Federal Court  Cour fédérale

Date: 20210507

Docket: IMM-842-20

Citation: 2021 FC 401

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 7, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

Mauricio Alejandro SANCHEZ HERRERA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mauricio Alejandro Sanchez Herrera is seeking judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada rendered January 20, 2020, allowing the appeal filed by the Minister of Public Safety and Emergency Preparedness [the Minister] against the decision of the Immigration Division [the ID].

[2] On March 1, 2018, the ID took note of the Federal Court's decision in *Jean-Baptiste v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1317 [*Jean-Baptiste*]. Considering itself bound by this Court's decision under the doctrine of binding precedent (or *stare decisis*), the ID concluded that the doctrine of *res judicata* applies to Mr. Sanchez Herrera's situation. Therefore, the ID issued a decision in favour of Mr. Sanchez Herrera and did not issue the deportation order requested by the Minister.

[3] On January 20, 2020, on appeal from the ID decision, the IAD chose not to apply *Jean-Baptiste* and concluded that the doctrine of *res judicata* does not apply to Mr. Sanchez Herrera's situation. The IAD therefore allowed the Minister's appeal and decided that Mr. Sanchez Herrera is a person described in paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[4] The IAD then made a deportation order against Mr. Sanchez Herrera and, pursuant to subsection 69(2) and paragraph 229(1)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], ordered him to leave Canada.

[5] In short, and as stated to the parties at the hearing, I do not believe, with respect to my colleague who decided *Jean-Baptiste*, that the criteria of the doctrine of *res judicata* are satisfied. If I had to decide the issue, I would reach a different conclusion than my colleague, obviously respecting the principles of judicial comity, which is aimed at trial judges and is recognized as one of the variations of the doctrine of binding precedent.

[6] However, I need not decide this issue on *res judicata*, as the Minister has not persuaded me that the IAD could, and for the reasons it gave, depart from the conclusions of law that the Court reached in *Jean-Baptiste*. In its decision, the IAD did not address the exceptions to the doctrine of binding precedent, and there is no indication that it considered or respected them. For this reason, I will allow the application for judicial review and return the matter to the IAD for redetermination.

II. Facts

A. *Convictions from 2011 and related inadmissibility proceedings (2011–2017)*

[7] On August 31, 1990, Mr. Sanchez Herrera, a citizen of Chile, became a permanent resident of Canada as a dependent of his father.

[8] On June 3, 2011, Mr. Sanchez Herrera was convicted of possession of a credit card knowing it was obtained by the commission of an offence in Canada, a crime under subparagraph 342(1)(c)(i) of the *Criminal Code*, RSC 1985, c C-46 [the Criminal Code]. He was fined $1,500.00 and sentenced to two days' imprisonment.

[9] On June 19, 2011, Mr. Sanchez Herrera was convicted of two counts of possession of a substance for the purpose of trafficking, offences described in subsection 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. He was ordered to serve a 12-month conditional sentence.

[10] On October 11, 2012, Mr. Sanchez Herrera was the subject of a report under subsection 44(1) of the Act. The officer concluded that there are reasonable grounds to believe that Mr. Sanchez Herrera is inadmissible under paragraph 36(1)(a) of the Act, for serious criminality, as a result of the three aforementioned convictions dated June 3 and September 19, 2011. This report was then referred for to the ID for an admissibility hearing under subsection 44(2) of the Act.

[11] On February 5, 2013, the ID issued a deportation order against Mr. Sanchez Herrera [the 2013 ID decision]. Based on the 2011 convictions, the ID determined that he is a person described in paragraph 36(1)(a) of the Act because he was convicted in Canada of offences under Acts of Parliament punishable by a maximum term of imprisonment of at least ten years.

[12] Mr. Sanchez Herrera appealed this decision to the IAD.

[13] However, on or about June 6, 2015, before the appeal of the 2013 ID decision was heard by the IAD, Mr. Sanchez Herrera committed another offence, arson. On August 21, 2015, he was convicted of offences under sections 434 and 436.1 of the Criminal Code and sentenced to 14 months and 11 days of incarceration and payment of a fine of $400.00, in addition to the 109 days of pre-trial detention served.

