Federal Court  Cour fédérale

Date: 20221018

Docket: IMM-2362-22

Citation: 2022 FC 1394

Ottawa, Ontario, October 18, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

BOUTROS MASSROUA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Boutros Massroua, seeks judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board of Canada finding him inadmissible to Canada under paragraph 35(1)(a) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID found the Applicant inadmissible because he was complicit in crimes against humanity on the basis that he voluntarily and knowingly made a significant contribution to ISIS by repairing vehicles they used in their operations.

[2] The ID's finding on this point relied on the factual determinations previously made by the Refugee Protection Division [RPD] that the Applicant was complicit in crimes against humanity because he voluntarily and knowingly made a significant contribution to ISIS. This finding was upheld by the Refugee Appeal Division [RAD], and on judicial review this Court found the RAD decision to be reasonable (*Massroua v Canada (Citizenship and Immigration)*, 2019 FC 1542 [*Massroua 2019*]).

[3] Based on this history, the ID applied paragraph 15(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which provides:

15 For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:	15 Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 35(1)a) de la Loi :
…	…
(b) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention…	b) toute décision de la Commission, fondée sur les conclusions que l'intéressé a commis un crime de guerre ou un crime contre l'humanité, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés…

[4] The Applicant argued before the ID that the RPD and RAD's prior findings of fact were tainted by procedural unfairness because of problems with the translation of his evidence, and asked the ID to re-examine the questions based on this new evidence. The ID refused to do so, because it interpreted paragraph 15(b) as precluding it from questioning the prior factual

determinations. It applied the legal test for complicity to the facts as found by the RPD, and concluded that the Applicant is inadmissible.

[5] The Applicant seeks judicial review of the ID's decision, arguing that its interpretation of paragraph 15(b) is unreasonably restrictive and fails to give effect to the underlying purpose of the provision.

[6] I agree, but only insofar as I find the ID's statutory interpretation analysis to be unreasonable. For the following reasons, the application for judicial review is granted.

II. Background

A. *Procedural History*

[7] The Applicant is a 57-year-old Catholic citizen of Lebanon. While in Lebanon, he worked as an automobile mechanic. In January 2015, the Applicant began working for a new customer after his regular working hours, and this continued at locations in both Lebanon and Syria until he left for Canada with his wife, in May 2015.

[8] The Applicant repaired jeeps and SUVs, some with bullet holes. On one occasion, he found a gun and fresh blood stains inside a vehicle he was working on. He observed others reinforcing vehicles with metal. There was heavy security at one of the locations. Based on all of these factors, the Applicant decided he did not want to continue to do this work. He said he faced pressure from the man he worked for, as well as from members of Hezbollah who wanted him to act as a spy and to report to them what he saw when he did these repairs. He and his wife fled to

Canada in May 2015, on a visitor's visa, which they were able to obtain because the sister of the Applicant's wife lives in Canada.

[9] The Applicant and his wife claimed refugee status soon after their arrival in Canada. The RPD began to hear his claim in November 2015, but the Minister requested that the proceeding be suspended so that an admissibility hearing could be held. The issue raised at that time was whether the Applicant had been a member of ISIS, and therefore inadmissible pursuant to paragraph 34(1)(f) of *IRPA*. In May 2016, the ID held an admissibility hearing and concluded that the Applicant and his wife were admissible to Canada.

[10] The RPD hearing resumed in September 2016, and in a decision dated October 12, 2016, the RPD rejected the Applicant's claim on the basis of exclusion pursuant to section 98 of *IRPA* and Article 1F(a) of the Refugee Convention. The RPD found that there are serious reasons for considering the Applicant complicit in crimes against humanity because he voluntarily made a significant and knowing contribution to ISIS by repairing vehicles that they used to further the purpose of the organization. The RPD found that the Applicant became aware early on that he was servicing vehicles used by ISIS, and thus he was complicit in the crimes against humanity the organization had committed.

[11] The RAD upheld this finding and this Court found the RAD's decision to be reasonable (*Massroua 2019*).

[12] Following this, the Minister referred the matter of the Applicant's inadmissibility to the ID for determination.

