undermined by exchanges preceding the finalization of the decision, or that any of the principles established in *Consolidated-Bathurst* had been breached as a result of the exchanges that took place internally in relation to the Nigeria JG.

III. Issues

[28] As previously mentioned, the Federal Court certified two questions, one pertaining to the Chairperson's authority to issue JGs on factual determinations under paragraph 159(1)(h) of the IRPA, and the other pertaining to the alleged unlawful interference with the Board members' discretion. While the certification of these questions served a "triggering" function by which the appeal was permitted (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 (*Kanthasamy*), at paragraph 44), this Court is not restricted to their determination and may further consider any issues affecting the validity of the judgment under appeal. The case law establishing this principle has been well summarized in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, at paragraph 50:

> Once an appeal has been brought to this Court by way of certified question, this Court must deal with the certified question and all other issues that might affect the validity of the judgment under appeal …. The certification of a question "is the trigger by which an appeal is justified" and, once triggered, the appeal concerns "the judgment itself, not merely the certified question" …. Simply put, "once a case is to be considered by the Federal Court of Appeal, that Court is not restricted only to deciding the question certified"; instead, the Court may "consider all aspects of the appeal before it" ….

[29] In my view, and taking into account the parties' submissions, this appeal and this cross-appeal raise four issues, two of which consist of the certified questions. They can be formulated as follows:

A. Does the appellant have the requisite public interest standing?

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

C. Do the JGs that the Chairperson issued with respect to Nigeria, Pakistan, India, and China unlawfully fetter the discretion of members of the RPD and the RAD to make their own factual findings, or improperly encroach upon their adjudicative independence?

D. Does the cumulative effect of the facts and context surrounding the promulgation of the Nigeria JG give rise to a reasonable apprehension of bias?

IV. Standard of review

[30] The parties are broadly in agreement with respect to the applicable standard of review. It is now well established that, on appeal from a decision of the Federal Court sitting in judicial review of an administrative decision, this Court must "'step[ping] into the shoes'" of the Federal Court, and determine whether it appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45–47. When, however, the Federal Court makes findings of fact or mixed fact and law on the basis of the evidence before it, rather than on a review of the administrative decision, it is the appeal framework developed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*) that applies: *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 15 C.P.R. (4th) 289, at paragraphs 57–58; *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, 439 D.L.R. (4th) 159, at paragraph 18.

[31] Applying this matrix, I am of the view that the first question pertaining to the Federal Court's finding with respect to the question of standing is to be reviewed on the *Housen* standard. This is clearly a decision made by the Federal Court, not the administrative decision maker: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 35 Imm. L.R. (4th) 1, at paragraphs 37–39; *Canada (Attorney General) v. Rapiscan Systems, Inc.*, 2015 FCA 96, 385 D.L.R. (4th) 170, at paragraph 21. Since the decision to grant CARL standing is clearly a question of mixed fact and law, it ought to be reviewed on the standard of palpable and overriding error.

[32] On the second issue relating to the authority of the Chairperson to issue JGs that include factual determinations, the Federal Court properly applied the reasonableness standard. Although determined by the Chief Justice with reference to *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, the applicable standard of review is still that of reasonableness under the framework laid out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*). Indeed, the Supreme Court stated that when reviewing an administrative decision, a court "should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness" (*Vavilov*, at paragraph 25).

[33] The same standard of reasonableness applies to the issues of consultation and pre-selection of the Nigeria JG. Both of these issues turn on the Chairperson's interpretation of his home statute. The presumption of reasonableness review in such cases was already well established in cases such as *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 46; and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at paragraph 22, and was reiterated in *Vavilov* (at paragraph 25).

[34] As for the issue raised by the second certified question (the third issue before this Court), the Federal Court stated that it was unnecessary to determine whether the applicable standard of review was that of correctness or reasonableness. In so doing,

the Court pointed to the fact that fettering of a decision-maker's discretion is *per se* unreasonable and relied for that proposition on *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710, at paragraphs 23–24 and *Danyi v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112, at paragraph 19.

[35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness: see *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (*Thamotharem*), at paragraph 33 ; *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170, at paragraph 34; *Wsáneć School Board v. British Columbia*, 2017 FCA 210, [2018] 4 C.N.L.R. 295, at paragraphs 22–23; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146, at paragraph 19; *Therrien v. Canada (Attorney General),* 2017 FCA 14, 24 Admin. L.R. (6th) 46, at paragraph 2; *El-Helou v. Canada (Courts Administration Service)*, 2016 FCA 273, at paragraph 43; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179, 11 Admin. L.R. (6th) 187, at paragraph 11; *Henri v. Canada (Attorney General)*, 2016 FCA 38, 395 D.L.R. (4th) 176, at paragraph 16; *Abi-Mansour v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 135, at paragraph 6; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraphs 33–56. In fact, it is not at all clear to me why we keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision, as Justice Binnie aptly observed in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at paragraph 102. What matters, at the end of the day, is whether or not procedural fairness has been met.

V. Analysis

A. *Does the appellant have the requisite public interest standing?*

[36] In its memorandum of fact and law, the respondent devotes only one paragraph to this issue, and merely reiterates its position before the Federal Court that CARL lacked the requisite public interest standing without setting out how the Court below erred, or adducing any new arguments in support of its thesis. At the hearing, the respondent appeared to accept the authority of *Edwards* and *HD Mining* for the proposition that questions of standing are matters arising under the IRPA and cannot be challenged on judicial review because of the constraints imposed by section 72 of that legislation.

