Federal Court  Cour fédérale

Date: 20211115

Docket: IMM-6195-20

Citation: 2021 FC 1195

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 15, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

LOUAY AHMAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] which confirmed the decision of the Refugee Protection Division [RPD] of July 27, 2018. The application for judicial review is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] In my view, this case must be sent back to the RAD because the reasons for the decision under review are neither transparent nor intelligible, making it impossible to assess justification. As such, the decision is unreasonable.

I. Facts

[3] Neither the RPD decision nor the RAD decision is easy to read. Moreover, it is only the RAD's decision that is before the Court and that must be dealt with on judicial review.

[4] The applicant is in his late forties and has resided in the Kingdom of Saudi Arabia since 2004. He is a citizen of Syria and visited family members after the uprising against the Assad government in 2011 on three occasions:

- November 24, 2014 to January 5, 2015: visiting during the hospitalization of his mother.
- November 7, 2015 to December 17, 2015: visiting during the hospitalization of one of his brothers.
- January 18, 2017 to February 24, 2017: visiting during a second hospitalization of his mother.

[5] He complained about a check that was allegedly carried out on him at checkpoints in 2015 and 2017. He claimed that in 2015 he was checked for one hour, while in 2017 he was detained by Syrian authorities for two hours; he was suspected of being a deserter because his name was similar to the deserter's.

[6] He appears to have returned to Saudi Arabia where he was the manager of a luxury goods store. Changes in the domestic policy of Saudi Arabia seeking to favor Saudi Arabian citizens as

employees caused him to use a United States visa he had obtained in 2015. He apparently left for the United States on July 29, 2017 and later came to Canada to seek refugee protection.

[7] The RPD determined that the important issues to be addressed were those of the applicant's credibility and the state protection he could expect from Syria.

[8] The RAD instead identified the determinative issues in this case as the applicant's credibility and the risk based on his personal profile in Syria.

II. Decision under judicial review

[9] As I stated at the outset, the RAD's decision is not easy to approach and, as I will conclude, it is neither intelligible nor transparent.

[10] After disposing of the applicant's request to present additional evidence before the RAD, the RAD addressed the issue of the applicant's conscription into the Syrian army. The new evidence the applicant sought to submit touched on two issues. One affidavit sought to put in evidence that one of the applicant's brothers had gone to work in Qatar because he no longer felt safe in Syria. Another of the applicant's brothers was allegedly recruited into the Syrian army by force. Finally, two men allegedly showed up at the family residence in Syria in August 2019 to ask questions about the applicant: they wanted to be told where the applicant was, when he arrived in Canada, and how he arrived there.

[11] Regarding the affidavit, the RAD was dissatisfied with its probative value. On the claim that one brother left for Qatar, the RAD stated that "the affidavit has little probative value because the [applicant's] personal circumstances are different and he did not provide details on the risks which Ahmed faced in Syria." (RAD decision, para 12).

[12] The other piece of evidence is the other brother's military card. Again, the RAD considered that this evidence has little probative value with respect to the applicant's situation, given the differences in age and health. It declared the evidence inadmissible.

[13] As to the merits of the claim, it is understood that the RAD did not consider the applicant's conscription to be a serious possibility of persecution. The RAD stated that the medical exemption, which the applicant was entitled to several years ago, would not be lost because there was insufficient proof of the surgery that allegedly cured the applicant's heart problem. The exemption would continue to exist since it was granted for medical reasons, and the surgery to repair the damage had not been proven. But the fact remains that neither the RPD nor the RAD expressed with any clarity what the impact of treating the heart problems would have been. The RPD insisted on addressing the issue of whether the applicant was cured. It was never stated why. There is no indication of the importance of this factor which the two administrative decision makers treated as being at the "heart of the issue of conscription" (RAD decision, para 16).

[14] In my opinion, the reasons that prompted the RPD to question the applicant on whether he was cured, even though he had been careful in this regard, remain unclear at best. My reading

of the transcript confirms that the argument before the Canadian authorities was that the applicant was trying to avoid conscription, rather than claiming an exemption for medical reasons that had been resolved. The treatment for heart problems is clearly mentioned in the BOC Form. I see no indication that applicant would even have wanted to attempt to use his lapsed medical exemption when this BOC Form notes that the exemption from military service was rescinded anyway under [TRANSLATION] “a decision issued in early July 2017” (BOC Form, para 5). The applicant referred to mandatory conscription, not his resolved heart problems. He was very open when questioned by the RPD, after submitting in his BOC Form that he had been treated. In my opinion, the confusion and misunderstanding stem from the questions asked.

[15] A negative inference was drawn from the fact that the BOC Form did not mention by name the surgical procedure that corrected the heart valve injury. The mere fact that the BOC Form did not mention the procedure was sufficient to declare the applicant not credible. From this, a series of consequences followed. Even though a response to a request for information revealed that those previously medically exempted in Syria are sent to an independent board for review to decide who is fit to serve in the civil war-torn military, the RAD stated that it did not have to consider this issue because the applicant lacked credibility. Neither the RPD nor the RAD considered it.

[16] The RAD asked whether a heart valve replacement was a minor medical condition that would qualify him for military service. The RAD simply stated that the issue was not resolved.

[17] The RPD had noted the issue of the age of conscription. The RAD simply stated that the age for military service is generally between 18 and 42 but noted that the age had been raised since the outbreak of the war in Syria. The RAD stated that it is unclear whether there is an official directive in this regard. Noting the existence of some documentary evidence, the RAD reported that the decision is made on a case-by-case basis, often based on whether the armed forces could benefit from someone's specific expertise. In this regard, the RAD simply stated that "[t]he RPD did not address the issue of whether there is a serious possibility that he would be recruited under the current military policy, given his personal situation" (RAD decision, para 21). The decision continues in the same vein. I quote from paragraphs 22 and 23 of the RAD decision:

> [22] The RPD also assumed that conscription was a determinative issue. It is not. The Federal Court of Appeal case law speaks to the issue of knowing whether conscription is a generally applicable legitimate right or is persecutory in nature. The issue of state protection is not part of the analysis. The RPD did not identify the appropriate legal issues. The appellant testified that he did not want to do military service because he did not want to kill anyone. The RPD did not assess this answer in light of the documentary evidence on this issue.
>
> [23] The issue of knowing whether the appellant is a bona fide conscientious objector and whether he risks being sent into combat at his age and with his alleged replaced heart valve, even if he is drafted, remains an outstanding issue.
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> [Footnotes omitted.]

[18] The RAD noted that there were significant issues that had not been resolved by the RPD and declared itself unable to resolve them without sending the matter back to the RPD for reconsideration. Despite this, the RAD decided that it did not have to do so because "the RPD had sufficient grounds not to believe the appellant regarding the heart surgery" (RAD decision,

para 24). It makes the credibility of the applicant a determinative issue. But his credibility was undermined because he failed to mention by name the surgery that resolved his heart problem in his BOC Form. Thus, on this basis alone, and despite the many unaddressed and unresolved issues, the RAD confirmed the RPD's decision.

[19] The second part of the decision relates to the applicant's alleged risks that, as a former resident of Saudi Arabia, he would face an objective risk if he were to be returned to Syria because he would be poorly received there. Indeed, the applicant was in possession of Saudi Arabia and United States visas, which could make him a target upon his return to Syria.

[20] The RAD noted that the BOC Form omitted this risk. Furthermore, it lacked any form of corroboration, which would make it purely speculative. The difficulties that the applicant might face in returning to Syria because he has an Alawite name are also treated as speculative.

[21] The same applies to his risk as a failed refugee protection claimant returning from abroad. For what seems to me to be a strange reason, the applicant is criticized for not having stated this risk in his refugee protection claim. One can question the importance of stating in a document prior to the examination of the refugee protection claim that if this claim is not granted, a more or less considerable risk would follow. This seems an obvious fact to me. In any event, the RAD rejected this argument because the applicant does not fit the profile of a person who, if denied refugee status, could be put at risk. Yet there is some documentary evidence that repatriated Syrians are at real risk of arrest and mistreatment because of lingering suspicions about them.

[22] All the RAD states on the matter is that “the [applicant] could make his own arrangements to return to Syria using a valid passport, without the intervention of the Canadian government. He did not leave Syria illegally and he still has a valid military service medical exemption. He is not involved in political activity. Given that refugee protection claims are confidential, there is no serious possibility that the appellant could be detained upon his return on the suspicion that he opposes the government” (RAD decision, para 32). It does not appear that the RAD considered that if he returns to Syria, the Syrian authorities will see the Saudi Arabian and American visas, and the fact that the applicant, after a stay in Canada, is returning to his country of origin. The RAD does not seem to take into account that a claimant, in such circumstances, could attract attention. The RAD is evidently satisfied that refugee claims in Canada are “confidential”.

III. Arguments and analysis

[23] At the outset, the applicant complained of an unreasonable decision and a breach of procedural fairness (where the standard of review is correctness).

[24] According to the applicant, the rationale provided for the RAD’s decision does not meet the minimum standard for reasonableness. He noted that “a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it”, as was observed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], para 128.

[25] We are reminded that justification is an integral part of a so-called reasonable decision. Paragraph 87 of *Vavilov* is cited in support of the need for a sound analysis since it states that "reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome" (*Vavilov*, para 87). This is part of the culture of justification established since *Vavilov*.

[26] It is distressing that the parties in this case have been swimming in confusion. I have read the transcript of the RPD hearing, and I have reviewed the RPD and RAD decisions, as well as the applicant's written submissions. To say that there was confusion is an understatement. It is not for the Court to lay blame at the feet of one or the other of the actors. Rather, the Court's role is to find an absence of the characteristics that make a decision reasonable.

[27] I will begin with an overview of *Vavilov*, in which the Supreme Court aims to foster a culture of justification so that a decision can be said to be reasonable. I will examine what the decision under review consists of and why I believe it lacks transparency and intelligibility, such that the Court can only conclude that it is wiser for a different panel of the RAD to reconsider the case and see which of the possible decisions it chooses.

[28] As is well known by now, *Vavilov* was intended to produce some degree of change in administrative law (see generally, "Big Bang Theory: Vavilov's New Framework for Substantive Review", Paul Daly and Colleen Flood eds., *Administrative Law in Context*, 4th ed (Emond Montgomery, Toronto, 2021)). As early as paragraph 2 of *Vavilov*, the Court states that there is a need to review and clarify certain aspects of the jurisprudence. Thus, the determination of the

standard of review is on the agenda. The application of the standard of reasonableness is also on that agenda. While the framework of analysis is still guided by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Court states that it will "affirm the need to develop and strengthen a culture of justification in administrative decision making" (*Vavilov*, para 2).

[29] The Court has simplified the determination of the standard of review. The vast majority of cases must now use the standard of reasonableness (*Vavilov*, para 10), which is presumed to be the applicable standard. Exceptions to the use of this standard already exist and are largely confirmed; the possibility of others being created is already foreseen (*Vavilov*, para 70).

[30] The distinct role conferred on administrative tribunals by Parliament must engender an attitude of respect for administrative decision makers that is manifested in judicial restraint and deference. But this attitude of respect is counterbalanced by a culture of justification for the exercise of public power delegated to administrative decision makers.

[31] Thus, a decision as a whole must be transparent, intelligible and justified to qualify as a reasonable decision. In *Vavilov*, the exercise of judicial review under the reasonableness standard of review compensates for the lack of guidance in the past on how to proceed. In my view, the Supreme Court is explicit and unequivocal. The focus is on justification because "reasoned decision-making is the lynchpin of institutional legitimacy" (quoted by the Supreme Court of Canada in *Vavilov*, at para 74; from the *amici curiae* factum).

[32] The necessity of a certain quality of reasoning is illustrated in paragraph 79 of *Vavilov*. I reproduce it in full:

> [79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

As the Supreme Court notes, reasons may have implications for the legitimacy of decisions where they are required, both in terms of procedural fairness and the reasonableness of a decision.

[33] Judicial review begins by examining the reasons for the decision and seeking to understand the line of reasoning that the administrative decision maker followed in reaching a conclusion (*Vavilov*, para 84). A result that might otherwise be reasonable cannot be valid if the reasoning is not rational and intelligible.

[34] The Court insists that the administrative decision maker must properly justify his or her decision, that he or she must not shirk this obligation to justify:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[35] A decision will be reasonable if the reviewing court understands the reasoning of the administrative decision maker in such a way that 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*, para 99).

[36] The Court in *Vavilov* identifies two basic categories of deficiencies: failures of internal logic and untenable decisions. Presumably, others may emerge over time. In this case, after several readings of the RAD decision and in light of the decision it confirms, I must unfortunately conclude that "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (*Vavilov*, para 103). I

hasten to add that the other actors, the RPD and the applicant, did not help pave the way for a decision with the characteristics of a reasonable decision. The hearing before the RPD was rather chaotic, with a certain insistence on discussing a medical exemption that it is not clear that the applicant was seeking, an applicant who testified with the assistance of an interpreter, and an applicant who never cleared up the confusion surrounding the medical exemption: on reading the transcript of the hearing, the RPD member seems to be very interested in the medical exemption that could have been lost since the heart problem that had given rise to the exemption had allegedly been resolved. In contrast, the argument before the RPD shows that it was the applicant's conscription that was emphasized and that the loss of the medical exemption was not so important, with the applicant suggesting instead that a governmental decree allowed conscription without exemptions. Put another way, the member was interested in the medical exemption, much more so than the applicant, who was merely responding to the concerns raised by the administrative decision maker, without this being the primary concern of the applicant, who feared general conscription without discrimination.

[37] In fact, the RPD's decision largely deals with the medical exemption. The RPD considered the issue and evidently did not believe the applicant. The Court cites several paragraphs in this regard:

> [TRANSLATION]
>
> [19] The panel asked if it is possible to obtain a document to attest that he was cured following an operation. The applicant replied that the hospital where the surgery took place had been bombed, but a cardiologist could confirm this and he did not have a document.
>
> [20] The panel asked him why he had not already sought medical evidence in Canada to show that he was cured. He replied that he did not think it was necessary to do so.

> [21] The panel asked him why he failed to state, in his Basis of Claim Form (BOC Form) or in any of his other statements submitted prior to the hearing, that he was cured of this medical condition. He replied that, according to the information, following an operation in 2009, he has been cured and he did not expect to be asked for a document to prove it.
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> [22] The applicant's explanation for this omission and his lack of effort to obtain and file as evidence a medical document is unsatisfactory and undermines his credibility in claiming that his heart condition has been cured. His heart condition, which allowed him to be exempted from military service in Syria, is central to his refugee protection claim, as his primary fear is forced recruitment into the Syrian army.
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> [23] In addition, the panel reminded the applicant at the conclusion of the hearing on May 29, 2018, that if he obtains a medical document regarding his health, he may request that the panel accept the evidence and consider that evidence prior to the final determination of the claim. The applicant has not provided the panel with any such document or evidence since the hearing ended.

It was the RPD that showed a strong interest, from the outset of the examination, in the medical exemption. This was not the applicant's doing. The applicant was only answering the member's questions. But this was not the object of his claim. Hence, it seems to me, the limited information provided about the medical exemption. In these circumstances, it would have been necessary to explain why the applicant's credibility was tainted in such a way that the entire claim had to be rejected on the basis of this one issue.

[38] It is not at all clear how transparency and intelligibility can be found either in the content of or in the emphasis placed by the RPD on the issue of the lost medical exemption if the real issue is in fact general conscription. In fact, the RPD relied on its finding on the medical exemption to reject the documentary evidence submitted by the applicant on the general cancellation of military service exemptions. It stated:

> [TRANSLATION]
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> [36] After considering all the evidence, the panel finds that the applicant is not generally credible. He has not provided credible and probative evidence regarding the recovery of his medical condition that allowed him to be excused from the military.

The problem is that the applicant did not attempt to do so because that was not the nature of his claim.

[39] The RPD decision is not the one before the Court. But the RAD, in its short decision, was satisfied that "medical exemption is at the heart of the issue of conscription" (RAD decision, para 16). It is unclear, to say the least, why this would be the case, rather than general conscription in Syria. The issue of general conscription was raised by the applicant at the RPD hearing from the outset. The RAD criticized the applicant for raising the medical exemption for the first time at the RPD hearing when he had not even mentioned his recovery in his BOC Form. My reading of the transcript of the RPD hearing is quite different. Rather, it was the member who was interested in this issue. The member acted as if the medical exemption was essential. This was repeated many times. In fact, it is not clear why this would be the case in the factual situation of this case. When the decision is read in the context of the member's examination, transparency and intelligibility are lacking.

[40] Thus, the RAD concluded that the applicant had very belatedly raised the loss of his medical exemption, which was not the case. Rather, my review of the transcript leads me to believe that it is more likely that this was never the case. It was the RPD that seized on the exemption and treated it as if it were the primary reason. Hence the misunderstanding. The

applicant's argument was not about the medical exemption for a condition that no longer existed. This was sufficient for the RAD to conclude that the applicant "is not credible and that there has likely been no significant change with respect to the [applicant's] medical exemption" (RAD decision, para 18). This conclusion, based on an incorrect premise, impacted the rest of the decision. The lack of credibility on this matter of a medical exemption resulted in several issues being sidestepped.

[41] In fact, one response to a request for information reported that individuals with medical exemptions would be seen by an independent panel for review. Given the applicant's lack of credibility, this issue was not addressed by the RPD in its decision. The RAD was satisfied with this.

[42] Other issues were not addressed by the RPD. The RAD noted that the "RPD also assumed that conscription was a determinative issue" (RAD decision, para 22). The RAD stated that this issue was not addressed by the RPD. Similarly, the issue of a serious possibility of the applicant being conscripted under the current military policy was not addressed, according to the RAD. The question of whether the applicant is a true conscientious objector was said to remain an open question. This, according to the RAD, means that these issues were not before it. But, in any event, "given my finding that the RPD had sufficient grounds not to believe the appellant regarding the heart surgery, this is enough to confirm the determination of the RPD on this issue, without referring the matter back to the RPD" (RAD decision, para 24).

[43] In essence, the RAD confirmed the RPD's finding on the applicant's credibility based solely on the fact that the BOC Form does not mention heart surgery (but does explicitly say that he was treated from September 5, 2009 to February 5, 2010 for heart problems) and that he first raised the issue in testimony before the RPD. As noted above, this is not accurate according to my reading of the hearing transcript. The applicant said he feared mandatory military service because a [TRANSLATION] "law that came out the month of the 7th in 2017, that rescinded all exemptions and so if I ever come back, I'm going to be drafted right away. And if I'm ever drafted I'm going to be sent to a place where I'm either going to kill or be killed" (May 29, 2018 transcript, p. 4). Only later did the RPD take up the issue of medical exemption. From the conclusion reached by the RPD, and accepted by the RAD, came a series of unfortunate consequences.

[44] Since *Vavilov*, the quality of reasons has become more important. Reasons are examined for reasonableness. Transparency, intelligibility and justification are sought. This is lacking here. The Supreme Court in *Vavilov* stated that "a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision" (para 105). The facts as they are known do not justify the RAD following the RPD's conclusion that was responsible for the emphasis on the medical exemption, while the applicant was very clear during the RPD examination that he was arguing a different justification for claiming persecution: a "law" of his country of citizenship, Syria, which he alleged would lead to his conscription. The RPD conducted its questioning as if the applicant had put forward the medical exemption issue at the hearing. At least that is what the RAD believed, in the decision for which

judicial review is sought. As a result, relevant issues were not considered by the RPD, and this was confirmed by the RAD.

IV. Conclusion

[45] The RAD stated in paragraph 17 of its decision:

> [17] The RPD was correct in drawing a negative inference from the fact that the appellant failed to indicate in his BOC Form written account that he had undergone a surgical procedure to correct a lesion on one of his heart valves. Although failure to mention material or key facts in a BOC Form may justify a negative finding, omission of a minor detail does not. The allegation that he could no longer receive a medical exemption is a material fact for a central element of the claim. It is a key issue, not a minor detail. The RPD was correct in drawing a negative inference from the fact that he raised this issue for the first time in his oral testimony, when he should have referred to it in the BOC Form.

If the applicant did not intend to invoke his medical exemption, but rather invoked a Syrian "law" that opened the door to general conscription, it was not abnormal that his BOC Form did not mention it. This same BOC Form noted a return to Syria for six months to undergo treatment for heart problems. This was not a state secret. It was at best an incidental matter under the applicant's theory of the case, which intended to raise a different issue than his past medical exemption. Indeed, if the 2016 law created a mandatory draft without recognition of past exemptions, as the applicant testified, the medical exemptions received ten years earlier were surely of minimal, if any, significance. In my view, the RAD's decision lacks the hallmarks of reasonableness. It is neither transparent nor intelligible. It merely accepts a conclusion about the credibility of the applicant that merited explanation.

[46] As I stated at the judicial review hearing, these pitfalls could have been avoided if the theory of the case had been made clear before the RPD. Instead, equivocation set in and was never resolved. It is from this equivocation that the lack of transparency and intelligibility stems.

[47] To be blunt, neither the RPD decision nor the RAD decision is satisfactory in terms of transparency or intelligibility when viewed against the record before the administrative tribunals, or after a careful reading of the transcript of the RPD hearing.

[48] The Court is of the opinion that the importance of the case, namely a possible return to Syria for the applicant because he was not granted refugee status, requires that the latitude left to the administrative decision maker be narrowed. In *Vavilov*, the Court states:

> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, **[2012] 1 S.C.R. 364**, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, **[2018] 2 S.C.R. 293**, at para. 53.
>
> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard,

> because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

And again, the Supreme Court states the following at paragraphs 134 and 135:

> [134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.
>
> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

The application for judicial review must therefore be granted and the entire record will have to be reconsidered. As the Federal Court of Appeal noted in *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at paragraph 42, in the context of a purportedly unreasonable decision which concerned the interpretation of legislation but is fully applicable with regard to the merits of the case, the decision cannot be tendentious, or expeditious, or result-oriented.

[49] It is preferable to return the matter to a different panel of the RAD for a new decision, which would include returning it to a different panel of the RPD, pursuant to subsection 111(1) of IRPA. Prudence dictates such a result.

The three options in subsection 111(1) will then be available to the RAD. The applicant's other arguments will also need to be revisited in order for a comprehensive review to be completed. This application for judicial review is *sui generis*. There is no question of general importance in this case.

JUDGMENT in IMM-6195-20

THE COURT ORDERS as follows:

1. The application for judicial review is allowed. The matter is returned to a new panel of the Refugee Appeal Division for redetermination under subsection 111(1) of the IRPA.

2. No question of general importance is certified under section 74 of the IRPA.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6195-20
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