Federal Court  Cour fédérale

Date: 20201005

Docket: IMM-4294-19

Citation: 2020 FC 948

Toronto, Ontario, October 05, 2020

PRESENT: Mr. Justice A.D. Little

BETWEEN:

AMENDE VIOLET OKOJIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application, Amende Violet Okojie asks the Court to set aside a departure order dated July 2, 2019 made under the *Immigration and Refugee Protection Regulations,* SOR/2002-227. That order was based on a finding that the applicant was a foreign national who was inadmissible under subs. 40.1(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), which in turn followed a final determination under IRPA subs. 108(2) that her refugee protection has ceased.

[2] A delegate of the Minister of Citizenship and Immigration (the "Delegate") made the departure order. The applicant submits that the Delegate gave no consideration to a detailed legal submission that she had not lost her status as a permanent resident of Canada. For that reason, she contends, the departure order must be set aside so that her argument can be properly considered.

[3] This matter bears considerable resemblance to *Tung v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 917, in which my colleague Justice Brown set aside a removal order made by a delegate of the Minister of Public Safety and Emergency Preparedness.

[4] I reach the same conclusion in this application, albeit for somewhat different reasons given the specific circumstances of this case and the additional detailed guidance on issues of justification provided by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

I. Facts and Events Leading to this Application

[5] Ms Okojie is a citizen of Nigeria who came to Canada in 2001. On July 8, 2003 she was granted refugee protection. She became a permanent resident of Canada on July 19, 2004.

[6] In 2004, 2009 and again in 2014, the applicant obtained a new passport from competent government authorities in Nigeria. Between 2004 and 2015, she travelled to Nigeria on 10-12 occasions.

[7] In 2015, the Minister applied to the Refugee Protection Division of the Immigration and Refugee Board (the "RPD") for cessation of the applicant's refugee status. The Minister's position was that Ms Okojie had voluntarily re-availed herself of the protection of her country of nationality, Nigeria, under paragraph 108(1)(*a*) of the IRPA.

[8] By decision dated December 19, 2018 (the "RPD Decision"), the RPD allowed the Minister's application for cessation on the basis that she had re-availed herself of the protection of her country of nationality.

[9] Ms Okojie applied for judicial review of the RPD Decision. On October 10, 2019, Justice Strickland dismissed her application: *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287.

[10] Meanwhile, on January 11, 2019, an officer filed a report to the Minister under subs. 44(1) of the IRPA. The officer reported that Ms Okojie was a "foreign national who has been authorized to enter Canada and who, in my opinion, is inadmissible" pursuant to IRPA subs. 40.1(1) "in that, on a balance of probabilities, there are grounds to believe [she] is a foreign national who is inadmissible on a final determination under subs. 108(2) that their refugee protection has ceased". The report referred to the RPD Decision to cease the applicant's refugee status and nullify the original decision to the RPD conferring refugee status.

[11] On March 1, 2019, Canada Border Services Agency (the "CBSA") issued a notice to the applicant to attend a hearing on March 16 under IRPA subs. 44(2) to address the report to the Minister under subs. 44(1).

[12] By letter dated March 12, 2019, the applicant's legal counsel submitted to the Delegate that Ms Okojie was not a foreign national, but a permanent resident, based on a statutory interpretation argument concerning paragraph 46(1)(*c.1*) of the IRPA (Certified Tribunal Record ("CTR"), pp. 55-59). Ms Okojie delivered the letter when she attended the hearing on March 16. The March 16 hearing was adjourned, apparently "in an effort to give the proper attention to the submissions" (CTR, p. 62).

[13] CBSA rescheduled the hearing several times, eventually to July 2, 2019. Ms Okojie applied to this Court for a stay of the hearing. Justice Gascon dismissed the application: *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880.

