SCC File No 40582

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

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APPELLANT

- and -

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PARTS I AND II – OVERVIEW AND STATEMENT OF POSITIONS

1. The decision of this Honourable Court in the present appeal will provide valuable guidance on the appropriate standard of review to be applied to questions regarding whether delegated legislation is enacted within the scope of an enabling statute. The central issue in this appeal is which of the conflicting approaches provided in *Vavilov*[1]and *Katz*[2] should be adopted. Using the *Katz* hyper-deferential approach would remove delegated legislation from the ambit of a more contextual approach in *Vavilov.* The *Katz* approach would require reviewing courts to distinguish administrative decisions from the administrative act of legislating, akin to identifying jurisdictional questions, a difficult and an unnecessary additional step that *Vavilov* eliminated. Robust reasonableness review enables courts to consider the factual and legal constraints including statutory objectives, relevant elements in statutory interpretation as espoused in *Vavilov.* The more contextual approach ensures accountability on the part of delegated authorities in their exercise of statutory power where there is little to no parliamentary oversight, promoting the rule of law. The CCR submits that *Vavilov* provides the appropriate consistent approach in judicial review.

2. Where significant individual interests are at stake, including the ability to obtain and maintain immigration status in Canada, a contextual approach provides a robust way for courts to ensure delegated legislation is in line with the objectives of the enabling statute which includes Canada's international obligations. In the immigration law context, the government routinely deploys a variety of delegated legislation to institute the work of the enabling statute, the *Immigration and Refugee Protection Act* ("*IRPA*").[3] Programs, applications, criteria and processes are created through subordinate legislation including the *Immigration and Refugee Protection*

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[1] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].
[2] *Katz Group Canada Inc v Ontario (Health and Long-Term Care),* 2013 SCC 64 [*Katz*].
[3] *Immigration and Refugee Protection Act,* SC 2011, c27 [*IRPA*].

Regulations ("Regulations"),[4] Ministerial Orders, Ministerial Instructions, and Orders-in Council.[5] As such, delegated legislation is part of a convoluted legal labyrinth that significantly impacts vulnerable persons such as refugee claimants, temporary foreign workers, and those subject to inadmissibility proceedings, for example. The CCR submits that the context of complex administrative regimes calls for a contextual and purposive interpretive analysis of provisions in enabling statutes, an approach provided in *Vavilov.*

PART III – ARGUMENT

A. Delegated Legislation Directly Impacts Those Engaged with the *IRPA*

3. The CCR submits that the prominent role delegated legislation plays in complex administrative regimes like Canada's immigration system, coupled with the severe potential impact on individuals flowing from delegated legislation, calls for a robust standard of review. The CCR will proffer various examples of delegated legislation and their potential effects to demonstrate that a contextual approach to judicial review is merited.

i. Regulations

4. Processes and criteria for granting or denying immigration status are often laid out in the *Regulations* and impact persons in profound ways. For example, the criteria and process for pre-removal risk assessments ("PRRA"), enacted to fulfil Canada's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to prevent refoulement to torture or cruel and unusual punishment, are in ss. 160-175 of the *Regulations* and

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[4] *Immigration and Refugee Protection Regulations,* Can. Reg. 2002-227 [*Regulations*].
[5] An Order in Council was issued during the COVID-19 pandemic, restricting entry to Canada: Craig Forcese, "Repository of Canadian COVID-19 Emergency Orders" (8 June 2020); *Ghaddar v Canada*, 2023 FC 946; *Bhairon v Canada*, 2022 FC 739. Another was issued to outline the Interim Federal Health Program: *Toussaint v Canada (AG)*, 2011 FCA 213; UNHRC, Communication No 2348/2014, *Toussaint v Canada*, UN Doc CCPR/C/123/D/2348/2014; *Monsanto v Canada (Health)*, 2020 FC 1053.

are considered a safety valve in *Charter* litigation.[6] Criteria and processes for resettling refugees are in ss. 138-158 of the *Regulations*. A declaration of relief is an application on humanitarian and compassionate grounds in s. 24.1 (*Regulations)* as per ss. 42.1(1) (*IRPA*) and offers relief in cases where a determination of inadmissibility under ss. 34, 35(1)(b) or 37(1) (*IRPA*) has been made.

5. The application of other regulations may lead to other severe consequences. For example, s. 124(1)(a) of the *IRPA* provides that it is a "general offence" to contravene the *IRPA* or any condition or obligation under the *IRPA*, making any contravention of any subsidiary legislation potentially criminal with severe consequences such as inadmissibility and removal.[7] As well, the government has proposed amendments to the *Regulations* to collect removal costs from a foreign national who seeks to return to Canada if the foreign national was previously removed at the expense of the Government of Canada.[8] Such a regulation could prevent a person from escaping refugee-like situations and returning to Canada after they have been granted immigration status.