[14] On October 3, 2016, the Minister requested a postponement of the hearing of this appeal before the IAD, as the file was then being assessed for the issuance of another 44(1) report, this time in relation to the August 21, 2015 conviction for arson. The IAD denied the request for

postponement, so the case proceeded as scheduled. Therefore, on October 25, 2016, the IAD heard Mr. Sanchez Herrera's appeal of the 2013 ID decision.

[15] As of that date, the 2015 arson conviction had not yet been reported under subsection 44(1) of the Act, and therefore had not been referred to the ID, which has consequently not ruled on the matter. The determination of inadmissibility arising from the 2015 arson conviction and the removal order that would be associated with it were clearly not before the IAD in 2016.

[16] In 2016, before the IAD, Mr. Sanchez Herrera did not challenge the legal validity of the deportation order issued against him by the ID in 2013, the one arising from the 2011 convictions. Instead, he invoked section 68(1) of the Act, submitted that there are humanitarian and compassionate grounds to justify special relief for him, and sought a stay of the deportation order issued against him by the ID. In considering humanitarian and compassionate grounds, Mr. Sanchez Herrera submitted to the IAD, among other things, the circumstances surrounding the 2015 arson, the introspection and the efforts he made during his period of incarceration, and the reasons that support his potential for rehabilitation.

[17] It is necessary here to pause in Mr. Sanchez Herrera's narrative to note that on November 28, 2016, the Federal Court issued its decision in *Jean-Baptiste*, detailed below.

[18] Returning to Mr. Sanchez Herrera, on February 3, 2017, the IAD issued its decision [the 2017 IAD decision]. It first confirmed the validity of the deportation order issued by the IAD in 2013, which stems, it must be repeated, from the 2011 convictions and the 2012 44(1) report.

[19] In this 2017 decision, the IAD further considered whether there are sufficient humanitarian and compassionate grounds to justify special relief for Mr. Sanchez Herrera, taking into account the best interests of the children directly affected and the other circumstances of the case. In conducting this review, with regard to the seriousness of the offences, the 2017 IAD decision notes, among other things, that it was the two convictions in 2011 that led to the deportation order issued by the ID in 2013. Regarding Mr. Sanchez Herrera's rehabilitative potential, the 2017 IAD decision examined the circumstances and impact of his 2015 conviction for the arson.

[20] In 2017, the IAD determined that there were sufficient humanitarian and compassionate grounds and stayed the deportation order for three years. It imposed certain conditions on Mr. Sanchez Herrera and provided, under the "conditions of stay of removal order", for a review at the end of the stay and, specifically, that the stay would remain in effect until a decision was made following the review at the end of the stay.

B. *Convictions from 2015 and related inadmissibility proceedings (2017–2021)*

[21] On November 9, 2017, Mr. Sanchez Herrera was the subject of a second report under subsection 44(1) of the Act, this time in relation to his August 2015 conviction for arson. The officer cited inadmissibility for serious criminality under paragraph 36(1)(a) of the Act. On the

same day, the report was referred to the ID for an admissibility hearing under section 44(2) of the Act.

[22] In 2018, the ID conducted the hearing in relation to this second 44(1) report. The ID then advised the parties that they would have to deal with the issues of *res judicata*, abuse of process and *stare decisis*, given the Federal Court's decision in *Jean-Baptiste*, a case with similar facts and dealing with *res judicata*.

[23] The Minister then argued that *res judicata* did not apply, as the issue was not the same and the 2017 IAD decision was not a final decision. The Minister noted that the 2017 IAD decision did not revisit the 2013 ID decision, as the deportation order was not in dispute and the 2017 IAD decision was ruling on a different matter, namely special relief. In the alternative, the Minister argued that if the ID found that the *res judicata* criteria were met, it had to use its discretion and not apply it. Before the ID, the Minister also stated that he had no arguments to make in relation to the principle of *stare decisis.*

[24] Before the ID, Mr. Sanchez Herrera submitted that the 2017 IAD decision is indeed a final decision, and that the ID is bound to follow the Federal Court's decision in *Jean-Baptiste* and find that it is *res judicata*. He added that this is an abuse of process by the Minister.