[14] At the July 2, 2019 hearing, the applicant again referred the Delegate to her counsel's March 12, 2019 letter submissions arguing that she remained a permanent resident. The Delegate completed a form entitled "Minister's Delegate Review". In completing that form:

- The Delegate ticked a box indicating that Ms Okojie advised that she was not a permanent resident (something the applicant contested by affidavit on this application);

- The Delegate ticked Yes in a box asking if "the allegations are correct and supported by evidence" and handwrote "Ms. Okojie confirmed the allegations are correct. Supporting evidence on file";

- The form states "I am satisfied on the basis of evidence that the allegation is correct. Therefore I find that you are the person described in paragraph [officer's handwriting: 40.1(1)] of the Immigration and Refugee Protection Act";

- Under "Removal Order Issued", the officer ticked the box for "Departure Order"; and

- Under "Additional Notes", the Delegate handwrote "√ Submissions Considered."

[15] Also on July 2, 2019, the Delegate made the Departure Order that is challenged in this application. It stated:

> I HEREBY make a Departure Order against the above-named person pursuant to the *Immigration and Refugee Protection Act and Regulations* because I am satisfied that the person is described in:
>
> Subsection 40.1(1) in that, on a balance of probabilities, there are grounds to believe is a foreign national who is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

II. Legislation

[16] The following provisions in the IRPA are important to an understanding of Ms Okojie's application to this Court:

Cessation of refugee protection – foreign national	**Perte de l'asile – étranger**
40.1(1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.	**40.1(1)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.
Cessation of refugee protection – permanent resident	**Perte de l'asile – résident permanent**
(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).	**(2)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des fait mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.
Loss of Status	**Perte du statut**
Permanent resident	**Résident permanent**
46(1) A person loses permanent resident status	**46(1)** Emportent perte du statut de résident permanent les faits suivants :
[…]	[…]
(*c.1*) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*);	**c.1)** la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile;
Cessation of Refugee Protection	**Perte de l'asile**
Rejection	**Rejet**
108(1) A claim for refugee protection shall be rejected, and a person is not a	**108(1)** Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié

Convention refugee or a person in need of protection, in any of the following circumstances:	ou de personne à protéger dans tel des cas suivants :
the person has voluntarily reavailed themselves of the protection of their country of nationality;	il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
[…]	[…]
Cessation of refugee protection	**Perte de l'asile**
(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).	**(2)** L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection de réfugiés, de tels des fait mentionnés au paragraphe (1).

III. Standard of Review

[17] The parties both submitted, and I agree, that reasonableness is the applicable standard of review of the Delegate's decision to issue a departure order.

[18] Reasonableness is the presumed standard applicable to judicial review of administrative decisions. This presumption of reasonableness review applies to all aspects of the decision: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 16, 23 and 25. The presumption may be rebutted by legislative intent, or if the rule of law requires a different standard: *Vavilov*, at paras 17, 23 and 69. *Vavilov* identifies only five such situations: see *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 (Stratas, JA), at para 16. None of those exceptions applies here.

[19] A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and justified in relation to the facts and law that constrain the decision-maker: *Vavilov*, at para 85. An otherwise reasonable outcome will not stand if it was reached on an improper basis, for example by an unreasonable chain of analysis in the reasons, or if the decision is not justified in relation to the facts and applicable law: *Vavilov*, at paras 83-86 and 96-97; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6.

[20] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. While the court's review is robust – meaning it will be thorough and sensitive to the legal and factual circumstances in each case – it is also disciplined. Not all errors or concerns about a decision will warrant intervention. The reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov,* at para 100. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently fundamental or significant to render the decision unreasonable: at para 100.

[21] The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. The Court in *Vavilov* contemplated that the reviewing court may consider whether evidence before the decision-maker constitutes a factual constraint on the decision-maker.

However, the reviewing court must not reweigh or reassess the evidence: *Vavilov*, at paras 125-126.