[37] In any event, I am of the view that it is very late in the day to challenge CARL's standing to bring applications for judicial review questioning the legality of the impugned

JGs. Moreover, the Prothonotary provided cogent reasons to grant standing, and the respondent has failed to show any reviewable error in the Federal Court's reasoning that could justify interfering with its decision to the effect that the Prothonotary's decision could not be appealed.

B. *Does the Chairperson of the I.R.B. have the authority pursuant to paragraph 159(1)(h) of the IRPA to issue JGs that include factual determinations?*

[38] Paragraph 159(1)(h) of the IRPA provides as follows:

> **Chairperson**
>
> **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
>
> …
>
> (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

[39] The appellant contends that the Chairperson's implicit interpretation of paragraph 159(1)(h) as conferring upon him the authority to issue JGs on factual determinations is unreasonable in two respects. First, such reading of the provision is unsupported, says the appellant, by basic principles of statutory interpretation. Second, the Chairperson's reasons appear to be internally inconsistent, given that the policy on which he relied in the first place is circumscribed to the issuance of JGs on questions of law and mixed fact and law.

[40] Referring to the text of paragraph 159(1)(h), the appellant reiterates that the term "jurisprudential" cannot plausibly be interpreted as contemplating guidance on factual issues, because "jurisprudence" consists of case law establishing legal precedents.

[41] Turning to the purpose of paragraph 159(1)(h), the appellant first argues that promotion of consistency in administrative decision-making, which lies at the heart of the provision, is understood to be in relation to questions of law and policy, and that nothing in the debates surrounding the adoption of the IRPA suggests otherwise. While the provision contains no express and unequivocal language ousting principles of natural justice, the Chairperson's reading of paragraph 159(1)(h), argues the appellant, is to this effect. In making this second submission, the appellant essentially relies on the cases of *Consolidated-Bathurst* and *Ellis-Don* which, in its view, must be read as preventing an institutionalized decision maker to influence a panel member's findings of fact, and therefore as prohibiting findings of fact to be part of the Board's JGs. In my

view, this interpretation of *Consolidated-Bathurst* and *Ellis-Don* is entirely without merit, as I will endeavour to show in the next section of these reasons. Finally, the appellant submits that guidance on constantly changing country conditions, for which there is no central database, inevitably leads to imperfect and necessarily delayed monitoring, as well as to eventual revocation of JGs after they have been relied upon in numerous cases.

[42] As part of its submissions on the first certified question, the appellant also takes issue with the Chairperson's reliance on the Board's *Policy on the Use of Jurisprudential Guides,* Policy No. 2003-01 (as amended December 2016) in its formal designation of the JGs. The policy states that "[a] decision may be identified as a [JG] on either a question of law or a question of mixed law and fact", yet the Chairperson's decision goes well beyond and concerns questions of fact. In the appellant's view, the Chairperson's reasons are internally inconsistent, and for that reason the decision to issue the impugned JGs on factual determinations is unreasonable.

[43] I am unable to agree with the appellant's submissions. On the contrary, I find that the Court properly found that the Chairperson had the authority to issue JGs on issues of fact in accordance with the plain words of the statutory provision. The Chairperson implicitly interpreted paragraph 159(1)(h) as conferring upon him the authority to issue JGs on factual issues, and that implicit interpretation was reasonable.

[44] In *Vavilov*, the Supreme Court held that "whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision" (at paragraph 120), thereby referring to the usual principles of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418, at paragraph 21. Although the Chairperson did not formally engage in such an exercise, there is no doubt in my mind that his implicit interpretation is consistent with that approach.

[45] I would start by noting that administrative agencies do not require an express grant of statutory authority in order to use "soft law" such as policy statements, guidelines, manuals and handbooks to structure the exercise of their discretion. As this Court found in *Thamotharem* (at paragraph 56):

> Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation….

[46] In the case at bar, there is an express statutory grant of authority to the Chairperson. Moreover, as properly noted by the Chief Justice, there is no limitation

confining the scope of paragraph 159(1)(h) to issues of law or mixed fact and law. On the contrary, the authority of the Chairperson to issue JGs is conferred in the broadest terms, as long as their purposes are to assist members in carrying out their duties, and with the only requirement that their issuance be preceded by consultation with the Deputy Chairperson.

[47] The breadth of this power aligns with the context in which paragraph 159(1)(h) is found. Not only does paragraph 159(1)(g) authorize the Chairperson to take "any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay", but subsection 162(2) requires the I.R.B. to deal with proceedings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". To this end, sections 170 and 171 provide guidance to members in conducting proceedings, and make clear that Parliament's intention was to promote efficiency and consistency while taking into account considerations of fairness and natural justice.

[48] To achieve that mandate as a tribunal with a large, diverse body of members adjudicating a high volume of cases, the I.R.B. has been provided with an arsenal of tools including not only JGs, but also guidelines and persuasive decisions. Various policy instruments, such as instructions, three-member panels, and training, are also available to the I.R.B., through the initiatives of its Chairperson. Paragraph 159(1)(h) cannot be interpreted in a vacuum. The legislative context in which it is found is consistent with the broad interpretation that the Chairperson has given to that provision, namely to ensure that Board members carry out their duties efficiently and without undue delays.