B. *The Decision Under Review*

[13] The admissibility hearing was held in November 2021, and both parties provided written submissions after the hearing. There was no dispute that ISIS has committed crimes against humanity; indeed, the Applicant acknowledged, “ISIS can fairly be characterized as a limited and brutal purpose organization.” Instead, the Applicant urged the ID to examine the evidence regarding his complicity rather than relying on the factual findings made in the previous RPD proceeding. He submitted that the ID should not rely on the prior findings of fact because they were “tainted by the lack of competent interpretation provided at the RPD hearing.” Because the underlying hearing was procedurally unfair, the Applicant argued that the ID should make its own findings of fact in order to make a determination as to complicity.

[14] A significant focus of the Applicant’s submissions before the ID related to the interpretation and application of paragraph 15(b) of the *Regulations*. His position was that the ID was required to make its own determination on whether the Applicant was complicit in crimes against humanity, because while paragraph 15(b) provided that findings of fact are binding, the determination of complicity involves a question of mixed fact and law, citing *Johnson v Canada (Citizenship and Immigration)*, 2014 FC 868 [*Johnson*] at paras 23-25. Furthermore, the Applicant submitted that the new evidence on the quality of the translation was admissible based on the finding in *Mungwarere v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 708 (*Mungwarere*] at para 75 that “the ID holds the discretion to admit new evidence that would contradict the guilty verdict or the refugee status exclusion order.”

[15] The Minister rebutted these arguments, on the basis that the findings of fact were consistent, and the Applicant had not raised concerns about the quality of interpretation earlier in the proceedings when he appealed the RPD decision to the RAD, or when he sought judicial review of the RAD's rejection of his appeal. Because the Applicant did not challenge this when he should have, the Minister argued that the ID was bound by the prior findings.

[16] The ID rejected the Applicant's argument that it could consider the new evidence because it considered itself precluded under section 15(b) of the *Regulations*. The ID's reasoning on this point is set out in the following passage, which is quoted at length since it is central to the arguments on the judicial review:

> [11] Mr. Massroua's counsel argues that new evidence which contradicts or calls into question the RPD's conclusions ought to be considered in my decision, relying on a statement by the Federal Court in *Mungwarere*: "the ID holds the discretion to admit new evidence that would contradict the guilty verdict or the refugee status exclusion order." However, I find this reliance misplaced. The sentence quoted above is an obiter statement by the Court, citing a Supreme Court decision [*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44] on issue estoppel that has nothing to do with the IRPA or IRPR and in which the Supreme Court was assessing a discretionary decision rather than the application of an explicit regulation such as IRPR 15(b); indeed, it is not clear which part of the Supreme Court decision the Federal Court relied on in making its obiter statement, since the Supreme Court was not speaking of the Immigration Division, much less of IRPR 15(b). *Mungwarere* suggests that the ID *may* have discretion to admit new evidence, but more recently the Federal Court of Appeal has said definitively that the ID *must* accept the factual determinations of the RPD [*Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 51]. The position of the Federal Court of Appeal is consistent with *Johnson* and a line of previous Federal Court decisions [citations omitted]. Mr. Massroua's approach, if followed, would vitiate the application of IRPR 15(b), since the Board's previous findings of fact would no longer be determinative in any way if they could simply be set aside based on new evidence. Mr. Massroua is attempting the very re-litigation of factual matters that IRPR 15(b) is designed to stop, according to

> *Johnson*. As such, I prefer the clearer guidance of the Federal Court of Appeal and of Federal Court decisions other than *Mungwarere*. (emphasis in the original)

[17] The ID member found that the Applicant's position amounted to a collateral attack on the determinations of the RPD and RAD, and that the proper venue for such a challenge was this Court rather than the ID. The ID went on to consider the legal test for complicity, finding the evidence sufficient to establish that the Applicant voluntarily and knowingly made a significant contribution to ISIS and was thus complicit in its crimes against humanity. The ID concluded that the Applicant was therefore inadmissible to Canada.

[18] The Applicant seeks judicial review of this decision.

III. Issues and Standard of Review

[19] The only issue in this case is whether the ID's interpretation and application of paragraph 15(b) is reasonable.

