Federal Court Cour fédérale

Date: 20220617

Docket: IMM-1355-21
IMM-6074-20

Citation: 2022 FC 916

Vancouver, British Columbia, June 17, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

VAN DUY PHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

THANH TU DUONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] These judicial review applications seek to set aside decisions that denied the applicants' requests for a permanent resident visa as a member of the Start-up Business Class under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). Although the applications were filed as two separate proceedings, they were argued concurrently and the same legal counsel represented the parties. The applications raised substantially the same issues for determination.

[2] The officers concluded that the applicants' primary purpose in participating in an agreement with a business incubator was to acquire a status or privilege under the *IRPA* and not to engage in the business activity that was the subject of a written commitment with the incubator.

[3] In this Court, the applicants submitted that the decisions were unreasonable under the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[4] For the reasons below, the applications will be dismissed. Applying the standards in *Vavilov* and other binding appellate cases, the applicants did not demonstrate that the officers made a reviewable error that would permit the Court to intervene to set aside the decisions.

I. Background and Events Leading to this Application

A. *The Start-up Business Class under the IRPA*

[5] Subsection 12(2) of the *IRPA* provides that a foreign national may acquire permanent residence status in Canada by being selected as a member of the economic class based on their ability to become economically established in Canada. Under subsection 14.1(1), the Minister of Citizenship and Immigration may give instructions establishing a class of permanent residents as part of the economic class and may provide rules governing such class.

[6] The Start-up Business Class program commenced on March 30, 2013, when the Minister issued Ministerial Instructions. The applicable instructions for these proceedings are the *Ministerial Instructions Respecting the Start-up Business Class, 2017*, (2017) C Gaz I, 3523 (the *"Ministerial Instructions"*).

[7] In April 2018, the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*IRPR*") incorporated the program through amendments to Part 6 ("Economic Classes"), Division 2 ("Business Immigrants"): see SOR/2018-72. The *IRPR* amendments included sections 98.01 to 98.13, which generally correspond to the contents of the *Ministerial Instructions*.

(1) The Ministerial Instructions

[8] Subsection 2(1) of the *Ministerial Instructions* established the start-up business class and defined the class as "foreign nationals who have the ability to become economically established in Canada and meet the requirements of this section". To qualify for the class, an applicant must

have: (a) obtained a commitment from either a designated business incubator, a designated angel investor group or a designated venture capital fund (listed in Schedules 1, 2 and 3 of the *Ministerial Instructions*); (b) attained a certain level of language proficiency; (c) completed at least one year of post-secondary education in good standing; and (d) a certain amount of transferable and available funds: *Ministerial Instructions*, subsection 2(2).

[9] A commitment consists of an agreement between a designated business incubator and an applicant, in the form of a Commitment Certificate and a letter of support. These documents confirm the applicant's participation in the relevant program, the terms of the agreement, and the due diligence assessment of the applicant and the start-up business: *Ministerial Instructions*, section 6.

[10] Subsection 2(5) of the *Ministerial Instructions* specified that an applicant is not a member of the Start-up Business Class if their participation is primarily for the purpose of acquiring a status or privilege under the *IRPA*, rather than for engaging in the identified business activity.

(2) Amendments to the *IRPR* for the Start-up Business Class

[11] Effective on April 11, 2018, the *IRPR* were amended to include provisions related to the Start-up Business Class.

[12] Subsection 98.01(1) of the *IRPR* prescribed the Start-up Business Class as a class of persons who may become permanent residents "on the basis of their ability to become

economically established in Canada", who meet the requirements of subsection 98.01(2) and who intend to reside in a province other than Québec.

[13] Under *IRPR* subsection 98.01(2), a foreign national is a member of the Start-up Business Class if: (a) they have obtained a commitment made by one or more entities designated under the *IRPR* and that complies with certain other conditions; (b) they have attained a certain level of language proficiency; (c) they have a certain amount of transferable and available funds; and (d) they have started a qualifying business within the meaning of section 98.06.

