Federal Court  Cour fédérale

Date: 20220620

Docket: IMM-3893-21

Citation: 2022 FC 928

Vancouver, British Columbia, June 20, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

KAUSAR NADIM SAMLI
EMILY-JOY FARAH SAMLI
LEANORA SERAPHINA SAMLI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants seek judicial review of a decision by an officer dated June 3, 2021, made under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*IRPR*"). The officer refused a request for a permanent resident visa under the regulations applicable to the Canadian Experience Class (the "CEC").

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

[3] For the reasons below, the application for judicial review is allowed. Applying the standards in *Vavilov* and other appellate cases, the applicants have demonstrated that the officer's decision contained one or more reviewable errors. The decision will be set aside and the matter will be remitted to another officer for redetermination.

I. Background

A. The Canadian Experience Class and Express Entry Program

[4] Under subsection 12(1) of the *IRPA*, a foreign national may be selected as a member of an economic class based on their ability to become economically established in Canada. One such economic class is the Canadian Experience Class, defined in subsection 87.1(1) of the *IRPR*.

[5] The *IRPR* contain criteria for eligibility in the CEC. Paragraph 87.1(2)(*a*) provides, in relevant part, that a foreign national is a member of the CEC "if they have acquired in Canada, within the three years before the date on which their application for permanent residence is made, at least one year of full-time work experience …" In these Reasons, I will refer to these criteria as "work time" requirements.

[6] The process for filing an application under the CEC involves three steps. First, an applicant makes an expression of interest by completing an online form. Second, the applicant

may be invited to file an application. Third, the applicant may make a formal application for a permanent resident visa under the CEC.

[7] The process for filing an expression of interest and receiving an invitation to apply is found in *IRPA* Part 1, Division 0.1 (entitled "Invitation to Make Application"), section 10. Paragraph 10.3(1)(*e*) gives the Minister the power to issue instructions. The Minister issued instructions that created the Express Entry system that govern expressions of interest and the issuance of invitations: *Ministerial Instructions respecting the Express Entry system – June 26, 2018 to August 30, 2020*, (2018) C Gaz I, 2665.

[8] To receive an invitation from the Minister, an applicant must submit an expression of interest, a pre-screening tool that determines if a foreign national meets the minimum eligibility criteria in one of the economic categories. At this stage, the information is self-declared and not verified by an officer. Once an expression of interest is accepted, the candidate is entered in the Express Entry pool.

[9] The system then assigns the candidate a score called the Comprehensive Ranking System ("CRS"), which determines points awarded and allows each candidate to be ranked. A candidate must meet the requirements for at least one of the classes in order to receive an invitation. Once selected based on eligibility and the CRS ranking, a candidate may receive an invitation to apply.

[10] After a candidate receives an invitation, the individual must submit an application for a permanent resident visa, along with supporting documents, within a specified time set out in *Ministerial Instructions.*

B. The Applicants' Circumstances

[11] The applicants are Dr Kausar N. Samli, his spouse Dr Emily-Joy F. Samli and their daughter Leanara. All are citizens of the United States. Dr Kausar Samli is a commercialization executive specializing in technology, biotech and biopharma. Dr Emily-Joy Samli holds a doctorate in infectious diseases, specializing in vaccine development and efficacy. The family also includes a son, Lucian, who was born in Canada in 2019.

[12] I will refer to Dr Kausar Samli as the "applicant" in these Reasons where needed, because his employment in Canada formed the basis of the expression of interest, the invitation to apply, the CEC application and the officer's decision under review. Although he applied under both the Federal Skilled Worker program and the CEC program, only the latter is relevant to the application before this Court.

[13] All three applicants entered Canada on July 9, 2017. The applicant obtained a work permit to work as the Chief Operating Officer of 1QBit Information Technologies ("1QBit"), valid until July 9, 2020. His spouse obtained a spousal open work permit and Leanara received a visitor record with the same validity.

[14] The applicant resigned from 1Qbit on July 10, 2018. The family contemplated a move back to the United States but soon found they were expecting their second child. Due to the potential complications of moving along with managing a pregnancy, as well as the settlement of the first child, the family decided to remain in Canada until Lucian's birth.

[15] In September 2018, the applicant began to work with Learning Machine Technologies, a company headquartered in the US. The position allowed him to work remotely from Canada.

[16] In May 2019, Lucian was born in Canada. The family's preparations to move back to the United States were delayed due to negotiations for the acquisition of the applicant's employer.

[17] During their time in Canada, both Drs Samli participated in substantial community and volunteer work.

[18] In June 2020, the applicant started the process of applying for permanent residence in Canada as an economic immigrant. The following events are material to this application:

- **July 8, 2020**: the applicant filed an expression of interest, based on one year of work experience from July 10, 2017 until July 10, 2018.
- **July 23, 2020**: based on his expression of interest, the applicant received an invitation to apply for permanent residence under the CEC.
- **September 3, 2020:** the applicant submitted an application for permanent residence in Canada as a member of the CEC.
- **June 3, 2021**: The officer refused the application.

[19] As may be seen, when the applicant filed his expression of interest on July 8, 2020, he had acquired, within the three years before the date on which the application for permanent residence is made, at least one year of full-time work experience in Canada. However, he no longer met those criteria as of the date he (i) received the letter dated July 23, 2020, containing an invitation to apply, and (ii) filed his application for permanent residence on September 2, 2020. He still had at least one year of full-time work experience in Canada, working for 1Qbit from July 10, 2017 to July 10, 2018, but some of that year was more than three years old.

[20] By letter to Immigration, Refugees and Citizenship Canada dated September 2, 2020, the applicant's legal counsel explained that the applicant no longer met the criteria for the CEC in *IRPR* paragraph 87.1(2)(*a*). The applicant therefore requested an exemption on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the *IRPA*.

[21] Following delays attributed to the pandemic, the applicant supplied additional materials to support his request for H&C relief, including information about establishment in Canada, both Drs Samli's respective contributions to Canada since their arrival, the best interests of the children and "Factors Impacting [the] CEC Application Filing Delays". The filed materials appear to have been completed on or about May 20, 2021.

II. The Decision under Review

[22] By decision letter dated June 3, 2021, an officer refused the application.

[23] The letter set out the requirements in *IRPR* subsection 87.1(2), and specifically quoted the contents of paragraph 87.1(2)(*a*). The officer was not satisfied that the applicant met the qualifying Canadian skilled work experience because he had declared one year of Canadian work experience from July 2017 to July 2018, but applied for permanent residence on September 3, 2020. Therefore, the applicant's qualifying period for his Canadian employment was from September 2017 to September 2020. As such, the applicant's work experience declared from July 2017 to September 2017 was outside of the qualifying period and could not be considered towards his application for permanent residence. The applicant had obtained 10 months of qualifying Canadian experience, not one year.

[24] The officer's letter referred to subsection 11(1) of the *IRPA*, and then set out section 11.2, which provided as follows:

Requirements	**Formalités**
Visa or other document not to be issued	**Visa ou autre document ne pouvant être délivré**
11.2 (1) An officer may not issue a visa or other document in respect of an application for permanent residence to a foreign national who was issued an invitation under Division 0.1 to make that application if — at the time the invitation was issued or at the time the officer received their application — the foreign national did not meet the criteria set out in an instruction given under paragraph 10.3(1)(e) or did not have the qualifications on the basis of which they were ranked under an instruction	**11.2 (1)** Ne peut être délivré à l'étranger à qui une invitation à présenter une demande de résidence permanente a été formulée en vertu de la section 0.1 un visa ou autre document à l'égard de la demande si, lorsque l'invitation a été formulée ou que la demande a été reçue par l'agent, il ne répondait pas aux critères prévus dans une instruction donnée en vertu de l'alinéa 10.3(1)e) ou il n'avait pas les attributs sur la base desquels il a été classé au titre d'une instruction donnée en vertu de l'alinéa

given under paragraph 10.3(1)(h) and were issued the invitation.	10.3(1)h) et sur la base desquels cette invitation a été formulée.

[25] The officer's letter stated that section 11.2 required the information provided by the applicant concerning both his eligibility to be invited to apply (under paragraph 10.3(1)(*e*)), and his qualifications on the basis of which he was ranked (under paragraph 10.3(1)(h)), to be valid both at the time the invitation was issued and at the time the applications for permanent residence were received.

[26] The letter stated that as the applicant no longer met the minimum eligibility criteria to be invited to apply set out in an instruction under paragraph 10.3(1)(*e*), he no longer met the requirements of section 11.2 of *IRPA*. The officer therefore refused the application.

[27] The officer's GCMS notes echoed the reasoning in the letter, as just described.

[28] Neither the letter nor the GCMS notes mentioned or analysed the applicant's written request for an exemption on H&C grounds under *IRPA* section 25.

III. Issues in this Application

[29] The applicants submitted that the officer's decision should be set aside as unreasonable under *Vavilov* principles, because it did not address or meaningfully grapple with a key issue: his request for H&C relief under *IRPA* section 25. The officer provided no reasoning as to why section 25 was not considered. Accordingly, the applicants submitted that the decision contained

no rational chain of analysis and no proper justification for ignoring his H&C request. The decision was not justified in relation to the facts and law that constrained it (citing *Vavilov*, at paras 83-86, 102-103, 128). According to the applicants, the officer's letter and the GCMS notes did not make it possible to understand the officer's reasoning on this critical point. The applicants relied on the recent decision in *Sedki v Canada (Citizenship and Immigration)*, 2021 FC 1071.

[30] The respondent's position was that the officer's decision was reasonable. The respondent maintained that the officer was not required to address the request for H&C relief in *IRPA* subsection 25(1) because of paragraph 25(1.2)(*a.1*), which provided:

Exceptions **(1.2)** The Minister may not examine the request if **[…]**	**Exceptions** **(1.2)** Le ministre ne peut étudier la demande de l'étranger faite au titre du paragraphe (1) dans les cas suivants : **[…]**
(a.1) the request is for an exemption from any of the criteria or obligations of Division 0.1	**a.1)** celle-ci vise à faire lever tout ou partie des critères et obligations visés par la section 0.1

[31] According to the respondent, paragraph 25(1.2)(*a.1*) did not permit the officer even to examine the applicant's H&C request because he sought an exemption from criteria or obligations found in *IRPA* Division 0.1. The respondent argued that Division 0.1 included the "criteria" in *IRPR* paragraph 87.1(2)(*a*) that were adopted in the *Ministerial Instructions* issued under *IRPA* paragraph 10.3(1)(*e*) to govern expressions of interest and invitations. The

respondent further argued that section 11.2, which requires the Officer to reject an application if the criteria were not met, was “tethered” to the provisions in Division 0.1.

[32] Overall, the respondent submitted that the absence of reasons in the officer’s letter and GCMS notes did not constitute a reviewable error under *Vavilov* principles because it was defensible in light of the facts and applicable statutory provisions and regulations.

[33] Both parties made submissions on remedy, assuming the officer’s decision contained a reviewable error. Both parties maintained that the outcome of the application on the merits was inevitable due to the proper statutory interpretation of paragraph 25(1.2)(*a.1*). Both the applicant and the respondent submitted that their respective interpretations constituted the sole reasonable interpretation of the applicable *IRPA* and *IRPR* provisions – and, naturally, they had different interpretations leading to different outcomes of the application.

[34] The applicant’s interpretation argument maintained that, properly understood, *IRPA* paragraph 25(1.2)(*a.1*) did not preclude the officer from considering the applicant’s request for H&C relief because he was not seeking an exemption from anything in Division 0.1. He was only seeking H&C relief from the criteria in *IRPA* section 11.2 and *IRPR* paragraph 87.1(2)(*a*), which was outside Division 0.1.

[35] On the other hand, the respondent argued that the statutory bar in *IRPA* paragraph 25(1.2)(*a.1*) did apply because the fundamental problem with the application related to the

applicant's non-compliance with criteria established in the *Ministerial Instructions* promulgated under *IRPA* paragraph 10.3(1)(*e*), which is in Division 0.1 of the *IRPA*.