[49] The only limitation to the plain wording of paragraph 159(1)(h) to which the appellant can point is the use of the word "jurisprudential". For the appellant, the term "jurisprudence" can only refer to legal principles as they are set out in the case law or court decisions. Much like the Federal Court, I find little support for this narrow reading of this concept. The appellant cites the case of *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, in which the Supreme Court held that "the answer to a question of fact, as it rests wholly on the evidence in a particular case, cannot be presumed to be true for any situation outside the specific one before the trial court" (at paragraph 86). While undoubtedly true, this principle does not entail that decisions entirely or largely based on factual determinations are excluded from a tribunal's jurisprudence. On the contrary, the Supreme Court does not seem to operate such a distinction, as pointed out by the respondent, when referring to decisions of tribunals and boards as "jurisprudence": see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 13; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paragraph 199; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, (1995), 121 D.L.R. (4th) 385, at paragraph 67. In any event, it would take more than such an oblique reference to limit the plain meaning of the broad power conferred on the Chairperson by paragraph 159(1)(h) of the IRPA.

[50] Furthermore, the issuance of JGs on factual issues is not tantamount to the establishment of binding legal precedents. To use the words of the Chief Justice, the impermissibility of factual precedents "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" (Reasons, at paragraph 77). Whether those JGs unlawfully fetter the Board members' discretion, on the other hand, is an entirely different issue that will be addressed further on in this analysis.

[51] Regarding the legislative history and purpose of paragraph 159(1)(h), it appears that the idea of vesting the Chairperson with the authority to issue JGs on questions of fact such as country condition has been around for quite some time. Commenting on the 1992 legislation, Professor Goodwin-Gill proposed that the relevance, timeliness, and authority of information relating to specific countries could be the subject of chairpersons' guidelines: House of Commons, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-86* [34th Parl., 3rd Sess., Issue No. 10] (September 15, 1992), at pages 10:33, 10A:14; Senate of Canada, *Proceedings of the Standing Senate Committee on Social Affairs Science and Technology* [34th Parl. 3rd Sess., Issue No. 17] (September 4, 1992), at page 17:32. Similarly, a former Chairman of the Law Reform Commission of Canada opined that country condition information should be the subject of chairpersons' guidelines and Board members deciding a case at variance with the information should be required to provide reasons for doing so: John Frecker, Brief to the Legislative Committee on Bill C-86 (*An Act to Amend the Immigration Act and other Acts in consequence thereof*) [34th Parl., 3rd Sess.], August 1992 (appeal book, pages 475–476).

[52] At paragraph 70 of his Reasons, the Chief Justice also referred to the *Clause by Clause Analysis* of Bill C-11, which repealed and replaced the *Immigration Act*, R.S.C., 1985, c. I-2. There, the rationale for the introduction of the Chairperson's authority to identify JGs was succinctly set out in the following terms: "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": Citizenship and Immigration Canada, *Bill C-11: Clause by Clause Analysis* (September 2001), page 127. I agree with the Chief Justice that "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" (Reasons, at paragraph 69).

[53] As for the appellant's argument that the Chairperson's interpretation of paragraph 159(1)(h) is inconsistent with the I.R.B.'s *Policy on the Use of Jurisprudential Guides* (as amended December 2016), it is without merit. It is no doubt true that this Policy notably states that "[a] decision may be identified as a [JG] on either a question of law or a question of mixed law and fact". However, as the Chief Justice rightly found, the Policy only "provides *some* indication of the manner in which the Chairperson interpreted his authority under paragraph 159(1)(h)" [emphasis in original] (Reasons, at paragraph 63). It is well established that such a policy, as other soft law tools upon which administrative

tribunals rely in their daily operations, cannot supersede the authority given to the Chairperson under the law and fetter his or her discretion: *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, (1982), 137 D.L.R. (3d) 558 (*Maple Lodge*), at pages 6–7. This principle has been reiterated in the immigration context on a number of occasions: see, for example, *Kanthasamy*, at paragraphs 30–33; *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, at paragraph 94; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, at paragraph 20.

[54] As a result, it is perfectly reasonable to understand the words of the Policy as referring to a description of the past and current practice with respect to which the Chairperson may consider exercising his or her authority to identify a decision as a JG. They cannot, by any means, be interpreted as constraining or circumscribing the statutory authority conferred by Parliament. To paraphrase the Supreme Court in *Maple Lodge* (at page 7), giving the Policy the effect contended for by the appellant would be to elevate the Chairperson's directions to the level of law and fetter his or her discretion. Consistent with this approach, I note that the Policy has been amended after the decision of the Federal Court and now explicitly mentions that a decision may be identified as a JG "on either a question of law, fact, or mixed law and fact" (*Policy on the Use of Jurisprudential Guides* (as amended December 2019); appeal book, page 1865).

[55] Finally, a word need be said regarding the practical problems raised by the appellant with respect to factual JGs. It is argued that the promulgation of JGs on factual determinations have led to the replications of errors, as illustrated by the revocation of the India Guide and the China Guide (and the Nigeria Guide subsequent to the decision of the Federal Court). In my view, what happens to a JG once it has been adopted in terms of its application and eventual revocation is irrelevant for the purpose of determining whether it is authorized by paragraph 159(1)(h). At one level, as submitted by the respondent, the revocation of a particular JG demonstrates to some extent that the I.R.B. monitoring of JGs is effective in ensuring the JGs remain useful and accurate. More importantly, the authority of the Chairperson to adopt a JG cannot be measured by its effectiveness nor even its accurateness, much like regulations whose validity do not depend on their usefulness nor on their advisability. The mere fact that JGs dealing with country conditions are frequently revoked may be a signal that they ought to be used with caution, especially if that revocation came as result of later discovery undermining their accuracy, but it can be of no impact on their conformity with the IRPA.