[14] Under subsection 98.06(1), a qualifying business with respect to an applicant is one

(a) in which the applicant provides active and ongoing management from within Canada;

(b) for which an essential part of its operations is conducted in Canada;

(c) that is incorporated in Canada; and

(d) that has an ownership structure that complies with the percentages established under subsection 98.06(3).

[15] Subsection 98.06(2) provides that a business that fails to meet one or more of the requirements in paragraphs 98.06(1)(a) to (c) is nevertheless a qualifying business "if the applicant intends to have it meet those requirements after they have been issued a permanent resident visa".

[16] Paragraph 89(b) provides, in relevant part, that an applicant in the Start-up Business Class is not considered to have met the applicable requirements of Division 2 if the fulfilment of the requirements is based on one or more transactions that were entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*, rather than for the purpose of engaging in the business activity for which a commitment referred to in paragraph 98.01(2)(a) was intended.

II. The Decisions under Review

A. *The Decision in Phan*

[17] The applicant, Van Duy Phan, is a citizen of Vietnam. On February 4, 2019, the applicant submitted an application for permanent residence as a member of the Start-up Business Class based on a business venture involving a social media platform for prospective and current international university students and their parents.

[18] The applicant obtained a Commitment Certificate from Empowered Startups Ltd. ("Empowered"), which was a designated business incubator.

[19] An officer sent the applicant procedural fairness letters dated March 6, 2019 and August 3, 2020, which raised concerns about *IRPR* paragraph 89(b). The applicant responded by letters dated March 13, 2019 and August 27, 2020.

[20] By decision letter dated February 25, 2021, an officer rejected the application. The officer's notes in the GCMS reveal a series of concerns about the application, as follows:

- lack of accomplishments and progress completed in the business venture;
- the applicant's lack of technology experience; and
- lack of evidence to show collaboration with a logo designer for the application.

[21] The officer was not satisfied with the work performed to date, the necessity of the venture being in Canada, the applicant's seriousness in the venture and Empowered's due diligence process and coaching. Because the applicant made little progress and had a poor quality business model and logo, the officer was concerned by "what appear[ed] to be a lack of seriousness on the part of the applicant".

[22] The officer applied paragraph 89(b) of the *IRPR* and found that the applicant's primary purpose in entering the commitment with Empowered was to acquire a status or privilege under the *IRPA*. The officer therefore refused the application for permanent residence as a member of the Start-up Business Class under *IRPR* paragraph 98.01(2)(a).

B. ***The Decision in Duong***

[23] The applicant, Thanh Tu Duong, is a Vietnamese national who, on August 22, 2017, submitted an application for a permanent resident visa as a member of the Start-up Business Class. The applicant's business venture was an e-commerce platform to connect sellers of Canadian agricultural equipment to prospective buyers in Vietnam.

[24] An officer sent the applicant a procedural fairness letter dated January 13, 2020, which raised concerns about *IRPR* paragraph 89(b). The applicant responded to it by letter dated February 10, 2020.

[25] By decision dated October 23, 2020, an officer rejected the application. The officer's GCMS notes identified concerns about:

- the progress and growth of the business since August 2017;
- the absence of concrete details and information on how the applicant was personally involved in the business since 2017;
- the work that has been completed in Canada: documentation provided by the applicant did not alleviate the officer's concerns about a lack of seriousness of the applicant. The officer was concerned about a "faulty business model", lack of research by the applicant and lack of coaching by Empowered; and
- the applicant failed to show significant progress and seriousness during the incubation period for the business venture.

[26] Overall, the officer was concerned about a lack of seriousness on the part of the applicant. The officer concluded that the applicant's primary purpose in entering the commitment with Empowered was to gain a status or privilege under the *IRPA*, as described in paragraph 89(b) of the *IRPR*. Therefore, the officer concluded that the applicant was not a member of the Start-up Business Class as described in *IRPR* paragraph 98.01(2)(a) and refused the application.

