Federal Court  Cour fédérale

Date: 20211130

Docket: IMM-6665-20

Citation: 2021 FC 1325

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 30, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GERNA CLAIRE GOUELE MAFOUMBA
DAVID AARON FRASER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (RAD) that confirmed the decision by the Refugee Protection Division (RPD) on a claim for refugee protection made by Gerna Claire Gouele Mafoumba and David Aaron Fraser. This

application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA or the Act].

[2] The Applicant is the single mother of her son, David Aaron Fraser. Mr. Fraser was born in the United States in 2017, making him a citizen of the United States. As for his mother, the Principal Applicant, she is a citizen of the Republic of the Congo, and she is the one seeking status as a refugee by invoking her political activities as a ground for obtaining this status in Canada.

I. The facts

[3] In addition to her son David Aaron Fraser (born on December 11, 2017), the Applicant stated that she had adopted two other children in the Congo. They are twins who were born on January 22, 2012, in Pointe-Noire, in the Republic of the Congo. It appears that the children are in the care of the Applicant's mother.

[4] The original narrative provided by the Applicant is included in the Basis of Claim (BOC) Form signed on September 12, 2018. According to the detailed narrative, Ms. Mafoumba arrived at JFK International Airport, in New York, on August 4, 2016. This is consistent with the information provided in the interview with the Canada Border Services Agency (CBSA) on August 30, 2018. In addition, in her affidavit dated February 3, 2021, it was rather on August 8, 2016, that she left the Congo for the United States (Affidavit dated February 3, 2021, para 6). That is of no real importance. The Applicant apparently sought to file an asylum claim in the United States, but it was abandoned and she crossed the border into Canada instead.

[5] In any event, the Applicant appears to have repeated her claim that she had to leave the Congo because of her political views. In fact, in her interview with the CBSA, she denied being persecuted on the basis of her race or ethnicity, religion, nationality, or membership in a particular social group (including her gender). What was noted in that interview was that the Applicant was seeking protection from Canada [TRANSLATION] "for political reasons because I am a member of the opposition party, the Pan-African Union for Social Democracy (UPADS). We are against the current regime. We staged a lot of protests against the government."

[6] The reason for believing herself to be persecuted was explained in the detailed narrative in the BOC form. In that narrative, the Applicant stated that she had decided to become involved with the opposition party in order to oppose the ruling party. In paragraph 7 of this narrative, she asserts that [TRANSLATION] "the government of the day did not consider human rights to be those of human beings. That is why I decided to become involved [*sic*] in the opposition party to fight for what is right and fight against the dictatorship in power." This involvement apparently began in 2011 as, according to the Applicant, [TRANSLATION] "active members and political activists of the Pan-African Union for Social Democracy (UPADS) [*sic*], the main opposition party in the country." The Applicant stated that she had taken over the role of the organization's youth secretary and team leader. She prepared reports for all meetings, organized meetings for the organization by drawing up an annual plan, prepared banners for protests, and assembled and mobilized young people by organizing workshops on human rights and the meaning of true democracy in the Congo.

[7] Following the announcement of a referendum to be held in October 2015 on certain changes to the national constitution regarding the presidential term, the party organized itself to protest and boycott such a referendum. A first rally was held on September 27, 2015, and the Applicant presented herself as [TRANSLATION] "among the leaders who organized the protest…."

[8] After five hours of protest, the Applicant claimed that the President (presumably of the country) ordered the security forces to open fire on the crowd, which is what happened. Several people died, while others were injured and arrested. The Applicant stated she was arrested and spent two days in detention. She was released on September 29, 2015, having been released on bail with a summons issued to the family. Since she failed to appear as summoned, the Applicant became wanted by the police. Being aware of the danger, the Applicant hid in another neighbourhood of Brazzaville.

[9] The police reportedly went to both her and her parents' homes on October 2 and 3, 2015. Both they and the Applicant's sister were at the home of the Applicant's parents. After being questioned about the Applicant, her sister was allegedly raped in front of her parents. After a week in a hospital, she remained hidden until she could leave Brazzaville for France.

[10] Despite these tragic events, the Applicant stated that she continued to secretly participate in the organization's meetings. Thus, a meeting of the organization was held on November 23, 2015, and, according to the Applicant's narrative, these meetings were attended solely by party leaders. On November 23, 2015, the Applicant and the other 10 participants were arrested. Despite the President of the party's plea during the police intervention, the Applicant

was detained until December 2015. The President of the party was detained until December 11, 2015. The Applicant stated that, thanks to a bribe, her family was able to secure her release.

