Federal Court  Cour fédérale

Date: 20211207

Docket: T-1608-19

Citation: 2021 FC 1368

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

REGIANE FERREIRA FILIZOLA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Major Regiane Ferreira Filizola, is a military officer with the Canadian Armed Forces (the "CAF"). The Applicant seeks judicial review of a decision of the Chief of the Defence Staff (the "CDS") of the Department of National Defence made pursuant to section 29.11 of the *National Defence Act*, RSC 1985, c N-5 (the "*NDA*").

[2] By way of letter dated April 26, 2019, the CDS denied the Applicant's grievance (the "Grievance") and request for funding of up to three cycles of in-vitro fertilization ("IVF") treatment including reimbursement of approximately $14,000 for treatment already received over one IVF cycle (the "Decision"). The CDS determined that the Applicant was not eligible for reimbursement under the CAF Spectrum of Care (the "SoC") health care policy in place at the time that she received her treatment.

[3] The Applicant submits the refusal of her claim for reimbursement of her IVF treatment costs amounts to discrimination based on her sex and disability. The Applicant argues that the policy on which the CDS based their decision was discriminatory and outdated, violated the principles of the SoC policy, and specifically violates the Applicant's equality rights under section 15(1) of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being *Schedule B to the Canada Act 1982* (UK), c 11 (the "*Charter*").

[4] For the reasons that follow, I find that the Decision of the CDS is reasonable. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicant and IVF*

[5] The Applicant is a member of the Regular Force of the CAF and receives health services from the CAF as listed in the SoC policy. As a resident of Ontario, the Applicant's spouse receives provincial health benefits provided by the Ontario Health Insurance Plan ("OHIP").

[6] The Applicant and her spouse wished to have biological children but were unable to conceive. On September 27, 2011, a clinical investigation determined that the couple's inability to conceive was due to male-factor infertility.

[7] The Applicant consulted with the CAF Medical Officer (the "MO") about whether her fertility treatments would be covered by the SoC policy. She was advised that she did not meet the eligibility criteria: the SoC policy required a medical diagnosis of infertility caused by bilateral fallopian tube obstruction for a female CAF member for IVF treatments.

[8] From 2012 to May 2016, the Applicant was posted in the Province of Quebec. On May 31, 2016, the Applicant was posted in Ontario.

[9] In September 2016, the Applicant and her spouse were recommended to begin IVF treatment with Intracytoplasmic Sperm Injection ("ICSI") immediately due to the risk of complications associated with further delays.

[10] IVF is a method of assisted reproduction combining an egg with a sperm in a laboratory dish. The success rate of an IVF treatment is reduced when the sperm used in the fertilization procedure have decreased mobility or are abnormally shaped. In such cases, it is recommended that the IVF treatment be accompanied by ICSI. The ICSI method is used to aid the sperm to reach the female egg and to increase the success rate of the IVF treatment.

[11] On August 4, 2016, the Applicant again received confirmation from the MO that her IVF treatment would not be covered by the CAF SoC policy.

[12] On October 11, 2016, the Applicant and her spouse underwent IVF and ICSI at their own expense. The IVF procedure (without the ICSI) cost approximately $14,000 CAD. The Applicant underwent a second IVF treatment in the summer of 2018, costing approximately $5,200 CAD. Both treatments were successful, resulting in the birth of two children.

B. *Health Coverage for Fertility Treatments*

[13] As a principle of the CAF SoC policy, the SoC coverage must provide health benefits that are comparable to those offered by the province in which the CAF member resides.

[14] In 2011, the province of Quebec passed a law approving funding for all causes of infertility. In November 2015, Quebec halted free coverage for infertility treatments and offered a tax credit in place of coverage.

[15] In December 2015, the province of Ontario removed IVF funding from the OHIP and began funding the Ontario Fertility Program (the "OFP"). The OFP is not funded by OHIP-insured services, yet requires that a patient hold a valid OHIP card. Under the OFP, once a doctor determines that IVF is the most appropriate option, eligible Ontario residents can access a one-time cycle of IVF, regardless of the cause of infertility.