[25] On March 1, 2018, the ID confirmed its jurisdiction, but did not issue a deportation order and issued a decision in favor of Mr. Sanchez Herrera [the 2018 ID decision]. The ID considered

itself bound by the Court's decision in *Jean-Baptiste* under the principle of *stare decisis*, and concluded that the doctrine of *res judicata* applies.

[26] The Minister appealed the 2018 ID decision to the IAD.

[27] Before the IAD, the Minister submitted that the ID misapplied the criteria of *res judicata* and *stare decisis* and, in the alternative, that there was no abuse of process.

[28] The Minister submitted that the doctrine of *res judicata* did not apply since the criteria set out by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] for determining issue estoppel were not met. The Minister noted in this regard that the same conclusion must be reached if the criteria for issue estoppel, also raised by Mr. Sanchez Herrera, are applied. The Minister clarified that these are not the same issues and the 2017 IAD decision is not a final decision, given section 66 of the Act and the decision itself. In this regard, the Minister noted that the 2017 IAD decision is also not a judicial decision under the sub-criteria set out in *Danyluk*.

[29] Before the IAD, the Minister added that the Court's decision in *Jean-Baptiste* should not have been followed by the ID, as the criteria required to apply the doctrine of *stare decisis* were not met. The Minister argued that (1) *Jean-Baptiste* does not resolve all of the arguments raised in this case; (2) the judge in *Jean-Baptiste* did not consider whether the original decision was in fact a judicial decision that can be used as such and in particular whether the decision maker has

jurisdiction under the three sub-criteria set out in *Danyluk*; and (3) the Supreme Court of Canada's decision in *Danyluk* must be followed.

[30] Finally, the Minister submitted to the IAD that there was no abuse of process, as the delay in issuing the 44(1) report in relation to the arson conviction was not unreasonable or exceptional and, in any event, the ID has no jurisdiction to consider the circumstances of the issuance of the 44(1) report and the Minister's decision to refer it to the ID. To challenge the 44(1) report and the Minister's decision under 44(2), the applicant had to apply to the Federal Court, not the ID (*Collins v Canada (Citizenship and Immigration)*, 2009 CanLII 16327; *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219).

[31] Before the IAD, Mr. Sanchez Herrera's response was essentially that (1) *res judicata* exists by virtue of estoppel; (2) silence on the part of the ID as to the exercise of its discretion not to apply *res judicata* does not render the decision void; (3) the IAD must, like the ID, follow the Federal Court's decision in *Jean-Baptiste* under the doctrine of *stare decisis*; and (4) the issuance of a 44(1) report by the Minister two years after the conviction, and after the 2017 IAD decision, is an abuse of process that directly affects Mr. Sanchez Herrera's right to legal certainty.

[32] On January 20, 2020, the IAD allowed the Minister's appeal and issued a deportation order against Mr. Sanchez Herrera. That decision, described below, is the subject of this judicial review.

C. *The Federal Court's decision in Jean-Baptiste*

[33] *Jean-Baptiste* is central to the present case and it is therefore useful to summarize it at this point in order to understand what follows. The parties have confirmed that the facts in *Jean-Baptiste* are similar to those in this case.

[34] In short, and according to the facts recounted in the decision, from 2007 to 2013, Mr. Jean-Baptiste, a permanent resident of Canada, committed multiple criminal offences. In January 2011, a first report under subsection 44(1) of the Act was prepared regarding his 2009 and 2010 convictions. In February 2011, the report was referred to the ID and on March 15, 2011, the ID issued a deportation order against Mr. Jean-Baptiste. Mr. Jean-Baptiste appealed to the IAD.

[35] On July 4, 2014, before the appeal was heard by the IAD, a second 44(1) report was prepared, this time covering the 2013 and 2014 convictions and sentences. This report was not referred to the ID for an admissibility hearing.

[36] On June 17, 2015, the IAD heard Mr. Jean-Baptiste's appeal and on July 8, 2015, it stayed the enforcement of the deportation order issued by the ID, which, it should be recalled, resulted from the 2009 and 2011 convictions. The IAD concluded that there were sufficient humanitarian and compassionate grounds, as permitted by section 68 of the Act. The information related to the convictions and sentences imposed in 2013 and 2014 was before the IAD in assessing humanitarian and compassionate grounds.