[22] In assessing reasonableness, the reviewing court may consider the submissions of the parties to the decision-maker, because the decision-maker's reasons must meaningfully account for the central issues and concerns raised by the parties: *Vavilov*, at para 127. This is connected to the principle of procedural fairness and the right of the parties to be heard, and listened to. The decision-maker is not required to respond to every line of argument or possible analysis or to make explicit findings on every point leading to a conclusion. However, 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": *Vavilov*, at para 128.

[23] In my view, the Supreme Court's decision in *Vavilov* raised the bar for what passes as sufficient reasons to justify some kinds of decisions. The majority of the Court emphasized the creation of a "culture of justification" in administrative decision-making: at paras 2 and 14. The Court held that on a judicial review application, the reviewing judge must consider both the reasons provided by decision-maker and the overall outcome: at paras 83 and 87. The reviewing court should start with the reasons, as they are the "primary mechanism by which administrative decision-makers show that their decisions are reasonable": at para 81. "[C]lose attention" must be paid to those reasons: at para 97. In addition, a decision must not only be justifiable; where reasons are required, the decision must actually be justified, by way of reasons, by the decision-maker: at para 86. The Court outlined in detail how to approach and analyze a decision-maker's

reasons, providing guidance about what will, and will not, be sufficient as justification for judicial review purposes: esp. at paras 84-86, 96 and following.

[24] Relatedly, the legal requirements for justification cannot lose sight of the specific context in which the impugned decision arises. The decision must be responsive to those affected by it, particularly if the impact of the decision on the individual's rights and interests is severe: *Vavilov*, at paras 95-96 and 133. Judicial review of the decision must also be mindful of the legal context of the impugned decision: *Vavilov*, at paras 86 and 89-94.

IV. Analysis

[25] Ms Okojie makes two overall submissions. First, she contends that the departure order should be set aside because the Delegate failed to give any consideration of her legal arguments made in counsel's letter dated March 12, 2019. In that letter, counsel argued that Ms Okojie remained a permanent resident based on certain facts related to her reavailment and an interpretation of IRPA paragraph 46(1)(*c.1*). In Ms Okojie's submission, *Vavilov* requires that the Delegate engage with her central arguments. Having not done so, the Delegate's decision to issue a departure order should be set aside and the matter remitted to another delegate of the Minister, who must consider those arguments before making a decision.

[26] The applicant's second position hinges on the interpretation of paragraph 46(1)(*c.1*). She contends that she has not lost her permanent resident status under that provision, and therefore the Delegate had no legal authority make a departure order because she was not inadmissible under subs. 40.1(1) – which only applies to foreign nationals.

[27] Justice Gascon described the applicant's statutory interpretation argument in detail in *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880, at paras 23 to 29. In sum, the argument is as follows. If a person falls in the circumstances listed in subs. 108(1), the person loses refugee status if the Minister applies successfully under subs. 108(2). In that case, the circumstances listed in paragraph 46(1)(*c.1*) may be triggered: a person loses permanent resident status "on a final determination under subs. 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(*a*) to (*d*)". If that paragraph applies, the person is inadmissible under s. 40.1(1) as a foreign national and a departure order may be issued based on a report under subs, 44(1). In this case, Ms Okojie submits that while the RPD's determination under subs. 108(2) occurred in 2018, that was only a formal recognition of what had in fact occurred much earlier. She submits that the facts that base her reavailment under paragraph 108(1)(*a*) occurred in 2004 and 2005, when she was first issued a passport by the Nigerian government and travelled to Nigeria on that passport.

[28] Those dates are critical to the applicant's position because Parliament enacted paragraph 46(1)(*c.1*) in 2012. Ms Okojie submits that Parliament enacted no transitional provisions that apply might expressly decide to make paragraph 46(1)(*c.1*) retrospective and nothing in the language necessarily implies that it applies retrospectively. Relying on the Supreme Court's decision in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 SCR 289, she argues that her permanent resident status cannot be lost due to events that occurred before paragraph 46(1)(*c.1*) came into force on December 15, 2012. Because her reavailment was based on events in 2004 and 2005, paragraph 46(1)(*c.1*) does not apply to Ms Okojie and she did not lose her permanent resident status. As a permanent resident, she is not inadmissible

under subs. 40.1(1). The report under subs. 44(1) is legally incorrect and the Delegate had no lawful authority to make a departure order based on that inadmissibility finding.