[20] This question is to be assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This framework seeks to reinforce a culture of justification in Canadian public administration by requiring administrative decision-maker's reasons to be "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker" (*Vavilov* at para 85). A reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant legal and factual constraints that bear on the decision"

(*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable, by satisfying the court that "any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[21] Special considerations apply when a court is tasked with reviewing an administrative decision-maker's interpretation of a statute or regulation. In *Vavilov* and other cases, this approach has largely been defined by setting out what a court is not to do. The point was aptly summarized by the Supreme Court of Canada in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paragraph 40:

> The administrative decision maker "holds the interpretative upper hand" (*McLean v. British Columbia (Securities Commission*), 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 40). When reviewing a question of statutory interpretation, a reviewing court should not conduct a *de novo* interpretation, nor attempt to determine a range of reasonable interpretations against which to compare the interpretation of the decision maker. "[A]s reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28, quoted in *Vavilov*, at para. 83). The reviewing court does not "ask itself what the correct decision would have been" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 50, quoted in *Vavilov*, at para. 116). These reminders are particularly important given how "easy [it is] for a reviewing court to slide from the reasonableness standard into the arena of correctness when dealing with an interpretative issue that raises a pure question of law" (*New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53, 390 N.B.R. (2d) 203, at para. 30).

[22] In *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 [*Mason*], the Federal Court of Appeal elaborated on the approach a court should take in reviewing an administrative decision-maker's statutory interpretation, building on its previous approach set out in *Hillier v Canada (Attorney General)*, 2019 FCA 44 [*Hillier*]:

> [16] *Hillier* begins by reminding reviewing courts of three basic things they should appreciate when conducting reasonableness review. First, in many cases, administrators may have a range of interpretations of legislation open to them based on the text, context and purpose of the legislation. Second, in particular cases, administrators may have a better appreciation of that range than courts because of their specialization and expertise. And, third, the legislation—the law on the books that reviewing courts must follow—gives administrators the responsibility to interpret the legislation, not reviewing courts.
>
> [17] For these reasons, *Hillier* tells reviewing courts to conduct themselves in a way that gives administrators the space the legislator intends them to have, yet still hold them accountable. Reviewing courts can do this by conducting a preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land before they examine the administrators' reasons. But the lay of the land is as far as they should go. They should not make any definitive judgments and conclusions themselves. That would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits.

[23] Inherent in this approach, according to *Mason* (at para 20), is a caution that "reviewing courts must exercise 'judicial restraint' and respect 'the distinct role of administrative decision-makers'" (*Vavilov* at para 75). They are to do this by examining the administrator's reasons with "respectful attention" and by "seeking to understand the reasoning process" (*Vavilov* at para 85).

[24] I will follow this guidance in examining the ID's decision.

IV. Analysis

[25] The Applicant submits that the ID's decision does not meet the *Vavilov* requirements because it failed to engage with the core issues he had raised, and its reasoning was not intelligible. He points out that *Vavilov* requires decision-makers to provide more robust reasons when the stakes are higher for the individual affected (*Vavilov* at para 133). The Applicant

submits that the ID's decision leaves him "in limbo" because he is permanently barred from seeking status in Canada, and although he is not removable from Canada, he cannot seek Ministerial relief. In addition, he would only have access to a restricted Pre-Removal Risk Assessment if he ever faces removal from Canada. Therefore, the ID had a higher burden to justify its decision.

[26] In this case, the Applicant submits that the ID erred in equating his position with a collateral attack on the decision; he never argued the RPD decision was in error, but rather that the entire process was tainted by procedural unfairness. In addition, the Applicant points out that the doctrine of collateral attack contains an exception where the prior decision was tainted by procedural unfairness.

[27] The Applicant contends that the ID failed to engage with his central argument, which was that paragraph 15(b) incorporates the doctrine of *res judicata* into *IRPA*, and by doing so it implicitly also provides a residual discretion to the ID to refuse to be bound by factual findings where doing so would result in an injustice (citing *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at para 33).

[28] Applying the approach sanctioned by *Vavilov*, and the guidance set out in *Mason*, my first task is to conduct a preliminary analysis of the text, context, and purpose of the provision to understand the broad context and interpretive possibilities, before examining the ID's reasons.

[29] Paragraph 15(b) is a simply worded provision; on its face, it offers little room for the exercise of discretion. Stripped to its core, it provides that for the purposes of an inadmissibility

determination under paragraph 35(1)(a) of *IRPA*, the findings of fact that supported a conclusion a person has committed a war crime or crime against humanity in a prior decision shall be treated as conclusive. It is notable that the provision uses the term “shall” rather than leaving some discretion, for example by stating that a prior finding “may” be treated as conclusive. The wording is imperative.