[16] The CAF Spectrum of Care Committee (the "SoC Committee") determines the services to which members of the CAF are entitled. Prior to February 26, 2019, the CAF health coverage for fertility services required a medical diagnosis of infertility associated with bilateral fallopian tube obstruction in order for CAF members to access a maximum of three cycles of IVF. The health coverage also included IVF medication when criteria were met, and a maximum of three cycles of ICSI for male-factor infertility, made available to male CAF members only.

[17] On February 2, 2017, the SoC Committee agreed to consider expanding IVF coverage and to obtain information on projected costs. On December 8, 2017, the SoC Committee decided to recommend to the Chief Military Personnel (the "CMP") that the SoC policy should include one paid cycle of IVF for any female CAF employee under the age of 43 years, in order to mirror the coverage available in Ontario. On June 8, 2018, the SoC Committee was informed that the CMP had not yet given official approval to the recommendation, that Armed Forces Council endorsement might be required, and that an effective date had not yet been determined.

[18] On February 26, 2019, the CMP of CAF issued CANFORGEN 029/19 to inform CAF members of a change in the eligibility criteria for fertility services, "effective immediately." The CAF SoC policy was updated to cover the costs of one cycle of IVF for all Regular Force women under 43 years of age and no longer required a medical diagnosis of infertility with associated bilateral fallopian tube obstruction to be eligible. The SoC policy was also updated to include reimbursement of the cost of up to three cycles of ICSI for CAF members.

C. *The Grievance*

[19] On November 1, 2016, the Applicant submitted the Grievance requesting funding for up to three cycles of IVF treatment with ICSI, including immediate payment of approximately $14,000 CAD for treatment already received over one cycle. The Grievance also raised the issues of unequal treatment in access to funding for IVF treatment:

> a) Although the CAF SoC policy funded up to 3 cycles of IVF with ICSI and medications, the eligibility criteria was too restrictive as it limited funding to a specific cause of infertility (bilateral fallopian tube obstruction for females); and
>
> b) The CAF SoC policy was discriminatory and did disservice to the Applicant because she was both denied coverage for not meeting the eligibility criteria and rendered ineligible under the OFP because she is not allowed to have an OHIP card.

[20] The Grievance was sent to the Military Grievances External Review Committee (the "MGERC") for review.

[21] On August 2, 2018, the MGERC issued its Findings and Recommendations Report (the "Report"). In the Report, the MGERC determined that the Applicant was treated according to the SoC policy in effect at the time she underwent IVF treatment in October 2016. The MGERC noted the changes that had occurred in Quebec in November 2015 and in Ontario in December 2015 when the province began the OFP and removed coverage of IVF treatments from the OHIP. However, the MGERC stressed that the OFP is a social program, and not a medical one. The MGERC stated:

> As it currently stands, neither province in Canada offers infertility treatment as a funded **medical** service. Based on this information, it is reasonable to conclude that the SoC, which is the policy in effect for CAF members, is not more restrictive than the OHIP; it provides the medical coverage for IVF comparable to, if not better than that available in the provinces of Ontario and Quebec.
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> (emphasis in original)

[22] The MGERC also concluded that the CAF has no obligation to cover the costs of ICSI treatments incurred by the Applicant's spouse, who is not covered by the SoC policy.

[23] The MGERC considered the proposed amendments to the SoC policy to mirror the coverage made available under the OFP. The MGERC noted that the amendments were still pending approval, yet found it would be fair to fund one cycle of IVF for the Applicant:

> Given the recent update obtained by the Committee on the status of the SoC changes, it is reasonable to expect approval in the near future. In anticipation of such approval to expend IVF coverage for CAF members, I find that it would be fair to extend the same treatment and fund one cycle of IVF for the grievor, who is under 43 years of age […] and would therefore be eligible. I also note that IVF is time-sensitive, as noted by Create Fertility Clinic in Toronto, who advised the grievor to begin IVF and ICSI immediately.