III. Analysis

[27] The issues in these applications may be conveniently analyzed under two headings:

A. Should new evidence be admitted on this application?

B. Was the officer's decision unreasonable, applying *Vavilov* principles?

A. *Should new evidence be admitted on this application?*

[28] The first question to be resolved is the admission of new evidence on this application under Rule 312 of the *Federal Courts Rules*, SOR/98-106.

[29] By Notice of Motion dated November 19, 2021, the applicants requested the admission of six pages of emails obtained by their counsel on October 20, 2021, following a request under the *Access To Information Act*, RSC 1985, c A-1.These emails were internal communications of certain employees of Immigration, Refugees and Citizenship Canada ("IRCC") that were disclosed to counsel on or about October 20, 2021.

[30] From the correspondence filed by counsel and their submissions, I understand that the contents of these internal IRCC emails caused the respondent to settle a number of other judicial review applications that were scheduled to be heard concurrently with these two applications, owing to concerns related to procedural fairness or a possible reasonable apprehension of bias.

[31] As the present applications did not settle, the Notice of Motion sought leave to file an affidavit attaching the emails for use on these applications for judicial review.

[32] The test for admission of a new affidavit under Rule 312 of the *Federal Courts Rules* starts with a determination of whether the evidence is admissible on the application for judicial review and whether the evidence is relevant to an issue properly before the Court: *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88, at paras 4 and 6. Under Rule 312, the Court will also have regard to whether it is in the "interests of justice" to admit the new affidavit, including whether the evidence (i) will assist the court, (ii) will cause substantial or serious prejudice to the respondent, and (iii) was available when the applicant filed the materials for the judicial review application or could have been discovered with the exercise of due diligence: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, at para 11. See also *McClintock's Ski School & Pro Shop Inc. v Canada (Attorney General)*, 2021 FC 471, at paras 38-39.

[33] In considering whether the evidence will assist the Court, the evidence must be sufficiently probative that it could affect the result: *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101, at paras 2 and 11.

[34] In this application, the applicants seek to use the IRCC emails to raise an argument about procedural fairness. The possible admission of evidence arising outside the tribunal record in order to argue procedural unfairness is an exception to the general rule that a reviewing court only considers evidence in the record that was before the decision maker: *Tsleil-Waututh Nation*, at paras 97-98; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paras 19-20. Nothing in the record and submissions suggested that the applicants knew about or could have raised the procedural

fairness concerns to the officers: see e.g., *Shoan v Canada (Attorney General)*, 2020 FCA 174, esp. at paras 3 and 6-7, aff'g 2018 FC 476, at paras 157-162.

[35] However, reviewing the emails and the record in these applications, I find no factual connection between the applicants or their applications, on one hand, and the emails or their contents on the other hand. The applicants' supporting affidavit and submissions did not make any connection between the individuals who authored or received the emails and the applicants or the decisions under review, and I do not detect any such nexus in the record. The respondent expressly confirmed to the Court that the individuals who authored or received the emails played no role in the decisions related to the applicants. The respondent's submissions advised that the officers who made the decisions and all the entries in the Global Case Management System ("GCMS") worked in offices located in a different Canadian city than the authors or recipients of the emails. There was therefore no possibility that the authors or recipients of the emails played a role in the decisions under review.

[36] Accordingly, the proposed new evidence is not relevant or sufficiently probative to warrant admission into evidence under Rule 312. The applicants' motion will be dismissed.

B. ***Was the Officer's decision unreasonable, applying Vavilov principles?***

(1) The Standard of Review – General Principles

[37] The reasonableness standard of review, as described in *Vavilov* and other appellate decisions, is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The reviewing court starts

with the reasons of the decision maker, which are read holistically and contextually with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33.

[38] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 24-36.

[39] The Supreme Court has identified two types of fundamental flaws that may warrant intervention by a reviewing court: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at para 101. However, to intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

[40] When issues of statutory interpretation arise, the Court takes the same approach as with other aspects of judicial review: the Court examines the administrative decision as a whole, including the reasons provided by the decision maker and the outcome reached. The question is

whether the decision, including the decision maker's interpretation of the provision(s), was reasonable: *Vavilov*, at paras 115-124; *Canada Post*, at para 41.