[36] Following the Court's approach in *Sedki*, the parties also agreed that if the Court were to find both interpretations to be reasonable, then the matter must be remitted to another officer for determination.

IV. Legal Analysis

[37] There are two issues to resolve on this application: (i) whether the officer's decision was reasonable; and if not, (ii) the remedy: whether the matter should be remitted for redetermination. The second question requires consideration of whether the outcome of the applicant's request for permanent residence as a member of the CEC is inevitable upon the Court's resolution of a question of statutory interpretation.

[38] For the reasons that follow, I conclude that the application should be allowed and the matter remitted for redetermination by another officer.

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

(1) Standard of Review

[39] The standard of review of the officer's substantive decision is reasonableness, as described in *Vavilov*. Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to

the facts and law that constrain the decision maker: *Vavilov*, at paras 85 and 99; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 30-32.

[40] The reviewing court starts its review with the reasons provided by the decision maker. They are the "primary mechanism by which administrative decision makers show that their decisions are reasonable": at para 81. The court must pay "close attention" to those reasons: *Vavilov*, at para 97. The reasons must be read holistically and contextually, in conjunction with the record that was before the decision maker: *Vavilov*, at paras 84, 88-97 and 103; *Canada Post*, at para 30; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 32. The reasons must conform to the legal and factual constraints that bear on the decision and the issue at hand: *Vavilov*, at paras 105-107; *Canada Post*, para 30.

[41] The Supreme Court's decision in *Vavilov* emphasized the creation of a "culture of justification" in administrative decision-making: at paras 2 and 14. A decision must not only be justifiable; where reasons are required, the decision must actually be justified, by way of reasons, by the decision maker: *Vavilov*, at para 86; *Canada Post*, at para 28.

[42] One touchstone for unreasonableness is the reviewing court's ability to discern a reasoned explanation for key aspects of the decision: *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157, at paras 7, 32, 64-66 and 70. The Supreme Court's decision in *Vavilov* "did change the law substantially by requiring that reviewing courts be able to discern a reasoned explanation for administrators' decisions": *Alexion Pharmaceuticals*, at para 7. If the

reasons are read with the record and the reviewing court cannot understand the reasoning on a critical point, the decision will be unreasonable: *Vavilov*, at para 103.

[43] In *Alexion Pharmaceuticals*, Stratas JA referred to two related components of the reviewing court's task with respect to reasoned explanations for administrative decisions (at para 12):

> • Adequacy. The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis" or it is "[im]possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov* at paras. 103-104.
>
> • Logic, coherence and rationality. The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104.

[44] The Federal Court of Appeal has concluded in several cases that decisions were unreasonable because they were made without adequate reasoning on a key issue: see *Safe Food Matters Inc. v Canada (Attorney General)*, 2022 FCA 19, at paras 50-57; *Alexion Pharmaceuticals*; *Canada (Attorney General) v Douglas*, 2021 FCA 89, at para 12; *Canada (Attorney General) v Kattenburg*, 2021 FCA 86, at paras 15-18; *Bragg Communications Inc v UNIFOR*, 2021 FCA 59, at paras 6 and 9-11; *Farrier v Canada (Attorney General)*, 2020 FCA 25, at paras 13-14 and 19.

[45] The Federal Court of Appeal has also held that a reasoned explanation for a decision may be found expressly, or be implied or be implicit in a decision. In some circumstances, the explanation may be found outside the reasons themselves or may be discerned through a review of the record. See: *Safe Food Matters*, at paras 58 and 60; *Mason*, at paras 31 and 38; and *Kattenburg*, at para 16, citing *Vavilov*, at para 123.

[46] On a judicial review application, the Court's approach is deferential and disciplined. Not all errors or concerns about a decision will warrant intervention. The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. 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; *Mason*, at para 36; *Alexion Pharmaceuticals*, at para 13.

[47] In assessing reasonableness, the reviewing court may consider the submissions of the parties to the decision-maker, because the decision-maker's reasons must meaningfully account for the central issues and concerns raised by the parties: *Vavilov*, at para 127. A decision-maker's failure to grapple meaningfully with key issues or central arguments raised by the parties "may call into question whether the decision-maker was actually alert and sensitive to the matter before it": *Vavilov*, at para 128.

[48] The onus on this application for judicial review is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

(2) Application of the *Vavilov* Substantive Review Principles

[49] In the present case, the applicant made an express, written request that his application be considered with an exemption on H&C grounds under subsection 25(1), because he did not meet the work time criteria for the CEC in *IRPR* paragraph 87.1(2)(*a*). This request was a central and important component of his application for a permanent resident visa in counsel's letter dated September 2, 2020.

[50] The officer's decision letter and the associated GCMS notes did not refer to the applicant's request for H&C consideration under subsection 25(1). The letter and the notes disclosed no discernible analysis of the request, the potential application of paragraph 25(1.2)(*a.1*), or the facts in the materials filed by the applicant to support his H&C request.

[51] These deficiencies give rise to two separate but related concerns going to the heart of a transparent, justified and responsive administrative decision.

[52] First, the officer failed to address or grapple with a central issue raised by the applicant. In the circumstances, there is no evidence on which to infer that the officer was alive and alert to the applicant's request for H&C relief: *Vavilov*, at para 128. The decision was simply unresponsive to the applicant's request.

[53] Second, the officer failed to provide any discernible reasoning in response to the request for H&C relief. The letter and the GCMS notes also did not mention paragraph 25(1.2)(*a.1*) and made no effort to interpret or apply it. Looking also at the record, I still can only conclude that the decision was made without adequate reasoning on a key issue: *Safe Food Matters*, at para 60.

[54] The decision letter, GCMS notes and the record provided no insight into why the officer did not consider or apply paragraph 25(1.2)(*a.1*). The officer has not "demonstrated through reasons" any recognition that paragraph 25(1.2)(*a.1*) could apply, nor any analysis of its text, context and purpose having regard to the other provisions of the *IRPA* and *IRPR*: *Safe Food Matters*, at para 55. The decision is unreasonable owing to absence or inadequacy of reasoning: *Alexion Pharmaceuticals*, at para 12. See, similarly, *Sedki*, at para 37.

[55] It is true that a reviewing court is permitted to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, at para 11 (approved in *Vavilov*, at para 97). Here, the page is blank on the H&C request. There are no dots to connect.

[56] I am not persuaded by the respondent's submission that the officer's decision was reasonable owing to the mere existence or the wording of paragraph 25(1.2)(*a.1*). That argument might have some traction if the officer had mentioned the H&C application, or referred to paragraph 25(1.2)(*a.1*) or its language, or had stated that Parliament did not permit consideration of an H&C request in the circumstances. But there are no facts in the letter, GCMS notes or in the CTR on which to infer that the absence of reasons was connected to paragraph 25(1.2)(*a.1*);

one could just as easily believe that the officer completely overlooked the H&C request. The Court is not permitted to backfill the officer's reasons to rectify the absence of any content or reasoning in the officer's decision documents. Under *Vavilov*, a reviewing court may not speculate as to what the decision maker was thinking and may not supply, supplement or "cooper up" the decision maker's reasons with its own reasoning: *Alexion Pharmaceuticals*, at para 10; *Kattenburg*, at para 17; *Vavilov*, at paras 96-97.

[57] I therefore conclude that the officer's decision was unreasonable for failing to address the applicant's H&C request and for failing to provide any reasons that shed light on the issue.

B. Remedy: Should the matter be remitted for redetermination?

[58] Each party made submissions, from their perspectives, on why the outcome is inevitable as a result of a proper interpretation of paragraph 25(1.2)(*a.1*) of the *IRPA*. Each party proposed that the Court should dispose of this matter on its merits, in their own favour.

[59] This is not a case in which the Court needs to make an Order to avoid an "endless merry-go-round of judicial reviews and subsequent reconsiderations": *Vavilov*, at para 142. Nor have the parties' submissions addressed concerns about delay, fairness, costs and the efficient use of public resources: *Canada (Attorney General) v Burke*, 2022 FCA 44, at para 116, citing *Vavilov*, at para 142.