[29] The respondent disagrees with both submissions. On the first, the Minister contends that the Delegate is presumed as a matter of law to have read the submissions and indeed, expressly stated that she had done so. That, the respondent says, was enough under *Vavilov* for the purposes of the decision in question here. The RPD made the key decision that Ms Okojie had re-availed and lost her refugee status, so in practical terms, the Delegate had more little to decide given the nature of the Departure Order. The Delegate had no legal obligation to write pages of analysis in response to Ms Okojie's legal submissions.

[30] On the second issue, the respondent contends that under paragraph 46(1)(*c.1*), it is the determination under s. 108 that refugee protection has ceased that triggers the loss of permanent resident status. The use of "has ceased" in subs. 108(2) refers to events in the past, but the provision speaks of a legal status (or loss of) going forward. In addition, all of the triggering events under subs. 46(1) are prospective in nature, including paragraph 46(1)(*c.1*). In the Minister's submission, Ms Okojie is no longer a permanent resident owing to paragraph 46(1)(*c.1*) and therefore the Departure Order was made with lawful authority. The Minister further submits that the Delegate's decision was reasonable on the record before her.

[31] Two important points arose at the hearing of this application. First, the respondent submitted that, contrary to the applicant's submission, the facts on which the RPD based its reavailment decision under subs. 108(2) were <u>not</u> limited to the period of 2004-2005 and in fact

the re-availments occurred up to 2015, i.e. after paragraph 46(1)(*c.1*) came into force on December 2012. If correct, this point could have a significant impact on the premise of the applicant's legal submissions.

[32] In addition, at the hearing the applicant's counsel reversed the order of the two issues above, in order to focus on the statutory interpretation argument. Although both counsel observed that the applicant's statutory interpretation of paragraph 46(1)(*c.1*) had been raised in previous applications to this Court, including before Justice Brown in *Tung*, none of the prior decisions has considered it on its merits. Counsel for the applicant therefore urged the Court to take this opportunity to interpret the provision. In his submissions, the respondent's counsel acknowledged that doing so would be of assistance.

[33] In my view, this application should be resolved by answering two questions. First, was the applicant's position in her counsel's letter dated March 12, 2019 a potential legal or factual constraint bearing on the Delegate's decision to issue a Departure Order? This issue goes to the nature of the submissions made by the applicant, and whether there is a sufficient basis, both legal and factual, for the position she took such that the position should be put to, and had to be considered by, the Delegate.

[34] In some respects, this first question adopts a methodology akin to the one used by Stratas JA in *Hillier v Canada (Attorney General)*, 2019 FCA 44, at paras 13-29. Focusing this first question on the existence of potential legal and factual constraints on the decision-maker incorporates the constraints-based approach taken to reasonableness review in *Vavilov* and other

appellate cases: see the discussion in *Entertainment Software Assoc.*, at paras 24-36. Consistent with *Vavilov*'s principles of judicial restraint and respect for the Minister's role as the initial decision-maker, this first question is intended to avoid findings by the Court on the factual or legal merits. I will therefore not take up the applicant's request to provide an interpretation of the relevant provisions of the IRPA – even a "tentative" one: *Hillier*, at para 18. In my view, it should be for the Minister or his/her delegate to provide their legal interpretation at first instance and apply it to the applicant's circumstances.

[35] An answer to this first question therefore navigates around both the Scylla of correctness (or 'disguised' correctness) review and the Charybdis of abandoning the fundamental role of the Court on an application for judicial review.