[56] For all of the foregoing reasons, I am of the view that the first certified question (i.e. the second issue on this appeal) should be answered in the affirmative.

C. *Do the JGs that the Chairperson issued with respect to Nigeria, Pakistan, India and China unlawfully fetter the discretion of members of the RPD and the RAD to make their own findings, or improperly encroach upon their adjudicative independence?*

[57] The appellant agrees with the Chief Justice that the statement of expectation in the accompanying policy notes for China, India and Pakistan interferes with the Board members' independence, but is of the view that it is no less true of the accompanying Policy Note for Nigeria. The appellant's position is that the distinction between a statement of expectation and a mere encouragement to take into account the factual determinations provided by the JGs is meaningless, because in both cases the Chairperson uses an institutional mechanism to communicate preferred findings of fact. In doing so, the Chairperson infringes on the independence of decision makers to the extent that they have the burden to explain why they do not follow the applicable JG. The problem is further compounded by the fact that the JGs are based on a factual record that is not disclosed to the public or other adjudicators.

[58] The appellant's thesis is broadly based on its reading of *Consolidated-Bathurst* and *Ellis-Don*, according to which the Supreme Court apparently left no room for institutional guidance in respect of a decision maker's findings of fact. Yet, a careful reading of these decisions, in my opinion, leads to a more nuanced conclusion.

[59] At issue in *Consolidated-Bathurst* was a decision of the Ontario Labour Relations Board to the effect that the appellant had failed to bargain in good faith by not disclosing, during negotiations for a collective agreement, that it planned to close the plant covered by the collective agreement. In the course of deliberating over this decision, a meeting of the full Board was held to discuss a draft of the reasons. The meeting was conducted in accordance with the Board's longstanding and usual practice to limit the discussion to the policy implication of a draft decision, and to accept the facts as contained in the decision. When the appellant learned of that meeting to which neither parties were invited to participate, it challenged the Board's decision on the ground that it violated the rules of natural justice.

[60] The Supreme Court first noted that two distinct rules of natural justice were at stake: that an adjudicator be disinterested and unbiased, and that the parties be given adequate notice and opportunity to be heard. With respect to the former, Justice Gonthier (writing for the majority) held that an institutional consultation procedure in itself does not create an apprehension of bias or lack of independence, provided it is designed to safeguard the ability of the decision-maker to decide independently both on facts and law in the matter. In so doing, he reiterated that the "criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions" (*Consolidated-Bathurst*, at paragraph 84 [page 334]). On the basis of the procedure followed by the Board in that case, the Supreme Court found that the full Board meeting was "an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties" (*Consolidated-Bathurst*, at paragraph 84 [page 335]).

[61] The Supreme Court revisited the same issue ten years later in *Ellis-Don,* and summarized in the following manner the requirements laid down by Justice Gonthier for an institutional consultation not to create a reasonable apprehension of bias: (1) the consultation proceeding cannot be imposed by a superior level of authority within the administrative hierarchy, and can only be requested by the adjudicators themselves; (2)

the consultation has to be limited to questions of policy and law, and the members who have not heard the evidence cannot be allowed to re-assess it; (3) even on questions of law and policy, the decision makers must remain free to come to whatever decision they deem right and not be compelled to adopt the views expressed by other members (*Ellis-Don*, at paragraph 29).

[62] Turning to the application of the *audi alteram partem* rule, the Court in *Consolidated-Bathurst* [at paragraph 86 (pages 335–336)] found that discussions on factual issues, to the extent that persons who have not heard all the evidence are involved, generally constitute a breach of the principles of natural justice. It bears reproducing the relevant excerpt of the Court's reasoning on that question:

> For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. In this case, for example, the Board had to determine which events led to the decision to close the Hamilton plant and, in turn, decide whether the appellant had failed to bargain in good faith by not informing of an impending plant closing either on the basis that a "*de facto* decision" had been taken or on some other basis. The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

[63] Having ruled out the discussion of factual issues and the introduction of any new evidence in the absence of the parties, the Court went on to add that the parties must also be informed of "any new ground" on which they have not had the opportunity to make representations (*Consolidated-Bathurst*, at paragraph 92 [page 338]). The Court drew a distinction between factual and legal matters, stating that the parties must be given a fair opportunity for correcting or contradicting any relevant piece of evidence prejudicial to their view, whereas the rule with respect to legal or policy arguments not raising issues of fact is "more lenient" and only gives the parties the right to state their case adequately and to answer contrary arguments (*Consolidated-Bathurst*, at paragraph 93 [page 339]).

[64] This dichotomy between factual matters and legal/policy issues is echoed in the penultimate paragraph of the majority's analysis [at paragraph 94 (pages 339–340)], which reads as follows:

> I therefore conclude that the consultation process described by [the] Chairman … in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and the parties are given a reasonable

> opportunity to respond to any new ground arising from such a meeting. In this case, an important policy issue … was at stake and the Board was entitled to call a full board meeting to discuss it. There is no evidence that any other issues were discussed or indeed that any other arguments were raised at that meeting and it follows that the appellant has failed to prove that it has been the victim of any violation of the *audi alteram partem* rule. Indeed, the decision itself indicates that it rests on considerations known to the parties upon which they had full opportunity to be heard.