[60] In some circumstances, it may be inappropriate to remit a matter to an administrative decision maker because it is evident that a particular outcome is inevitable or no purpose would be served by sending the matter back: *Vavilov*, at para 142; *Mobil Oil Canada Ltd v Canada-*

Newfoundland Offshore Petroleum Board, [1994] 1 SCR 202, at pp. 228-230; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at para 100, and the cases cited there. In exercising its circumscribed remedial discretion, the Court must bear in mind that the administrative decision maker, not the reviewing court, is the merits-decider: *Entertainment Software*, at paras 99-100. The Federal Court of Appeal has also stated that the discretion not to remit the matter for redetermination should be exercised only in the "clearest of circumstances", if the evidence can lead only to one result: *Canada (Attorney General) v Impex Solutions Inc*, 2020 FCA 171, at paras 90-92.

[61] For the reasons below, I have concluded that the outcome of this application is not inevitable and accordingly, this matter should be remitted for redetermination by another officer.

[62] Like the present case, the litigants in *Sedki* contended that they each had identified the only reasonable interpretation of certain provisions in the *IRPA*. To resolve the question of whether to remit the matter back for redetermination, McHaffie J. considered the reasonableness of each party's submissions on the text, context and purpose of the provisions, consistent with the proper approach to statutory interpretation: see *Vavilov*, at paras 115-124; *Sedki*, at paras 19-21, 32-39. That approach is consistent with the principle that the officer is the fact-finder and initial decision maker on the merits, and with the instruction in appellate cases that a reviewing court's role is not to determine the correct interpretation of the provisions of a statute: *Vavilov*, at para 116; *Canada Post*, at paras 40-41; *Mason*, at para 20.

[63] This case does not involve circumstances in which a single reasonable legal interpretation of one or more provisions of a statute and regulation leads to an inevitable outcome. I do not believe that the legal question of whether or not the officer had the ability to examine H&C considerations in this case is the sole factor leading to an outcome one way or the other. Instead, the resolution of the issues in this application requires the interpretation of several provisions of the *IRPA*, *IRPR* and *Ministerial Instructions*, as well as the application of the legislation and regulations to the particular facts and circumstances of this applicant. It is not appropriate for this Court to grant a remedy on the merits at this stage because it would require elements of fact-finding and the application, at first instance, of the statute and regulations to those facts.

[64] The officer applied section 11.2 of the *IRPA* to deny the application. The officer found that the applicant no longer met the minimum criteria to be eligible to be invited to apply as set out in "an instruction given under section 10.3(1)(e)" of the *IRPA* and therefore no longer met the requirements of section 11.2.

[65] As noted above, the respondent argued that the statutory bar in *IRPA* paragraph 25(1.2)(*a.1*) applied because he required an exemption from criteria or obligations established under Division 0.1 of the *IRPA*. The applicant's position was that he was not seeking an exemption from any criteria or obligation in Division 0.1, but was only seeking H&C relief from provisions outside Division 0.1, namely *IRPA* section 11.2 and *IRPR* paragraph 87.1(2)(*a*).

[66] The respondent submitted, in effect, that the work time criteria in *IRPR* paragraph 87.1(2)(*a*) permeated the entire CEC process, from initial expression of interest, to issuing an

invitation, to filing the application, to the grant or denial of a permanent resident visa. The path of provisions linking *IRPA* paragraph 25(1.2)(*a.1*) with *IRPA* Division 0.1 and the criteria in *IRPR* paragraph 87.1(2)(*a*) was as follows:

- *IRPA* paragraph 25(1.2)(*a.1*) bars an officer from examining an H&C application seeking an exemption from the criteria or obligations in *IRPA* Division 0.1;
- In *IRPA* Division 0.1, subsection 10.1(1) established that an invitation from the Minister is required for an applicant to submit an application under a particular set of classes that are referred to in an instruction given under paragraph 10.3(1)(*e*);
- *IRPA* paragraph 10.3(1)(*e*) provided that a Minister may give instructions governing the applications to Division 0.1, including instructions regarding the classes to which subsection 10.1(1) applies;
- The Minister issued the *Ministerial Instructions.* Under subsection 2(b), *IRPA* subsection 10.1(1) applies to the CEC referred to in *IRPR* subsection 87.1(1); and
- *IRPR* subsection 87.1(1) established the CEC, whose eligibility requirements include the work time criteria in subsection 87.1(2)(*a*).

