

CANADA / JUDGMENT

Pepa v. Canada (Citizenship and Immigration)

2025 SCC 21

COURT

Supreme Court of Canada

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Pepa v. Canada (Citizenship and Immigration)

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Wagner, Richard; Karakatsanis, Andromache; Côté, Suzanne; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas; Jamal, Mahmud; O'Bonsawin, Michelle; Moreau, Mary

On appeal from

Federal Court of Appeal

Subjects

Administrative law

Immigration

Notes

Case in Brief SCC Case Information

Decision Content

SUPREME COURT OF CANADA

Citation: *Pepa v. Canada (Citizenship and Immigration)*, 2025 SCC 21

Appeal Heard: December 4, 2024

Judgment Rendered: June 27, 2025

Docket: 40840

Between:

Dorinela Pepa

Appellant

and

Minister of Citizenship and Immigration

Respondent

- and -

Canadian Civil Liberties Association and

Canadian Association of Refugee Lawyers

Interveners

Coram: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

Reasons for Judgment:

(paras. 1 to 132)

Martin J. (Wagner C.J. and Karakatsanis, Kasirer, Jamal and Moreau JJ. concurring)

Reasons Dissenting in Part:

(paras. 133 to 153)

Rowe J.

Joint Dissenting Reasons:

(paras. 154 to 218)

Côté and O'Bonsawin JJ.

Note: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Dorinela Pepa Appellant

v.

Minister of Citizenship and Immigration Respondent

and

Canadian Civil Liberties Association and

Canadian Association of Refugee Lawyers Interveners

Indexed as: Pepa v. Canada (Citizenship and Immigration)

2025 SCC 21

File No.: 40840.

2024: December 4; 2025: June 27.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

on appeal from the federal court of appeal

Administrative law — Judicial review — Standard of review — Standard of review applicable to interpretation by Immigration Appeal Division of statutory provision granting right of appeal of removal order to foreign national holding permanent resident visa.

Immigration — Judicial review — Inadmissibility and removal — Removal order — Right of appeal — Statutory right of appeal of removal order to Immigration Appeal Division provided to foreign national who holds permanent resident visa — Removal order issued against foreign national who arrived to Canada with unexpired permanent resident visa — Immigration Appeal Division concluding that it lacked jurisdiction to hear appeal of removal order on basis that permanent resident visa was expired when removal order was made — Whether Immigration Appeal Division's interpretation reasonable — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 63(2).

At the age of 20, P was granted a permanent resident visa to Canada as an accompanying dependent child of her father, the principal applicant. Her visa was unexpired when she arrived in Canada. On arrival, when an immigration officer asked about her marital status, she disclosed that she had married a few weeks prior. Because of the change in her marital status, she could not be granted permanent resident status as a dependent child. She was instead authorized to enter Canada for further examination. The further examination resulted in a referral for an admissibility hearing at the Immigration Division of the Immigration and Refugee Board. By the time the hearing commenced months later, P's visa had expired.

At the conclusion of the admissibility hearing, the Immigration Division issued a removal order against P. She sought to appeal the removal order to the Immigration Appeal Division (“IAD”), relying on s. 63(2) of the Immigration and Refugee Protection Act (“IRPA”), which provides a right of appeal to the IAD against a removal order to “a foreign national who holds a permanent resident visa”. The IAD concluded it did not have jurisdiction to hear P’s appeal pursuant to s. 63(2) of the IRPA because, when the removal order was issued, her visa had already expired; she was therefore not “a foreign national who holds a permanent resident visa” at the time of the issuance of the removal order that she was appealing to the IAD. On judicial review, the Federal Court held that the reasonableness standard applied and that the IAD could reasonably conclude that it did not have jurisdiction to hear P’s appeal given that her visa had expired before the removal order was made. The Federal Court of Appeal agreed.

Held (Rowe J. dissenting in part and Côté and O’Bonsawin JJ. dissenting): The appeal should be allowed, the decisions of the IAD, the Federal Court and the Federal Court of Appeal set aside, and the matter remitted to the IAD for determination of P’s appeal.

Per Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal and Moreau JJ.: Reasonableness is the appropriate standard of review to be applied to the IAD’s interpretation of s. 63(2) of the IRPA. This presumptive standard applies since this case does not fit into any of the categories where the presumption can be rebutted and the interpretation of s. 63(2) does not warrant a new category of correctness review. In the instant case, it was unreasonable for the IAD to find that it does not have jurisdiction to hear an appeal of a removal order pursuant to s. 63(2) if the permanent resident visa is expired at the time the removal order is issued. The IAD’s reasons lack internal rationality and demonstrate a failure of justification, based on the relevant precedents, the applicable principles of statutory interpretation, and the potential impact of the decision on P. The only reasonable interpretation of s. 63(2) is the following: the point in time at which a person must hold a visa in order to access the right of appeal against a removal order under s. 63(2) is the time of arrival in Canada. Accordingly, P had a right to appeal her removal order to the IAD because she was the holder of a permanent resident visa when she entered Canada.

First, the IAD’s decision was not reasonable in light of the relevant precedents. The IAD invoked and relied on cases that were either decided under a different and outdated provision, were not on point and concerned other matters, or were not binding upon it to begin with. It relied on precedents that were not sufficient to resolve the statutory interpretation question before it, and it did not justify or explain their continued currency where they concerned an outdated statutory provision or starkly different facts. None of the cases cited by the IAD were sufficient pronouncements to resolve the contested interpretation of s. 63(2) without further analysis and some level of engagement with the modern approach to statutory interpretation. As such, it was unreasonable for the IAD to constrain itself to their holdings.

In particular, the IAD treated *Canada (Minister of Citizenship and Immigration) v. Hundal*, [1995] 3 F.C. 32, as applicable and authoritative, even though in that case, the Federal Court was interpreting a different, predecessor provision, namely s. 70(2)(b) of the former Immigration Act. It was not reasonable for the IAD to base its approach on that decision without exploring,

explaining, and justifying why it had continued currency. Furthermore, it was not reasonable for the IAD, in relying on Hundal, to bypass the critical question under the new provision, namely, at what point in time a person must hold a visa. Additionally, the IAD's reliance on its own prior decisions in *Asif v. Canada* (Public Safety and Emergency Preparedness), 2018 CanLII 131198 (I.R.B. (Imm. App. Div.)), and *Far v. Canada* (Public Safety and Emergency Preparedness), 2016 CanLII 90984 (I.R.B. (Imm. App. Div.)), both of which relied upon the analysis in Hundal, was not sufficient to justify the interpretation it came to. As for the IAD's reliance in *Asif* on the Federal Court's decision in *Zhang v. Canada* (Minister of Citizenship and Immigration), 2007 FC 593, [2008] 1 F.C.R. 716, it was misplaced because of *Asif*'s starkly different facts, which involved a revoked visa. Similarly, the IAD found the case of *Ismail v. Canada* (Citizenship and Immigration), 2015 FC 338, [2015] 4 F.C.R. 426, to be a binding pronouncement even though it involved the revocation context rather than the situation of a visa merely expiring. The difference between revocation and expiry is key given that the expiration of a visa, unlike its revocation, does not imply any fault or illegality in the initial grant, but merely signifies that the temporal conditions of an otherwise valid visa have lapsed, which warrants different legal treatment. The Federal Court in *Ismail* also relied upon Hundal without explaining its continued applicability following the change in the legislation. Lastly, the IAD's disregard for the relevance of *McLeod v. Canada* (Minister of Citizenship and Immigration), [1999] 1 F.C. 257 (C.A.), on the basis that it relates to visas being rendered invalid by a change of circumstances was inconsistent with its treatment of *Ismail* as a binding pronouncement despite the fact that it was a case of revocation rather than expiry.

Second, it was unreasonable for the IAD not to conduct any form of statutory interpretation analysis in relation to s. 63(2), given that the case law it relied on was not sufficiently material or binding. Though failure to conduct a statutory interpretation analysis is not fatal on its own, where the case law available to the decision maker is not sufficiently material or binding, the analysis cannot simply stop without ensuring that due consideration has been given, according to the modern principle of statutory interpretation, to competing interpretations. The ordinary meaning of s. 63(2) is that the person must hold a visa at the appropriate time, in the present tense. However, the key issue is not answered by the ordinary meaning of either or both of the official language versions, given that the section does not prescribe the time at which the individual must hold an unexpired visa, or whether a visa which has expired is considered to have been held at the relevant time. The determination of the relevant time must be informed by the other principles of statutory interpretation that ought to have been considered.

With regard to the object of the provision and the intention of Parliament, s. 63(2) creates a statutory right of appeal intended to operate as a procedural and substantive safeguard in favour of people who successfully obtained a permanent resident visa, but are ordered to leave the country before becoming permanent residents. On its face, its purpose and object is to enable holders of permanent resident visas an opportunity to challenge the legal validity of a removal order issued against them by way of an appeal to the IAD. The desired oversight occurs in a well-established sequence, such that the appeal will necessarily be based on the decision that is its subject matter, and arise only after that decision has been made. This purpose must be kept in

mind when interpreting s. 63(2) to determine when the person must hold the required visa. While the legislative history of s. 63(2) provides limited guidance, the repeal of the previous express limitations in s. 70(2) of the Immigration Act suggests that Parliament intentionally broadened the scope of the appeal provision, choosing to remove language indicating that the individual must hold a valid visa at the time of the immigration officer's report. It was unreasonable for the IAD to conclude that Parliament must have intended that the visa be held at the time the removal order is issued because it is the removal order decision which triggers the need for an appeal. There is an important conceptual difference between the act that triggers the appeal, which is the removal order, and the separate statutory requirement that an individual hold a visa at a particular time. It is a misreading of the provision to conflate when the initial decision is made with when the visa must be held. The IAD's reading of s. 63(2) is at odds with Parliament's object, purpose, and sequence in enacting this statutory appeal right.

Additionally, on a robust review, it is not reasonable to conclude, without clear wording or a compelling justification, that Parliament intended the absurd consequence that a person could lose their right to appeal before any removal order is issued. Under the IAD's interpretation, the average person subject to further examination upon entering Canada may well lose their appeal right simply due to the normal timeframe of an examination exceeding their visa expiry date. The prospect of absurd consequences is also compounded by the arbitrariness of tying a person's right of appeal to the date of expiry on a passport, or the date of expiry on medical documentation — both of which cannot be rationally connected to a right of appeal. As for context, there are other related provisions and applicable guidelines which allow for the granting of permanent resident status even when the visa has expired, as long as the visa was unexpired at the time of arrival. This context was not considered by the IAD.

Third, in terms of the potential impact of the decision on the individual, the Court in *Vavilov* concluded that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. In the instant case, the impacts on the individual are significant. P will be separated from her family and barred from the country for five years. The IAD did not give sufficient consideration to these consequences of the decision for P. The IAD did not explain why its decision best reflects Parliament's intention. Its reasons ought to have demonstrated that it considered the consequences of the decision and whether such harsh personal consequences were justified in light of the facts, the law and Parliament's intention.