[30] To put this in its context, paragraph 15(b) is located in Part 3 of the *Regulations*, which deal with Inadmissibility, and is part of Division 1, which is headed “Determination of Inadmissibility.” The other two paragraphs of section 15 deal with other findings of fact that must be treated as conclusive: paragraph (a) deals with findings by international criminal tribunals, while paragraph (c) concerns findings made by a Canadian Court under the *Criminal Code*, RSC, 1985, c C-46, or the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 concerning a war crime or crime against humanity committed outside of Canada. These are all provisions that limit the scope of fact-finding made by subsequent decision-makers in assessing inadmissibility.

[31] The sections that precede and follow section 15 have a similar effect. Section 14 of the *Regulations* makes certain prior decisions conclusive regarding the findings of fact that support a finding of inadmissibility under paragraph 34(1)(c) of *IRPA* (engaging in terrorism), while section 16 of the *Regulations* prescribes a list of senior officials who can be found inadmissible to Canada because they were part of governments that engaged in terrorism, systematic or gross human rights violations or genocide, war crimes, or crimes against humanity. Once again, these provisions limit the scope of fact-finding in relation to these matters.

[32] Another relevant contextual element of section 15(b) is the legislative provisions granting ample jurisdiction to all divisions of the Immigration and Refugee Board to make findings of fact and law(*IRPA* subsection 162(1)), and the general obligation to deal with all proceedings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit" (IRPA subsection 162(2)).

[33] The last step is a brief examination of the purpose of these provisions – not to come to a definitive conclusion on the point, but rather to situate it as part of gaining the "lay of the land." At one level, the purpose of the provision is entirely obvious: to eliminate the requirement for *de novo* fact-finding by the ID in the context of admissibility proceedings where there are prior findings on the same issue. The rationale for such a provision in this context is clear. Findings of fact relating to complicity in war crimes or crimes against humanity will often involve lengthy and detailed examinations of complex evidence. Once one decision-maker does that, there is a wider public interest in not repeating it in a subsequent proceeding.

[34] In this regard, the basic purpose of paragraph 15(b) appears to replicate the values expressed in the doctrine of *res judicata*, namely the interest in finality of proceedings (*Danyluk* at para 18). Similar comments regarding the purpose of paragraph 15(b) have been made in previous decisions of this Court. In *Kanyamibwa v Canada (Public Safety and Emergency Preparedness),* 2010 FC 66 at para 76, the Court stated: "Subsection 15(b) of the Regulations illustrates the common law principle of res judicata and explicitly manifests Parliament's intention not to allow the re-litigation of some issues." In *Re Senat et Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2020 CarswellNat 2787, the Immigration Appeal Division

found that under paragraph 15(b), it must consider "the facts related to inadmissibility [as] res judicata" (para 7).

[35] It is neither necessary nor appropriate to engage in a further analysis to come to a definitive view of the purpose of the provision; that is what *Vavilov*, *Mason*, and *Hillier* counsel against, because this is the task that Parliament has assigned to the IRB, not the Court. It is sufficient to state that the basic purpose of paragraph 15(b) is to give effect to the interest in the finality of proceedings, at least insofar as those concern the findings of fact that underpin the inadmissibility determination, and in this respect it pursues the same goal that is embodied in the common law doctrine of *res judicata*.

[36] In accordance with the approach set out in *Mason* (at paragraph 18), the next stage in the process is that "a reviewing court should 'focus on the administrator's interpretation, noting what the administrator invokes in support of it and what the parties raise for or against it', trying to understand where the administrator was coming from and why it ruled the way it did: *Hillier* at para. 16."

[37] The ID's reasoning is set out in the passage cited above. It rejected the Applicant's reliance on *Mungwarere*. The ID found that the Court's statement in that case that "the ID holds the discretion to admit new evidence" was an *obiter* passage, that cited a Supreme Court of Canada decision on issue estoppel [*Danyluk*]. The ID observed that the Supreme Court decision had nothing to do with *IRPA* or the *Regulations*. It also noted that *Danyluk* dealt with a "discretionary decision rather than the application of an explicit regulation such as... [paragraph] 15(b)…" This part of the ID's reasoning directly discusses the Applicant's submissions on the

point, and it accurately states that *Danyluk* did not deal with the provisions at issue in the case before it. While the finding that the Court's statement in *Mungwarere* is *obiter* is not without doubt, this is precisely the kind of finding that is for the ID, not the Court, to make.

[38] However, the next part of the ID's analysis is more questionable. The ID went on to state:

> [I]ndeed, it is not clear which part of the Supreme Court decision the Federal Court relied on in making its obiter statement, since the Supreme Court was not speaking of the Immigration Division, much less of [paragraph] 15(b). *Mungwarere* suggests that the ID *may* have discretion to admit new evidence, but more recently the Federal Court of Appeal has said definitively that the ID must accept the factual determinations of the RPD. (emphasis in original)

[39] I agree with the Applicant's submission that there are several problems with this part of the analysis. First, it is clear that *Mungwarere* cites *Danyluk* because it recognized that the common law doctrine of *res judicata* was subject to an exception where the invocation of the doctrine would work an injustice. The fact that *Danyluk* also dealt with the application of the doctrine in an administrative law context is also pertinent.

[40] The purpose of the reference to *Danyluk* is clear from the factual context in *Mungwarere*, where the applicant was seeking to challenge a finding of fact made in a prior criminal proceeding in which he had been acquitted of criminal charges. The fact that he was acquitted meant that he could not appeal those findings, even if he disagreed with them. When the Minister claimed those findings of fact were binding in the subsequent inadmissibility proceeding, Mr. Mungwarere objected, relying on the residual discretion that *Danyluk* said existed where the strict application of *res judicata* had the potential to work an injustice.

[41] Second, the reference to the "definitive" statement of the Federal Court of Appeal on the proper interpretation of paragraph 15(b) takes the point made in *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 [*Tapambwa*] too far. In paragraph 51 of that decision, the Court of Appeal found that the ID "must" accept the previous factual determinations of the RPD, citing *Johnson* at paragraphs 24 and 25 "for elaboration on this point." This statement was made in the course of describing the provisions that govern inadmissibility determinations. As the Court of Appeal noted at paragraph 1 of *Tapambwa*, the question before it arose:

> …in the unique and limited circumstances where the interpretation of Article 1F(a) [of the Refugee Convention], and thus the legal foundation for the finding that the appellants were excluded from consideration as refugees under the Convention, changed between the date of the exclusion finding and the hearing before the pre-removal risk assessment (PRRA) officer.

[42] The change in circumstance in that case related to the fact that shortly after the inadmissibility proceedings came to an end, the Supreme Court of Canada released its decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, changing the test for "complicity" in war crimes cases. Mr. Tapambwa argued that this change meant that the earlier determination should not be treated as binding. The Federal Court of Appeal in *Tapambwa* found that a PRRA officer had no jurisdiction to reconsider the prior exclusion finding:

> [60] As I have described, the purpose of the PRRA is not to repeat the work of the RPD and the IAD, or to sit on appeal of those decisions. The RPD and the Immigration Division are *functus* once they have rendered their decisions, and the question of exclusion and inadmissibility is final as far as the PRRA officer's authority under the IRPA is concerned. Barring fresh evidence or evidence of a risk not previously assessed, the question of exclusion was finally determined with the dismissal of the appellants' application for judicial review by the Federal Court on July 11, 2013, eight days prior to the decision in *Ezokola*. The appellants' exclusion

> was finally determined "on the basis" of the applicable law at that time.

[43] Interestingly, in that case, the Court of Appeal went on to reject the Minister's argument that the PRRA officer was bound by *res judicata*, because whereas the earlier determination dealt with the claimant's prior conduct, the PRRA officer was tasked with reviewing future risks he might encounter upon his return to his country of origin (*Tapambwa* at para 66). In that sense, the prior decision did not deal with the same question and therefore the doctrine did not apply.

[44] The issue that arises from the foregoing discussion is whether the ID's treatment of these decisions is reasonable. On the one hand, it could be said that this is exactly the role that Parliament has assigned to the ID and the Court should not interfere with its assessment of the jurisprudence. On the other hand, it can be argued that there must be limits on the interpretive latitude granted to an administrative decision-maker, particularly where – as in this case – the impact of the decision on the Applicant is so significant. As *Vavilov* confirms at paragraph 133:

> Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

[45] In the present circumstances, I am not required to make a specific finding on this knotty question, because I find a more fundamental flaw in the ID's analysis. The Applicant acknowledged before the Court that the question he raised about the interpretation of paragraph 15(b) had not been explicitly dealt with in any of the prior jurisprudence. Recognizing that, he

asked the ID to decide whether paragraph 15(b), by incorporating the doctrine of *res judicata* into the process, also brought with it the residual discretion that had been recognized in *Danyluk* and subsequent cases (for example, *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63). One of the elements of the residual discretion recognized in *Danyluk* is refusing to apply the doctrine where doing so would work an injustice on a party. That is what the Applicant claimed here. He argued that the prior findings were tainted because they were reached by a process that had denied him procedural fairness.

[46] I find that the ID's decision simply fails to grapple with this question. The ID had to examine the argument and the case law cited by the parties and to explain its reasons for either accepting or rejecting the Applicant's arguments about the proper interpretation of paragraph 15(b). While parts of its reasoning may be defensible, at its core the ID's decision simply side-steps the question that was put to it, by relying on a short descriptive statement in a Federal Court of Appeal decision that dealt with a separate question, while rejecting a relevant precedent from this Court on the basis that it cited a decision of the Supreme Court of Canada that had no weight because it did not deal with the immigration context.

[47] The ID's conclusion about its preferred approach to paragraph 15(b) is clear: rather than allowing any scope to question previous findings of fact, it preferred the "clearer guidance" of the Federal Court of Appeal and previous decisions of this court that found the prior findings of fact to be binding and subject to no exceptions.

[48] While the ID's conclusion on this point is clear, the line of analysis that takes it there is irretrievably undermined, in my view, by its approach to dealing with the precedents, as

discussed above. I find that the ID's analysis does not "bear the hallmarks of reasonableness – justification, transparency and intelligibility…" (*Vavilov* at para 99).

[49] I underline here that my comment on the Federal Court of Appeal's decision in *Tapambwa* is not intended to suggest that this decision is not a relevant precedent in the assessment of the question that the Applicant put before the ID. Rather, I find that the ID's reliance on a passing comment regarding section 15(b) takes the point too far and fails to analyze the crux of the question that was put before it. The Court of Appeal's decision in *Tapambwa* may well be an important consideration in the analysis of whether section 15(b) implicitly incorporates – or explicitly excludes – the residual discretion that exists in the application of the common law doctrine of *res judicata*. The point is that the ID must actually grapple with that question, recognizing that none of the precedents deal with that precise issue.

[50] The same criticism can be levelled at the ID's treatment of *Mungwarere*. The point is not that it should have been treated as a binding precedent, because that decision did not deal with the precise question before the ID in this case. Rather, it should not have been discarded because it cited a Supreme Court of Canada decision that did not deal with immigration law. Again, the ID must engage with the substance of the issue.

[51] An important element of judicial review under the *Vavilov* framework is an assessment of whether the challenged decision reflects a logical and coherent chain of analysis. This is not measured against some abstract notion of logical coherence or perfection; instead, a reviewing court is to assess the extent to which the decision reflects the relevant law as applied to the facts. Another element of this is whether the reasons are responsive to the main arguments put forward

by the parties (*Vavilov* at paras 94, 106, 127-28). In my view, the ID's decision falls short because the statutory interpretation exercise it engaged in failed to "meaningfully grapple with key issues or central arguments raised by the parties…" (*Vavilov* at para 128).

[52] Applying the guidance for conducting judicial review of an administrative decision that is rooted in statutory interpretation, as set out in *Vavilov*, *Mason* and *Hillier*, I find the decision of the ID to be unreasonable.

[53] The application for judicial review is granted. The ID's decision is set aside, and the matter is returned for reconsideration by a different panel of the Immigration Division.

[54] There is no question of general importance for certification.

JUDGMENT in IMM-2362-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Immigration Division's decision dated February 24, 2022 is set aside.

3. The matter is remitted back for reconsideration by a different panel.

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Molly Joeck	FOR THE APPLICANT
Brett Nash	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edelmann & Company Barristers and Solicitors Vancouver, BC	FOR THE APPLICANT
Department of Justice Canada Vancouver, BC	FOR THE RESPONDENT