[24] The MGERC made the following recommendations in the Report:

> I recommend that the grievance be denied.
>
> I recommend that the CAF offer funding for one cycle of IVF to the grievor as soon as possible, in anticipation of the soon-to-be approved changes to the CAF SoC.

D. *Decision Under Review*

[25] By way of letter dated April 26, 2019, the CDS denied the Applicant's Grievance and the claim for reimbursement of her IVF treatment costs. The CDS accepted the MGERC's findings as their own, but did not agree with all of their recommendations. The CDS found that the Applicant did not meet the criteria for coverage of fertility treatments under the CAF SoC policy at the time of her treatment.

III. **Statutory Scheme**

A. *Healthcare Provisions*

[26] While healthcare in Canada generally falls under provincial jurisdiction, CAF members are excluded from the definition of an "insured person" under section 2 of the *Canada Health Act* RSC, 1985, c. C-6 ("*Canada Health Act*") and are therefore not eligible to receive healthcare under provincial healthcare plans.

[27] Nevertheless, the Federal Government can provide health care services in matters that fall under their jurisdiction. This includes members of the CAF, pursuant to subsection 91(7) of the *Constitution Act, 1867,* (UK) 30 & 31 Vict, c 3. Furthermore, Chapter 34 of the *Queen's Regulations and Orders for the Canadian Forces,* Volume I, issued pursuant to the *NDA,* requires the CAF to provide medical care to its members at public expense (art 34.07(4)). Accordingly, the CAF is responsible for the provision of healthcare comparable to that guaranteed under the *Canada Health Act.*

B. *Grievance Procedures*

[28] Subsection 29(1) of the *NDA* provides that CAF members have a right to grieve a decision, act or omission of their employer. The CDS is the final authority in the CAF grievance process (*NDA*, s 29.11). Before considering a grievance and making a final determination, the CDS is required to refer any grievance relating to the entitlement to medical care or dental treatment to the MGERC for their review (*NDA*, ss 29.12 and 29.2(1)). The CDS is not bound by the findings or recommendations of the MGERC (*NDA*, s 29.13(1)), but reasons for a decision must be provided if the CDS does not follow the MGERC's recommendations (*NDA*, s 29.13(2)). Once a decision is made by the CDS, it is final and binding, subject to judicial review in this Court (*NDA*, s 29.15).

IV. **Preliminary Issues**

A. *New Evidence*

[29] The Respondent submits that the Applicant's memorandum refers to additional online resources that were not included in the certified tribunal record and that should therefore not be relied upon for the purpose of this judicial review.

[30] I accept that it is trite law that evidence which was not before the decision maker cannot be introduced during the course of an application for judicial review in order to dispute the decision being challenged. However, I find that the additional online resources referenced by the Applicant in their submissions are government resources explaining health coverages or

resources relied on by the Applicant to explain IVF and ICSI procedures. I therefore accept this evidence, as it is available to the public and is purely informational.

B. *New Notice of Application*

[31] The Respondent submits that in the Application record, dated April 5, 2021, the Applicant included a new Notice of Application (the "new Notice of Application") which raised issues that were not included in the original Notice of Application, dated October 2, 2019 (the "original Notice of Application"). In particular, the new Notice of Application explicitly includes arguments based on a *Charter* violation. The Respondent contends that the Applicant should not be permitted to set out new allegations following the close of the evidentiary record.

[32] I agree with the Respondent. I find that the Applicant failed to give the Respondent adequate notice of the altered grounds for the application, as included in the new Notice of Application. Pursuant to Rule 75(1) of the *Federal Court Rules*, SOR/98-106 (the "*Rules*"), this Court may, on motion, allow a party to amend a document in order to protect the rights of all parties. I find that the Applicant could have made a motion to amend the original Notice of Application before submitting the Application Record. I therefore disregard the new Notice of Application.