[65] I am unable to agree with the appellant that *Consolidated-Bathurst* and *Ellis-Don* leave no room for internal guidance on factual issues of the type found in the impugned JGs. While I recognize that the plain words of the Supreme Court in these cases may lead to an understanding that administrative bodies' institutional processes are restricted to questions of law and policy, I am loathe to adopt such a strict reading of the principles established by the Court and to infer that JGs dealing with particular aspects of country conditions necessarily infringe the principles of natural justice. As stated in *Consolidated-Bathurst*, institutional constraints faced by an administrative tribunal inform the rules of natural justice, which "do not have a fixed content" (at paragraph 69 [pages 323–324]).

[66] I start with the proposition that coherence in decision-making is a legitimate goal for administrative boards and tribunals. While a lack of unanimity may be the price to pay for the decision-making freedom and independence given to administrative decision-makers, as noted by the Supreme Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, (1993), 105 D.L.R. (4th) 385 (*Domtar*), at page 800, persons affected by administrative decisions are entitled to expect that like cases will generally be treated alike, and that outcomes will not depend merely on the identity of the individual decision-maker. This objective was recognized as a valid one in *Consolidated-Bathurst*, where Justice Gonthier wrote [at paragraph 74 (pages 327–328)]:

> The second rationale for the practice of holding full board meetings is the fact that the large number of persons who participate in Board decisions creates the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one" …. Given the large number of decisions rendered in the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. The fact that the Board's decisions are protected by a privative clause … makes it even more imperative to take measures such as full board meetings in order to avoid such conflicting results. [Citation omitted.]

[67] These considerations apply with equal force in the context of the I.R.B. Just like the Ontario Labour Relations Board, the I.R.B. is a high volume tribunal that annually receives and decides thousands of claims and appeals. There are hundreds of decision makers across various regions of the country. Moreover, judicial review is subject to leave from the Federal Court. In that context, the need for consistency is even more

obvious, and as this Court recognized in *Thamotharem*, the use of guidelines and other soft law techniques to achieve an acceptable level of consistency is particularly important for large tribunals exercising discretion such as the I.R.B.

[68] The Supreme Court reiterated its concern for consistency in *Vavilov*. Referring to the above-quoted excerpts from *Domtar* and *Consolidated-Bathurst*, the Court found that administrative bodies may resort to guidelines and other soft law techniques to address this concern. It even went so far as stating that a departure from longstanding practices or established internal authority without any explanation for so doing may be a badge of unreasonableness (*Vavilov*, at paragraph 131).

[69] Of course, consistency should not be reached at the expense of natural justice, and must not compromise the judicial independence of panel members and their capacity to decide on the basis of the particular facts of each case and of their opinions: *Consolidated-Bathurst*, at paragraph 74 [pages 327-328]. In the case at bar, the appellant argues that the impugned JGs do just that.

[70] Before turning to the thrust of the appellant's argument, which is to the effect that the JGs fetter the Board members' discretion on questions of fact, a word must be said about the presumed violation of the *audi alteram partem* rule resulting from the fact that the entire record upon which the JGs are based is not disclosed to the public and to other adjudicators. Counsel for the appellant submits that refugee claimants do not know the case they have to meet.

[71] Admittedly, the entire record on the basis of which is made the decision designated as a JG is not disclosed. However, this is a far cry from the position that a refugee claimant is in the dark with respect to the rationale of that decision or as to the relevant factors that may appropriately be taken into consideration to distinguish his or her situation. First of all, many of the documents in the record are cited in the decision and available for future decision makers and the public alike. As pointed out by the intervener, that documentary evidence would form part of the relevant NDP. Of course, the available record would not contain the facts that are specific to the particular claimant who was the subject of the JG, and that were adduced in his or her evidence. However, the JGs are clearly not meant to address those particularized personal facts, but only those issues that are extraneous to a claimant's specific circumstances.

[72] The real focus of the appellant's submission, which the Federal Court countenanced to a large extent, is the interference that the impugned JGs would have with the Board members' independence. As previously mentioned, the Chief Justice agreed with the appellant that the China, Pakistan and India JGs appear to encroach on the discretion of the Board members and effectively pressure them to either adopt factual conclusions or provide a reasoned justification for not doing so. He reached that conclusion on the basis of the language used in the policy notes that accompanied the identified decisions to the effect that RPD and RAD members were "expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so", without any cautionary instructions about the non-binding nature of these JGs.

[73] I wholeheartedly agree that judges and quasi-judicial decision makers alike must be free to come to their own findings of fact, without any external pressure. This is one of the most sacred principles of natural justice, and a cornerstone of our legal system. With all due respect for the contrary view, however, I fail to see how any of the impugned JGs improperly encroach upon Board members' adjudicative independence. I come to this conclusion essentially for three reasons.

[74] First, I would note that the type of factual issues set forth by the impugned JGs must be distinguished from the ones contemplated by the Supreme Court in *Consolidated-Bathurst* and *Ellis-Don*. In *Consolidated-Bathurst*, for example, the Board had to determine, in light of the events that led to the decision to close a plant, whether the appellant's failure to inform of the impending plant closing breached the duty to bargain in good faith. This exercise solely required consideration of evidence specific to the circumstances of the parties, hence the prohibition for Board members who had not heard this type of evidence, to re-assess it.