With regard to the question of remedy, when it is clear that there is only one reasonable interpretation, the reviewing court should make a pronouncement on that interpretation rather than remitting the matter pro forma for reconsideration to the decision maker. While a reviewing court focuses exclusively on whether the decision maker's decision was reasonable, the process of application of the relevant legal and factual constraints may eliminate other options and may even narrow the field to only one possible interpretation. A reviewing court should only conclude that there is one inevitable interpretation if that conclusion flows logically and inexorably from the legal and factual constraints already identified during the review of the decision maker's

reasons. The only reasonable interpretation of s. 63(2) is that the validity of the permanent resident visa, for an appeal under s. 63(2), is assessed at the time of arrival in Canada. The appropriate remedy is therefore to remit the matter to the IAD for determination of P's appeal, with P's right of appeal now established.

Per Rowe J. (dissenting in part): There is agreement with the majority that the appeal should be allowed and the decisions of the IAD, the Federal Court and the Federal Court of Appeal set aside. However, there is disagreement with respect to remedy: the matter should be remitted to the IAD for redetermination based on the guidance that is provided in the reasonableness analysis set out by the majority.

There is agreement with the majority that the standard of review is reasonableness. Vavilov recognizes that while questions of statutory interpretation of provisions that circumscribe a decision maker's jurisdiction continue to exist, the standard of review to decide such questions is reasonableness. There is also agreement with the majority that the IAD's decision was unreasonable, substantially for the reasons it sets out. With respect to remedy, there is disagreement with the majority's conclusion that there is a single reasonable interpretation. While Vavilov provided for limited circumstances for courts, properly, to substitute their own reasons and outcome for that of the administrative decision maker, it warned that reviewing courts should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. Such caution is warranted to avoid slipping into a pattern of "disguised" correctness review. In this case, if the Court interprets the relevant provision, there may well be consequences for the legislative scheme, which it cannot contemplate. This very much favours referring the matter back with guidance rather than deciding it on the basis of a single reasonable interpretation.

Per Côté and O'Bonsawin JJ. (dissenting): The appeal should be dismissed. The determination of this appeal should be guided by the most fundamental principle of immigration law: non-citizens do not have an unqualified right to enter or remain in Canada. There is agreement with the majority that the standard of review is reasonableness but disagreement that the IAD's decision was unreasonable. The IAD reasonably interpreted s. 63(2) of the IRPA as requiring P to hold a valid, unexpired visa at the time the Immigration Division issued the removal order. Reading the decision as a whole, the IAD had regard to instructive precedents and its own past decisions, the governing statutory scheme, and the principles of statutory interpretation. By faithfully applying the guidance set out by the Court in Vavilov, there is no basis for appellate intervention.

The IAD appropriately relied on instructive precedents and its own past decisions in interpreting s. 63(2) of the IRPA. First, the IAD turned its mind to the Federal Court's decision in Hundal, where it outlined the general principle that a visa remains valid after it is issued, subject to four exceptions. The IAD relied on the third exception, which provides that if there is an expiry date on a visa and the time expires, the visa will not be valid after the expiry date. While Hundal was decided under a provision that was repealed and replaced with s. 63(2) of the IRPA, the distinctions between these two provisions do not affect the reasonableness of the IAD's decision. The IAD in this case reasonably understood that despite this change in legislation, the third

exception in *Hundal* continued to rebut the presumption of visa validity. The case of *Zhang* directly addressed the applicability of the holding in *Hundal* to the instant case. In *Zhang*, the IAD concluded that the notion of validity was imported into s. 63(2) by necessary implication and legislative intent. On judicial review, the Federal Court engaged in a textual, contextual, and purposive analysis of the provision, concluding that the right of appeal under s. 63(2) only applies to foreign nationals who hold valid visas — not to those who hold invalid or expired visas. The Federal Court recognized that extending the reach of s. 63(2) of the IRPA to apply to those who hold invalid visas would run counter to legislative intent and result in the absurd consequence of providing those with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. The same logic applies to expired visas, otherwise any foreign national holding a visa would be entitled to an appeal under s. 63(2), regardless of the visa's legal effect.

The question regarding the time at which a valid visa must be held is answered by another Federal Court decision that the IAD considered, *Ismail*. In *Ismail*, the Federal Court explicitly rejected the proposition that the validity of a visa need only be assessed upon arrival at a port of entry. Rather, it found that a textual, contextual, and purposive analysis of both the provision at issue and the IRPA as a whole revealed that a right of appeal to the IAD is granted only to those who hold a valid permanent resident visa at the time an exclusion report is issued. In this case, it was a reasonable conclusion for the IAD and the Federal Court to read *Ismail* as confirming that a foreign national must hold a valid visa when the decision to issue a removal is made. The majority's view that *Ismail* is non-binding because it concerns itself with a revoked visa, rather than an expired one, unduly narrows the scope of *Ismail*. When read as a whole, it is clear that the Federal Court's reasons in *Ismail* are animated by the validity of the visa itself. The Federal Court in both *Ismail* and *Zhang* held that Parliament did not intend to grant appeal rights to foreign nationals with no legal right to be in Canada, regardless of whether their document's lack of legal effect is by way of revocation or expiration.

Beyond the above binding precedents, the IAD also reasonably considered its own precedents, *Far* and *Asif*. In *Far*, the IAD concluded that it lacked jurisdiction to hear an appeal because the foreign national's visa had expired prior to the completion of the examination process. In arriving at this conclusion, the IAD relied upon the third exception outlined in *Hundal* and reasoned that *Ismail* also applied to expired visas. It also found that it was the decision to issue a removal order that triggers the right of appeal to the IAD. In *Asif*, the IAD concluded that it lacked jurisdiction pursuant to s. 63(2) of the IRPA because the foreign nationals' visas were not valid at the time the removal orders were issued. It again arrived at the conclusion that the act that triggers the right of appeal to the IAD is the decision to make a removal order. It did so by reading the legislative scheme in conjunction with the jurisprudence, including *Hundal*, *Ismail*, *Zhang*, and its earlier decision in *Far*. In the instant case, the IAD reasonably relied on this conclusion to support its decision that the right of appeal in s. 63(2) requires a valid, unexpired visa at the time the removal order is issued.

Lastly, the IAD reasonably distinguished the Federal Court of Appeal's decision in *McLeod*. The IAD appropriately recognized that the question of the visa's validity in *McLeod* arose solely from a change of circumstances after its issuance. The question in the instant case does not turn on a change of circumstances. Rather, this case turns on whether a foreign national who does not hold a valid, unexpired visa at the time a decision to issue a removal order is made has a right to appeal that decision to the IAD. The IAD reasonably found that the passage of time after P's arrival in Canada did not constitute a change in circumstances in an analogous way to *McLeod*. This was a sufficient basis to distinguish *McLeod* from the instant case.

P's visa expired one month before the issuance of the removal order. There is no basis to interfere with the IAD's conclusion that P did not have a right of appeal pursuant to s. 63(2) because she did not hold a valid visa at the time of the issuance of the removal order.

As for remedy, the relevant legal constraints do not point to a single reasonable interpretation of s. 63(2). The remedial discretion to make a pronouncement on the statutory provision should only be exercised in the clearest of cases. This is not such a case, and to make such a pronouncement risks sliding into a disguised correctness review and opening the door to absurd consequences in relation to the legislative scheme that the Court cannot contemplate.

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By Martin J.

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By Côté and O’Bonsawin JJ. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal (Laskin, Rivoalen and Monaghan JJ.A.), 2023 FCA 102, 97 Imm. L.R. (4th) 68, [2023] F.C.J. No. 622 (Lexis), 2023 CarswellNat 1415 (WL), affirming a decision of Roussel J., 2021 FC 348, [2021] F.C.J. No. 351 (Lexis), 2021 CarswellNat 1101 (WL), dismissing an application for judicial review of a decision of the Immigration and Refugee Board of Canada (Immigration Appeal Division), [2019] I.A.D.D. No. 1099 (Lexis), 2019 CarswellNat 7782 (WL). Appeal allowed, Rowe J. dissenting in part and Côté and O’Bonsawin JJ. dissenting.

Mary Lam, Lorne Waldman and Steven Blakey, for the appellant.

Marianne Zoric and Sarah Drodge, for the respondent.

Teagan Markin and Nadia Effendi, for the intervener Canadian Civil Liberties Association.

Benjamin Liston, Anthony Navaneelan, Justin Jian-Yi Toh and Annie O’Dell, for the intervener Canadian Association of Refugee Lawyers.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal and Moreau JJ. was delivered by

Martin J. —

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I. Introduction

- [1] Ms. Dorinela Pepa left Albania in 2018, at age 20, to start a new life in Canada with her father. They had both been approved for and held permanent resident visas to Canada. The father was the principal applicant and Dorinela was an accompanying dependent child. When she arrived in Canada, the immigration officer asked her about her marital status and, surprisingly but truthfully, she replied she was married. Unbeknownst to her father, Dorinela had married in secret a few weeks before her arrival in Canada.

- [2] The Canadian immigration procedures require that the change in her marital status should have been reported from Albania. With her father handling all of the immigration paperwork, Dorinela states she did not know she had to disclose her marriage before leaving for Canada. Further, her father did not know she had married and only learned of her actions when they were already in Canada. Because of the change in her marital status, she could not be granted permanent resident status as a dependent child, and was instead admitted into the country for further examination.
- [3] When she entered Canada, Dorinela was the holder of an unexpired permanent resident visa. This type of visa, which can last for up to a year, may nonetheless expire earlier because the duration of such visas is tied to the first date any underlying document expires, such as a passport or supporting medical documentation. Dorinela's visa expired on September 16, 2018, based on the end date on her medical documentation.
- [4] Dorinela's counsel says she pushed for an early resolution by sending a letter on July 24, 2018, but nonetheless Dorinela's hearing to decide on her admissibility did not start until September 25, 2018, nine days after the expiration of Dorinela's visa. On October 18, 2018, the decision maker issued a removal order against her, barring her from entering Canada — where her father, stepmother, and stepbrother now live — for five years.
- [5] She sought to appeal the decision to remove her from Canada to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board, a special administrative appeal body designated for such matters under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("IRPA"). Section 63(2) of the IRPA is the relevant source of the right to appeal to the IAD. It provides an appeal against the removal order to "[a] foreign national who holds a permanent resident visa" and, in French, "[l]e titulaire d'un visa de résident permanent". While "holds" is stated in the present tense, notably absent from this provision is a clear statement of when the foreign national must hold the visa or be "[l]e titulaire" to have a right to appeal. Before us, Dorinela argues it is on arrival to Canada and the Minister of Citizenship and Immigration ("Minister") submits it is when the removal order is made.
- [6] In its decision, which is the subject matter of this appeal, the IAD agreed with the Minister. It concluded Dorinela had no right to appeal the removal order because to have such a right, she was required to hold a visa at the time the removal order was issued, and, by that time, hers had expired. In reality, her visa had expired before the hearing leading to that removal order ever began. Thus, according to the IAD's interpretation of s. 63(2), it lost jurisdiction to hear an appeal from a removal decision before any removal decision had been made, and before any admissibility hearing had taken place.
- [7] Dorinela asks this Court to review this decision on a correctness standard. However, like the Federal Court ("FC") and Federal Court of Appeal ("FCA"), I conclude that the standard of review to be applied is reasonableness. The judicial task is therefore to determine if the IAD decision demonstrates an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker.