[36] The second question addressed below is: did the Delegate's decision display the required elements of transparency, intelligibility and justification that are required by the Supreme Court in *Vavilov*?

Issue 1: Did the Applicant's Position Potentially Constrain the Delegate's Ability to Issue the Departure Order?

[37] In my view the answer to this question is Yes. There are two considerations at play.

[38] First, the applicant's submissions focus on a fundamental legal issue – whether there is legal authority for the Departure Order due to the inadmissibility of the applicant under subs.

40.1(1) of the IRPA. If the applicant is correct in her interpretation of paragraph 46(1)(*c.1*), she may still be a permanent resident of Canada. If she remains a permanent resident of Canada and is not a foreign national, then subs. 40.1(1) cannot render the applicant inadmissible. If she is correct, there may have been no lawful authority to make the Departure Order. In that case, the IRPA would act as a legal constraint on the outcome of the Delegate's decision. In saying so, I make no comment on the strength of the applicant's or the respondent's positions in law; I simply find that the applicant's legal argument is sufficient to put to the Delegate for consideration.

[39] A second, factual consideration is more nuanced. The applicant's legal position on this application, and before the Delegate in the March 12, 2019 letter, is premised on the position that the events that led to the RPD's cessation finding all occurred prior to December 15, 2012 when IRPA paragraph 46(1)(*c.1*) came into force. As noted, the respondent took issue with that premise, arguing that some of the events giving rise to the applicant's re-availment occurred after December 15, 2012, or alternatively, some of the events upon which the RPD concluded that the applicant had re-availed were found by the RPD to have occurred after 2012.

[40] Having reviewed the record and the RPD's decision with care, I believe that there is no silver bullet for the respondent that prevents the applicant's position from being put to the Delegate. The applicant's position has sufficient foundation to justify consideration by the Delegate, recognizing that there are arguments to be made for the respondent's position. I will explain concisely, and only for the purposes of this application, with reference to certain findings

in the RPD Decision and to specific paragraphs in that decision on which the applicant relies for her argument.

[41] The Minister submitted to the RPD that Ms Okojie voluntarily re-availed herself of the protection of Nigeria by applying for and receiving multiple Nigerian passports from government officials. The Minister further alleged that she used those passports to return to Nigeria voluntarily "a number of times over an eleven-year period" (RPD Decision, at paras 4 [quotation], 5 and 11). Ms Okojie confirmed that her three passports, issued in 2004, 2009 and 2014, were official Nigerian passports and she was their rightful holder: at para 13. Based on Ms Okojie's testimony, the RPD found that she visited Nigeria in 2004, 2005, 2007, 2009, 2010, 2012, 2013 and 2015: at para 14.

[42] The RPD found that that the determinative issue was whether Ms Okojie had, through her actions, taken sufficient action (i) voluntarily, (ii) intentionally and (iii) actually to reavail herself of the protection of the authorities in Nigeria under IRPA paragraph 108(1)(*a*): RPD Decision, at para 18.

[43] At paragraph 19 of its decision, the RPD made the following conclusion related to the voluntariness and intention requirements for reavailment under paragraph 108(1)(*a*):

> The panel finds that, on a balance of probabilities, the respondent's [Ms Okojie's] actions in obtaining a new passport from Nigerian authorities in Abuja on three separate occasions, was both voluntary and intentional … she applied and received a passport from Nigerian authorities, on three separate occasions and furthermore, she travelled on those passports on ten separate occasions to Nigeria.

[44] In paragraph 24, the panel observed again that Ms Okojie's reavailment was voluntary and intentional. She renewed her passport in 2004 for the sole purpose of travel to Nigeria, having already obtained permanent residence status in Canada, and the purpose of her passport was for travel not identification. The panel then referred to Ms Okojie's return trips to Nigeria, to marry, to achieve a pregnancy, for support during miscarriages and to see her ill parents, all of which the panel found were voluntary, not necessary. I note that these trips occurred not only in 2004-2005 but up to 2015 and using not only the 2004 passport but also the 2009 and 2014 passports: RPD Decision, at paras 14-15 and 25-26.