[11] Upon her release, the Applicant's family was able to have her sent to another location, in Pointe-Noire, where she hid from December 3, 2015, to March 31, 2016. In July 2016, a group of police officers knocked on the door of the place where she was hiding at the time and entered her home. She was harassed, beaten, handcuffed, and blindfolded. She was taken to a prison. There, the Applicant identified a police sergeant who raped her four times. Another bribe was paid, which allowed the Applicant to be released. This is why the Applicant left the Congo, with her family's support.

[12] The narrative in the BOC indicates that the Applicant was [TRANSLATION] "afraid to return to the Republic of the Congo, out of fear of being tortured or killed" (narrative in the BOC, para 20).

[13] In the interview with the CBSA on August 30, 2018, it was revealed that the Applicant had applied for asylum in the United States, but that it took too long to get results. It was also revealed that the Applicant had no intention at the outset of filing a refugee protection claim in Canada. Instead, after waiting for two-and-a-half years in the United States, she preferred to come to Canada (August 29, 2018) and enter illegally by crossing the New York State–Quebec border, somewhere other than at a port of entry. She asserted that she chose this option because she had no passport, as she had lost it on the New York subway.

II. The decision for which judicial review is sought

[14] Of course, the application for judicial review is made with respect to the RAD decision. It stated at the outset that the Applicant fears persecution because of her political activities and because in the past "you were a victim of sexual violence" (RAD decision, para 1). The decision also stated that no specific fear regarding the Applicant's minor son was expressed with respect to the United States, the country where he was born and of which he is a citizen. However, to understand the rest of the matter, it is necessary to revisit the RPD's decision with which the RAD concurred.

A. *The RPD*

[15] The RPD found that the Applicant lacked credibility. Thus, it opined that [TRANSLATION] "the claimant struggled to testify. She could not recall many of the elements of her refugee protection claim, as recorded in the BOC and in her detailed narrative" (RPD's decision, para 16). The Applicant and her counsel then indicated that these numerous oversights were related to the trauma she allegedly suffered in her country.

[16] Careful to avoid taking an overly rigid approach to the memory issue, the RPD nonetheless noted that this explanation for struggling to testify had only been provided when the Applicant was confronted with a significant contradiction between her testimony and her narrative. Clearly, the RPD was troubled by unexplained lapses of memory. It repeatedly referred to these lapses:

> [TRANSLATION]

> [19] However, the claimant and her counsel did not mention these memory issues prior to the claimant being confronted with a significant contradiction between her testimony and her narrative. She also did not file a medical note that could explain these lapses. She testified that she did lacked the financial resources to request an assessment that could have confirmed the impact of her psychological condition on her memory.
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> [20] The panel can sometimes give the benefit of the doubt to certain claimants, in assessing credibility and determining a serious possibility of persecution. In this case, it seemed clear to the panel that the claimant simply did not recall the elements of a rehearsed narrative, because of the elements described in the reasons below.
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> …
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> [44] In the absence of a medical note or proactive disclosure of any memory issue, that is, before the claimant was confronted with contradictions between her narrative and her testimony, and the lack of a credible explanation, these lapses and contradictions undermine the claimant's credibility.

[17] The RPD then made a series of findings about the Applicant's testimony that demonstrate the difficulties that were encountered with the testimony. I shall cite a number of them:

[TRANSLATION]

- "The claimant's explanations regarding her involvement in the UPADS political party do not indicate a high-level involvement as the party's national secretary, as claimed" (RPD decision, para 21).
- When the RPD asked which federation she was a member of, the claimant was unable to answer, even though this was indicated on the membership card that had apparently been issued to her in 2013.
- With respect to this party membership card, the RPD noted that the claimant had indicated that she had been given this card when she joined the party in 2011 and that it was the only card she had. However, the card had been issued in 2013.
- The claimant remained vague when asked about her political activities. She stated [TRANSLATION] "that the discussions were about the state of the country, what needed to be reassessed, and suggestions from members" (RPD Decision, para 26).

It was noted that the Applicant appeared to be among the [TRANSLATION] “leaders” of the party.

[18] The RPD also criticized the Applicant for her lack of clarity regarding her detentions. The RPD dealt with the issue as follows:

> [TRANSLATION]
> [31] The panel had to repeat the question to know whether she had actually been detained for a third time. While she initially confused the scenario of the second and third periods of detention of her narrative, during her testimony, the claimant resumed after a break and reported being raped during the third period of detention.
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> [32] The panel believes that she may have got mixed up between the two episodes of detention but does not believe it is credible that she is unable to answer some questions about important information related to her narrative. This led the panel to find that this was an account learned by the claimant and that all this confusion about the three alleged periods of detention cannot be explained by an oversight of the claimant that would be related to past trauma.
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> [33] The panel recalls the context of the lack of a medical note on file and that it considered Chairperson’s Guideline 4. Other factors also call into question the credibility of the claimant, beyond what can be reasonably attributed to trauma-related oversights, and which could explain why the claimant forgets a period of detention or certain elements of her narrative.