- [8] While a “decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation” (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 109). I conclude that the IAD’s reasons are unreasonable as they lack internal rationality and demonstrate a failure of justification, based on the relevant precedents, the applicable principles of statutory interpretation, and the potential impact of the decision on Dorinela.
- [9] Specifically, the IAD first invoked and relied on cases that were either decided under a different and outdated provision, were not on point and concerned other matters, or were not binding upon it to begin with.
- [10] Second, the IAD did not conduct any form of a statutory interpretation analysis in relation to s. 63(2). While such is not always required, it was unreasonable in this case because, had the IAD conducted the analysis according to the modern approach to statutory interpretation and the present wording of s. 63(2), it would have had no choice but to come to a different result. Understanding the text, context, and purpose of s. 63(2), it is unreasonable to conclude that an appeal right is lost or lapses before the decision which is the express subject of that appeal right has even been made.
- [11] Third, “if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature’s intention” (Vavilov, at para. 133). The IAD reasons show it also failed to do this.
- [12] By establishing an appeal right to the IAD, Parliament expressly granted a right of appeal for immigration decisions as important as this removal order and with the purpose of creating a safety mechanism that would function fairly, in sequence, and in the public interest. Yet, despite the severe repercussions for Dorinela, the IAD determined that she lost her right of appeal because her underlying medical documentation happened to expire, before her hearing began, and during the normal period of time in which an examination would routinely take place.
- [13] Without clear wording, which is not present, it cannot be assumed that Parliament intended the absurd, arbitrary, and adverse consequences which flow from interpreting a provision designed to provide due process and access to justice in the manner suggested by the IAD.
- [14] After finding that the IAD reasons and outcome were unreasonable, the only reasonable remaining interpretation of s. 63(2) in this context is that Dorinela had a right to appeal because she was the holder or “titulaire” of a permanent resident visa when she entered the country.
- [15] For the reasons below, I would allow the appeal, confirm that the IAD had jurisdiction to hear Dorinela’s appeal, and remit the matter to the IAD for determination of her appeal.

II. Background and Procedural History

- [16] At the age of 20, Ms. Pepa was granted a permanent resident visa on February 4, 2018, as an accompanying dependent of her father, who in turn was being sponsored to Canada by his wife. On February 27, 2018, Ms. Pepa married in secret, not telling anyone about the marriage before her arrival in Canada. A letter had been sent to her father in relation to his and all accompanying dependents' visas, stating that he must advise of any changes in marital status "BEFORE you leave for Canada" (A.R., vol. II, at p. 101). However, Ms. Pepa states that she never saw that letter and hadn't known of this warning, as her father alone handled all the immigration matters and paperwork. Her father did not know she had married, and she herself did not know she had to disclose the marriage before arriving in Canada.
- [17] On March 20, 2018, Ms. Pepa arrived in Canada. An immigration officer asked about her marital status, and she disclosed her recent marriage. Because of the change in her circumstances, Ms. Pepa was authorized to enter Canada for further examination and she was not granted permanent resident status.
- [18] Ms. Pepa explained that she realized the impact of her actions, and divorced on March 29, 2018, during the examination process. She expressed fear that she had been used: the man she married might not have married her because he loved her, but instead merely in hopes that he, too, might be able to come to Canada in the future.
- [19] As a result of this further examination, on April 6, 2018, an officer prepared a report under s. 44(1) of the IRPA alleging that Ms. Pepa was inadmissible under s. 41(a) of the IRPA for failing to comply with the requirements found in s. 51(b) of the Immigration and Refugee Protection Regulations, SOR/2002-227 ("IRPR"). The report sets out that there are grounds to believe that Ms. Pepa is inadmissible because she changed her marital status without notifying the Canadian Embassy. This report led to a referral under s. 44(2) of the IRPA, dated April 7, 2018, for an admissibility hearing.
- [20] A further s. 44(1) report was issued on July 13, 2018, based on s. 40(1)(a) of the IRPA, which provides that a permanent resident or a foreign national is inadmissible "for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of [the IRPA]". This report finds that there are grounds to believe that Ms. Pepa's failure to inform Canadian immigration officials of her change in marital status prior to her arrival in Canada induced an error in the administration of the IRPA, because her visa remained valid when it ought to have been cancelled due to the fact that her marital status had changed, rendering her no longer eligible to become a permanent resident as a dependent child. This report led to a further referral under s. 44(2) of the IRPA, dated July 24, 2018, for an admissibility hearing.

- [21] A permanent resident visa is issued for a period not exceeding one year, and the expiry date is tied to the earliest expiry date of the documents underlying it: the applicant's passport or medical documentation. Ms. Pepa's medical documentation had a "valid to" date of September 16, 2018, and the expiry date on her Albanian passport was years after that. As such, the date of expiry on her visa was the earlier of the two: September 16, 2018.

A. Immigration and Refugee Board of Canada, Immigration Division, 2018 CanLII 154361 (A. Beecham)

- [22] It took six months from Ms. Pepa's arrival in Canada before an admissibility hearing at the Immigration Division ("ID") of the Immigration and Refugee Board commenced on September 25, 2018. Although her counsel says they pushed for an early resolution by sending a letter on July 24, 2018, this early resolution clearly did not occur. Therefore, her visa expired before the hearing began.
- [23] At the outset of the hearing, the respondent Minister advised that he was abandoning the report relating to inadmissibility under s. 41(a) of the IRPA, and would proceed only on the grounds of the July report relating to misrepresentation.
- [24] At the conclusion of the hearing, the ID issued an exclusion order against Ms. Pepa on October 16, 2018. An exclusion order is a form of removal order (IRPR, s. 223). This meant she was unable to become a permanent resident, and would be forbidden from entering Canada, where her father, stepmother, and stepbrother now live, for a period of five years.
- [25] The ID reasoned that upon applying for permanent residence, applicants are "placed under a positive obligation to inform Canadian Embassy officials of any change in circumstances relevant to the issuance of the visa" (p. 8). The ID was satisfied that there was a change in Ms. Pepa's personal circumstances and that she was obliged to inform the Canadian Embassy officials about the change in her marital status, but she did not. The failure to correct the earlier information that she was single turned into a misstatement of fact. Ms. Pepa "deprived the authorities of actionable information that could lead to investigations o[r] further verification and she foreclosed a line of questioning or investigation that might otherwise have been taken concerning her eligibility as a dependent" (p. 14). Further, Ms. Pepa "was able to induce an error in the administration of the [IRPA]", as she "obtain[ed] a permanent resident visa as a dependent, which, although initially true, ceased to be true when her marital status changed" (p. 14). As a result, immigration officials were not apprised of the change in her circumstances, and were therefore unable to factor that into their decision. The ID concluded that Ms. Pepa "retains her right of appeal to the Immigration Appeal Division, and she has 30 days within which to file such an application. The exclusion order will not be enforced while the appeal is pending" (p. 15).

B. Immigration and Refugee Board of Canada, Immigration Appeal Division, 2019 CanLII 145325 (V. Zafir)

- [26] Ms. Pepa sought to appeal the removal order to the IAD and its decision of August 27, 2019 is the subject of this appeal. In its reasons, the IAD stated that “this appeal hinges on the threshold issue of jurisdiction” (para. 2). The IAD concluded it did not have jurisdiction to hear her appeal under s. 63(2) of the IRPA because, when the exclusion order was issued, her visa had already expired: she was “therefore a foreign national who did not hold a valid permanent resident visa at the time of the issuance of the Exclusion Order that she was appealing to the IAD” (para. 15; see also para. 19).
- [27] The IAD also considered a second issue: whether the loss of her “right to appeal to the IAD” involved an abuse of process because of the time it took to progress from her initial admission to Canada to the eventual exclusion order (para. 20). The IAD found no abuse of process. Indeed, “there is no evidence upon which to conclude, on a balance of probabilities, that the proceedings as a whole, from admission, to examination, to the issuance of reports and the final ID decision, were outside the normal time for processing such matters” (para. 25).

C. Federal Court, 2021 FC 348 (Roussel J.)

- [28] The application judge began by determining that the reasonableness standard of judicial review applied. She found that, contrary to Ms. Pepa’s argument, “the IAD’s decision [was] not a question ‘regarding the jurisdictional boundaries between two administrative bodies’” (para. 16, citing *Vavilov*, at para. 53) but, rather, was a question of the IAD interpreting a provision of its home statute.
- [29] The application judge found that the ID was not required to identify a specific statutory provision that indicates at what point in the processing of her application for permanent residence Ms. Pepa had to communicate her change in circumstances. The ID could reasonably conclude that Ms. Pepa’s failure to report her marriage was inconsistent not only with the clear instructions identified in the confirmation of permanent residence, but also with the general and broad continuing duty of candour required of all applicants under the IRPA and the IRPR to disclose all facts which may be material to their applications for permanent residence.
- [30] The application judge then held that Ms. Pepa’s right of appeal to the IAD was governed by s. 63(2) of the IRPA, and interpreted the wording of that provision as establishing “that the act that triggers the appeal to the IAD is the issuance of a removal order” (para. 50). The application judge was also not persuaded that the IAD misinterpreted *Ismail v. Canada* (Citizenship and Immigration), 2015 FC 338, [2015] 4 F.C.R. 426. The application judge added that s. 63(2) of the IRPA only applies to one “who holds” a permanent resident visa, referring to the FC’s decision in *Zhang v. Canada* (Minister of Citizenship and Immigration), 2007 FC 593, [2008] 1 F.C.R. 716, for the proposition that since s. 63(2) of the IRPA is written in the present tense, having once held a permanent resident visa does not place an applicant within the ambit of the provision. The application judge ultimately held that the IAD could reasonably conclude that it did not have jurisdiction to hear Ms. Pepa’s appeal given that her

visa had expired before the removal order was made.