C. *Charter Arguments*

[33] The Respondent submits that the Applicant should be precluded from advancing arguments based on a *Charter* violation since the original Notice of Application made no

mention of *Charter* arguments as grounds for the application. The Respondent contends that they did not receive sufficient notice to be able to appropriately respond to the *Charter* arguments.

[34] The original Notice of Application comprised several grounds for the application, including the following:

> That the CAF SoC was funding 3 cycles of IVF but that the criteria for coverage was too restrictive and discriminatory in nature. At the time that the application was made to the CDS, the CAF SoC allowed for funding of up to 3 cycles of IVF and Intra-cytoplasmic Injection (ICSI) to serving regular force members that had a very specific medical condition (blocked fallopian tubes for females and ICSI for males), i.e. it discriminated coverage to serving members by associating IVF funding with the cause of infertility. This makes [sic] impossible for healthy same sex couples and couples that have fertility issues with a partner that is a non-serving member to qualify for coverage;
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> (emphasis added)

[35] During the hearing, counsel for the Applicant explained that when the Applicant filed the original Notice of Application in 2019, she was not represented by legal counsel. The Applicant submits that while the arguments with respect to a *Charter* violation were not articulated in the original Notice of Application, they were implicit in the wording, since equality has always been at the heart of this case. When the Applicant later retained counsel, the original Notice of Application was reformulated to explicitly include the *Charter* argument in the new Notice of Application.

[36] The Applicant contends the reference to the coverage being "too restrictive and discriminatory in nature" in the original Notice of Application should have put the Respondent on notice that the Applicant would make arguments with respect to section 15 of the *Charter*.

[37] When this argument was put to counsel for the Respondent at the hearing, the Respondent submitted that the use of the word "discriminatory" in the original Notice of Application is not enough to signal the Applicant's intention to make submissions based on a *Charter* violation.

[38] Pursuant to Rule 301(e) of the *Rules*, a notice of application is required to set out "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on."

[39] In *Majeed v Canada (Public Safety)*, 2007 FC 1082 at paragraph 25, this Court found that the inclusion of the *Charter* arguments that were not mentioned in the notice of application is prejudicial:

> Not only does this course of events seriously prejudice the respondent, it would also mean that the Court would be called upon to determine a constitutional issue largely in an evidentiary vacuum. As the Supreme Court of Canada has repeatedly observed, Charter issues should be decided on the basis of a proper evidentiary record: see, for example, *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at para 80, and *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at para 8 and following.

[40] In *Jama v Canada (Attorney General)*, 2018 FC 219 at paragraphs 19 and 20, Justice Manson found that new grounds based on the *Charter* arguments cannot be raised when they are not mentioned in the notice of application. Justice Manson notes at paragraph 20:

> An applicant for judicial review must set out in their notice of application the grounds on which they rely, and cannot present new grounds in their memorandum of fact and law (*Tl'azt'en Nation v Sam*, 2013 FC 226 at para 6).

[41] I agree with the Respondent that the use of the word "discriminatory" in the original Notice of Application does not consist of sufficient notification of the *Charter* arguments and that the lack of specificity leads to prejudice. The onus was on the Applicant to amend the notice of application in a timely manner, pursuant to Rule 75(1) of the *Rules*, in order to notify the Respondent of their intention of raising the *Charter* arguments. I find that the Applicant failed to do so. Accordingly, I will not consider the Applicant's *Charter* arguments.

V. **Issue and Standard of Review**

[42] The sole issue in this case is whether the Decision of the CDS is reasonable.

[43] The Respondent submits that the standard of review is reasonableness since none of the circumstances warranting a departure from the presumption of reasonableness arise (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 25). The jurisprudence establishes that where a decision of a specialised tribunal interpreting and applying its enabling statute is subject to judicial review there is a presumption that the standard of review

is reasonableness (*Vavilov* at paras 13, 24 and 30). The Respondent submits that, pursuant to *Vavilov*, the deferential review should respect the specialized expertise of the CDS in this case.