These paragraphs are important in light of the Applicant’s attempt to introduce additional evidence before the RAD. We will come back to this.

[19] The RPD was also surprised by the alleged attack on her parents and sister in October 2015. The Applicant apparently testified that she had already been arrested on that day and therefore had not seen the rape of her sister. Moreover, her narrative explained her absence by indicating that she had been hiding at a friend’s house. When asked how she had learned about

the attack on her family, she replied [TRANSLATION] “I think it was the people in the neighbourhood who informed me of it” (RPD Decision, para 35). The RPD went on to state the following:

> [TRANSLATION]
> [36] This is not a spontaneous response that can be expected about such a significant event. The panel considers that it is not credible that the claimant believes that she was detained on the night her parents and sister were attacked, although according to the narrative she had been hiding at a friend’s house and was allegedly detained for a second time only a month and a half later.
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> [37] She is also unable to explain where she was hiding out. She claims that she was at a friend’s house, but she does not remember whose it was or where this person lived.

[20] The Applicant’s credibility was undermined in the eyes of the RPD for the following reasons:

> [TRANSLATION]
> [41] The panel is surprised that the claimant continued her political activities, even though she was detained for the first time and had lived in hiding at times, in addition to the fact that her sister was raped in front of her parents. She stated in her narrative that she was secretly participating in meetings.
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> [42] While the claimant states that she was detained with 11 people after a meeting, she refers to only the treasurer and some of the members who were allegedly detained with her. However, according to her narrative, the president of the party, whom she admires to the point that she named her two adopted children after his family name, was also detained at that time. She was reportedly detained until December 11. She replied that it was an oversight on her part and apologized. She also did not know how long she was allegedly detained at that time, given that she replied “two or three days” when questioned. Instead, her narrative indicates “from November 23 to December 2015,” a minimum of one week. She blamed the state of confusion she was in following the events of recent years.

In fact, the RPD criticized the Applicant for not submitting a medical note or for failing to proactively disclose any memory problems.

[21] In the end, the RPD found that there was a lack of credible explanations for the oversights and contradictions in the Applicant's testimony. The existence of two pieces of documentary evidence provided by the Applicant was considered insufficient in relation to her laborious testimony.

[22] These two documents, known as [TRANSLATION] "documentary evidence," were an "initial medical certificate" issued on July 18, 2016, by a generalist nurse from a clinic that appears to be located in Pointe-Noire. It identified three injuries. The certificate stated that the Applicant was [TRANSLATION] "sexually assaulted (Raped) on July 17, 2016," but did not link the injuries noted to a sexual assault. In fact, it is not known where this information about a sexual assault on a given date came from, but there are those who suggested that it could only have come from the Applicant. A short report was made on the injuries noted, and it indicated that a treatment based on antibiotics and anti-inflammatory drugs was administered. The other document was a handwritten statement that was said to be from the Applicant's sister, who now resides in France. It provided an account of the events of October 2 and 3, 2015. In this narrative, the deponent stated that [TRANSLATION] "based on my experience, I confirm that my sister's life is in danger, as well as that of the whole family and her fiancé." It is claimed in this narrative that if the Applicant were to return to the Congo, the government would kill her, and she pleaded with American authorities to protect her sister.

[23] At the end of the hearing before the RPD, the Applicant submitted the allegations of ethnic discrimination against her. However, according to the RPD, the Applicant did not explain why she would be at risk because of her ethnic origin. As a result, the RPD found that the Applicant had failed to demonstrate that she would face a serious possibility of persecution on the basis of her ethnicity.

[24] Although the Applicant did not raise the persecution to which she could be subjected because of her gender in her BOC or at the hearing before the RPD, it was briefly considered. Therefore, in the RPD's view, the objective evidence revealed that violence against women was common in Congo. In any event, the Applicant's profile led the RPD to find that the threshold of serious possibility of persecution had not been met. There was no risk of domestic violence, and the Applicant would be reunited with her mother and two other children if she were to return to Brazzaville. She had a place to stay, she is educated, and she has had paid employment in the past.

[25] To the RPD, the key issue was the Applicant's credibility. However, the Applicant is not credible.