D. Federal Court of Appeal, 2023 FCA 102, 97 Imm. L.R. (4th) 68 (Laskin, Rivoalen and Monaghan JJ.A.)

- [31] The FCA concluded that the application judge had identified and then properly applied the applicable standard of review, which was reasonableness. The FCA agreed with the application judge “that the IAD was not faced with a question of jurisdictional boundaries between administrative tribunals” (para. 9).
- [32] Ms. Pepa submitted “that the IAD unreasonably interpreted subsection 63(2) as providing a right of appeal only to a person who holds a valid permanent resident visa at the time the removal order is issued” (FCA reasons, at para. 10), arguing that it is sufficient that the visa be valid at the time of arrival or of the s. 44 report. Moreover, Ms. Pepa argued that the IAD misunderstood the finding in *Ismail* and should have applied *McLeod v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 257 (C.A.) (“*McLeod FCA*”). The FCA disagreed with Ms. Pepa’s submissions largely for the reasons given by the application judge.
- [33] Ms. Pepa also submitted that the IAD failed to undertake a textual, contextual, and purposive analysis when it interpreted s. 63(2) and that this was unreasonable. The FCA also disagreed with that submission, finding instead that “[t]he IAD undertook the required analysis by reviewing and adopting precedents bearing on the issue before it” (para. 12). The FCA determined that it was reasonable for the IAD to have reviewed the case law it did and the submissions of the parties, and not to have undertaken its own statutory interpretation analysis.
- [34] The FCA ultimately determined that it was reasonable for the IAD to have found that “it does not have jurisdiction to hear an appeal pursuant to subsection 63(2) of the [IRPA] if the permanent resident visa is expired at the time the removal order is issued” (para. 18).

III. Standard of Review

- [35] *Vavilov* established a presumption that when a court reviews the merits of an administrative decision, the standard of review is reasonableness. This presumption is rebutted in two circumstances. The first is where the legislature has either (A) indicated an intent for a different standard to apply by explicitly prescribing the standard of review, or (B) provided for an appeal from an administrative decision to a court (para. 17; see also *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 40; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 27). The second is where the rule of law requires that the standard of correctness be applied (*Vavilov*, at para. 17; *Mason*, at para. 39; *Canada Post Corp.*, at para. 27). This second category includes three sub-groups: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at para. 17; *Mason*, at para. 41).

- [36] The Court did not foreclose the “possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case”, however, any new basis would have to be “exceptional” and should be “consistent with the framework and the overarching principles set out in these reasons” (Vavilov, at para. 70). A new category of correctness review was later recognized in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, [2022] 2 S.C.R. 303: “. . . when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute” (para. 28; see also Mason, at para. 43).
- [37] Ms. Pepa submits that “[t]here remains an argument” that the issue here fits into one of the existing exceptions requiring a standard of correctness (A.F., at para. 32, fn. 27) and, alternatively, a new category of correctness review should be recognized. She claims that judicial tolerance of multiple reasonable interpretations of s. 63(2) would lead to absurd consequences whereby prospective appellants could not know in advance whether they had a right to an appeal because individual IAD members would be free to pick and choose among multiple constructions of the same jurisdiction-conferring provision.
- [38] I agree with the Minister and the courts below that the presumptive standard of reasonableness applies. This case does not fit into any of the categories where that presumption can be rebutted. Parliament has not explicitly prescribed the standard of review or provided a statutory appeal mechanism from an administrative decision to a court. Nor is the interpretation of s. 63(2) of the IRPA a general question of law of central importance to the legal system as a whole, such as questions with legal implications for many other statutes or for the proper functioning of the justice system as a whole. Though crucially important for individuals such as Ms. Pepa, the issue at hand is narrowly focused on a single appeal provision under the IRPA, and it is not enough that it “‘touches on an important issue’ or . . . raise[s] an issue of ‘wider public concern’” (Mason, at para. 47, quoting Vavilov, at para. 61). It is clearly not a constitutional question. It is also not a question related to the jurisdictional boundaries between two or more administrative bodies, and it does not engage the new category recognized in *Society of Composers*.
- [39] Further, the interpretation of s. 63(2) of the IRPA does not warrant a new category of correctness review. In Vavilov, the amici curiae submitted that, “where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both ‘yes’ and ‘no’ — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker” (para. 71). Well aware of this argument, the Court specifically chose not to “recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body” and stated (at para. 72):

In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law.

This Court has thus already addressed whether the possibility of multiple interpretations of the same provision being available gives rise to a correctness standard, and answered in the negative.

[40] Nor do “similar rule-of-law considerations arise in the case at bar” as in *Society of Composers* (A.F., at para. 32). That case did not say the possibility of inconsistent decisions within an administrative body would justify a correctness analysis. Instead, it dealt with the possibility of inconsistent decisions between an administrative body and a court when the legislature had given them concurrent first instance jurisdiction over a legal issue in a statute (*Society of Composers*, at paras. 35-39). This was characterized as one of those “rare and exceptional circumstances where it is appropriate to recognize a new category of correctness review” (para. 28): the legislature had expressly involved a court in the administrative scheme, and this rebutted any presumption that the legislature wanted the decision-maker to operate without undue judicial interference (para. 29). Creating a category of correctness review for possible inconsistent decisions within an administrative body has already been thoroughly canvassed and rejected in *Vavilov*, and *Society of Composers* did not open the door for reconsideration of that principle.

[41] This Court has been intentionally cautious about recognizing new categories of correctness, and there is no reason to dislodge the presumption of reasonableness review as applied to the IAD’s interpretation of s. 63(2) of its home statute. The Court reached the same conclusion in *Mason*, where this Court held that the standard of review was reasonableness, and that was not changed or displaced by the certified question regime under s. 74(d) of the IRPA, under which the FC may certify a question for the FCA (para. 48). Recognizing a new correctness category here would conflict with *Vavilov*’s goal of simplifying the standard of review framework and making it more predictable by providing only limited exceptions to reasonableness review (*Mason*, at para. 53). New categories will be recognized only in the most exceptional of circumstances. This is not the case here. Reasonableness is the appropriate standard of review.

IV. Positions of the Parties

[42] Ms. Pepa submits that an individual remains a visa holder for the purpose of s. 63(2) unless the visa is revoked prior to the completion of the port of entry officer’s examination; it was unreasonable for the IAD to assess the expiry date of the visa at any juncture other than at the arrival at the port of entry; and if the IAD’s construction of s. 63(2) of the IRPA is upheld as reasonable, absurd results will follow in view of the administrative reality that permanent resident visas are sometimes issued with less than two months before their expiry. She asks that the decision of the IAD and the decisions of the FC and FCA upholding the IAD decision be set aside and that the matter be remitted to the IAD for redetermination on the basis that

it has jurisdiction to hear her appeal.

- [43] The respondent Minister argues that the IAD's decision is reasonable and justified in light of the legal and factual constraints bearing on its decision. According to the Minister, it was reasonable for the IAD to rely on prior judicial and IAD precedents when conducting its interpretive exercise, especially as it came to the same conclusion as other IAD panels. Further, the IAD's interpretation of s. 63(2) is consistent with the modern approach to statutory interpretation and the principles of interpreting bilingual legislation. The Minister claims that the IAD's interpretation does not lead to absurd consequences but that Ms. Pepa's interpretation does: it invites this Court to read in new qualifications for the appeal right and make a policy choice that Parliament itself did not adopt.

V. Issue

- [44] The sole issue is whether it was reasonable for the IAD to find that it does not have jurisdiction to hear an appeal pursuant to s. 63(2) of the IRPA if the permanent resident visa is expired at the time the removal order is issued.

VI. Analysis

A. Guidance From Vavilov and its Companion Cases

- [45] Vavilov and its companion cases, *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845, and *Canada Post Corp.* provide detailed guidance on conducting a reasonableness review of an administrative decision (Vavilov, at paras. 73-142; *Canada Post Corp.*, at paras. 28-34).
- [46] Administrative decision makers hold “the interpretative upper hand” (*Canada Post Corp.*, at para. 40, quoting *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 40). A principled approach to the reasonableness review begins by examining the reasons provided and “seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion” (Vavilov, at para. 84). The reasons are reviewed to determine if they led to a decision that was based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (paras. 84-85).
- [47] Under this “reasons first” approach, reviewing courts should remember that “the written reasons given by an administrative body must not be assessed against a standard of perfection”, and need “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” (Vavilov, at paras. 84 and 91, quoting *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). What is required will depend on the context (*Canada Post Corp.*, at para. 30). The reviewing judge must read the decision maker's reasons “holistically and contextually” (Vavilov, at para. 97), “in light of the history and context of the proceedings in which they were rendered”, including “the evidence before the

decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body" (para. 94).

- [48] Reviewing courts should not ask how they themselves would have resolved an issue, but should instead focus on whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable (Vavilov, at paras. 75 and 83). A reviewing court should not create its “own yardstick and then use [it] to measure what the [administrative decision maker] did” (para. 83, and Canada Post Corp., at para. 40, both quoting *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28). Nor should a reviewing court ask “what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem” (Vavilov, at para. 83; see also Canada Post Corp., at para. 40).
- [49] Any flaws relied upon by the party challenging the decision must be “sufficiently central or significant to render the decision unreasonable” (Vavilov, at para. 100). Vavilov specified two kinds of “fundamental flaws” that indicate an administrative decision is unreasonable: (1) a failure of rationality internal to the reasoning process; and (2) a failure of justification given the legal and factual constraints bearing on the decision (para. 101). A reviewing court is not required to classify unreasonableness into one of these categories, as they are merely useful descriptions for understanding how a decision might be unreasonable (para. 101).
- [50] First, a failure of rationality internal to the reasoning process arises if the decision is not rational or logical, or, to put it more colloquially, whether or not the reasoning “adds up” (Vavilov, at paras. 102-4).
- [51] Second, a failure of justification in light of the legal and factual constraints can include where a decision is in some respect untenable in light of: “. . . the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies” (Vavilov, at para. 106; see also paras. 99-115). These elements do not serve as a checklist, and each may vary in significance depending on the circumstances. They are provided “merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached” (para. 106).

- [52] The question is whether the IAD's interpretation of s. 63(2) of the IRPA, determining that Ms. Pepa lost her right of appeal because her permanent resident visa had expired prior to the issuance of the removal order, was reasonable. The most relevant consideration here is whether the decision is untenable in light of the pertinent factual and legal constraints that bear on it. The issues here concern: (1) the relevant precedents; (2) the principles of statutory interpretation; and (3) the potential impact of the decision on the individual.
- [53] I start with a brief overview of s. 63(2) and then turn to the reasons of the IAD, as they are "the principal lens through which the exercise of reasonableness review takes place" (D. Mullan, "Reasonableness Review Post-Vavilov: An 'Encomium for Correctness' or Deference As Usual?" (2021), 23 C.L.E.L.J. 189, at p. 202; see also Vavilov, at para. 84).