[41] The applicant bears the onus to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

(2) Did the officer make a reviewable error by applying the wrong legal regime to the decision in Duong?

[42] In the Phan application, the parties agreed that the *IRPR* applied to the officer's decision. I agree.

[43] In the Duong application, the respondent noted that the applicant had filed his application under the *Ministerial Instructions*, before the comparable provisions of the *IRPR* became law. The respondent acknowledged that the officer should have applied the *Ministerial Instructions* but erroneously referred to and applied the *IRPR* provisions in the decision letter and the GCMS notes. However, the respondent also submitted that both subsection 2(5) of the *Ministerial Instructions* and paragraph 89(b) of the *IRPR* required that an applicant's primary purpose of entering into a commitment be for the purpose of the business venture and not to gain a status or privilege under the *IRPA*. Accordingly, the respondent submitted that the outcome and reasoning in the officer's decision was not affected by the erroneous reference to the provisions of the *IRPR* rather than the *Ministerial Instructions*.

[44] I agree with the respondent. While the officer referred to the wrong legal source, the error did not materially affect the officer's reasoning and the outcome of the decision. The substance

of the decision at issue was the same, whether under subsection 2(5) of the *Ministerial Instructions* or *IRPA* paragraph 89(b). Accordingly, the error in this case was not so fundamental as to undermine the reasonableness of the officer's decision on this ground: *Vavilov*, at paras 100-101.

(3) The Applicants' Main Challenge to the Reasonableness of the Decisions

[45] To support their principal positions on the substantive merits of the judicial review applications, the applicants raised two closely related arguments. First, the applicants submitted that the officers made an error of law by failing to determine, under *IRPR* subsection 98.06(2), whether or not they intended to meet the "active and ongoing management" requirement after being issued a permanent resident visa. Second, the applicants submitted that the officers made an error of law or reached an unreasonable decision because the officers' analysis under paragraph 89(b) was, in the result, "tainted" by the officers' failure to make the required determination under *IRPR* subsection 98.06(2).

[46] The applicants argued that *IRPR* subsection 98.06(2) gave them an "entitlement to wait" to meet the requirements of paragraphs 98.06(1)(a) to (c) until after being issued a permanent resident visa. The applicants submitted that the start-up visa program was predicated upon an applicant's "human capital" and "potential" and was designed to attract innovative business people who have the potential to build high growth start-up businesses in Canada that can compete on a global scale. The applicants submitted that the officers were required to apply the intention test under subsection 98.06(2) of the *IRPR*:

Exception — intention	**Exception — intention**
(2) A business that fails to meet one or more of the requirements of paragraphs (1)(a) to (c) is nevertheless a qualifying business if the applicant intends to have it meet those requirements after they have been issued a permanent resident visa.	**(2)** L'entreprise qui ne satisfait pas aux exigences prévues aux alinéas (1)a) à c) est néanmoins une entreprise admissible si le demandeur a l'intention, après s'être vu délivrer un visa de résident permanent, de faire en sorte que l'entreprise satisfasse à ces exigences.
[Emphasis added.]	[Soulignement ajouté]

[47] The applicants also submitted that IRCC's Operational Instructions and Guidelines entitled *Assessing the application (start-up business class)* showed that the program was predicated upon an applicant's "potential" and instructed the officials on how to appropriately assess an application:

These instructions show how officers should appropriately assess an application for the start-up business class.	Les présentes instructions indiquent aux agents comment évaluer adéquatement une demande présentée au titre de la catégorie du démarrage d'entreprise.
[…]	[…]
Criteria for a qualifying business	**Critères d'admissibilité d'une entreprise**
In order to apply, applicants are required by paragraph 98.01(2)(d) and subsection 98.06(1) of the Immigration and Refugee Protection Regulations to have started a qualifying business. This means the applicant must have	Pour présenter une demande, un demandeur est tenu, en vertu de l'alinéa R98.01(2)d) et du paragraphe R98.06(1) du Règlement sur l'immigration et la protection des réfugiés, d'avoir mis sur pied une entreprise admissible. Cela

formed an entity for business/commercial purposes that has an ownership structure that complies with the percentages established by the Minister.	signifie qu'il doit avoir créé une entité à des fins professionnelles ou commerciales dont la structure de propriété respecte les pourcentages établis par le ministre.
In addition, in order to have a qualifying business, the applicant **must** meet the following criteria or intend to meet them upon receiving permanent residence:	De plus, pour que son entreprise soit admissible, le demandeur **doit** satisfaire aux critères suivants ou avoir l'intention d'y satisfaire à l'obtention de sa résidence permanente:
• the applicant provides active and ongoing management of the business from within Canada	• Le demandeur assure une gestion active et continue de l'entreprise à partir du Canada.
[…]	[…]
[Emphasis added.]	[Soulignement jouté]

[48] The applicants maintained that these provisions allowed applicants have an intention to provide active and ongoing management from within Canada after being issued their permanent resident visa. Therefore, an applicant could be granted permanent residence by showing such an intention to meet the requirements for a qualifying business after receiving permanent residence. According to the applicants, the officers in this case did not conduct the required assessment as to whether or not the applicants intended to meet the requirements after being issued a permanent resident visa. Instead, and in conflict with their entitlement to wait for the issuance of the permanent resident visa before meeting the requirements, the officers erroneously expected a "result" in the progress of the business venture, or significant progress.

[49] The respondent took a different view of this case. The respondent submitted that the officers' decisions only applied *IRPR* paragraph 89(b). The decisions were not based on an application of *IRPR* subsection 98.06(2), or on whether the applicant met the requirements of a "qualifying business" by providing active and ongoing management of the business venture from within Canada under paragraph 98.06(1)(a), as the applicants' position asserted. The respondent submitted that there was no obligation in law (or in any guidelines) to apply subsection 98.06(2) and, because the officers only applied paragraph 89(b), there was no reason in this case for the officers to apply the intention test under subsection 98.06(2).

[50] The respondent also maintained that the officers' decision was reasonable in the applicants' circumstances. The officers were concerned with a lack of progress and accomplishments in the business ventures. The respondent supported the reasoning of the officers based on the evidence in the record.

[51] Both the applicants and the respondent filed evidence that was not before the officers, designed at least in part to support their respective views of the proper interpretation of the *IRPR* provisions.

(4) Application of Legal Principles

[52] As a preliminary matter, I have considered whether the applicants' arguments are properly before this Court on judicial review. The principal issue concerns the interpretation of certain provisions in the *IRPR* and how the provisions interact: whether the officers could make their decisions under *IRPR* paragraph 89(b) without (first, or also) making a determination under

subsection 98.06(2). The applicants did not raise the issue in any submission to the officers, and the decisions did not address it.

[53] As a general rule, a reviewing court will not consider an issue that could have been raised before an administrative decision maker but was not, and is later raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 23-26; *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 99; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 73 (leave to appeal to the Supreme Court granted: SCC File No. 39855 (March 3, 2022); *Gomez v Canada (Attorney General)*, 2021 FC 1300, at paras 58-84. However, the general rule does not require the reviewing court to decline to hear all "new" issues in all circumstances, particularly if the rationales supporting the general rule are not engaged: see *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44, [2015] 3 SCR 147, at paras 65-69; *Alberta Teachers*, at paras 5 and 27-29.

[54] Although the parties' submissions were concerned with the proper interpretation of the *IRPR* provisions, I am also mindful that when issues of statutory interpretation arise on judicial review, *Vavilov* and *Canada Post* instruct that the Court's role is not to determine the correct interpretation of the provisions of the statute, in this case the *IRPR*. The Court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Vavilov*, at para 116; *Canada Post*, at paras 40-41; *Mason*, at para 20.