[44] When reviewing a question of statutory interpretation, the Respondent submits that the Court must start with how and why the decision maker arrived at the decision and reasons, while considering the reasons holistically and contextually, to determine whether the decision is defensible (*Vavilov* at paras 105-107, 108-135).

[45] The Respondent notes that this Court has applied the reasonableness standard to previous decisions of the CDS (see: *Stemmler v Canada (Attorney General)*, 2016 FC 1299; *Higgins v Canada (Attorney General)*, 2016 FC 32 at para 77), and submits that post-*Vavilov*, the standard of reasonableness for decisions of the final authority – in this case the CDS – have remained unchanged as this Court maintains that "…a wide margin of appreciation must be accorded to the FA in exercising its grievance jurisdiction" (*Bond-Castelli v Canada (Attorney General)*, 2020 FC 1155 at para 31).

[46] The Respondent cites the case of *Rompré v Canada (Attorney General)*, 2012 FC 101 at paragraph 22, to emphasize how this Court has treated expertise of the CDS:

> […] In this case, the CDS is the most senior officer in the CF and he is charged with control and administration of the CF. For grievances and, more particularly, when appropriate remedies must be determined, he has significant discretion. The issues he had to decide in this case are questions of mixed fact and law that fall under his expertise and his specific knowledge of the military environment.

[47] The Applicant's submissions address the appropriate standard of review for issues related to the *Charter* violations. Having determined above at paragraph 41, that I will not be considering the *Charter* arguments, I agree with the Respondent that the standard of review is reasonableness, in accordance with *Vavilov*.

[48] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether the decision as a whole is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[49] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

VI. **Analysis**

(1) **Presumption against retroactive application**

[50] It is a presumption of statutory interpretation that laws affecting substantive rights do not apply to facts that occurred before the law came into force (*R v Dineley*, 2012 SCC 58 ("*Dineley*") at para 10; *Canada (Attorney General) v Almalki*, 2016 FCA 195 at para 34; *R v Marshall*, 2019 ONSC 7376 at para 14). The presumption against retroactive application exists to provide certainty to the law. In *Dineley* at paragraph 10, the Supreme Court emphasized:

> New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively.

[51] The presumption against retroactive laws is strong and only rebutted through clear language or necessary implication (*Mandavia v Central West Health Care Institutions Board*, 2005 NLCA 12 at para 103).

[52] In the Decision, the CDS explained that there was a requirement to adhere to the SoC policy in effect at the time of the Applicant's treatment:

> I am not indifferent to your situation, but I must respect policy. Consequently, I cannot subscribe to the Committee's recommendation to authorize reimbursement on the assumption that the SoC may change in the future, and that such a change would be retroactive to cover the costs that you incurred.

[53] The Respondent acknowledges that the issuance of CANFORGEN 029/19, effective immediately on February 26, 2019 changed the eligibility criteria for CAF members to access fertility services and included one cycle of IVF for women under 43 years of age. However, the Respondent submits that the Applicant had already received IVF treatment in October 2016, with

the knowledge that her treatment would not be covered under the SoC, and long before the new policy was in effect.

[54] In *Canada (Attorney General) v Irvine*, 2003 FCT 660, this Court reviewed the issue of whether the test articulated by the SCC in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 SCR 868 ("*Grismer*") should apply retroactively to CAF decisions made prior to *Meiorin* being decided. At paragraph 31, this Court noted:

> I appreciate the fact that the CAF took the initiative to amend their policies in response to the recent case law of *Meiorin* and *Grismer*, however, these amendments were not in existence at the time of the decision. I believe the changes in the policy were not meant to be applied retroactively, but rather, they were to be applicable from the point at which they were made.
>
> (emphasis added).