[75] The same cannot be said of the reviews of country condition evidence or analytical frameworks found in the impugned JGs. While these can be characterized as factual findings, they are of a special nature to the extent that they go beyond the evidence specific to any particular claimant. The accuracy of the review of a specific country condition with respect to IFAs, state protection or objective fear is not dependent upon a claimant's specific circumstances, and is not meant to be. After all, the objective of refugee determination is not so much to determine what <u>has</u> happened, but what <u>will</u> happen if a person is returned to his or her country of origin.

[76] The fact that Sikhs throughout India face little discrimination and do not generally face difficulties relocating to other areas of India (India Guide, at paragraphs 36 and 47), or that the Pakistani government proactively victimizes Ahmadis (Pakistan Guide, at paragraph 33), for example, are not predicated upon claimants' personal history. This is precisely why these factual determinations will generally apply to claimants sharing a similar set of circumstances. As the Federal Court noted in *Barrantes v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 518, 272 F.T.R. 164, "it would not do to have one panel member's terrorist organization be characterized by another member as a benevolent non-government organization" (at paragraph 12). This is obviously a far cry from requiring members to adopt particular factual conclusions pertaining to a specific claimant. At the end of the day, Board members are always free to accept or reject the reasoning used in a JG when applying it to the unique personal narrative of the claimant before them.

[77] Second, the public nature of the JGs is to be contrasted with the behind-closed-doors consultations between members, on a specific case, that were reviewed in *Consolidated-Bathurst* and *Ellis-Don*. The JGs are meant to apply to all claimants originating from the same country to which they are directed and whose situation broadly raise the same issues. They are also clearly identified and posted on the I.R.B. website, and are readily available to all claimants and their counsel. They are therefore

much less susceptible to give rise to an apprehension of coercion or to a perception of interference by superiors.

[78] Third, and more importantly, Board members remain free to decide cases on the basis of their own assessment of the facts and of the evidence before them. I agree with the Federal Court that the Nigeria JG is more explicit than the other three in making clear that each case must be decided on its particular facts. This is not, however, the critical factor explaining why the Pakistan, India and China JGs did not pass muster and were found to improperly pressure Board members to adopt the factual determinations made in the identified decisions. In the Federal Court's view, it is the statement in the policy notes that accompanied these last mentioned JGs, to the effect that "'RPD and RAD members are expected to apply [JGs] in cases with similar facts or provide reasoned justifications for not doing so'", that was problematic (Reasons, at paragraph 141). In my view, this reasoning is questionable for a number of reasons. Yet, it bears noting that all the policy notes, including the one accompanying the Nigeria JG, used the exact same language that was found derogatory by the Federal Court.

[79] That being said, and despite the importance given to the language of the policy notes, it appears that the Federal Court's finding of improper pressure on Board members rests on a constellation of factors. In his penultimate paragraph devoted to the assessment of the Pakistan JG (which is relied upon for the assessment of the India and China JG), the Chief Justice writes [at paragraph 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.

[80] In my view, these comments are disputable for the following reasons.

[81] As noted by the respondent, members do not know at the time they are writing a decision that it will be designated as a JG (Kipling affidavit, at paragraphs 17–39; appeal book, pages 1664–1670). As a result, I fail to see how one could expect to see a *caveat* to the effect that any future decision maker considering the decision as a potential precedent must base its decision on the particular facts and circumstances of the case, or why the absence of such *caveat* should disqualify that decision as a potential JG. In any event, I am not persuaded that there is such a stark contrast between the Nigeria JG and the three others in this respect.

[82] The Pakistan JG itself noted that it is not for the RPD or the RAD to determine "whether every Ahmadi would be a refugee" (appeal book, page 660). The India JG also discusses a review of the documentary evidence "in the present case" and the "personal situation" of the claimants (appeal book, pages 623 and 627). The China JG makes it clear that there is "insufficient evidence in the present case" to establish that the smuggler bribed individuals at each of the security layers in place. However, the finding in another case that bribing one person with a computer would be sufficient "is not applicable in the circumstances of this case" (appeal book, page 639).

[83] I agree with the Chief Justice that the evidence as to whether decision makers have considered themselves bound to follow the JGs must be assessed in addition to other factors. Such factors have been described by the Chief Justice as "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" (Reasons, at paragraph 106).

[84] With respect to the language of the document, the Chief Justice made much of the contrast between the "mandatory language" of the Pakistan, India, and China JGs and the "cautionary language" of the Nigeria JG which, in his view, "makes it abundantly clear that each case must be decided on its particular facts" (Reasons, at paragraph 119). With all due respect, I am unable to grasp how 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" is crucially different from a mere invitation or encouragement for a Board member to take into account factual guidance. Yet, the Chief Justice is of the view that the former crosses the line because the language used "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" (Reasons, at paragraph 95). It seems to me this is a distinction without a difference: in either cases, it is understood that the departure from a JG will be reasonable if justified, that is, when the decision maker has provided proper reasons for doing so. Indeed, as previously mentioned at paragraph 68 above, it is incumbent upon any decision maker to explain why longstanding practices or established internal decisions are not followed.

[85] As for the effect of the impugned JGs in practice, I find that the evidence, as it was presented by the Chief Justice, does not establish on a balance of probabilities that Board members feel pressured as to how they should conduct themselves. The Chief Justice himself notes that there is "no evidence that Board members would face sanctions or other adverse consequences for not applying any of the impugned JGs" (Reasons, at paragraph 134), and that the statistics "implicitly demonstrate that not all Board members are blindly following the JGs" (Reasons, at paragraph 136). "[C]ommon experience", to use the Chief Justice's words, is not sufficient to establish undue pressure, especially in the context of a quasi-judicial tribunal such as the I.R.B.