[55] In the present case, I find no bar to considering the issue raised by the applicants. The issue arises from an alleged omission by the officers in the decisions, to make an allegedly required determination under the *IRPR*. The applicants' position is based on an alleged unstated interpretation of the provisions by the officers in the decision letters and GCMS notes (i.e., that section 89 could be applied on its own, without a determination under subsection 98.06(2)): see similarly, *Alberta Teachers*, at para 29. The respondent did not raise an objection to the applicants' submissions on these issues in this Court. The respondent also did not allege that any prejudice was caused by a failure to raise the issue before the officers, such as an inability to adduce evidence on the issue and indeed adduced additional evidence of its own: *Alberta Teachers*, at para 5 and 28. Finally, and consistent with judicial review principles, I will rest this decision on narrow grounds that do not include my own interpretation of the *IRPR* provisions and do not prevent a future decision on their interpretation.

[56] Turning to the application of the principles in *Vavilov*, I have concluded that the applicants have not demonstrated that the officers' decisions were unreasonable. The applicants' submissions have not persuaded me that the officers made a reviewable error in this case, whether by focusing on paragraph 89(b), by failing to conduct an analysis under subsection 98.06(2) before an analysis under paragraph 89(b), or by failing to consider subsection 98.06(2) at all. There are several reasons for this conclusion.

[57] First, the applicants did not identify any specific legal constraints on the officers' approach, interpretation or application of the *IRPR* provisions or on how the provisions interact. In particular, the applicants did not point to any express language in the provisions that required

the officers to make a determination under subsection 98.06(2). Nor did the applicants suggest that the language in the *IRPR* made a determination under subsection 98.06(2) logically antecedent to a decision under paragraph 89(b), or that a decision under the latter provision could not legally stand without a decision under the former. The applicants provided no specific legislative constraint in the words of the *IRPR*: see *Vavilov*, at para 111; *Entertainment Software*, at para 33; *Safe Food Matters Inc. v Canada (Attorney General)*, 2022 FCA 19, at para 42.

[58] The applicants also did not contend that the officers were constrained by any court decision that required the officers to consider subsection 98.06(2) first, or at all: *Vavilov*, at para 112; *Entertainment Software*, at para 33. In fact, the applicants submitted that there were no cases whatsoever interpreting these provisions of the *IRPR*.

[59] Second, the respondent was correct to observe that the officers' decisions only concerned the application of paragraph 89(b) of the *IRPR*. The possible application of that provision was the very issue raised in the officers' procedural fairness letters, to which the applicants had an opportunity to respond (and did). The applicants did not challenge the officers' reasoning under paragraph 89(b).

[60] Third, the applicants' submissions to the officers and their responses to procedural fairness letters did not raise any of the issues that they raised in this Court related to *IRPR* subsection 98.06(2). So there is no issue as to whether the officers ignored a key submission or failed to grapple with an important issue raised by the applicants: *Vavilov*, at para 128.

[61] Relatedly, the applicants' arguments in this Court were not based on something the officers actually stated or decided. Neither the decision letters nor the officers' GCMS notes analyzed or even mentioned *IRPR* subsection 98.06(2), or the possibility that the applicants could meet the requirements of paragraphs 98.06(1)(a) to (c) after obtaining permanent residence, or an intention test. The officers also did not engage in an interpretation of the text, context and purposes of subsections 98.06(1) and (2), or of how section 89 and subsection 98.06 interact or relate to each other: see *Vavilov*, at paras 118-122. In this Court, the applicants did not argue that the officers' decisions were deficient for failing to provide a discernible reasoned explanation of their (unstated) interpretation of the *IRPR* provisions: see *Mason*, at para 32; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157; and *Safe Food Matters*.