[37] On November 19, 2015, over the objections of Mr. Jean-Baptiste, who then claimed an abuse of process, the CBSA again wrote the same second 44(1) report, which covered the 2013 and 2014 convictions and sentences. This time, however, the report was referred to the ID for an admissibility hearing.

[38] On April 1, 2016, the ID found Mr. Jean-Baptiste subject to paragraph 36(1)(a) of the Act and issued an deportation order against him.

[39] Under section 64 of the Act, Mr. Jean-Baptiste cannot appeal the ID's decision to the IAD, so he instead asked the Court to review the ID's decision.

[40] The Court, on judicial review, overturned the ID's 2016 decision. It concluded that *res judicata* principles applied, given the 2015 IAD decision, and that the ID could not, in 2016, consider the second 44(1) report, the one covering the 2013 and 2014 convictions.

[41] The Court determined that all of the relevant information (the 2013 and 2014 convictions and sentences) was before the IAD in 2015, at the time the stay was granted, and that *Danyluk* does not permit a reconsideration of that information. Specifically, the Court determined that:

> [32] The principle of *res judicata* is simple: once a panel has rendered a decision, it is not open to the parties to resume proceedings by ignoring that decision if the same issue has been decided; that judicial decision is final, and the same parties are involved (*Danyluk*, supra).
>
> [33] In this case, the ID Member was hearing the matter referred to her by the CBSA on November 19, 2015, although a decision on the same facts had already been rendered by the IAD on July 8, 2015. Admittedly, on April 1, 2016, the ID was studying section 36(1)(a) of the IRPA, while the IAD was

> assessing the existence of humanitarian and compassionate grounds for granting a stay of removal. The fact remains that the IAD was assessing a deportation order issued by the ID under the same provision of the Act.
>
> [34] In filing a second report with the ID after the IAD had allowed the applicant's appeal, the CBSA chose to circumvent that decision and disregard the principle of *res judicata*. The applicant could have applied for judicial review of the IAD's decision, but did not avail himself of this procedure. The Court cannot approve such a practice.

[42] It seems clear that the Court in *Jean-Baptiste* was applying the principles of *res judicata* developed by the Supreme Court in *Danyluk* and was not departing from them. Rather, the Court concluded that the *Danyluk* criteria were satisfied, having found that the parties were the same, that the IAD's decision was a final decision and that the same issues were in dispute.

III. The IAD's decision in 2020, the subject of this judicial review

[43] Let us return to the case of Mr. Sanchez Herrera. On January 20, 2020, therefore, the IAD determined (1) that Mr. Sanchez Herrera, a permanent resident of Canada, is subject to a deportation order based on his August 2015 conviction, which stems from an indictable offence punishable by more than 10 years' imprisonment; (2) that the doctrine of *res judicata* does not apply in this case because the criteria are not met; (3) that *Jean-Baptiste* should not be applied; and (4) that Mr. Sanchez Herrera's abuse of process claims must be dismissed.

[44] The IAD first noted that the ID, in 2018, correctly concluded that on August 21, 2015, Mr. Sanchez Herrera was sentenced to 18 months of imprisonment for an arson offence. The IAD added that Mr. Sanchez Herrera was then (in August 2015) awaiting a hearing before the

IAD, but in connection with the 2013 ID deportation order arising from the 2011 convictions and the 2012 44(1) report. The IAD then also noted that the arson conviction had been considered by the IAD in 2017, but only to assess whether there were humanitarian and compassionate grounds to warrant special relief in the form of a stay of deportation.

[45] The IAD then noted that it "disagrees entirely" with the ID's conclusion on *res judicata*. Instead, the IAD determined that the doctrine of *res judicata* does not apply in this case. The criteria for issue estoppel were not met since, in sum: (1) this was not the same legal issue because the hearing before the ID in 2018 was in relation to the second 44(1) report and was a new issue that had never been decided; and (2) the 2017 IAD decision on the issue was not a final decision on a matter before it since the appeal was not "allowed". The IAD relied on sections 66, 69 and 72 of the Act.