[67] According to the respondent, then, the *Ministerial Instructions* made under Division 0.1, paragraph 10.1(3)(*e*) adopted the criteria in paragraph 87.1(2)(*a*) for the invitation process. On this view, the criteria in paragraph 87.1(2)(*a*) are part of the "criteria or obligations of Division 0.1" that are barred from H&C consideration by paragraph 25(1.2)(*a.1*). In this case, section 11.2 required the officer to apply the same work time criteria at both the invitation and application stages (see *Ugboh v Canada (Citizenship and Immigration)*, 2021 FC 876, at para 12). The

respondent submitted that the officer found that the applicant was not eligible to be issued an invitation and therefore applied *IRPA* section 11.2.

[68] The applicant submitted (and the respondent appeared to agree) that when the applicant filed his expression of interest on July 8, 2020, he met the work time requirements in *IRPR* paragraph 87.1(2)(*a*) that later became an issue: he had a year of Canadian work experience within the past three years (i.e., since July 8, 2017). With respect to the issuance of the invitation, the applicant claimed that, as a matter of fact, the online Express Entry form to express an interest in the CEC, as designed by the Minister and as contemplated by section 5 of the *Ministerial Instructions*, only permitted the entry of a month (not a specific day). Thus the applicant could only insert the month of July when he applied, and not a specific day within July. On this view, the invitation was properly issued within the month of July in compliance with the process created by the Minister to receive expressions of interest. (The respondent argued that the question was whether the applicant met the requirements for an invitation on the date it was issued and he did not.)

[69] The applicant's submissions also emphasized that in the *Ministerial Instructions*, the decision to issue an invitation is to focus on the applicant's eligibility as determined by, and as of the date of, the expression of interest. The applicant contrasted that approach with *IRPA* section 11.2, which must focus on eligibility as of the date that the invitation was issued. The applicant's position may be supported by subsection 5(1) of the *Ministerial Instructions*. In order to be eligible to be issued an invitation, the applicant "must, *if the expression of interest were to be considered an application* for a permanent resident visa" as a member of the CEC class, be able

to meet the requirements to be a member of that class as well as the selection criteria and other requirements for receiving a permanent resident visa as a member of that class [emphasis added]. Focusing on that italicized phrase in subsection 5(1), the applicant may have qualified for an invitation even as of July 23, 2020, when the invitation to apply was issued, because his eligibility was to be considered as though his expression of interest – made on July 8, 2020 – were an application for permanent resident visa. As of that date, as explained above, his circumstances qualified for an invitation and applying the italicized words, the passage of about two weeks did not affect the outcome of his expression of interest.

[70] If one were to accept the factual and legal scenario advanced by the applicant, he met the requirements in Division 0.1 of the *IRPA*. It also answers the respondent's argument about the applicability of the criteria in *IRPA* paragraph 87.1(2)(*a*) through the *Ministerial Instructions* issued under paragraph 10.1(3)(*e*). Paragraph 25(1.2)(*a.1*) would have no application because, accepting that same factual and legal basis, the applicant had a valid invitation and only required an exemption from the application of paragraph 87.1(2)(*a*) and section 11.2 (which are both provisions outside Division 0.1) when, in September 2020, he made his application for a permanent resident visa with an exemption on H&C grounds.

[71] The applicant also adduced evidence on this application concerning the respondent's practices in applying the *Ministerial Instructions* to individuals who do not perfectly meet the requirements of the CEC, albeit for different reasons than the applicant. The applicant contended that those informal practices supported his position.