[62] The parties argued this application on the basis that the Court should provide guidance on the interpretation of the *IRPR* provisions. Both adduced new evidence in this Court and made submissions about the proper interpretation of the *IRPR* provisions based on the economic development policy and the purposes of the Start-up Business Class program. While it may be counterintuitive to some observers, I am unable to engage in that interpretation exercise. The existing instructions from the Supreme Court and the Federal Court of Appeal, which bind this Court, do not permit it. It is the administrative decision maker's role to interpret the provisions first, subject to later review for reasonableness (not correctness) by the Court. See *Safe Food Matters*, at para 37; *Alexion Pharmaceuticals*, at para 24; *Mason*, at paras 12, 20 and 76, citing *Vavilov*, at paras 75, 83 and 116, and *Hillier v Canada (Attorney General)*, 2019 FCA 44.

[63] The Federal Court of Appeal's decision in *Mason* does permit a reviewing court to take a preliminary look at the provisions as part of its assessment of reasonableness: *Mason*, at para 17. However, I cannot engage in an analysis of the reasonableness of the decision maker's consideration of the text, context and purpose of the provisions (as there was none). I will therefore simply observe that, on their face, the *IRPR* provisions did not constrain the officers' decisions in a manner that mandated a different outcome for the applicants.

[64] Beyond that, restraint is appropriate in this case because there are no prior court decisions on the issue and the decisions under review did not include any analysis on the interpretation issue now raised by the applicants: *Mason*, at paras 31 and following. Considering the arguments made in this Court and the nature of the Start-up Business Class program, the expertise of the decision maker may also be a factor when considering the text, context and purpose of the provisions: *Mason*, at paras 11 and 16.

[65] I conclude that the applicants' main arguments have not demonstrated that the decisions contained a reviewable error.

(5) Additional Issues Raised by the Applicants

[66] In their written submissions, the applicants made additional arguments that I will address summarily.

[67] The applicants submitted that the respondent should have provided a "substituted evaluation" of their applications. Subsection 98.10(1) of the *IRPR* provides that an officer may

substitute their evaluation of the applicant's ability to become economically established in Canada for the requirements in subsection 98.01(2), if meeting or failing to meet those requirements is not a sufficient indicator of whether the applicant will become economically established in Canada.

[68] The officers made no reviewable error by failing to substitute their own evaluations under subsection 98.10(1). The phrase "*may* substitute" suggests that subsection 98.10(1) is a permissive provision, not a mandatory one: *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4, at paras 44 and 47. While there are some contexts in which the word "may" is not purely permissive, the applicants did not submit that subsection 98.10(1) is such a provision.

[69] Finally, in the Phan application, the applicant submitted that the officer unreasonably discounted the impact of the restrictions imposed during the COVID-19 pandemic. The applicant noted that internal emails between other officers noted that the restrictions were a legitimate concern for applicants in the Start-up Business Class program. The respondent submitted that the officer considered the pandemic but determined that the applicant did not need to be in Canada to begin product development and therefore the restrictions were not a sufficient explanation of why the applicant has not progressed more in the business venture.

[70] I find no reviewable error in the officer's analysis. The officer's GCMS notes indicated that the applicant intended to hire Canadian software developers and/or researchers to help design and develop the technical aspects of the product, but had not done so. The officer considered the applicant's claim that the pandemic restrictions made it impossible to return to

Canada to hire the necessary expertise, but concluded that the applicant did not need to be in Canada to do so.

IV. Conclusion

[71] Overall, I conclude that the applicants have not demonstrated that the officers' decisions were unreasonable, applying the principles in *Vavilov*.

[72] The applications will therefore be dismissed. Neither party proposed a question for certification and none will be stated in this case.

JUDGMENT in IMM-1355-21 and IMM-6074-20

THIS COURT'S JUDGMENT is that:

1. The motion to admit new evidence under Rule 312 of the *Federal Courts Rules* is dismissed.
2. The applications for judicial review are dismissed.
3. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1355-21 & IMM-6074-20
STYLE OF CAUSE:	VAN DUY PHAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION THANH TU DUONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 22, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	JUNE 17, 2022

APPEARANCES:

Richard Kurland	FOR THE APPLICANTS
Edward Burnet	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Kurland Kurland, Tobe Vancouver, British Columbia	FOR THE APPLICANTS
Edward Burnet Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT