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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

In *Pepa v. Canada (Citizenship and Immigration),* 2025 CarswellNat 2504, 2025 CarswellNat 2503, 2025 SCC 21, 504 D.L.R. (4th) 1 (S.C.C.), the Supreme Court refined and applied the reasonableness standard as developed in *Vavilov*, with a particular focus on the remedial implications of a finding that only one course of action could be characterized as reasonable for a decision-maker to take.

The appeal concerned s.63(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), which provides: "A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing". The appellant held a visa when she entered Canada. But on her entry into Canada, she was referred for an admissibility hearing to determine her entitlement to remain in the country. By the time the hearing at the Immigration Division rolled around, her visa had expired, and she was subject to a removal order.

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She sought to appeal to the Immigration Appeal Division but the IAD determined that it did not have jurisdiction, on the basis that precedent within the IAD, and from the Federal Court and Federal Court of Appeal, required that in order to appeal a negative decision, the affected person must hold a valid visa at the time of the appeal.

Both the Federal Court and Federal Court of Appeal found that the IAD's interpretation of s. 63(2) was reasonable. A majority of the Supreme Court allowed the appeal on the basis that the IAD's interpretation was unreasonable. Martin J. laid out several reasons why the IAD's interpretation could not stand, including the absurd result that people in the appellant's position lost their statutory right of appeal (at paras. 99-106) but her central proposition was that it is unreasonable for an administrative decision-maker "to rely on clearly inapplicable or distinguishable case law—like cases in different areas of the law or cases addressing different statutory provisions—without justification and explanation of its continued relevance to the matter at hand" (at para. 66).

With respect to remedy, Martin J. held it was unnecessary to remit the matter back to the IAD as there was only one reasonable course of action in light of proper approach to statutory interpretation.

> [121] Having determined that the IAD's interpretation of s. 63(2) is unreasonable, I turn now to the question of remedy. In *Vavilov*, this Court held that, "where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons" (para. 141).
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> However, a court may decline to remit a matter to the decision maker "where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (para. 142). When the decision at issue involves statutory interpretation, "it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" (para. 124). When it is clear that there is only one reasonable interpretation, the reviewing court should make a pronouncement on that interpretation rather than remitting the matter *pro forma* for reconsideration.
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> [122] In *Mason*, this Court recently determined there was one single reasonable interpretation of s. 34(1)(e) of the IRPA. That section provides that permanent residents and foreign nationals are inadmissible to Canada on "security grounds" for "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada". The interpretative question was whether "acts of violence" require a link to national security or the security of Canada, or whether s. 34(1)(e) applies to acts of violence more broadly even without such a link. This Court concluded that the administrative decisions under review did not reasonably interpret the section of the IRPA at issue largely because the IAD's reasons failed to address critical points of statutory context and the broad consequences of its inter-

pretation on the individual. The IAD's omissions were significant, involved a failure of responsive justification and, cumulatively, rendered the IAD's decision unreasonable. This Court's analysis pointed overwhelmingly to only one reasonable interpretation of s. 34(1)(e), as the inevitable result of a proper reasonableness analysis.

[123] *Mason* concluded that a court may properly determine during a reasonableness review that the interplay of text, context, and purpose leaves room for a single reasonable interpretation of the statutory provision, though "[i]t must be stressed that the possibility of a single reasonable interpretation is not a starting point of reasonableness review, as this would be contrary to a 'reasons first' approach" (para. 71 (emphasis deleted)). Instead, "it is a conclusion that a reviewing court may draw as a result of a proper reasonableness review, as part of the court's consideration of the appropriate remedy" (para. 71 (emphasis deleted)).

[124] Deference does not absolve reviewing courts of their duty to review the decision because "the exercise of public power must be justified, intelligible, and transparent" (*Vavilov*, at para. 95). The "reasonableness review may at least on occasion require intensive delving into the merits of a decision. Such deep probes do not necessarily point to disguised correctness review or an abandonment of deference" (Mullan, at pp. 215-16).

[125] Through the application of the relevant legal and factual constraints, a reviewing court focuses exclusively on whether the decision maker's decision was reasonable. However, it is natural that this process may incidentally eliminate other options that suffer from the same defects as the one under review, and may even narrow the field to only one possible interpretation. It should not be a surprise that there are cases in which one reasonable interpretation may arise, given that when legislatures speak, they intend to speak with clarity and purpose. This outcome will be more plausible when the question of interpretation is narrow, the statutory language is highly precise, and there are functionally very few options to choose from. A reviewing court should only conclude that there is one inevitable interpretation if that conclusion flows logically and inexorably from the legal and factual constraints already identified during the review of the decision maker's reasons.

[126] In considering whether there is any utility in submitting this matter for reinterpretation by the IAD, the starting point is to identify the narrow question at hand. Here, it is at what point in time a person must hold a visa in order to access a right of appeal against a removal order under s. 63(2). That this question is categorical rather than qualitative suggests that there is a limited pool of potential answers. It is useful to refer to the four possible timeframes put forward by the FC for when the visa must be held: (1) at the time of arrival in Canada; (2) at the time the report under s. 44(1) is made; (3) at the time it is referred to the ID; or (4) at the time the removal order is issued.

[127] The time of the removal order is not a reasonable interpretation for the reasons explained.

[128] Options two and three suffer from the same problems which made option four unreasonable. Regardless of whether the validity of the visa is assessed at the time the s. 44(1) report is made, or the time it is referred to the ID, or the time the removal order is issued, the same absurdities and arbitrariness persist. The average person subject to further examination upon entering Canada can lose their appeal right simply due to the normal timeline of the examination process extending beyond their visa expiry date, before the decision subject to the appeal has even been made. Indeed, before the hearing has even begun. These interpretations are all similarly unreasonable.

[129] The only interpretation that does not face these same grave disqualifications is the one put forward by Ms. Pepa: that the validity of the permanent resident visa, for an appeal under s. 63(2), is assessed by the IAD at the time of arrival in Canada.

[130] The purpose of the expiry date on the visa, within the sequence of the IRPA, is that the visa holder must travel to Canada and present themself for examination before that expiry date is up. Although the visa holder must travel to Canada prior to the expiry date, examinations and investigations may and usually do extend past this date, as was the case for Ms. Pepa. As the expiry date on the visa is based only on the earliest expiry date of the documents underlying it (the applicant's passport or medical documentation), if a visa holder has a passport with a fast-approaching expiry date, for example, the visa's expiry date could pass quickly after the date of arrival in Canada. Only this interpretation protects the rights of appeal granted to holders of permanent resident visas and acknowledges the high stakes of losing a right to appeal a removal order.

[131] In the case at bar, we reach the conclusion that the validity of the permanent resident visa for the purposes of the appeal right under s. 63(2) must be assessed by the IAD at the time of arrival in Canada. This conclusion is reached as a result of a robust reasonableness review to consider the appropriate remedy, using the framework established by *Vavilov* and utilized in *Mason*. Cumulatively, the above deficiencies make the decision unreasonable. In this case, the appropriate remedy is to remit the matter to the IAD for determination, with Ms. Pepa's right of appeal now established.

On the issue of remedy, Rowe J. dissented in part, and while finding the IAD decision to be unreasonable, would have remitted the matter back to the IAD, while two other justices, Côté and O'Bonsawin JJ., dissented, and would have found the IAD's decision reasonable.

This release features developments in several other areas of administrative law.

In *Canada (Prime Minister) v. Hameed*, 2025 CarswellNat 2339, 2025 CarswellNat 2340, 2025 FCA 118, 506 D.L.R. (4th) 131 (F.C.A.), the Federal Court of Appeal considered the scope of judicial review in the context of a challenge to the federal government's failure to make timely judicial appointments. The Court allowed an appeal from a Federal Court decision which had accepted a constitutional convention in this regard. In the course of its reasons, the Court considered whether the Federal Court had jurisdiction to hear the application. The Federal Court of Appeal found the Federal Court had erred in assuming jurisdiction under the *Federal Courts Act*.

In *Ricketts v. Veerisingnam*, 2025 CarswellOnt 9973, 2025 ONSC 841 (Ont. Div. Ct.), the Ontario Divisional Court considered the question of when new issues can be raised on judicial review. The Court (with Nakatsuru J. dissenting) held that it was not open to a person appealing a decision of the Landlord Tenant Board (LTB) to raise ineffective assistance of counsel and file fresh evidence on the issue on judicial review. D.L. Corbett J., writing for the Court, distinguished a judicial review of an administrative tribunal from the appeal of a trial judge where the new issue of ineffective assistance of counsel often will be raised for the first time on appeal.

In *Talukder v. Canada (Public Safety and Emergency Preparedness),* 2025 CarswellNat 2759, 2025 FCA 132 (F.C.A.), the Federal Court of Appeal dismissed motions to intervene from the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees under Rule 109 of the *Federal Courts Rules* on the basis that the proposed interventions will add issues to the appeal and go beyond the central issue in dispute between the parties.