6. Another noteworthy example lies in regulation 117(9)(d). This provision imposes a lifetime ban to sponsor family members who were not examined at the time of the sponsor's immigration to Canada, resulting in permanent family separation.[9] In other words, persons who were not disclosed or examined as a family member (accompanying or not) at the time the principal applicant (sponsor) applied for immigration status to Canada are not members of the family class and therefore not eligible to be sponsored as a family member.[10] The stated policy rationale is to

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[6] *Regulations, supra* note 4, ss 160-175; *Canadian Council for Refugees v Canada (Citizenship and Immigration),* 2023 SCC 17.
[7] *IRPA, supra* note 3, s 124(1)(a).
[8] Canadian Council for Refugees, *Proposed amendment to increase removal costs* (Dec 2023).
[9] *Regulations, supra* note 4, s 117(9)(d).
[10] Jamie Liew, Prasanna Balasundaram, and Jennifer Stone, "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers" (2017) 26 JL & Soc Poly'y, 112 at 113 [Troubling Trends].

combat "fraudulent abuse," but this term is not defined in legislation.[11] Regulation 117(9)(d) operates as a strict liability provision absent of discretion to ameliorate its application.

7. This regulation was unsuccessfully challenged in *de Guzman.*[12] While the litigants argued the s. 117(9)(d) contravened Canada's obligations under the *Convention on the Rights of the Child*, the Court of Appeal pointed to s. 25(1) of the *IRPA* (applications on humanitarian and compassionate grounds) as a safety valve. At the time of this decision however, the litigants and the court did not have the benefit of evidence showing this safety valve as often illusory.

8. Since *de Guzman,* research revealed, "In looking at the reasons for non-disclosure and non-examination, 90% of the cases appear to have nothing to do with fraud but involved tragic and heartbreaking circumstances".[13] This case law and lawyer survey revealed reasons that included honest misunderstandings, fear of disclosing a child born outside of the marriage or a child born as a result of rape, the reliance on bad advice, among other non-fraudulent reasons. More significantly, the research revealed that the purported safety valve of a s. 25(1) (*IRPA*) application was not always viable - less than half of the applications submitted with explanations of the non-fraudulent reasons led to family reunification, and some only after multiple applications were submitted and judicial reviews undertaken.[14] The same research revealed lengthy family separation in the interim (varying from one year to 14 years) and a disturbing trend that where children were involved, this did not tip the balance or always lead to a positive or swift resolution.[15]

9. This research showed how the regulation operates and its resultant impact of thwarting an objective of the *IRPA* of reuniting families by keeping *bona fide* family members separated.

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[11] "Regulatory Impact Analysis Statement" (2004) C Gaz II, Vol 138, No 16 at 1100.
[12] *de Guzman v Canada (MCI),* 2005 FCA 436.
[13] Troubling Trends, *supra* note 10 at 113, 123-126.
[14] *Ibid* at 132-134.
[15] *Ibid* at 129, 131.

Further, the research demonstrated how ineffective the safety valve of s. 25(1) was in relieving the harsh and automatic application of the regulation. The findings led to the creation of a targeted pilot project by the government to allow people to apply to be exempted from s.117(9)(d).[16]

10. What is important for this Honourable Court to consider is how such evidence is relevant in potential future judicial reviews and could only be considered under any framework with a robust reasonableness standard of review that would allow consideration of the impact of the regulation on people directed impacted by it (families, spouses, children) alongside a consideration of the objectives of the *IRPA*: family reunification and adherence to international legal obligations under s. 3(1)(d) and s 3(2)(b) of the *IRPA*.

ii. Ministerial Orders

11. In the immigration law context, two Ministerial Orders are noteworthy: one was issued under the *IRPA* to designate a foreign national's arrival as irregular; and another, at one point, listed up to 42 countries as designated countries of origin.[17] While these Orders are published in the *Canada Gazette,* they are otherwise not subject to parliamentary scrutiny. These Orders subject refugee claimants to the risk of detention, different refugee determination processes and timelines and limited access to alternative procedures that otherwise would have been available.[18]

12. The designated country of origin regime was created through a convoluted matrix of provisions in the enabling statute, regulations, and Ministerial Orders.[19] In the case of *YZ,* s. 110(2)(d.1) of the *IRPA* was found to violate s. 15(1) of the *Charter*. While the court focused on a

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[16] Government of Canada, Pilot program to exempt permanent residence applicants in the family class or spouse or common-law partner in Canada (SCLPRC) class from paragraph R117(9)(d) or R125(1)(d) exclusion (Oct 30 2023).
[17] *IRPA, supra* note 3, ss 109.1(1); Government of Canada, "Designated countries of origin policy", (last modified 17 May 2019).
[18] *Regulations*, *supra* note 4, ss 231(2), 159.9, 174.1.
[19] *YZ v Canada (Citizenship and Immigration),* 2015 FC 892 at para 7.

provision in the enabling statute, the court's analysis required a full contextual analysis of all the relevant pieces in this regime including the regulations that enacted different timelines and access to safety valves such as an appeal at the Refugee Appeal Division ("RAD") and the PRRA to show inequality based on national origin.[20] This example illustrates the difficulty of untangling the various forms of delegated legislation from the enabling statute, and from administrative decision making. The incoherence of using different standards of review becomes evident in this context.

iii. Ministerial Instructions

13. Subsections 14.1 and 87.3(3) of the *IRPA* permits the issuance of Ministerial Instructions. Subsection 87.3(3) states such instructions can be issued with respect to "processing of applications and requests" that include "establishing categories of applications or requests': "establishing conditions, by category or otherwise, that must be met"'. While they must be published in the *Canada Gazette,* they can be issued without pre-examination by Parliament for review by committee. Since 2008, Ministerial Instructions have been used increasingly and are the main vehicles by which changes to processing criteria and eligibility classes are made.[21]

14. The case of *Liang* was brought due to the issuance of a series of Ministerial Instructions that foreclosed the processing of immigration applications already submitted.[22] Liang's application received a positive selection notice but due to a Ministerial Instruction did not move to an acceptance status. The court noted in this decision that applicants like Liang had been waiting for processing between 4.5 and 9 years and that there was no language in the provision that permitted the use of Ministerial Instructions or the *IRPA* in general that "extinguishes the longstanding and

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[20] *Ibid.*
[21] Asha Kaushal, *"Do the Means Change the ends? Express Entry and Economic Immigration in Canada"* (2019) 2:1 Dal LJ 83 at 112-113.
[22] *Liang v Canada (Citizenship and Immigration),* 2012 FC 758.

well-accepted duty to process applications in a reasonable time frame."[23] While the remedy sought was a mandamus, this case highlights the factual and legal constraints that could animate a judicial review of whether the Ministerial Instruction was constructed properly under the enabling statute, something that would only be possible under a robust standard of review.

15. In these examples, using a hyper-deferential approach to judicial review of delegated legislation would lead to a vacuous analysis where factual and legal constraints such as how the delegated legislation interacts with other mechanisms in the *IRPA*, including the viability or inability of the scheme to be considered as a safety valve in *Charter* cases, and adherence to international legal obligations to prevent refoulement, for example, would be absent.

B. There is no need to distinguish between administrative decisions from the administrative act of legislating

16. *Vavilov* articulated there are "no 'clear markers' to distinguish [jurisdictional questions] from other questions related to the interpretation of an administrative decision maker's enabling statute" and "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute".[24]

17. Similarly, there is no reason to distinguish administrative decisions from the administrative act of legislating. Justice Pentelechuk cites cases dealing with the review of primary legislation and conflates this act of parliamentary legislating with delegated legislating. They are distinct.[25] Insulating delegated legislation from review for this reason ignores that delegated legislation is an

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[23] *Ibid* at para 43.
[24] *Vavilov, supra* note 1 at para 66.
[25] *Mikisew Cree First Nation v Canada,* 2018 SCC 40 at para 51: Karakatsanis J. was speaking to Parliamentary law-making and noted review of regulations is undecided.

administrative act that receives little to no parliamentary scrutiny.[26] Reverting to the approach in *Katz* would introduce a preliminary step in the analysis where courts will be required to ask if they are reviewing an act of legislation or administration – a line that is difficult to draw and akin to the jurisdictional question – a step this Court wanted to avoid in *Vavilov*.

18. The CCR submits there is no principled basis for insulating Cabinet, as a delegate, from judicial review. Claiming Cabinet is entitled to greater deference than other bodies that exercise statutory power to create delegated legislation is problematic when one considers the minimal parliamentary scrutiny delegated legislation receives.[27] This Court noted, "This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute".[28] The *IRPA* and its vast body of delegated legislation provides a clear example of this tension.