B. The Legislative Scheme and Section 63(2)

- [54] The IRPA is a complex statute which covers various aspects of the immigration process. Parliament has established a comprehensive legislative regime which puts into place a sequence of provisions to deal with the multiple ways in which people may come into this country.
- [55] Generally, the process for permanent resident applicants like Ms. Pepa involves the following steps. An overseas visa officer first conducts an assessment of whether an applicant satisfies the admissibility requirements. When satisfied, the officer issues a permanent resident visa and confirmation of permanent residence to the applicant. The visa holder must travel to Canada and present themselves for examination before their visa expires. In Canada, the officer renders a determination of eligibility, considering any new information. If eligible, the visa holder is then admitted to Canada as a permanent resident. This is the normal course of events.
- [56] In Ms. Pepa's case, she was not admitted to Canada because of the new information that she was married. Instead, a further examination took place. Where there are admissibility concerns, the officer will write a s. 44(1) report setting out the grounds of inadmissibility, a second officer will review the report, and if it is determined to be well founded, the officer, who is the Minister's delegate, will refer the matter to the ID for a hearing. At the conclusion of the hearing, the ID may issue a removal order. This can include an exclusion order.
- [57] Statutory appeal rights are not mandatory, yet Parliament has expressly granted a right of appeal to the IAD for immigration decisions as important as exclusion orders in these circumstances. The relevant statutory right of appeal is found in s. 63(2):
- (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

[58] Statutory appeal rights to the IAD were also a feature of the predecessor provision to s. 63(2), although they were granted in different terms. Under s. 70(2)(b) of the former Immigration Act, R.S.C. 1985, c. I-2, in order to have a right of appeal, a person had to hold a valid visa at the time the immigration report was made. It stated:

(2) Subject to subsections (3) and (4), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who

...

(b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

[59] Parliament replaced that provision with s. 63(2), which requires only that the individual demonstrate they are a person “who holds a permanent resident visa” or, in French, that they are “[l]e titulaire d'un visa de résident permanent”.

C. The IAD's Reasons

[60] In its reasons, the IAD stated that “this appeal hinges on the threshold issue of jurisdiction” (para. 2). This issue obviously calls for and depends upon the interpretation of s. 63(2). In its short reasons, in which nine paragraphs were directed to its jurisdiction to hear the appeal, the IAD cited s. 63(2) but did not interpret it, either at all or according to the modern approach to statutory interpretation. Instead, it relied on various cases to support its reading of s. 63(2).

[61] The IAD concluded it did not have jurisdiction to hear Ms. Pepa's appeal under s. 63(2) because, when the exclusion order was issued, her visa had already expired: she was “therefore a foreign national who did not hold a valid permanent resident visa at the time of the issuance of the Exclusion Order that she was appealing to the IAD” (para. 15; see also para.19).

D. The Burden of Justification

[62] Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to the essential elements of the modern principle of statutory interpretation (Vavilov, at para. 120). The meaning of s. 63(2) was directly in dispute before the IAD: Ms. Pepa argued that her visa was still valid when the referrals under s. 44(2) of the IRPA were issued, while the Minister said she needed to hold the visa at the time the removal order was issued.

[63] The IAD did not meet its burden of justification, based on its reasoning process and the outcome it produced. In terms of its reasoning, the IAD acted unreasonably in what it did and what it failed to do. It did not conduct its own interpretation of s. 63(2) according to the

constraints imposed by the modern principles of statutory interpretation. That is not in itself fatal as administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. Nonetheless, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context, and purpose of the provision (Vavilov, at para. 120).

- [64] While decision makers may sometimes rely on authorities which have interpreted the legislative provision according to those principles, it is not just the citing of any case that will satisfy the burden of justification. The decisions relied on must themselves be based on the expected interpretative framework and must be pertinent, on point, and help to answer the question at hand. Since the IAD's interpretation of s. 63(2) cannot be justified simply on the basis of the cases it cites, it was therefore required to turn its own mind to how s. 63(2) should have been approached under the relevant principles of interpretation. It did not do so. Its analysis is at odds with the object and purpose of the appeal right in s. 63(2) and its conclusion allows results that are both absurd and arbitrary. The IAD decision also did not take into account the severe consequences of its decision on Ms. Pepa.
- [65] Had the IAD undertaken the required analysis and appreciated the constraints it was under, it would have concluded, taking into account the text, context, and purpose, that the only time at which a person must "hold" a visa under s. 63(2) is when they enter Canada.

E. The Decision Was Not Reasonable in Light of the Relevant Precedents

- [66] I start with the case law the IAD relied upon in its reasons to ground its interpretation of s. 63(2). Administrative decision makers are not required to apply the common law in the same manner as courts in order for their decisions to be reasonable (Vavilov, at para. 113). However, "[a]ny precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide" (para. 112). Vavilov is clear, at para. 112, that

[a]n administrative body's decision may be unreasonable on the basis that the [administrative decision maker] failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable

In line with Vavilov, it would also be unreasonable for an administrative decision maker to rely on clearly inapplicable or distinguishable case law — like cases in different areas of the law or cases addressing different statutory provisions — without justification and explanation of its continued relevance to the matter at hand.

- [67] Similarly, while administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by stare decisis, both administrative decision makers and reviewing courts alike must be concerned with the general consistency of

administrative decisions, and if a decision maker departs from longstanding internal practices, that departure must be explained (Vavilov, at para. 129). Whether a particular decision is consistent with the administrative body's past decisions is a constraint which the reviewing court can and should consider when determining if an administrative decision is reasonable (para. 131). This does not mean that administrative decision makers are bound by internal precedent in the same manner as courts, but simply respects the legitimate expectations of the parties and reduces the risk of arbitrariness (para. 131). Vavilov is also clear that "reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions" (para. 132).

- [68] In its reasons, the IAD relied on the FC's decisions in *Canada (Minister of Citizenship and Immigration) v. Hundal*, [1995] 3 F.C. 32 (which was later affirmed by the FCA in (1996), 206 N.R. 184), and *Ismail*, and its own decisions in *Asif v. Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 131198 (I.R.B. (Imm. App. Div.)), and *Far v. Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 90984 (I.R.B. (Imm. App. Div.)), and distinguished the *McLeod* FCA case, to arrive at the conclusion that Ms. Pepa did not have a right of appeal to the IAD. As I will explain, this was not a reasonable approach to the interpretation of s. 63(2) and did not act as a substitute for the IAD addressing how that provision should reasonably be interpreted in light of the applicable legal constraints. Reviewing courts must exercise caution not to overstep their role when examining the soundness of the precedents that were relied on. The role of a reviewing court in such an instance is to ensure that the duty of justification has been discharged, not to wrestle with the correctness of the past administrative precedents, nor to overturn by proxy a judicial precedent. In this case, the precedents the IAD relied on were not sufficient to resolve the statutory interpretation question before it, nor did the IAD justify or explain their continued currency where they concerned an outdated statutory provision or starkly different facts. As such, it was unreasonable for the IAD to constrain itself to their holdings.
- [69] First, the IAD treated *Hundal* as applicable and authoritative, even though in that case the FC was interpreting a different statutory provision, s. 70(2)(b) of the former Immigration Act. As explained, s. 70(2)(b) was the predecessor provision to s. 63(2), and it set out different terms and requirements for accessing an appeal right to the IAD. The former provision tied the appeal right to "the time that a report with respect to the person was made by an immigration officer", whereas the new provision specifies no such point in time. The former provision stated that the person was required to be "in possession of a valid immigrant visa", while the new s. 63(2) speaks only of a foreign national "who holds a permanent resident visa" being able to appeal, and does not specify that the visa must be "valid". These significant textual changes signal that Parliament did not intend to simply reproduce the former provision when it enacted s. 63(2), and they seriously call into question the transferability of the holding in *Hundal* to cases dealing with the new provision.

- [70] Interpreting the former provision, the FC in Hundal addressed the question of when a visa could be said to be valid within the meaning of s. 70(2)(b). In that context, the FC summarized the case law under the old provision and outlined four exceptions to the general principle that once a visa is issued, it remains valid: (1) a visa becomes invalid where there is a frustration or impossibility of performance of a condition on which the visa was issued; (2) a visa is invalid where there is a failure to meet a condition of the granting of the visa itself before the visa is issued; (3) a visa ceases to be valid when it reaches its expiry date; and (4) a visa is no longer valid when it is revoked or cancelled by a visa officer.
- [71] The IAD found that the third exception outlined in Hundal, being expiry, applied in this case to deprive Ms. Pepa of a right to appeal as her visa had expired before the removal order was issued. In doing so, the IAD not only failed to justify why the interpretation of a different provision applied to s. 63(2), but it also bypassed the critical question that arises under the new provision: At what point in time must the person hold the visa in order to access the appeal right? This question did not arise in Hundal because the old provision prescribed the relevant point in time as being when a report is made against the person. Thus, even assuming that the four exceptions to validity set out in Hundal apply seamlessly to the new legislation, the IAD did not explain why Hundal supports the proposition that the absence of a relevant point in time under s. 63(2) means the visa must be held at the time the removal order is issued.
- [72] With respect, absent some rational justification as to why Hundal has continued currency, it was not reasonable for the IAD to base its approach to s. 63(2) on a decision taken under a prior provision with different wording. Furthermore, it was not reasonable for the IAD, in relying on Hundal, to bypass the critical question under the new provision, namely, at what point in time a person must hold a visa. The IAD used Hundal as binding authority when its jurisprudential force could not simply be assumed but should have been explored, explained, and justified. As such, Hundal is not a constraint on the decision maker and, without any explanation, it was not reasonable for the IAD to rely upon it to justify its conclusion regarding how the current s. 63(2) should be interpreted.
- [73] Second, the IAD's reliance on Asif and Far was not, in these circumstances, sufficient to justify the interpretation it came to. In Asif, a husband was granted a permanent resident visa and approved to immigrate to Canada with his dependents (his wife and children). Only the wife and children arrived in Canada, with the wife telling the officer upon their arrival that the husband had gone missing months prior. They were sent for further examination resulting in the issuance of exclusion orders, but their visas expired prior to the issuance of those orders. The IAD relied on Hundal to find that they had no right to appeal because they did not hold "valid" visas at the time of the issuance of the exclusion orders. The IAD also provided no explanation for why the exception outlined in Hundal should apply to s. 63(2).

- [74] The IAD here and in *Asif* relied on the IAD case of *Far*. In *Far*, the appellant came to Canada with a valid permanent resident visa but was sent for further examination due to concerns that he had used a fraudulent passport in the past. His visa expired before the examination process was complete, a deportation order was issued against him, and the IAD determined it did not have jurisdiction to hear his appeal due to the expired visa, again citing *Hundal*.
- [75] The IAD in *Ms. Pepa*'s case acknowledged that these decisions were not binding, but saw "no compelling reason" to depart from *Asif* (para. 12). It invoked prior IAD decisions, which themselves relied upon the analysis in *Hundal*, without explanation or justification. Since *Hundal* is not an authoritative source for how the current s. 63(2) should be read, the subsequent IAD cases which relied upon it cannot reasonably be seen as providing a determinative interpretation of s. 63(2), either on their own or in combination. And because *Hundal* was used as the basis for the other IAD decisions considered, it means the reasons contain a near total absence of any attention to the text, context, and purpose of the very legislative provision over which *Ms. Pepa* and the Minister asserted competing interpretations.
- [76] Accordingly, neither *Hundal* nor the IAD cases relying upon it serve as legal constraints on the IAD in *Ms. Pepa*'s case. Reliance on a clearly distinguishable non-binding case, and the subsequent IAD decisions which followed it, without further analysis themselves, cannot be reasonable without explanation of the reasoning behind such a conclusion. No explanation is present in the IAD's reasons here.
- [77] The IAD in *Asif* also relied on the FC's decision in *Zhang* — despite its starkly different facts. Roughly one month after *Ms. Zhang*'s visa was issued, her visa was revoked and she was asked to return it, after authorities learned that the man she had listed as her husband was in fact married to another woman. Instead, she flew to Canada with the invalid document, and tried to use it to enter the country. Since s. 70(2)(b) of the former Immigration Act included the word "valid" and s. 63(2) of the IRPA does not, *Ms. Zhang* argued Parliament intended to remove validity as a prerequisite for the IAD's jurisdiction to hear appeals of removal orders. The IAD concluded that the notion that a visa must be "valid" was imported from s. 70(2)(b) of the former Immigration Act into the new s. 63(2), and before the FC, de Montigny J. (as he then was) dismissed the application for judicial review on a correctness standard of review. De Montigny J. conducted a statutory interpretation analysis and concluded that "Parliament can hardly be said to have intended that foreign nationals would be able to use visas revoked by Canadian officials in an attempt to fraudulently enter the country, and then rely on those revoked visas as a basis for their appeal rights" (para. 13).
- [78] I note that the critical question on this appeal does not concern whether the word "valid" can be imported into the new legislation, but is instead: Under s. 63(2), at what point in time must the person hold the visa in order to access the appeal right? In *Zhang*, after concluding that *Ms. Zhang*'s argument must fail, de Montigny J. went on to comment that it would defy common sense to find that s. 63(2) of the IRPA applies to applicants with revoked or expired visas (para. 16). The inclusion of an expired visa was unnecessary obiter in the

circumstances of a revoked visa, and de Montigny J. did not focus his analysis on the particular and clearly differentiable circumstance of an expired visa. Cases concerning revocation of a visa have only limited relevance to the facts at bar.

- [79] Lastly, the IAD disregarded the relevance of McLeod FCA on the basis that it relates to visas being rendered invalid by a change of circumstances, not by their expiry. Yet, the IAD also found the FC case of Ismail to be a binding pronouncement which “directly answers the question”, despite the fact that it was a case of revocation rather than expiry, which is also an entirely different context (para. 18). Though neither case mirrored Ms. Pepa’s circumstances precisely, there was inconsistent treatment of these cases as one was disregarded and the other was treated as binding.
- [80] In Ismail, the applicant had her visa revoked after arriving in Canada, but prior to examination. The FC held that, “[a]s stated by this Court in Zhang, a finding that the appeal right in subsection 63(2) of the IRPA would apply to an invalid or revoked visa would lead to the absurd consequence of granting persons with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. In the absence of clear words to the contrary, Parliament cannot be taken to have had that intention” (para. 18). However, these comments are made firmly in the revocation context. Indeed, Ismail appears to explicitly narrow its findings to cases where the permanent resident visa has either (1) never been issued, or (2) been revoked:

I agree, therefore, with the IAD that foreign nationals who are found to be inadmissible at the port of entry or at a deferred examination will have a right of appeal to that tribunal only when their inadmissibility does not relate to the absence of a permanent resident visa. Such will be the case where there has been a change in circumstances since the visa was issued, for example, as a result of a criminal conviction or of a new medical condition. In those circumstances, an exclusion order will be appealable before the IAD, and humanitarian and compassionate factors may then be taken into consideration. When the inadmissibility relates to the absence of a permanent resident visa (whether a permanent resident visa has never been issued or has been revoked), however, the only recourse will be an application for judicial review in this Court. [Emphasis added; para. 19.]

- [81] The circumstance of the visa merely expiring is not listed. The difference between revocation and expiry is key. In revocation cases, there is a clear determination that the visa should never have been granted in the first place, or that the reasoning underlying the issuance of the visa is no longer valid, due to factors such as fraud. For example, in Ismail, the visa was revoked because the applicant submitted fraudulent language certificate results, and, in Zhang, the visa was revoked because the applicant claimed she was married to a man who was in fact married to somebody else. The expiration of a visa, unlike its revocation, does not imply any fault or illegality in the initial grant, but merely signifies that the temporal conditions of an otherwise valid visa have lapsed, which warrants different legal treatment. Ms. Pepa’s visa was never revoked and only expired because of the date on her medical documentation.

- [82] The FC in *Ismail* also relied upon *Hundal* without explaining its continuing applicability, and interpreted s. 63(2) as granting a right of appeal only to a person who holds a “valid” permanent resident visa at the time an exclusion report is issued, which did not include the applicant (para. 18). The court in *Ismail* held that “Parliament could have drafted that section differently, to include for example, persons who hold ‘or have held’ a valid permanent resident visa. Parliament chose otherwise, and courts must enforce clear legislative intention” (para. 18). However, as will be explored more fully in the next section, Parliament could also have chosen to add a point in time at which the individual must hold a valid visa in order to retain their appeal right. It did not. Instead, it explicitly removed the specific point in time for when a person must be in possession of the valid visa required under the previous provision, and also removed the word “valid”. *Ismail* also fails to account for this change in the legislation.
- [83] In *McLeod FCA*, the appellants were granted permanent resident visas as dependents of their mother, but shortly before they travelled to Canada, their mother died. Though the FCA focused on when a visa could become invalid by a change of circumstances, not by its expiry, this decision does provide something of note. In *McLeod*, the expiry date of the visas was December 21, 1992. On December 3, 1992 they proceeded to Canada. They were denied admission and an inquiry was held on April 8, 1993. Removal orders were issued against them as a result of that inquiry on August 4, 1993 (*McLeod v. Canada (Minister of Employment & Immigration)* (1994), 24 Imm. L.R. (2d) 187 (I.R.B. (App. Div.), at para. 1). Thus their visas expired long before the removal orders were issued, though the facts do not provide the date on which the initial report was issued. Nonetheless, the IAD in that case interpreted s. 70(2)(b) of the former Immigration Act, but found that the IAD “does have the jurisdiction to entertain this appeal”, and ultimately quashed the removal orders (para. 32 (emphasis added); see also paras. 33 and 44). Thus, despite their visas expiring long before the removal orders were issued, the removal orders were still quashed by the IAD and that decision was upheld by the FCA. Though neither decision was directly on point, it is of note that *Ismail* was considered binding while the *McLeod* case was brushed aside.
- [84] None of the cases cited by the IAD were sufficient pronouncements to resolve the contested interpretation of s. 63(2) without further analysis and some level of engagement with the modern approach to statutory interpretation. While these cases may have properly been informative to the IAD to some degree, it was not reasonable to stop there given the key differences at hand. *Far and Asif* were IAD decisions which (as well as the IAD in this case) relied upon *Hundal* — a case that cannot be considered binding on the matter considering it was decided under an entirely different provision. In addition, *Ismail* is a case of revocation rather than expiry, which is fundamentally different.
- [85] Overall, the FCA below erred in concluding that based on the IAD’s review of the case law, it was reasonable for the IAD not to undertake its own statutory interpretation analysis. While *Vavilov* states that precedent will act as a constraint on what the decision maker can reasonably decide, this only applies to precedent on the issue before it, or precedent on a

similar issue. A decision maker needs more than a few citations to cases relying on a different provision, or a clearly distinct factual matrix, to determine the issue. Though failure to conduct a statutory interpretation analysis is not fatal on its own, where the case law available to the decision maker is not sufficiently material or binding, the analysis cannot simply stop without ensuring that due consideration has been given, according to the modern principle of interpretation, to the competing interpretations asserted by the parties.

F. The Decision Was Not Reasonable in Light of the Principles of Statutory Interpretation

- [86] A decision may be unreasonable due to a failure of justification in light of the legal and factual constraints, which can include the principles of statutory interpretation (Vavilov, at paras. 99 and 115-24). Given that the case law relied on by the IAD was not sufficiently material or binding, it ought to have conducted an analysis of the text, context, and purpose of the very legislative provision over which the parties had competing interpretations. There is no requirement for an administrative decision maker to conduct a full statutory interpretation analysis in every case. However, if a proposed interpretation is clearly incongruous with a statutory provision's text, context, or purpose, its failure to consider that element "would be indefensible, and unreasonable in the circumstances" (para. 122).
- [87] The usual principles of statutory interpretation apply when an administrative decision maker interprets a provision (Vavilov, at para. 120). It is well established that a statutory interpretation analysis must be guided by the modern approach: "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; Vavilov, at para. 117).
- [88] In this case, the reasons ought to have considered the grammatical and ordinary meaning of s. 63(2); the object and intention of Parliament; and the context in which this provision operates. Had the IAD considered these key elements, it would have had no choice but to come to a different result: a reading of s. 63(2) which did not support absurd, arbitrary, and potentially unfair consequences.
- (1) Grammatical and Ordinary Meaning
- [89] The ordinary meaning is "the natural meaning which appears when the provision is simply read through as a whole" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning of the phrase "[a] foreign national who holds a permanent resident visa" is, quite simply, a foreign national who is in possession of a permanent resident visa. The Minister argues and the FC below held that since s. 63(2) is written in the present tense, having once held a permanent resident visa does not place an applicant within the ambit of this provision (R.F., at para. 82; F.C. decision, at para. 53).