[86] In that respect, it is worth reiterating that the word "guide" itself connotes the idea of a general norm, or a tool, not meant to determine the result of any particular case:

Thamotharem, at paragraph 66. This notion is reinforced by the *Policy on the Use of Jurisprudential Guides* that was in force at the time of the designation of each of the four JGs, which states that "[m]embers are expected to follow the reasoning in a decision identified as a [JG] to the extent set out in the accompanying statement, unless there is a reason not to do so, where the facts underlying the decision are sufficiently close to those in the case being decided to justify the application of the reasoning in the [JG]" (appeal book, page 1682). Moreover, and quite apart from this Policy and the various policy notes accompanying the designated JGs, Board members should be expected to know the well established legal principle that soft law tools such as guidelines are non-binding. It appears from Mr. Kipling's affidavit that Board members are instructed on the appropriate use of JGs (appeal book, page 1674), and the training material cautions that "reliance on the findings of another panel must be limited, careful and justified" and that "[t]he panel's reasons must demonstrate that all material circumstances of the particular case were considered" (appeal book, page 1852).

[87] As for the statistics cited by the Federal Court tending to show that a substantial percentage of the Board's members are following the impugned JGs, they are at best inconclusive. Not only are the JGs not always explicitly referred to in the decisions, making it difficult to determine the proportion of cases in which they were actually followed, but in those cases when they are cited, they are far from being blindly followed. In the case of the India Guide, for example, members opted not to apply it in 49 percent of the decisions that cite the JG, according to a Jurisprudential Guide Monitoring dated April 2018. Those members choosing not to apply it are often doing so on the basis of existing objective documentary evidence (appeal book, page 983). Considering the unclear nature of the statistical information, it would be risky and presumptuous to draw any kind of firm conclusion as to the impact of JGs on members' adjudicative independence, real or perceived. The considerable number of RAD and RPD decisions postdating the China, Pakistan and India JGs similarly reveal that members exercise their discretion in deciding refugee cases and do not shy away from conducting their own analysis and distinguishing the facts when appropriate.

[88] For all of the above reasons, I am of the view that the impugned JGs do not unlawfully fetter the Board members' independence. They simply put claimants on notice that the current existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing their particular circumstances.

[89] That being said, I am sensitive to the fact that JGs on findings of fact are fraught with risks and difficulties, as the repeal of three of them abundantly shows. Country conditions, by their very nature, are bound to change, and in some critical circumstances at an accelerated pace, with potentially dramatic consequences for refugee claimants. Even if JGs are closely monitored, as suggested by Mr. Kipling in his affidavit (appeal book, page 1673), the prejudice suffered by refugee claimants whose claims were decided on the basis of a JG that was eventually repealed cannot be minimized. In cases where a deportation order is issued and carried out, in particular, the prejudice may prove to be irreparable.

[90] Such a possibility obviously calls for the utmost vigilance from counsel representing claimants, and for the need on their part to act with the highest standard of professionalism and thoroughness. Compliance with the highest standards is essential to ensure that valid claims are not tossed out mistakenly, either as a result of a mistaken reading of the existing country condition or of factual developments that have been overlooked. Unfortunately, many refugee claimants are not represented by counsel and are ill-equipped to make their case and especially to distinguish their personal circumstances from those identified in a JG.

[91] This is why the decision to designate a JG should be taken with the utmost caution. It is not for courts to devise a system whereby the risk of mistake will be, if not eliminated, at least reduced to a minimum. Adjudicative decision makers, however, must always use their discretionary powers wisely, and strive to avoid sacrificing fairness to consistency and expediency.

D. *Does the cumulative effect of the facts and context surrounding the promulgation of the Nigeria JG give rise to a reasonable apprehension of bias?*

[92] The appellant contends that the cumulative effect of the facts and context surrounding the issuance of the Nigeria JG gives rise to a reasonable apprehension of bias. In support of its submission, the appellant raises the high degree of involvement from the Acting Deputy Chairperson of the RAD who: (1) first noticed a high volume of cases from Nigerian claimants; (2) sat on the RAD Professional Development and Adjudicative Committee; and (3) wrote the memo explaining the rationale for designating RAD decision TB7-19851, authored by Member Gamble as a JG.

[93] Of concern is also the lack of clarity with regard to how Member Gamble came to write the decision, either voluntarily or not. Her decision, says the appellant, is inexplicably broad and extends to the availability of IFAs in cities that had not been proposed to the claimant by the RPD. Also, the fact that the Chairperson reviewed and commented on draft reasons runs counter to the Chairperson's sole authority to identify decisions as JGs. Finally, the lack of consultation of the immigration and refugee bar contributes to the appearance of bias.

[94] As argued by the appellant, there is no doubt that a reasonable apprehension of bias can arise as a result of the structure of a decision-making body or the way it operates, even if the actions or words of an individual decision maker are blameless. As the Supreme Court stated in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at paragraph 67, the requirement that justice should not only be done but be seen to be done "envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification". What the appellant is claiming, in essence, is that the circumstances surrounding the origin, planning and promulgation of the Nigeria JG create a reasonable apprehension of bias, regardless of whether Member Gamble acted impartially when drafting her decision.