C. A hyper-deferential approach creates uncertainty and threatens the rule of law

19. The *Katz* hyper-deferential approach utilises the framework of "irrelevant," "extraneous," and "completely unrelated"[29] and brings reviewing courts back to the question of jurisdiction – a step eliminated in *Vavilov*. Whether delegated legislation has been enacted within the scope of an enabling statute cannot be answered merely by finding any link, however tenuous, between the delegated legislation and enabling statute.[30] This threshold of "fit" is unhelpful and imposes an

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[26] John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov" 2020 CanLIIDocs 3679 at 31 [Keyes 2020].
[27] John Mark Keyes, "Parliamentary Scrutiny and Judicial Review of Executive Legislation in Canada – Is it Working in Canada" (2023), 17 J of Parl & Political L 192.
[28] *Vavilov, supra* note 1 at para 66.
[29] *Katz*, *supra* note 2 at para 28.
[30] *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTS 2010-168,* 2012 SCC 68 at para 25.

extremely high bar. The hyper-deferential approach threatens the rule of law by limiting the scope of the analysis, excluding the wide-ranging considerations in the *Vavilov* framework.

D. *Vavilov* provides an appropriate universal approach

20. *Vavilov* provides a universal and comprehensive approach to judicial review that has been widely followed.[31] Including delegated legislation within the ambit of *Vavilov* would ensure a consistent approach to judicial review. *Vavilov* addressed the treatment of "jurisdictional questions" and concluded that the framework of reasonableness, which is "both robust and responsive to context"[32] is appropriate since this enables "courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "jurisdictional issue".[33] This approach is justified given the severe negative consequences that can flow from delegated legislation, including the denial of refugee protection and refoulement.

E. Robust reasonableness review includes legislative interpretation that takes into account factual and legal constraints and is not second-guessing policy choices

21. Legislative interpretation is at the core of the *Vavilov* approach as it is for *vires* analysis. Applying *Vavilov* would not mean a court is second-guessing the legislature's policy choices. Rather, this approach would allow a court to have a complete understanding of what those policy choices are.[34] Ruth Sullivan, a leading authority on statutory interpretation states:

> The conditions in which legislation operates from time to time can assist in dynamic interpretation. In the law of evidence, information about external context is referred to as "legislative facts" because it is the sort of information a legislature requires to make sound policy choices and to create effective schemes.[35]

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[31] *Portnov v Canada (AG),* 2021 FCA 171.
[32] *Vavilov*, *supra* note 1 at para 67.
[33] *Ibid* at paras 66 and 67.
[34] Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law, 2016) at 205.
[35] *Ibid.*

22. The approach in *Vavilov* allows a reviewing court to not only look to the statutory scheme to determine whether the delegated legislation is adhering to its purpose but also relies on an approach of statutory interpretation informed by factual and legal constraints. These include adherence to statutory objectives including international legal obligations, which are especially relevant in cases where *Charter* rights are at stake. The *Vavilov* approach also considers the impact of the delegated legislation on the individual. Certain contextual constraints will have more force, enabling the court to weigh them in different contexts. Some forms of delegated legislation receive "little parliamentary time".[36] Judicial review holds delegated authorities accountable to legislative parliamentary intent and ensures vulnerable individuals have access to robust judicial oversight. Circumscribing analysis of delegated legislation would frustrate access to judicial review for vulnerable persons and may lead to devastating consequences.

PART IV and V – SUBMISSIONS ON COST AND ORDER REQUESTED

23. The CCR does not seek costs and requests that none be awarded against it. The CCR takes no position on the outcome of this appeal but asks that the relevant issues be determined in accordance with the submissions made above.

ALL OF WHICH IS RESPECTFULY SUBMITTED THIS 3rd DAY OF APRIL 2024

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[36] Keyes 2020, *supra* note 26 at 32; Keyes 2023, *supra* note 27.

PART VI – TABLE OF AUTHORITIES

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2	*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65	1, 18, 19, 21
3	*Canadian Council for Refugees v Canada (Citizenship and Immigration),* 2023 SCC 17	4
4	*de Guzman v Canada (MCI),* 2005 FCA 436	7
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8	*Mikisew Cree First Nation v Canada,* 2018 SCC 40	17
9	*Monsanto v Canada (Health)*, 2020 FC 1053	2
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18	Asha Kaushal, *"Do the Means Change the ends? Express Entry and Economic Immigration in Canada"* (2019) 2:1 Dal LJ 83	13
19	John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov" 2020 CanLIIDocs 3679	17, 22
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22	Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law, 2016)	21

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23	Canadian Council for Refugees, *Proposed amendment to increase removal costs* (Dec 2023)	5
24	Craig Forcese, "Repository of Canadian COVID-19 Emergency Orders" (8 June 2020)	2
25	Government of Canada, "Designated countries of origin policy", (last modified 17 May 2019).	11
26	Government of Canada, Pilot program to exempt permanent residence applicants in the family class or spouse or common-law partner in Canada (SCLPRC) class from paragraph R117(9)(d) or R125(1)(d) exclusion (Oct 30 2023)	9
27	"Regulatory Impact Analysis Statement" (2004) C Gaz II, Vol 138, No 16 at 1100.	6