- [90] I agree that the provision does not say “holds or has held”, and the plain meaning is that the person must “hold” a visa at the appropriate time, in the present tense. The French version is not tied to a verb and focuses more on the status of the person as “[l]e titulaire d’un visa de résident permanent peut interjeter appel de la mesure de renvoi”. When interpreting bilingual legislation, both versions of the legislation are equally authentic and equally authoritative (see, e.g., M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at p. 28; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 68; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 356 et seq.).
- [91] However, the key issue arising under s. 63(2) is not answered by an ordinary reading of either or both of the official versions. Even accepting that one must hold an unexpired visa under s. 63(2), the section does not prescribe the time at which the individual must hold that visa, or whether a visa which has since expired is still considered to have been “held” at the relevant time. In addition, under the modern approach to statutory interpretation, the analysis does not end with consideration of the text of the provision alone. Due to this, and because nothing in the open-ended wording of s. 63(2) addresses or answers this question, the determination of the relevant time must be informed by the other principles of statutory interpretation that ought to have been considered.
- (2) Object of the Provision and Intention of Parliament
- [92] On its face, the purpose and object of s. 63(2) is to enable holders of permanent resident visas an opportunity to challenge the legal validity of a removal order (which may include an exclusion order) issued against them by way of an appeal to the IAD. It creates a statutory right of appeal intended to operate as a procedural and substantive safeguard, a check and balance as it were, on administrative decision making in favour of people who successfully obtained a permanent resident visa, but are ordered to leave the country. Parliament obviously understood that a defining and inherent characteristic of an appeal is that it arises as part of a process of decision making, and is a second step after the initial decision has been made. The desired oversight occurs in a well-established sequence, such that the appeal will necessarily be based on the decision which is its subject matter, and arise only after that decision has been made.
- [93] This purpose must be kept in mind when interpreting s. 63(2) to determine when the person must hold the required visa. The legislative history of s. 63(2) provides limited guidance. Notably, s. 63(2) does not prescribe the time at which the individual must hold that visa, or whether a visa which has since expired is still considered to have been “held” at the relevant time. By way of comparison, the former s. 70(2)(b) required the visa to be “valid”, set out a specific point in time for when the person had to be in possession of the valid visa, and allowed for a visitor’s visa to count. The current s. 63(2) shares none of these features and instead provides a right of appeal that is less limited and more open-ended. No clear rationale emerges with respect to why this section was enacted to replace the former provision and why Parliament chose not to prescribe when the requisite visa must be held.

- [94] Before this Court, Ms. Pepa argues that Parliament intended the appropriate point in time to be when a visa holder arrives in Canada. She claims that by removing any reference to visa validity in s. 63(2), Parliament was not concerned with whether the visa remains unexpired at the time the right to appeal vests. She submits that only the time of arrival accords with the Parliament's clear intent and express purpose of providing an efficacious appeal right to persons subject to a removal order.
- [95] The Minister argues that the relevant time is when the removal order is issued, on the basis that the removal of the word "valid" does not mean that Parliament intended to eliminate the requirement for any document referred to in the IRPA to be unexpired and otherwise genuine and operative, and that these changes were likely made to modernize the style of the provision rather than to change its substance. The Minister also argues there is a trend of narrowing appeal rights, noting that s. 70(2) of the Immigration Act provided a right of appeal to the IAD for those in possession of a valid visitor's visa, while s. 63 of the IRPA does not. The Minister says that because it is the issuance of the removal order which triggers the right of appeal, then that is the time at which the visa must be held.
- [96] The Minister overstates the importance of removing visitors' visas because read as a whole, it does not appear that Parliament wanted to otherwise narrow appeal rights by enacting s. 63(2). The repeal of the previous express limitations on s. 70(2) instead suggests Parliament intentionally broadened the scope of the appeal provision. It did not expressly narrow appeal rights by outlining the point in time at which the individual must have held a valid visa in order to retain their appeal right. In fact, Parliament chose to remove language that the individual must hold a valid visa at the time of the immigration officer's report.
- [97] Nor is it reasonable to conclude that Parliament must have intended that the visa be held at the time the removal order is issued because it is the removal order decision which triggers the need for an appeal. The FC accepted that reasoning and determined that "[t]he wording of subsection 63(2) of the IRPA establishes that the act that triggers the appeal to the IAD is the issuance of a removal order" (para. 50). Appeal rights are naturally tied to and necessarily triggered by a decision: in this case, the issuance of a removal order. But, with respect, there is an important conceptual difference between the act that triggers the appeal, which is the removal order, and the separate statutory requirement that an individual "holds" a visa at a particular time. These concepts are distinct. There is no need for any forced identity between them for the provision to have meaning or make sense. Indeed, under s. 70(2)(b) of the former Immigration Act, the trigger for an appeal was the removal order, but the visa was required to be held only at the time the report was issued. With respect, these two distinct components should not be twinned or equated: they were different under the previous provision and they are different under s. 63(2).

- [98] Not only is it a misreading of the provision to conflate when the initial decision is made with when the visa must be held, but also the IAD's reading of s. 63(2) to mean that the visa must be held when the removal order is issued is at odds with Parliament's object, purpose, and sequence in enacting this statutory appeal right.

Absurd Consequences and Arbitrary Results

- [99] The IAD's approach and outcome renders a visa holder's appeal eligibility contingent on how quickly any post-arrival inadmissibility case brought against them moves through the system, a result that is particularly problematic for visa holders whose visa expires within a short period of time. The IAD's interpretation results in the possibility that a visa holder can lose their right to appeal before the decision is taken — in Ms. Pepa's case, before the hearing has even begun. The question is whether it is reasonable to assume that Parliament intended that result. Based on the provision's wording, purpose, and legislative history, Parliament could not have intended a result which is both absurd and arbitrary.
- [100] To review, in 2018, Ms. Pepa arrived in Canada on March 20, the examination process took place over the subsequent months, the hearing commenced on September 25, and the exclusion order (a form of removal order) was issued on October 16. Her visa expired on September 16, shortly before the hearing commenced.
- [101] The IAD acknowledged that "[s]he lost the right to appeal to the IAD due to the time it took for the process to progress from her admission for further examination at the port of entry, to the issuance of the Exclusion Order" (para. 20). Approximately seven months elapsed from the date of Ms. Pepa's arrival to the date the exclusion order was issued. The IAD also concluded that there was no evidence this timeline was anything but normal (para. 25). Accepting the IAD's conclusion that this is a normal timeline, this is no outlier case where the visa expired due to unreasonable delays in the examination. Thus, under the IAD's interpretation, the average person subject to further examination upon entering Canada may well lose their appeal right simply due to the normal timeframe of an examination exceeding their visa expiry date.
- [102] It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences (Rizzo, at para. 27). An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, if it is incompatible with other provisions, or if it defeats the purpose of the statute or renders some aspect of it pointless or futile (para. 27). On a robust review, it is not reasonable to conclude, without clear wording or a compelling justification, that Parliament intended that a person could lose their right to appeal before any hearing on the merits took place and before any removal order was issued. The burden of justification to establish that Parliament wanted a person to lose their right of appeal due to scheduling delays or as a result of the normal timeline of further examinations extending beyond the visa's expiry date would be very high. There is no solid evidence or sound argument upon which to rest the finding that Parliament

intended such absurd consequences. In fact, Parliament explicitly excised language from the old provision requiring a person to hold a valid visa at the time a report was made, and instead omitted any reference to a point in time in the new IRPA. The IAD reasons rest on the absurd premise that Parliament enacted the IRPA to include a facially and fatally flawed safeguard: an express appeal right that can commonly be lost before any decision that could be appealed is taken. With respect, that is not a reasonable reading or result. As was the case in *Mason*, at para. 98, the IAD failed to address the absurd consequences of its interpretation.

- [103] The prospect of absurd consequences is also compounded by potential arbitrariness associated with the expiration of a person's visa. The issuance of a permanent resident visa to a foreign national takes place as a result of an assessment of that person's eligibility, and the expiry date of the visa is linked to this assessment: a permanent resident visa is issued for a period not exceeding one year, and the expiry date is tied to the earliest expiry date of the applicant's passport or medical documentation.
- [104] In this case, Ms. Pepa's medical examination documentation had a "valid to" date of September 16, 2018, while her Albanian passport would not expire until several years later. As such, the date of expiry on her visa was the earlier of the two: September 16, 2018.
- [105] The IAD's interpretation arbitrarily ties a person's right of appeal to the date of expiry on a passport, or the date of expiry on medical documentation, to a maximum cap of one year. On their face, neither of those dates can be rationally connected to a right of appeal. Thus, the absurdity is compounded by arbitrariness.
- [106] Given the legislative history, absurd consequences, and inherent arbitrariness of the visa's expiration date, the intention of Parliament cannot have been for individuals like Ms. Pepa to lose their right of appeal before the issuance of a removal order. It cannot be assumed that Parliament repealed the predecessor provision to enact a futility, as the IAD's interpretation suggests. The IRPA is a comprehensive piece of legislation with a sequence of remedies in place, and Parliament must have intended those remedies to have a purpose and be efficacious. To find otherwise would require the clearest of statutory language to the contrary, which s. 63(2) does not contain.

(3) Context

- [107] Words take their colour from their surroundings (J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6). In the world of statutory interpretation, there is a presumption "that the provisions of [a statute] are meant to work together . . . as parts of a functioning whole" (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at p. 323), which form together into a rational, internally consistent framework (*Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 28).

[108] There are other related provisions and statements in the guidelines which show the relevance of coming into the country with an unexpired visa and allow for the granting of permanent resident status even when the visa has expired. This case concerns s. 63(2) and giving “[a] foreign national who holds a permanent resident visa” a right of appeal to the IAD. However, s. 67(2) of the IRPA is also relevant here:

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

[109] Section 67(2) tells us that if the IAD allows an appeal, it can substitute the decision that should have been made or refer the matter for reconsideration by the appropriate decision-maker. For example, it could order the officer at the port of entry to grant that person permanent resident status. At this stage, s. 20(1) comes into play:

20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,

(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; . . .

[110] Section 20(1)(a) states that every foreign national seeking to enter Canada must establish that they “hold” the relevant visa — in this case, the permanent resident visa. Ms. Pepa has rightfully noted that Immigration, Refugees and Citizenship Canada (“IRCC”) has an operational manual, which is not binding as law on the IAD, but operates as evidence of general practice and context which can be used in statutory interpretation. The IRCC’s Enforcement Manual 19 (“ENF 19”) states clearly that upon a successful IAD appeal, where the decision is to allow the individual to remain in Canada:

The individual may be granted permanent resident status even if the permanent resident visa expired, provided they initially appeared for examination and presented their permanent resident visa within its period of validity.

(ENF 19: Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB), August 22, 2024 (online), at s. 11.8)

[111] ENF 19 indicates that where a foreign national is successful on an appeal to the IAD, and the IAD overturns a removal order so that the individual is allowed to remain in Canada, then that individual is not barred from entering Canada on the basis that their permanent resident visa has expired. They may be granted permanent resident status even if the visa has expired. It is sufficient as long as they presented an unexpired permanent resident visa at the port of entry upon their initial arrival in Canada for examination. For the purposes of s. 67(2), which is in the same part of the legislation as s. 63(2), the requirement that they “must establish . . . that they hold the visa” is, in this related provision, assessed at the time of arrival to Canada.