B. *The RAD*

[26] The RAD sided with the RPD and also found that the Applicant was not credible. As noted above, the RPD was critical of the Applicant, who failed to provide any medical notes or to proactively disclose any memory issues that had repeatedly been raised in her testimony before the RPD. The RPD's decision was issued on October 11, 2019. On November 26, 2019,

the Applicant was seen by a [TRANSLATION] “registered psychotherapist” and “member of the College of Registered Psychotherapists of Ontario.” The psychotherapist’s report was produced on November 29, 2019. The Applicant attempted to submit it to the RAD as new evidence, but to no avail. The RAD stated that it believed that the criteria set out in subsection 110(4) of the Act had not been met.

[27] A psychotherapist’s report, dated November 29, 2019, was an attempt by the Applicant to address her lack of explanation of her alleged memory loss after the Applicant was confronted with contradictions and inconsistencies in her testimony before the RPD. An application to introduce new evidence must meet the criteria of subsection 110(4) of the Act. The RAD dismissed that application.

[28] At the outset, the RAD noted that neither the Applicant nor her counsel requested to have the Applicant designated as a vulnerable person by submitting a formal request to that effect. It is therefore necessary to clarify the nature of the vulnerability, the type of procedural accommodation requested, and the reasons for granting them. A psychological report describing the specific difficulty is also required.

[29] In fact, according to the RAD, the RPD acted in a manner that facilitated the testimony, thus taking past trauma into account.

[30] According to the RAD, a psychotherapist’s report does not cover events that have occurred since the RAD’s decision. This report cannot influence the appeal before the RAD.

[31] In any event, according to the RAD, what was submitted to it was insufficient on its own to restore credibility. Paragraph 16 of the decision states the following: “However, a report provided by a psychologist, anthropologist or other expert that is based on a claimant’s discredited story cannot rehabilitate the credibility of that story.”

[32] The RAD noted that an expert’s opinion does not in itself demonstrate the truthfulness of the patient’s information on which it is based. A report cannot address issues that fall within the exclusive jurisdiction of the decision-maker.

[33] In other words, a psychotherapist’s report is not based on objective facts, but rather on the account given by the person being treated. However, the veracity of the information has not been established. The expert report was dismissed. Similarly, a hearing cannot be held in this case. The rule before the RAD is to proceed without a hearing, on the basis of the record of the proceedings (section 110(3) of the Act). A hearing may be ordered under section 110(6) of the Act, but only if specific conditions exist. The RAD was of the view that this request was not supported by comprehensive and detailed submissions. In any event, one of the three conditions required by section 110(6) was not met, as the psychotherapist’s report was found to be inadmissible. Therefore, a hearing could not be held.

[34] The RAD then reviewed the evidence that had been received by the RPD. However, the RAD stated that it had conducted its own analysis of the evidence, by listening to, among other things, the recording of the hearing. The standard before the RAD was the correctness standard, which meant that the RAD did not have to show any deference to the RPD. The RAD stated that

it had listened to and weighed the evidence with sensitivity and compassion. This is especially necessary because a woman who has experienced sexual abuse may need to be shown an extremely understanding attitude. The RAD stated the following in paragraph 34 of its decision:

> …I have listened to the recording of the hearing and reviewed the decision, and I note that the RPD asked its questions, allowed your counsel to question you when you did not seem to understand the RPD's questions, listened to your answers and wrote its decision while showing sensitivity to your allegation that you were detained and raped in your country.

To the RAD, the RPD indicated its understanding that the Applicant may use defence mechanisms, such as avoidance, to avoid discussing certain events. Moreover, this should not prevent the RPD from doing its job by thoroughly reviewing the refugee protection claim, while avoiding re-traumatizing the person seeking refugee protection.

[35] The Applicant argued that it was wrong to accuse her of lacking credibility. The RAD agreed that it was open to the RPD to draw negative inferences based on improbabilities, inconsistencies, and oversights. The RAD noted that the RPD found that the Applicant had had memory lapses because it had in fact been a rehearsed narrative. As for political activities, the responses were general, and the testimony was considered to be muddled about the periods of detention, in addition to including significant oversights without explanation. To the RAD, listening to the recording of the hearing revealed that the Applicant had not been significantly involved in the party's activities. In particular, the RAD noted the confusion surrounding the party membership card. I have reproduced paragraph 44 of the decision:

> [44] When the RPD asked if you remembered when you had obtained your membership card, you initially stated that you did not. You then answered that you thought it was in September 2011. Your card indicates that it was issued to you on November 20,

> 2013. When asked which federation you belonged to, you answered that you did not understand the question. Your counsel intervened and rephrased the question, but you still did not provide an answer. Yet your membership card clearly indicates that you belong to the Makélékélé 1 federation. When asked to describe the party's structure, you mentioned only the key officers. When asked to describe the meetings held by your party, your answers were very general: you stated that members talked about what was happening, the current state of the country, the internal organization, and party members' complaints and suggestions. When asked if you were still in contact with party members, you answered that you were with some, but you did not submit any documents from any of these party members.
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> [References omitted.]