[45] At paragraphs 25-26, the RPD continued to consider Ms Okojie's evidence about the voluntariness and intention of her trips, including after her husband became a permanent resident of Canada in 2007 – he could not adjust and later returned to Nigeria, where she visited him; and her 2010 and 2015 trips to visit her ill father and mother, respectively.

[46] In paragraph 27, the panel found, after considering these explanations by Ms Okojie for her actions, that there was insufficient proof to the contrary to rebut the presumption that she voluntarily and intentionally re-availed herself of the protection of her country of nationality by applying for and obtaining a new national passport. By "obtaining and using this national passport to return to Nigeria", the panel found that she "did actually obtain protection of Nigeria authorities" and therefore fulfilled the third requirement for reavailment under paragraph 108(1)(*a*). In paragraph 28, the RPD panel found that she not only obtained the services and assistance of Nigeria officials in obtaining a new passport but that her "visit there with a valid passport in her own identity meant that she was alerting officials to her presence in the country".

The panel found that Ms Okojie entered Nigeria and made her whereabouts known to officials of the country based on "the several entry and exit stamps in his passport" (*sic*). The panel found that Ms Okojie through her reavailment acknowledged her confidence in the Nigerian government to protect her, although she was granted refugee status in Canada in 2003 on the basis of her fear of remaining in Nigeria.

[47] The RPD's overall conclusion stated at paragraphs 6 and 29 made no specific reference to any events that led to its conclusion.

[48] I return to the parties' submissions on this application. As I understood the applicant's counsel in reply at the hearing, her argument is that when the RPD mentioned Ms Okojie's initial new passport in 2004 at paragraph 24 of the RPD Decision, it was that passport's renewal, and the trip(s) to Nigeria using it in 2005, that formed the basis of the RPD's conclusion on reavailment at paragraphs 27-28. In those paragraphs, the RPD made references to "a" passport (singular), "this passport", "a" valid passport and "her visit" (singular), all of which referred back to the applicant's initial 2004 passport renewal mentioned in paragraph 24. Hence, the applicant's position on this application, and before the Delegate in the March 12, 2019 letter, was that the events that led to the RPD's conclusion of reavailment (at least on the third element of actual reavailment) all occurred prior to December 15, 2012 when IRPA paragraph 46(1)(*c.1*) came into force.

[49] On the other hand, the respondent submitted that some of the events considered by the RPD occurred after December 15, 2012. There are RPD findings that refer to all three of her

Nigerian passports and to her many visits to Nigeria after 2005. Ms Okojie obtained a new Nigerian passport in 2014 and visited that country after 2012 up to 2015.

[50] Without making any comment on which party's position is preferable, in my view, there was a sufficient factual basis in the RPD's Decision to trigger the applicant's position concerning paragraph 46(1)(*c.1*) of the IRPA.

[51] I conclude therefore on the first question that the applicant's position as set out in her legal counsel's letter dated March 12, 2019 was a potential factual and legal constraint on the Delegate's decision to issue a Departure Order, such that the position was appropriate to be put to and considered by the Delegate.

Issue 2: Does the Delegate's decision display the required elements of transparency, intelligibility and justification that are required under *Vavilov*?

[52] In my view, the Delegate's decision does not display the essential requirements of transparency, intelligibility and justification that are the hallmarks of reasonable administrative decisions as set out in *Vavilov*. As explained in more detail below, the Delegate neither engaged sufficiently with, nor justified her conclusion in any way concerning, the applicant's central argument that she continued to be a permanent resident of Canada on a proper interpretation of the IRPA.

[53] The applicant made her position clear in a detailed letter from her legal counsel. The applicant's argument goes to the heart of whether the Delegate had legal authority to make the Departure Order. If the applicant is correct that she remained a permanent resident, and did not become a foreign national in Canada after the RPD's decision under subs. 108(2), she was not inadmissible under subs. 40.1(1). In those circumstances, I find, as did Justice Brown in *Tung*, that the Delegate had to do more than she did before issuing the Departure Order.

[54] Justice Brown decided *Tung* before the Supreme Court released its decision in *Vavilov*. His reasoning is based on previous Supreme Court decisions that were substantially incorporated into the Court's guidance in *Vavilov*. Justice Brown applied a reasonableness standard of review and focused on the existence of justification, transparency and intelligibility and whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law: at paras 5-6. In *Tung*, Justice Brown concluded that there was nothing in the record that indicated that Ms Tung's detailed submissions "were considered at all": at para 6. He found that, given the importance of the loss of permanent resident status, some attention must be given to the submissions made by the affected person as to why she should not be ordered to leave Canada. Justice Brown was not persuaded that that "any consideration" was given to her submissions in that case: at paras 10-11.

[55] With respect to the decision-maker's reasons (or absence of) in *Tun*g, Justice Brown stated at para 16:

> It may be that the decision-maker, in this case the Minister's Delegate, decided all of the arguments advanced by the Applicant lacked merit. It may be the Minister's Delegate found some had merit and that others did not. I am not able to tell on this record

> what happened. I am told the Minister's Delegate found status was lost "by operation of law", but there is no such finding in the record. There is effectively nothing. And that gives this reviewing court cause to order judicial review, which will be done.

[56] In the present case, the decision of the Delegate includes the Departure Order and the form entitled "Minister's Delegate Review" with the boxes to tick and places for the Delegate to add specific comments.

[57] The Delegate must have accepted the contents of the report of the officer made under subs. 44(1). As described earlier, that report found the applicant to be inadmissible under IRPA subs. 40.1(1) because there were grounds to believe she was a foreign national who was inadmissible on a final determination under subs. 108(2) that their refugee protection has ceased. It is only by virtue of paragraph 46(1)(*c.1*) that one can conclude that Ms Okojie was inadmissible under subs. 40.1(1) due to a decision under subs. 108(2).

[58] The Minister's Delegate Review form included the Delegate's handwritten statement "Submissions considered." While on the face of the record, the Delegate stated that she considered submissions, there is actually no indication what submissions she considered before issuing the Departure Order. According to the form, the applicant appeared without counsel, so one must infer that the submissions were those in counsel's letter dated March 12, 2019. The Delegate did not say.

[59] There is no indication that the Delegate actually engaged with the submissions made to her on the central issue raised by Ms Okojie. If the Delegate did consider them, she must have (i)

disagreed with the applicant's submissions on whether she remained a permanent resident and the applicant's legal interpretation of paragraph 46(1)(*c.1*) and (ii) accepted the conclusion in the officer's report made under subs. 44(1). The record does not disclose how she reached those conclusions, or why she did not accept some or all of the applicant's submissions. There is no suggestion that she received or considered any written legal arguments contrary to the applicant's submissions. She does not indicate whether she read IRPA paragraph 46(1)(*c.1*) or the RPD's decision. We do not know if she used, considered or was even aware of any events after December 15, 2012 to support her decision to make the Departure Order. The record leaves the Court unable to determine whether the Delegate made any effort at all to engage or grapple with the applicant's position set out in her counsel's detailed letter dated March 12, 2019.

[60] In the present circumstances, the Delegate merely confirmed that she had "[c]onsidered submissions". Like Justice Brown in *Tung*, I do not believe that the Delegate had to write a lengthy decision or explanation for why she accepted the report under subs. 44(1) and disagreed with the applicant's submissions on the interpretation of paragraph 46(1)(*c.1*). The Supreme Court in *Vavilov* expressly stated that a decision maker is not required to respond to every line of argument or possible analysis or to make explicit findings on every point leading to a conclusion (*Vavilov*, at paras 91 and 128); however, a decision-maker's failure to meaningfully grapple with key issues or central arguments raised by a party may be a concern: *Vavilov*, at para 128. It is also not for the Court to provide reasoning that was not provided by the Delegate: *Vavilov*, at paras 96-97 (discussing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708).

[61] In my view, given the Supreme Court's emphasis on justification in *Vavilov*, some circumstances require more than an implicit or silent understanding that a decision-maker has considered both parties' substantive legal arguments before making a decision that affects an individual's fundamental rights or interests. In this case, the Delegate had to do more than she did to confirm that she engaged and grappled with the applicant's submissions that she remained a permanent resident; there had to be some concrete level of responsiveness to the contents of counsel's letter. It was insufficient merely to handwrite that she considered the submissions on the form. The absence of additional comments demonstrating the Delegate's engagement with the central issue raised by the applicant "call[s] into question whether the decision-maker was actually alert and sensitive to the matter before [her]": *Vavilov*, at para 128. It also raises concerns about transparency and intelligibility, given that the Delegate did not explain in any way why she rejected the applicant's position.

[62] Given the nature of the applicant's interests at stake, the salience to the Delegate's decision of the applicant's detailed legal submissions on an issue of statutory interpretation, and the factual circumstances related to the Delegate's decision to issue a Departure Order, I conclude that the Delegate's decision in this case suffers from an absence of justification. The circumstances also provoke concerns about transparency and intelligibility.

[63] There are two final points. First, in *Vavilov*, the Supreme Court addressed judicial review in the absence of reasons, such as when the decision-making process does not easily lend itself to producing a single set of reasons: at paras 136-138. In those circumstances, the reviewing court is to examine the decision in light of the relevant constraints on the decision-maker in order to

determine whether the decision is reasonable. The Court also opined that is would be "perhaps inevitable" that without reasons, the court's analysis would then "focus on the outcome rather than on the decision-maker's reasoning process": at para 138.

[64] In my view, those paragraphs of *Vavilov* do not apply here. The circumstances in this case are quite unlike the two examples provided by the Court – a municipality passing a by-law (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5) or a law society rendering a decision (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293). In addition, this is not a case in which there is a complete absence of explanation or reasons for the decision. We have the contents of the Departure Order dated July 2, 2019 and the record includes the Minister's Delegate Review form completed by the Delegate.

[65] Lastly, with regard to whether the Delegate's decision falls within a range of reasonable outcomes, the Delegate was in some respects faced with a binary choice – to agree with the subs. 44(1) report and issue the Departure Order, or not. However, the outcome could have been different if the Delegate had demonstrably considered the statutory interpretation arguments advanced by the applicant and agreed with her. In any event, *Vavilov* requires that a decision be reasonable both in outcome and in the process used by the decision-maker to reach the outcome: *Vavilov*, at paras 83 and 86-87.

[66] Accordingly, I find that the Delegate's decision did not comply with the fundamental requirements prescribed by the Supreme Court in *Vavilov*. The Delegate's decision was unreasonable.

V. Conclusion

[67] The Delegate's Departure Order will therefore be set aside. There is no question for certification. This is not a case for costs.

JUDGMENT in IMM-4294-19

THIS COURT'S JUDGMENT is that:

1. The Departure Order is set aside. The matter is returned to a different delegate of the Minister for redetermination, including consideration of the applicant's position as set out in counsel's letter dated March 12, 2019.
2. There is no question for certification under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.
3. There is no order as to costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4294-19
STYLE OF CAUSE:	AMENDE VIOLET OKOJIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 6, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	OCTOBER 5, 2020

APPEARANCES:

Lorne Waldman Tara McElroy	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Tara McElroy	FOR THE APPLICANT
Stephen Jarvis Attorney General of Canada	FOR THE RESPONDENT