[55] The Respondent cites the decision of the Alberta Court of Queen's Bench in *Skyline Roofing Ltd. v Alberta (Workers' Compensation Board Appeals Commission),* 2001 ABQB 624, at paragraph 62 to advance that the presumption that laws do not apply retroactively also applies to policies:

> Because statutorily-authorized policies can have the force of law, there is a general presumption that such policies cannot be made to apply retroactively. Citizens are entitled to know what the law is as of the date they are making decisions about their conduct. Even the legislature rarely enacts regulations with retroactive effect, because of this constitutional principle. Accordingly, the power to make

> retroactive policies will not be inferred unless the statute requires it.

[56] The Respondent submits that provincial health care tribunals such as the Ontario Health Services Appeal and Review Board (the "ON HSARB") have considered the issue of retroactive application of health care policies. The ON HSARB hears matters regarding payments for health services and their coverage by OHIP. Jurisprudence from the ON HSARB support the position that an individual is insured according to the coverage in place at the time the treatment is received (*JV v Ontario (Health Insurance Plan)*, 2009 CanLII 84982 (ON HSARB) at paras 18-23) and that, unless specifically provided for, regulations are not to be retroactively applied (*JAR v The General Manager*, 2014 CanLII 2337 (ON HSARB) at paras 21 and 28).

[57] In my view, the language of CANFORGEN 029/19 is clear: the changes to the SoR policy were to be "effective immediately" starting February 26, 2019 – not sooner. I agree with the Respondent that, in keeping with the strong presumption against retroactivity, the new SoC policy cannot serve as a basis for the reimbursement of the expenses the Applicant incurred before the new SoC policy was implemented. I find that the CDS considered the Grievance, dated November 1, 2016, and the evidence before him to reasonably determine that the Applicant was not entitled to be reimbursed for the IVF-related procedures, as she did not meet the eligibility criteria of the SoC policy in place at the time that she received treatment.

(2) **CDS error is not a fatal flaw: Overall outcome would remain the same**

[58] The CMP of CAF issued CANFORGEN 029/19 on February 26, 2019. At the time of the Decision, dated April 26, 2019, the SoC policy's eligibility criteria for fertility services had already been amended, yet the language in the CDS' reasons suggest that the SoC policy changes were still forthcoming:

> […] the Committee [MGERC] recommended that the grievance be denied and that the CAF offer you funding for one cycle of IVF as soon as possible, in anticipation of the soon-to-be-approved changes to the SoC.
>
> [emphasis added]

[59] During the hearing, the Applicant's counsel submitted that the CDS' lack of awareness of the policy change at the time of the Decision led to an unreasonable decision that did not account for the context in which the Grievance was made, including the changes to the SoC policy and the MGERC's recommendation that the CAF offer to fund one cycle of IVF in anticipation of those changes.

[60] The Respondent submits that the CDS was unaware that the policy had effectively been amended two months' prior, as the material in the file that forms the certified tribunal record, on which the CDS based his decision, was prepared before the policy change. By the time the amendment was published in the form of CANFORGEN 029/19, the decision was awaiting the final consideration, approval and signature of the CDS.

[61] The Respondent contends that even if the CDS had erred in failing to refer to the fact that the SoC policy for IVF coverage had changed on February 26, 2019, the error has no impact on the overall decision. I agree with the Respondent that if sent back for redetermination, the CDS could not reasonably reach a different outcome based on the facts and law in this case (*Maple Lodge Farms Ltd. v Canada (Food Inspection Agency)*, 2017 FCA 45 at para 51).

[62] I find that it was reasonable for the CDS to determine that the Applicant did not meet the eligibility criteria of the SoC policy in place at the time she received her IVF treatment. While the CDS erroneously stated in his reasons that the policy change was forthcoming, I find that even if the CDS had properly referenced the new SoC policy in the Decision, it would not have affected the overall determination that the policy could not be applied retroactively. I find that this defect in the CDS' reasons is not sufficient to prevent the Decision from exhibiting justification, intelligibility and transparency, pursuant to *Vavilov* (at paras 99-100).