[46] In the IAD's decision, in relation to the Federal Court decision in *Jean-Baptiste*, it states as follows:

- At paragraph 7: "Contrary to what the Federal Court implies in paragraph 34 of the *Jean-Baptiste* decision, a stay of the execution of a removal order is not a final decision in a matter before the IAD".
- At paragraph 9: "Furthermore, also in *Jean-Baptiste*, the Federal Court concludes that the IAD 'was assessing a deportation order issued by the ID.' However, this must be the same removal order". The IAD then argues, in sum, that the Federal Court did not consider that it was reviewing two different deportation orders, one of which had not, in fact, even been referred to the ID for an admissibility hearing.
- At paragraph 11: "the *Jean-Baptiste* decision is unfortunately difficult to follow, and the IAD cannot refer to it in this matter. Moreover, *Jean-Baptiste* does not spell out every argument examined by the IAD in this decision".

- At paragraph 12: “the IAD decides not to apply *Jean-Baptiste*. In the IAD’s opinion, the decision strays from the applicable principles of the doctrine of *res judicata*, as set out by the Supreme Court in *Danyluk*”.

- At paragraph 12: “First, the structure of the IRPA clearly indicates that in the case of a removal order, a stay is not a final decision (see subsections 68(3) and 69(1) of the IRPA)”.

- At paragraph 12: “The case law has also already established that the issues before the ID in an inquiry into certain convictions are different from the issues before the IAD which, when a stay for other convictions is granted, address the new convictions before the ID”.

- At paragraph 12: The IAD concludes by stating that, even if the three conditions of *res judicata* existed, it would exercise its discretion to refuse to apply *res judicata* in order to promote the administration of justice, citing *Danyluk* at paragraphs 66 and 67.

[47] The IAD therefore disagreed with the Federal Court’s findings (1) that the IAD’s first decision is a final decision; (2) that the IAD was also reviewing a deportation order; and (3) that these are the same issues in dispute.

[48] Regarding the abuse of process claims, the IAD found that the facts do not support Mr. Sanchez Herrera’s argument. Mr. Sanchez Herrera does not contest this conclusion before the Court and it is not necessary to elaborate on this section of the IAD’s decision.

[49] Ultimately, the IAD found that the Minister has demonstrated, on a balance of probabilities, that the doctrine of *res judicata* was not applicable by the ID in the case before it in 2018. The IAD therefore determined that the analysis of the situation, as it should have been done by the ID, lead to the conclusion that Mr. Sanchez Herrera is subject to a removal order on

the basis of serious criminality under paragraph 36(1)(a) of the Act. The IAD allowed the Minister's appeal.

IV. Issue

[50] Mr. Sanchez Herrera asks the Court to determine (1) whether the IAD erred in applying the doctrine of *res judicata*; (2) whether the IAD violated the doctrine of *stare decisis* by refusing to apply a rule developed in Federal Court precedent; and (3) whether there is a special interest justifying its intervention.

V. Parties' positions

[51] There is only one issue that allows the Court to dispose of the dispute, that of the IAD's failure to comply with the doctrine of binding precedent, or *stare decisis*.

[52] The Minister has not persuaded me that the IAD considered or followed the strict criteria of the doctrine of binding precedent set out in the case law before choosing not to apply the Federal Court's decision in *Jean-Baptiste*. This is a fatal error.

[53] Mr. Sanchez Herrera submits that an important element of the IAD's decision is the existence of a Federal Court judgment with which it disagreed and which it set aside, thereby violating the rule of binding precedent.

[54] Mr. Sanchez Herrera added that this is a question of law that is beyond the expertise of the panel and could have implications for the Canadian judicial system as a whole, and that it is therefore appropriate for the Court to use the standard of correctness (no citation provided).

[55] Mr. Sanchez Herrera submits that the IAD could not disagree with the Court's decision in *Jean-Baptiste* and refuse to apply it. He noted that a decision maker cannot refuse to apply the precedent of a higher court.

[56] The Court asked the parties to file additional submissions related to two recent Federal Court of Appeal [FCA] decisions dealing with the doctrine of binding precedent, *Tan v Canada (Attorney General)*, 2018 FCA 186 [*Tan*] and *Bank of Montreal v Li*, 2020 FCA 22 [*Bank of Montreal*].

[57] Mr. Sanchez Herrera submits that these two decision are clear and leave no room for doubt, that the IAD must follow the jurisprudence developed by the Federal Court (vertical *stare decisis*) and adds that the undersigned, presiding over this hearing, is also bound to apply the *ratio decidendi* of *Jean-Baptiste*.

[58] The Minister responds that the standard of reasonableness applies, pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[59] In his memorandum, the Minister argues that a decision of a higher forum should not be followed in the following circumstances:

- Where there are additional arguments that were never decided by the judgment for which *stare decisis* is invoked.
- Where a decision of a forum even higher than the first one sets out criteria that the first one failed to apply or consider.
- Where a judgment cited to invoke *stare decisis* does not demonstrate a detailed analysis of the applicable criteria.

[60] The Minister argues that it was appropriate for the IAD not to apply *Jean-Baptiste*, since the judge in that decision did not decide all of the arguments that are raised in this case (including the applicable provisions of the Act as to the non-final nature of an IAD decision granting a stay), that the IAD did not have jurisdiction in 2017 to determine the second removal order, and that the issue is whether the 2017 IAD decision is in fact a judicial decision, under the *Danyluk* sub-criteria, and particularly the question of the IAD's jurisdiction in 2017, in relation to the second removal order.

[61] The Minister therefore submits that *Jean-Baptiste* cannot serve as a precedent, as it did not address all of the issues raised in this case. He notes that it was reasonable and proper for the IAD to accept the Minister's arguments regarding *Jean-Baptiste*. He adds that the decision does not establish any line of authority and has not been cited or considered on appeal.

[62] The Minister points out that a decision that departs from long-standing practice or settled case law need not be followed under paragraphs 131 and 132 of *Vavilov*. He noted that the IAD had the option of following the Federal Court's decision in *Jean-Baptiste* or the Supreme Court's decision in *Danyluk* and that it did not err in following the Supreme Court's decision under the very principles of the doctrine of binding precedent.

[63] In response to the Court's request, the Minister made submissions on the two FCA decisions referred to above. In relation to *Tan*, the Minister confirms that lower courts may revisit higher court precedents in two situations: where a new issue is raised, and where there is a change in the circumstances or there is evidence that fundamentally shifts the parameters of the debate. He says that the FCA also states that the rule of *stare decisis* does not compel a wrong course of action and that criteria have been established for departing from the beaten path.

[64] The Minister adds that the IAD determined that *res judicata* did not apply because the first two criteria of *Danyluk* were not met, and that the IAD relied on *Danyluk* rather than *Jean-Baptiste*. The Minister notes that the IAD distinguished *Jean-Baptiste* in detail in paragraphs 6 to 12 of its decision for the purpose of explaining why it was departing from it.

[65] In the Minister's view, the reasons demonstrate that the IAD was reasonable in considering the *Jean-Baptiste* precedent to be "manifestly wrong", in light of the new legal arguments.

[66] Regarding the FCA's decision in *Bank of Montreal*, the Minister first submits that the FCA confirmed that the reasonableness standard applies.

[67] Second, the Minister cites paragraphs 36 and 37 of the decision to confirm, in essence, that the doctrine of *stare decisis* must sometimes give way when a decision is wrong, as established by *Miller v Canada (Attorney General)*, 2002 FCA 370 [*Miller*]. The Minister submits that the decision confirms that an administrative tribunal may "choose" to depart from

the precedent if it has grounds to do so, including the three grounds that the Minister argued before the IAD and reiterated before the Court. The Minister submits that these three grounds, while not exhaustive, could indeed be used to demonstrate that a Court precedent is manifestly wrong, as established in *Miller*.

[68] The Minister argues that the FCA has repeatedly upheld the principle established in *Miller* and cites *Brace v Canada (Attorney General)*, 2019 FCA 274 [*Brace*]; *Markou v Canada*, 2019 FCA 299 at para 52 [*Markou*]; *Ark Angel Fund v Canada (National Revenue)*, 2020 FCA 99 at para 3 [*Ark Angel*]; *Canada v 984274 Alberta Inc*, 2020 FCA 125 at para 55 [*Alberta Inc*]; *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 [*Canadian Council*]; *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 31 [*Dugré*].

VI. Analysis

a) *Standard of review*

[69] I will apply the standard of reasonableness. As Mr. Sanchez Herrera noted, *Vavilov* (at para 17) provides an exception to the presumption that the standard of reasonableness applies, for certain matters affecting the legal system as a whole. However, he has not convinced me that this exception applies in this case (*Bank of Montreal*).

[70] Where the applicable standard of review is reasonableness, the role of the reviewing court is to examine the reasons given by the administrative decision maker and the determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in

relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). The reviewing court must consider "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, citing *Dunsmuir v New-Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47, 74 and *Catalyst Paper Corp v North Cowichan* (*District*), 2012 SCC 2 at para 13).

[71] It is not enough that the decision be justifiable. Where reasons are required, the decision "must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (*Vavilov* at para 86 [emphasis in original]). Review under the standard of reasonableness is thus concerned with both the outcome of the decision and the reasoning followed (*Vavilov* at para 87). Finally, the reviewing court must focus its attention on the actual decision made by the administrative decision maker, including its rationale, and not on the conclusion it would itself have reached had it been in the shoes of the decision maker.

b) *Doctrine of binding precedent (stare decisis)*

[72] The doctrine of binding precedent, or *stare decisis*, is the [TRANSLATION] "principle by which courts render decisions consistent with those they have already rendered or those that higher courts have already rendered" (original French definition from Hubert Reid, *Dictionnaire de droit québécois et canadien*, 5th ed (Montréal, Wilson & Lafleur, 2015)).

[73] The concept of certainty in the law requires that the court follow and apply authoritative precedents. This is the fundamental principle upon which the common law relies (*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 38 [*Bedford*]). The question of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents (*Bedford* at para 39).

[74] The "horizontal" view is that of the Supreme Court, or of different panels of the Court of Appeal, regarding their own precedents. Judicial comity governs the conditions under which a judge of a trial court, such as the Federal Court, may depart from a decision of another judge of the same court.

[75] It is accepted that this is a case of "vertical" *stare decisis*, involving the IAD's obligation to follow Federal Court precedent.

[76] According to the Supreme Court, again in *Bedford*, a lower court cannot ignore authoritative precedent. In particular, a "lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly" (*Tuccaro v Canada*, 2014 FCA 184 at para 18).

[77] The bar is high when it comes to justifying reconsideration. The conditions are met when a new question of law arises or when there is a significant change in the situation or evidence.

This approach balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role (*Bedford* at para 44).

[78] The Supreme Court reiterated this position in *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44 [*Carter*], stating: "The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'".

[79] The issue was recently considered by the FCA in *Tan* and *Bank of Montreal*, which I have highlighted to the parties, and in the 2002 decision *Miller*, which the Minister relied upon, in particular to advance the clearly wrong decision test.

[80] However, *Miller* does not deal with the "vertical" *stare decisis* that arises in the proceedings. It deals with only the "horizontal" *stare decisis*, particularly that between different panels of the FCA itself.

[81] The FCA confirmed, at paragraph 8, that it can overturn its own decisions, subject to certain conditions. In paragraph 10, the FCA stated that the "test used for overruling a decision of another panel of this Court is that the previous decision is manifestly wrong, in the sense that

the Court overlooked a relevant statutory provision, or a case that ought to have been followed". The FCA also stated that in order to succeed, the appellant must not only persuade the panel that the prior decision is erroneous, but also that it must be reversed. In that decision, the FCA concluded that, even if the decision was wrong, it was not persuaded that there were compelling reasons not to apply it.

[82] That decision clearly deals with the horizontal *stare decisis* between different panels of the FCA and thus does not address the situation before us, which is vertical, that is, the IAD's obligation to follow Federal Court precedent.

[83] In *Tan*, the FCA again considered one of its own precedents and thus applied the doctrine of "horizontal" *stare decisis*. In paragraph 31 of the decision, the FCA identified two additional circumstances in which an FCA panel may depart from the decision of another panel. The FCA also discussed the standard to be applied when a five-judge panel reviews a decision made by a three-judge panel, using the compelling reasons test.