[36] Another point of confusion over the number of the Applicant's detentions was not explained otherwise than by referring to [TRANSLATION] "confused memories." It is not clear how this would be an erroneous negative inference about credibility.

[37] The RAD had to clarify that the absence of a medical note was not related to the allegation that the Applicant was sexually abused. At that time, the RPD was concerned only with establishing the absence of a medical note regarding the Applicant's loss of memory. More importantly, the RAD noted a series of contradictions with information provided in the BOC. I have reproduced in full paragraph 47 of the RAD Decision:

> [47] In listening to the recording of your testimony before the RPD, it is clear that your testimony contradicted some of the information provided in your BOC Form and omitted important elements contained in your written account. This was the case with respect to the number of times you were allegedly detained; when you were allegedly incarcerated for the first time; that you were present when your sister was raped; how many days you were allegedly incarcerated; that your party's president was incarcerated with you; and where you hid before leaving your country—in your home village of Ludjima (which is in the Democratic Republic of

> the Congo, yet you were born in Brazzaville) or in Pointe-Noire, as stated in your BOC Form
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> [References omitted.]

[38] The RAD also considered the letter of the Applicant's sister and a certain initial medical certificate issued by a nurse. No weight was given to them in light of the quality of the testimony provided by the Applicant, whose credibility was seriously affected.

[39] Finally, the RAD considered the Applicant's claim for protection for the minor child. The RAD noted that "[d]uring the RPD hearing, you did not provide any evidence specifically relating to your minor child's fear with respect to the US, his country of citizenship." (RAD Decision, para 52). This led the RAD to find that it would be improper to engage in speculation about the future. The RAD therefore found that the lack of evidence regarding the minor son resolved that matter and that there could be no violation of the *Convention on the Rights of the Child*, which requires that the best interests of the child be considered.

III. Arguments and analysis

[40] While the appeal of the RPD decision before the RAD is subject to the correctness standard, the standard of review before the Federal Court regarding judicial review of the RAD decision is that of reasonableness. There is a significant difference between the two. While it is being appealed before the RAD, it owes no deference to the RPD decision, but this is not the case for a decision under judicial review before the Federal Court.

[41] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the landmark decision on the matter, the Supreme Court reiterated that reviewing courts intervene only when it is truly necessary. Judicial restraint is the leading principle (para 13), and courts are obliged to recognize the legitimacy of the authority of administrative decision-makers in their field, and adopt a posture of respect for them (para 14). That it why the reviewing court should not substitute its judgment for that of the administrative decision-maker, as could be the case under the correctness standard. Attention cannot be focused on the finding the court would have reached in the place of the administrative decision-maker. In the vast majority of cases, a decision that is unreasonable must be returned to the administrative decision-maker.

[42] This manifests itself in different ways. For our purposes, it must simply be remembered that the onus is on an applicant to demonstrate the unreasonableness of the RAD decision. A reasonable decision has characteristics that are justification, transparency, and intelligibility, and the decision is justified in light of the relevant legal and factual constraints (para 99).

[43] The Supreme Court in *Vavilov* insisted that the identified shortcomings, if any, must be serious. They ensure that the decision cannot be said to meet the requirements of justification, transparency, and intelligibility. Deficiencies should not be superficial or peripheral to the merits of the decision (para 100).

[44] The Court elaborated on what makes a decision unreasonable. It identified two categories of fundamental deficiencies (it can be assumed that these two are not exhaustive). A decision lacking internal logic would not be reasonable. On the contrary, a decision based on an internally

coherent reasoning will be reasonable. The reviewing court is able to follow the decision-maker's reasoning. As the Supreme Court wrote, the reasoning "adds up" (para 104): the reasoning is not circular, it does not present false dilemmas, nor does it end up with unfounded generalizations or absurd premises.

[45] An indefensible decision, given the factual and legal constraints, will also, of course, be an unreasonable one.

[46] However, the Supreme Court also insisted on a culture of justification (*Vavilov*, para 14). Paragraph 87 states the following:

> [87] …Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process . . .

[47] The Applicant is therefore faced with this burden. The first issue to be addressed is that of the admissibility of new evidence on appeal. This relates to the psychotherapist's report. The IRPA determines in which cases such evidence will be admissible. I have reproduced subsection 110(4) of the Act:

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[48] This issue is important here. The issue of the Applicant's credibility is central to the debate. It is understood that her memory lapses in her testimony were perceived as the result of a learned narrative. Credibility was a determinative issue. The Applicant sought to provide an alternative explanation on appeal using the services of medical experts, including a psychotherapist. In addition, the above-mentioned report stated that the Applicant was diagnosed with post-traumatic stress disorder.