(3) **The SoC policy did not mirror provincial coverage**

[63] At the time the Applicant underwent fertility treatment at her own expense, the province of Ontario had removed IVF funding from the OHIP and began funding the OFP, which gave any eligible Ontario residents access to a one-time cycle of IVF, regardless of the cause of infertility. In order to access the treatment, an Ontario resident was required to hold an OHIP card. In contrast, the SoC policy at the time covered three cycles of IVF for women with a bilateral fallopian tube obstruction, including the cost of medication.

[64] As a member of the CAF, the Applicant does not have an OHIP card. The Applicant submits that the SoC policy at the time was overly restrictive: with an OHIP card, she would have been able to have one cycle of IVF treatment covered under the OFP. This was the relief recommended by the MGERC, in order to offer comparable care to the province of Ontario.

[65] In the Decision, the CDS reviewed the policies in Ontario and Quebec, the only two provinces that included IVF in their respective provincial health care plans. The CDS noted that Quebec had replaced its funding for IVF with a tax credit in 2015, and that Ontario introduced coverage for a one-time IVF cycle, irrespective of the cause of infertility in 2015. Before concluding that he could not authorize the reimbursement, the CDS reasoned:

> […] while the current CAF policy cannot cover every scenario, it does offer comparable and affordable coverage to members whose condition is the result of the most common causes of infertility.
>
> Infertility has been revisited several times by the SoC Committee. Historically, Quebec and Ontario have been the only two provinces to provide funding coverage for IVF but have differed in eligibility requirements.

[66] During the hearing, counsel for the Applicant submitted that while deference should be shown to decision makers who hold specialized expertise, *Vavilov* requires the Court to examine the contextual constraints with respect to the facts of a case. The Applicant contends that the CDS is not an expert in the areas of health care or infertility. While the CDS was not bound by the MGERC's recommendations, he failed to account for the context of the Grievance, including the conclusions drawn by experts who had reviewed the Grievance and determined that the policy at the time of treatment was overly restrictive. The Applicant argues that the policy itself

was changed two months before the Decision to reflect the issues raised in the Grievance and that the CDS should have allowed the reimbursement to reflect the coverage available in Ontario.

[67] At the hearing, the Respondent's counsel submitted that this case is a review of the Decision to refuse the Applicant's request for reimbursement, not a review of the policy in place at the time of the Grievance. I agree. I also agree with the Respondent's submission that while the SoC aims to offer comparable coverage as the various provinces introduce new covered services, the CAF should not be required to mirror those changes instantaneously.

[68] Despite the MGERC's recommendation to reimburse the Applicant for one cycle of IVF, as the final authority in the CAF grievance process (*NDA*, s 29.11) the CDS is not bound by the findings or recommendations of the MGERC, and can reach a different conclusion if reasons are provided (*NDA*, s 29.13). The CDS may not be a medical expert, but he is legislated by the *NDA* to interpret the CAF policies and act as the final authority. While I sympathize with the Applicant, I find that it is possible to follow the CDS' reasoning in the Decision.

[69] The parties confirmed at the hearing of the matter that they were not seeking costs.

VII. **Conclusion**

[70] In my view, given the significant discretion owed to the CDS, I find it was reasonable for the CDS to deny the Grievance and request for funding of up to three cycles of IVF, including reimbursement for treatment already received over one IVF cycle. At the time the Applicant received her IVF-related treatments, she was not eligible for reimbursement under the SoC.

While the SoC policy's eligibility criteria was changed on February 26, 2019, I find that it was reasonable of the CDS to conclude that the SoC policy cannot be retroactively applied to enable the Applicant to be reimbursed for IVF treatments that she received on October 11, 2016. I also find that the error in the CDS' reasons does not render the Decision unreasonable. Accordingly, I dismiss this application for judicial review.

JUDGMENT in T-1608-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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