[84] However, the FCA did address the doctrine of vertical *stare decisis* in passing. The most relevant passages of that decision, for the purposes of this application, are found in paragraphs 22 and 29. In paragraph 22, the FCA confirms that "[t]he jurisprudence is to the effect that the doctrine of stare decisis requires an administrative tribunal to follow a Court's interpretation of the law". In paragraph 29, the FCA reiterates the principle stated by the Supreme Court in *Carter* that higher courts may be reconsidered by trial courts, where a new

issue is raised, “where there is a change in the circumstances” or there is evidence that “fundamentally shifts the parameters of the debate”.

[85] To be sure, the FCA confirmed that these principles have been articulated with respect to vertical *stare decisis*, and that they are equally relevant to horizontal *stare decisis*. However, the FCA did not say that, conversely, the criteria for horizontal *stare decisis*, being the “manifestly wrong” test, apply to vertical *stare decisis*.

[86] In *Bank of Montreal*, the FCA stated, “As a matter of principle, an administrative decision-maker is bound to follow applicable precedents originating from any court, let alone a court of appeal; the doctrine of *stare decisis* calls for no less (*Tan v Canada (Attorney General*), 2018 FCA 186, 427 DLR (4th) 336, at para 22 [Tan]). Courts themselves may depart from precedent in exceptional cases. The Supreme Court has acknowledged that the certainty and predictability of *stare decisis* must sometimes give way when a case has been wrongly decided, or where the economic, social and political circumstances underlying a decision have changed (see *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3, at paras 56–57; *Canada v Craig*, 2012 SCC 43, [2012] 2 SCR 489, at paras 24–27; *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, at para 47; *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51, [2017] 2 SCR 317, at para 65; *Vavilov*, at para 18)”.

[87] The decisions cited by the Minister applying the 2002 *Miller* decision all deal with horizontal, not vertical, *stare decisis* and, given the nuances between the different criteria applying to each, are not helpful.

[88] As noted above, the Supreme Court has confirmed that lower courts may revisit the precedents of higher courts in two situations: where a new issue is raised, and "where there is a change in the circumstances" or there is evidence that "fundamentally shifts the parameters of the debate".

[89] I have not found, in the case law, the exceptions raised by the Minister in his memorandum, or the exception for manifestly wrong decisions subsequently relied upon, that would allow the IAD to depart from Federal Court precedent. Furthermore, there is no indication that a Federal Court decision must be cited, followed or reviewed on appeal to bind the IAD under the doctrine of binding precedent.

[90] Moreover, the IAD did not discuss the exceptions to its obligation to follow Federal Court precedent in this case, and there is no evidence that it considered or applied the criteria established by the Supreme Court.

[91] The IAD's conclusion that the Court in *Jean-Baptiste* departed from the principles applicable to the doctrine of *res judicata* established by the Supreme Court in *Danyluk* appears unreasonable and incorrect. It could not, therefore, be a question of the IAD having to choose between the Federal Court's decision or that of the Supreme Court. Rather, the IAD disagrees with the conclusions reached by the Federal Court in its analysis of the *Danyluk* test.

[92] The IAD may disagree with the specific conclusions of law reached by the Federal Court and support its analysis. However, if the IAD fails to consider and meet the criteria established

by the Supreme Court for departing from precedent, it must declare itself bound by those conclusions.

VII. Conclusion

[93] The IAD's decision is not justified in light of the relevant legal constraints. The application for judicial review will be allowed, and the matter will be referred back to the IAD for reconsideration by another decision maker.

[94] The parties have agreed to submit a certified question to the Court. To be certified, a question must be dispositive of the appeal, transcend the interests of the parties and raise an issue of broad significance or general importance. The question must also have been dealt with by the Federal Court and must necessarily arise from the case itself, as opposed to arising out of the way in which the Federal Court may have disposed of the case (*Sran v Canada (Citizenship and Immigration)*, 2018 FCA 16 at para 3).

[95] Therefore, since the suggested question relates to principles of *res judicata* and it has only been dealt with incidentally, the question will not be certified.

JUDGMENT in IMM-842-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.

2. The matter is referred back to the IAD for reconsideration;

3. No question of general importance is certified.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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