[49] If the psychotherapist's report had been admitted into evidence, it may have shed a different light on the Applicant's questioning before the RPD. However, it must still be admissible. The Applicant bears this burden. But the decision on this eligibility issue must itself meet the criteria of justification, transparency, and intelligibility. In my opinion, the RAD's decision, in which it states that the new evidence should not be admitted, is lacking.

[50] Perfection is not sought in the reasons. However, they need to explain, even minimally, how given outcomes are reached. As the Court reiterated in *Vavilov*, "reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov*, para 95).

[51] In fact, a defective justification does not satisfy the need for transparency and intelligibility that makes a decision reasonable. Of course, a justification on a peripheral element should not be fatal. This will be different if the issue for which reasons are required,35 for example, is a key element of the decision).

[52] Where the decision will have significant personal repercussions, or may cause serious harm, it will have an impact on the reasons: “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” (*Vavilov*, para 133). To clearly highlight the importance of the reasons, the majority in *Vavilov* wrote the following in paragraph 135:

> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

[53] And that is not all. The reviewing court must ensure that the administrative decision-maker’s reasoning is fully understood. But the reviewing court should not set out its own reasons to support the administrative decision. The rationale for the decision seems as important as the outcome itself. “To allow a reviewing court to do so would be to allow an administrative decision-maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would

also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision" (*Vavilov*, para 96).

[54] The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230 [*Singh*], confirmed that decisions on the admissibility of new evidence are subject to a reasonableness standard (para 29). In addition, the Court of Appeal considered the conditions of subsection 110(4) to be essential (para 35). This means that other criteria, such as the RAD considering the probative value or credibility of evidence, cannot replace the requirements of subsection 110(4) (para 36): These must be met first.

[55] The Applicant claimed that the RAD's refusal to admit the report was due to a poor understanding of the law. She added that the approach used by the RAD lacked intelligibility and transparency. In my view, the Applicant is right. The refusal to admit into evidence must be reviewed.

[56] The reasons given by the RAD cannot meet the reasonableness standard given their transparency and intelligibility. The RAD clearly decided that the criteria of subsection 110(4) were not met. However, with all due respect, it is not clear why in reading paragraphs 12 to 20 of the RAD's decision.

[57] The Applicant essentially complains that the RAD's analysis was confused. I do not believe that she is wrong. In my opinion, the analysis lacked transparency and intelligibility. The section of the RAD's decision on new evidence is a patchwork of elements that does not explain

why the criteria are not met. At best, paragraph 14 of the decision states that there isn't "anything that arose after the RPD rejected your claim." However, subsection 110(4) refers to two other circumstances in which evidence may be admissible. There is no reference to those circumstances. Instead, the RAD deals with other issues whose relevance to the admissibility of the evidence on appeal is questionable. The Applicant noted that the RAD introduced in its analysis of the admissibility of the new evidence the concept of a vulnerable person, in accordance with Chairperson's Guideline 8. The relevance of this addition is not explained.

[58] In paragraph 13, the RAD explains that the Applicant has not applied to the RPD for procedural accommodation under Chairperson's Guideline 8 on vulnerable persons before the Immigration and Refugee Board of Canada. A long paragraph is devoted to it, but it does not lead to any conclusion. In fact, the relevance of this statement remains a mystery. The Applicant claims that RAD speculated that the RPD took psychological suffering into account and that the RPD criticized the report submitted as evidence without accepting it as evidence. I agree. The purpose of a psychotherapist's report is obviously to counter the RPD's findings on the Applicant's memory problems at the RPD hearing. This led the RPD to conclude that the Applicant had rehearsed her narrative. The issue was whether the new evidence to that effect was admissible.

[59] The review of paragraphs 14 to 23 of the RAD decision leads me to conclude that there was some confusion. The RAD appeared to find that the RPD had acted in such a way as to facilitate the testimony before declaring in the same sentence that the therapeutic report could have no influence on the outcome (RAD decision, para 14) without even revealing how the RPD

had reached that outcome. If the report, to the extent that it was admissible, could have the effect of addressing the memory lapses that undermined the Applicant's credibility, how can the RAD then go on to opine that the report could have no influence? How is the probative value assessed at the admissibility stage? What are the rules and the analytical framework? And why would the probative value be so low? This may be true, but we still need to know why. The same is true of the comment in paragraph 15 that "the fact remains that the report presented on appeal cannot, on its own, restore your credibility." The RAD added in paragraph 16 that "a report provided by a psychologist, anthropologist or other expert that is based on a claimant's discredited story cannot rehabilitate the credibility of that story." It would again be necessary to explain why in what has been said to have been the analytical framework used.

[60] The central issue in this case was the Applicant's credibility. The RPD repeatedly noted in its decision that memory problems in the absence of explanation were perceived as more of a rehearsed narrative. Without analysis, it is not known why the RAD dismissed what the Applicant submitted as new evidence on the basis that that evidence could not redeem her credibility. With all due respect, their review was neither transparent nor intelligible.

[61] While the issue is to determine whether new evidence was admissible to counter the decision on credibility, the RAD seems to have submitted a tautological proposal when it stated in paragraph 16 that [TRANSLATION] "based on an account that has lost all credibility, a report from a psychologist, anthropologist or other expert cannot restore to the narrative of the person seeking refugee protection the credibility that has been lost." However, credibility was lost because the Applicant had memory lapses about the narrative itself. The psychotherapist's report

was not an end in itself; it sought to restore credibility to restore value to the narrative. The reviewing court cannot attempt to determine what the result of the analysis should be. All it wants is for the analysis to be carried out. Once this has been done, it will remain to be seen whether the finding reached was itself reasonable.

[62] Lastly, the RAD criticized the psychotherapist's report by reiterating that such a report does not in itself prove the truth of the information on which it is based. That is certainly true. This Court has reiterated as much numerous times (*Demberel v Canada (Minister of Citizenship and Immigration)*, 2016 FC 731 at para 47; *Owolabi v Canada (Minister of Citizenship and Immigration)*, 2021 FC 2). In *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304, paragraph 16 states the following:

> [16] The RPD has discretion to dismiss psychological evidence when the physician simply repeats what the patient has told them about the reasons for their stress, and then draws a medical conclusion that the patient suffers from stress because of these reasons. This is all the more true when the RPD dismisses the facts underlying the diagnosis. In this case, there was no independent medical examination to support the psychological assessment, and no other medical basis corroborates the diagnosis.

The consistent jurisprudence of this Court confirms that psychological reports should not be seen as a universal remedy *(Egwuonwu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 231; *Bradshaw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 632; *N'kuly v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1121). This may have been what the RAD was referring to.

[63] Essentially, the RAD failed to explain how the considerations put forward affected the admissibility for evidence under subsection 110(4) of the Act. It is possible that such considerations were relevant. But we do not know. The reviewing court should not involve itself in the merits of the matter under judicial review because Parliament clearly left the issue of determining the admissibility of new evidence to the administrative decision-maker on the basis of criteria that have been the subject of legislation. It is not up to the reviewing court to substitute for the RAD and to seek to interpret subsection 110(4) of the Act. I note that the Applicant also relied on the Federal Court of Appeal decision in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] as to the admissibility of new evidence. Ultimately, the RAD did not consider the scope of subsection 110(4) of the Act and the three eligibility options contained therein, made a footnote reference to *Singh* (*supra*) and did not even allude to *Raza*. I note in passing that the Federal Court of Appeal clearly saw a role for *Raza* in its review of subsection 110(4) in *Singh*. Paragraph 49 of *Singh* states that "Subject to this necessary adaptation, it is my view that the implicit criteria identified in *Raza* are also applicable in the context of subsection 110(4)." Given the obvious importance of the admissibility of new evidence in regard to the impugned credibility, the issue of admissibility deserved better.

[64] What is lacking here is the lack of justification and intelligibility of the decision on the refusal to admit a new item of evidence. This should have brought the RAD back to the application of *Singh* and *Raza*. *Vavilov* was a change of direction in that the Court sought to create a culture of justification: "We will also affirm the need to develop and strengthen a culture of justification in administrative decision making" (para 2). This is why not only the outcome matters, but also the rationale for achieving it must be considered. The reasons have several

salutary effects. They explain the decision-making process and why the decision was made. They demonstrate that the arguments were considered and that the decision is fair: It is not arbitrary (*Vavilov*, para. 79).

[65] The process of drafting reasons also has a practical purpose. It encourages administrative decision-makers to more carefully examine their own thinking and to better articulate their analysis in the process, the discipline of writing (*Vavilov*, para. 80). The importance of the reasons is highlighted in the manner set out in paragraphs 81 and 84 of *Vavilov*:

> [81] …The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.
>
> …
>
> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
>
> [Emphasis added]

[66] The reviewing court is therefore encouraged to understand the administrative decision-maker's rationale to determine whether the decision was reasonable. That was not possible in

this case. In *Vavilov*, the Supreme Court endorsed the Federal Court of Appeal in *Delios v Canada (Attorney General*), 2015 FCA 117, when the Court of Appeal stated in paragraph 28 that "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did." Rather, the reviewing court only decides on the reasonableness of the decision, which, as the Supreme Court specified, includes the rationale and the outcome.

[67] That is why the reviewing court does not replace the reasons given by the administrative decision-maker. It is worth repeating. The Supreme Court is of the view that "a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (para 98). The fact that the reviewing court may consider the outcome to be reasonable does not allow it to disregard the erroneous basis of that outcome. In my view, that is the case here. The Court in *Vavilov* showed how important reasons are when it wrote the following in paragraph 96:

> To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision.

[68] In the case at hand, the reasons do not demonstrate an internally coherent reasoning. The issue is to determine whether a psychotherapist's report was admissible on appeal before the RAD based, first and foremost, on subsection 110(4) of the Act. However, the RAD stated, but failed to explain, that the report was inadmissible because no events had occurred since the RPD's decision. As the Supreme Court pointed out in *Vavilov*, "Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment" ": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139, (*Vavilov*, para 102). Moreover, subsection 110(4) has two other components that should have been considered.

[69] I think it was necessary to explain why subsection 110(4) did not apply. The Applicant clearly believed that the creation of the report after the RPD's decision was evidence that met one of the requirements of subsection 110(4). As stated above, subsection 110(4) is essential according to the Court of Appeal in *Singh*. However, the scope of the subsection deserved better for an Applicant for whom this decision was of paramount importance.

[70] According to *Singh*, the factors in *Raza* are not excluded from any analysis when trying to determine admissibility. I reiterate that the Court of Appeal in *Singh* determined that the implied admissibility conditions found in *Raza* (with respect to paragraph 113(a) of the Act, the wording of which is very similar to subsection 110(4) of the Act), are of use in reviewing the requirements of subsection 110(4). But the criteria in *Raza* were added to the criteria of new

evidence: they do not counterbalance those criteria. As the Court of Appeal stated in *Singh*, "It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible" (para 44). Unfortunately, the full analysis of the admissibility of the new evidence was missing in this case.

IV. Conclusion

[71] The lack of reasons for declaring the new evidence inadmissible is fatal in the case at hand. One would have thought that there should have been a statement, however brief, outlining the contents of the report that the Applicant wished to file and use. After this, it may have been appropriate to apply the analytical framework from *Singh*, which uses the criteria identified in *Raza*. The decision on admissibility can thus have been articulated so as to have arrived at a rationale that was reasonable.

[72] Two comments appear relevant to me. The first is that this Court does not rule in any way as to whether the evidence that the Applicant wished to submit on appeal was admissible. Such a decision is the exclusive jurisdiction of the RAD. The Court's decision concerns the presence of transparency and intelligibility, nothing more.

[73] The second is to reproduce the end of paragraph 49 of *Singh*:

> Not only are the requirements set out in *Raza* self-evident and widely applied by the courts in a range of legal contexts, but there are very good reasons why Parliament would favour a restrictive approach to the admissibility of new evidence on appeal.

Moreover, the Court of Appeal in *Singh* accepted without hesitation the RAD's comment in that same case, at paragraph 20 of the RAD decision:

> On this topic, it should be noted that the fact that evidence corroborates facts, contradicts RPD findings or clarifies evidence before the RPD does not make it "new evidence" within the meaning of subsection 110(4) of the Act. If that were the case, refugee protection claimants could split their evidence and present evidence before the RAD at the appeal stage that could have been presented at the start, before the RPD. In my opinion, this is exactly what subsection 110(4) of the Act seeks to prohibit.
>
> [Footnotes omitted.]

[74] There is no need to consider any other reasons invoked by the Applicant to argue that the decision was unreasonable. It is preferable that the RAD first determine the issue of new evidence, whether it is admissible, and its effect if it is admissible, before a court considers other arguments that may be affected by the possible admission of new evidence. If the evidence is inadmissible, it may not be useful to go further. However, the new, differently-constituted RAD that will hear the new determination will have the opportunity to act on any issues raised at that time if it deems it appropriate.

[75] As a result, the application for judicial review is allowed. The Applicant's appeal will have to be heard by a differently-constituted RAD which will then make a decision on all of the grounds of appeal, not only on the sole issue of the so-called new evidence.

[76] The parties did not request that a question be certified. In fact, there is no serious question of general importance.

JUDGMENT in IMM-6665-20

THIS COURT'S JUDGMENT is as follows

1. The application for judicial review is allowed.
2. The Applicant's appeal will have to be heard by a differently-constituted RAD, which will then make a decision on all of the grounds of appeal, not only on the sole issue of the so-called new evidence.
3. No question is certified.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD:

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