[95] All of the arguments raised by the appellant before this Court reflect, for the most part, arguments made before the Federal Court. For the reasons that follow, I am of the view that they were properly dismissed and that the manner in which the Nigeria JG was selected does not give rise to a reasonable apprehension of bias. When viewed from the objective perspective of the reasonable person, I do not think that the circumstances referred to by the appellant would create a reasonable apprehension of bias.

[96] The Federal Court appropriately found that there was no evidence to suggest that the Chairperson made any attempt to identify the decision as a JG before it was finalized or to interfere with the Board member's discretion in coming to her own conclusions. Indeed, the decision was identified as a JG long after the member issued her decision. The evidence shows that in July 2017, the Board members were asked by the Acting Chairperson "to consider what types of appeals could benefit from a RAD JG. If you are working on a set of reasons that you feel could be a good candidate for a JG, please raise that with your ADC or the member in your region who sits on the Adjudication Strategy Committee" (appeal book, page 1699). Obviously, such an invitation does not, in and of itself, interfere with a Board member's independence, and does not affect the Chairperson's discretion to identify a decision as a JG.

[97] Consistent with that invitation, Member Gamble sent a draft of her decision to the Acting Deputy Chairperson on May 9, 2018. On May 10, 2018, the Acting Deputy Chairperson sent a draft policy language to the Acting Chairperson. On May 17, 2018, Member Gamble finalized her decision. On June 13, 2018, the Acting Deputy Chairperson and Deputy Chairperson were still drafting language for a policy note. On June 19, 2018, the Acting Deputy Chairperson wrote a memo recommending the designation of Member Gamble's decision as a JG. On July 6, 2018, almost two months after it was finalized, Member Gamble's decision was formally identified by the Acting Chairperson as a JG. There is no evidence that Member Gamble did not reach her decision independently of any influence or that there was improper consultation. Nor is there any evidence that the Chairperson's involvement in the matter went beyond reviewing language for a policy note that was finalized long after the decision was released. In my view, the appellant has failed to demonstrate that the Federal Court was wrong in concluding that the decision was independently made and that Member Gamble was not the subject of any kind of pressure or influence in arriving at her conclusions.

[98] There is also no indication in the record tending to show that the Board member improperly consulted other members while she was deliberating, or that the circulation of draft reasons to other members for their comments was not voluntary. At the deliberation stage, members are not precluded from consulting other members with more experience to ensure consistency in decision-making. The Federal Court appropriately found that the review process was entirely consistent with the principles set out in *Consolidated-Bathurst* and *Ellis-Don*. While the Acting Deputy Chairperson reviewed drafts of the member's decision, under the IRPA, the Chairperson and Deputy Chairperson are also members of the RAD and paragraph 159(1)(h) does not prohibit them from suggesting changes to a draft at a deliberative stage.

[99] As for paragraph 13 of Member Gamble's decision, which broadens the availability of IFAs to cities that had not been proposed to the claimant by the RPD, I see nothing improper here and certainly no support for the claim that the decision was pre-selected. The Board member specifically made reference to the record before her and to the possibility of available IFAs in other cities. The RAD notes that while in the appellant's case, the availability of an IFA in Ibadan and Port Harcourt was determinative, a review of the record demonstrates the availability of an IFA in other cities as well, for persons in the appellant's situation. Paragraphs 13, 16, and 21 of the decision are not findings of fact but rather *obiter* comments that merely suggest a framework for analysis and make it clear that a particular claimant's specific circumstances and allegations must still be considered.

[100] The Chairperson's objectives in issuing the Nigeria JG were perfectly legitimate, and rationally linked to the selected decision. As found by the Federal Court, nothing suggests that the expressly stated goal of conducting "more focused hearings" and its corollary, the assessment of IFAs without having first to decide the credibility of a claimant's allegations of persecution, are a disguised attempt at reducing the rate of acceptance of refugee claims by persons of Nigerian origin, as was the case in *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 F.C.R. 377 (*Kozak*), with respect to refugee claims by Hungarian Roma. There is no evidence that the Board was looking for quick dismissals of refugee claims by persons of Nigerian origin, as opposed to streamlining the process by reducing the length of hearing time and the time spent writing or rendering oral reasons.

[101] Finally, I do not find that the lack of consultation with the immigration and refugee bar prior to the issuance of the Nigeria JG is contributive of an appearance of bias. I have already explained that no such consultation is required by the IRPA (see paragraph 26 above). In *Kozak*, this Court admittedly saw in the lack of consultation of the immigration and refugee bar one element pointing to bias in the context of a lead case. But as noted in that decision, a lead case is different from a JG in that it is planned and organized before the case is heard, whereas a decision is identified as a JG after it has been rendered. Moreover, it is clear that the lack of consultation in that case was but one factor leading to the conclusion that the hearing panel was biased and not acting independently. This Court notably put great emphasis on the leading role of one of the two panel members in initiating and planning the impugned lead case. As the Court stated, "[t]he Board's selection of the lawyer and of the lead cases may be seen as part of Board management's response to the concerns of CIC about the Board's previous positive decisions and its future handling of a large number of Hungarian Roma claims" (*Kozak*, at paragraph 63). None of these concerns arise in the present case and, therefore, I find that *Kozak* is distinguishable.

VI. Conclusion

[102] For all of the above reasons, I would dismiss the appeal, grant the cross-appeal, and answer the certified questions in the following manner:

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?

   Answer: Yes

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?

   Answer: No

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Near J.A.: I agree.

LeBlanc J.A.: I agree.