[72] The parties therefore have distinct and opposing positions, which may be compared and contrasted as follows:

- The applicant claimed that he only required an exemption from the work time criteria established in *IRPR* paragraph 87.1(2)(*a*) and *IRPA* section 11.2, whereas the respondent argued that he also required an exemption from the same criteria that were adopted in the *Ministerial Instructions* made under paragraph 10.3(1)(*e*), a provision in Division 0.1. The respondent also argued that the applicant's letter to the officer dated September 2, 2020, acknowledged that the applicant required an exemption from the criteria for an invitation.
- The applicant submitted that paragraph 25(1.2)(*a.1*) only applied to the criteria or obligations of Division 0.1 (which, as its title "Invitation to Make Application" suggested, only concerned expressions of interest and resulting invitations) and not to the requirements of Division 1 including section 11.2 or the *IRPR* including paragraph 87.1(2)(*a*). The applicant argued that Parliament deliberately placed section 11.2 in Division 1, rather than in Division 0.1. By contrast, the respondent maintained that the *Ministerial Instructions* incorporated the criteria in *IRPR* paragraph 87.1(2)(*a*) into the invitation process under Division 0.1. The respondent contended that section 11.2 was "tethered" to Division 0.1 owing to its contents – it expressly did not permit the officer to issue a permanent resident visa if the applicant did not meet the criteria for an invitation nor an application.
- The applicant argued that the purpose of paragraph 25(1.2)(*a.1*) was only not to permit H&C applications with respect to decisions on whether to issue an invitation and not on applications, whereas the respondent contended that it did

not matter on the facts because the applicant did not meet the requirements for an invitation when it was issued.

- On the facts, the applicant argued that he met the requirements established by the CEC program when he completed the online forms on July 8, 2020, whereas the respondent submitted that he did not meet the requirements to be issued an invitation as of July 23, 2020 and did not meet the requirements to apply to become a member of the CEC when he applied in early September 2020.
- The applicant argued that the invitation was properly issued to him as of July 23, 2020, but the respondent submitted that it was not.

[73] As may be seen, some of these issues are suffused with factual questions. In the circumstances, I find it inappropriate to resolve the competing issues at the remedy stage of a judicial review application. I am also unable to conclude that either party's submissions are inevitably bound to succeed or that there is no purpose to remitting this matter. As *Vavilov* contemplated as the default and usual remedy, the matter must be returned to a different officer for redetermination.

V. Conclusion and Proposed Certified Question

[74] For these reasons, the officer's decision dated June 3, 2021 will be set aside.

[75] The applicant proposed that the Court certify a question for appeal under *IRPA* paragraph 74(*d*). The proposed question was whether *IRPA* paragraph 25(1.2)(*a.1*) precludes the respondent from examining humanitarian and compassionate considerations in an application for a

permanent resident visa under the Canadian Experience Class, in the factual circumstances of the applicant.

[76] The respondent's position was that if the Court made a specific determination on the statutory interpretation issue, then the respondent agreed that a question proposed by the applicant should be certified. However, if the dispositive issue before the Court was the absence of any reasons by the officer, the respondent's position was that it was not appropriate to certify a question to deal with the statutory interpretation issue.

[77] In my view, the proposed question should not be certified for appeal. To be certified, the question must (among other things) have been raised and dealt with in the decision of this Court, and be dispositive of the appeal: *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10, at para 72; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674, at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 FCR 229, at para 36. Neither the officer nor this Court has provided an interpretation of paragraph 25(1.2)(*a.1*) or an application of that provision to the facts. In light of the reasons for concluding that the officer's decision was unreasonable, and the reasons for remitting the matter back for redetermination, this is not the appropriate application in which to certify the proposed question for an appeal to the Federal Court of Appeal.

JUDGMENT in IMM-3893-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision dated June 3, 2021, is set aside and the matter remitted for redetermination by another officer.
2. 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-3893-21
STYLE OF CAUSE:	KAUSAR NADIM SAMLI, EMILY-JOY FARAH SAMLI, LEANORA SERAPHINA SAMLI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, B.C.
DATE OF HEARING:	NOVEMBER 29, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
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APPEARANCES:

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