- [112] The IRCC's Enforcement Manual 4 ("ENF 4") (ENF 4: Port of Entry Examinations, February 28, 2024 (online)) also expressly contemplates that examinations at the port of entry may be delayed for a variety of reasons (see, e.g., "to allow the person to get their documents" (s. 11.3), "to obtain more information before deciding" (s. 12.3), or "to consult the visa office and obtain more information and evidence about the person's marital status" (s. 12.6)). ENF 4 goes on to indicate that where examinations are delayed past the point of visa expiry, the applicant may still "be granted permanent residence at a later date after the expiration of their visa . . . provided they initially appeared for examination and presented their [permanent resident] visa . . . within its period of validity" (s. 12.13). This provides another example where what matters is that the person entered the country with an unexpired visa. Examinations may continue despite an expired visa, and permanent residence may still be granted despite an expired visa.
- [113] Overall, this context was not considered by the IAD despite the presence of related provisions and applicable guidelines which allow for the granting of permanent resident status even when the visa has expired as long as the visa was unexpired at the time of arrival.
- [114] In conclusion, had the IAD assessed the above-considered elements of statutory interpretation — the grammatical and ordinary meaning, the object and intention of Parliament, and the context — it would have had to come to a different result.

G. The Decision Was Not Reasonable in Light of its Potential Impact on Ms. Pepa

- [115] Vavilov states that "individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm" (para. 133). Specifically, Vavilov requires (at para. 133):

Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

- [116] The Court in Vavilov explained that "concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable" (para. 134). Vavilov provided the example of the IAD, noting that when exercising its equitable jurisdiction to stay a removal order under the IRPA, it should consider the potential foreign hardship a deported person would face (para. 134). This Court concluded that administrative decision makers wield significant power over people's lives, including those most vulnerable, and with this power comes a heightened duty "to ensure that their reasons demonstrate that they have considered the consequences of a

decision and that those consequences are justified in light of the facts and law” (para. 135).

- [117] This focus on impact “may well lead to a more considered and coherent approach to vulnerability in Canadian administrative law” (L. Sossin, “The Impact of Vavilov: Reasonableness and Vulnerability” (2021), 100 S.C.L.R. (2) 265, at p. 277). This element may be particularly relevant in the immigration context, which often involves vulnerable individuals (see, e.g., *Dhaliwal v. Canada (Public Safety and Emergency Preparedness)*, 2020 CanLII 7806 (F.C.), per Norris J., citing *Vavilov*, at para. 133; *Thangeswaran v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 91, at para. 37, per Ahmed J.).
- [118] The impacts on the individual here are significant. Ms. Pepa will be separated from her family and barred from the country for five years. Before the ID, Ms. Pepa spoke of her fears of returning to Albania: “. . . in Albania I cannot go anywhere. I do not speak with my mother” and “I do not have a good life in Albania” (A.R., vol. II, at pp. 26 and 28). Her counsel argued that “the deportation to Albania will leave her in an untenable situation as her biological mother has not been supportive of her since the divorce”, and Ms. Pepa said that her relationship with her mother is not good because she chose to live with her father after their divorce (pp. 148 and 216). Her counsel argued that “she has no place to go as her father supports her in Canada”, and “if she is sent away she will have no emotional support and this father and daughter relationship cannot be repaired if [Ms. Pepa] is in Albania while the father is in Canada” (p. 148). Her father, stepmother, and stepbrother are all in Canada, and her biological brother is in the process of being sponsored to Canada as well (p. 147).
- [119] *Vavilov* states that “if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature’s intention” (para. 133 (emphasis added)). In my view, the IAD did not give sufficient consideration to the relatively significant consequences of the decision for Ms. Pepa. Though the stakes here are not as high as in the penal context, the consequences are nonetheless severe. Further, the IAD’s failure to address key factors of statutory interpretation at all in its reasons shows it did not explain why its decision respects Parliament’s intention, let alone “best reflects” Parliament’s intention. Parliament intended an efficacious appeal process, and the IAD’s reading makes this process all but illusory in cases where the visa has expired before the removal order is issued. The reasons ought to have demonstrated that the decision maker considered the consequences of the decision and whether such harsh personal consequences were justified in light of the facts, the law and Parliament’s intention. This did not happen here.

H. Conclusion on the IAD Reasons

- [120] The reasons indicate that the cases relied on by the IAD do not provide a responsive justification which supports its interpretation of s. 63(2). It failed to show an understanding of how the modern approach to statutory interpretation acted as a constraint on its reading of this disputed provision and had the IAD assessed the essential elements of statutory

interpretation, it would have had no choice but to come to a different result. As well, the decision maker's reasons failed to reflect the high stakes at risk for Ms. Pepa. These flaws are sufficiently central and significant to render the decision unreasonable (Vavilov, at para. 100). In sum, the IAD's decision — both the rationale and the outcome to which it led — is unsound in light of the pertinent constraints that bear on it.

VII. Remedy

- [121] Having determined that the IAD's interpretation of s. 63(2) is unreasonable, I turn now to the question of remedy. In Vavilov, this Court held that, "where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons" (para. 141). However, a court may decline to remit a matter to the decision maker "where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (para. 142). When the decision at issue involves statutory interpretation, "it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" (para. 124). When it is clear that there is only one reasonable interpretation, the reviewing court should make a pronouncement on that interpretation rather than remitting the matter pro forma for reconsideration.
- [122] In Mason, this Court recently determined there was one single reasonable interpretation of s. 34(1)(e) of the IRPA. That section provides that permanent residents and foreign nationals are inadmissible to Canada on "security grounds" for "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada". The interpretative question was whether "acts of violence" require a link to national security or the security of Canada, or whether s. 34(1)(e) applies to acts of violence more broadly even without such a link. This Court concluded that the administrative decisions under review did not reasonably interpret the section of the IRPA at issue largely because the IAD's reasons failed to address critical points of statutory context and the broad consequences of its interpretation on the individual. The IAD's omissions were significant, involved a failure of responsive justification and, cumulatively, rendered the IAD's decision unreasonable. This Court's analysis pointed overwhelmingly to only one reasonable interpretation of s. 34(1)(e), as the inevitable result of a proper reasonableness analysis.
- [123] Mason concluded that a court may properly determine during a reasonableness review that the interplay of text, context, and purpose leaves room for a single reasonable interpretation of the statutory provision, though "[i]t must be stressed that the possibility of a single reasonable interpretation is not a starting point of reasonableness review, as this would be contrary to a 'reasons first' approach" (para. 71 (emphasis deleted)). Instead, "it is a conclusion that a reviewing court may draw as a result of a proper reasonableness review,

as part of the court's consideration of the appropriate remedy" (para. 71 (emphasis deleted)).

- [124] Deference does not absolve reviewing courts of their duty to review the decision because "the exercise of public power must be justified, intelligible, and transparent" (Vavilov, at para. 95). The "reasonableness review may at least on occasion require intensive delving into the merits of a decision. Such deep probes do not necessarily point to disguised correctness review or an abandonment of deference" (Mullan, at pp. 215-16).
- [125] Through the application of the relevant legal and factual constraints, a reviewing court focuses exclusively on whether the decision maker's decision was reasonable. However, it is natural that this process may incidentally eliminate other options that suffer from the same defects as the one under review, and may even narrow the field to only one possible interpretation. It should not be a surprise that there are cases in which one reasonable interpretation may arise, given that when legislatures speak, they intend to speak with clarity and purpose. This outcome will be more plausible when the question of interpretation is narrow, the statutory language is highly precise, and there are functionally very few options to choose from. A reviewing court should only conclude that there is one inevitable interpretation if that conclusion flows logically and inexorably from the legal and factual constraints already identified during the review of the decision maker's reasons.
- [126] In considering whether there is any utility in submitting this matter for reinterpretation by the IAD, the starting point is to identify the narrow question at hand. Here, it is at what point in time a person must hold a visa in order to access a right of appeal against a removal order under s. 63(2). That this question is categorical rather than qualitative suggests that there is a limited pool of potential answers. It is useful to refer to the four possible timeframes put forward by the FC for when the visa must be held: (1) at the time of arrival in Canada; (2) at the time the report under s. 44(1) is made; (3) at the time it is referred to the ID; or (4) at the time the removal order is issued.
- [127] The time of the removal order is not a reasonable interpretation for the reasons explained.
- [128] Options two and three suffer from the same problems which made option four unreasonable. Regardless of whether the validity of the visa is assessed at the time the s. 44(1) report is made, or the time it is referred to the ID, or the time the removal order is issued, the same absurdities and arbitrariness persist. The average person subject to further examination upon entering Canada can lose their appeal right simply due to the normal timeline of the examination process extending beyond their visa expiry date, before the decision subject to the appeal has even been made. Indeed, before the hearing has even begun. These interpretations are all similarly unreasonable.
- [129] The only interpretation that does not face these same grave disqualifications is the one put forward by Ms. Pepa: that the validity of the permanent resident visa, for an appeal under s. 63(2), is assessed by the IAD at the time of arrival in Canada.

[130] The purpose of the expiry date on the visa, within the sequence of the IRPA, is that the visa holder must travel to Canada and present themselves for examination before that expiry date is up. Although the visa holder must travel to Canada prior to the expiry date, examinations and investigations may and usually do extend past this date, as was the case for Ms. Pepa. As the expiry date on the visa is based only on the earliest expiry date of the documents underlying it (the applicant's passport or medical documentation), if a visa holder has a passport with a fast-approaching expiry date, for example, the visa's expiry date could pass quickly after the date of arrival in Canada. Only this interpretation protects the rights of appeal granted to holders of permanent resident visas and acknowledges the high stakes of losing a right to appeal a removal order.

[131] In the case at bar, we reach the conclusion that the validity of the permanent resident visa for the purposes of the appeal right under s. 63(2) must be assessed by the IAD at the time of arrival in Canada. This conclusion is reached as a result of a robust reasonableness review to consider the appropriate remedy, using the framework established by Vavilov and utilized in Mason. Cumulatively, the above deficiencies make the decision unreasonable. In this case, the appropriate remedy is to remit the matter to the IAD for determination, with Ms. Pepa's right of appeal now established.

VIII. Disposition

[132] For these reasons, I would allow the appeal, set aside the decisions of the IAD, the FC, and the FCA, and remit the matter to the IAD for determination of Ms. Pepa's appeal, with the sole reasonable interpretation of s. 63(2) now established: whether a foreign national "holds" a permanent resident visa in order to access a right of appeal under s. 63(2) of the IRPA is assessed at the time of that individual's arrival in Canada. This means that the IAD has jurisdiction to hear Ms. Pepa's appeal of the exclusion order issued against her on October 16, 2018.

The following are the reasons delivered by

Rowe J. —

[133] I agree with the majority that the Immigration Appeal Division ("IAD")'s decision was unreasonable. I respectfully disagree with respect to remedy. I would remit the matter to the IAD for redetermination.

[134] I adopt the majority's description of the facts and the procedural history.

I. Standard of Review

- [135] Section 63(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (“IRPA”), provides for an appeal to the IAD from a decision by the Immigration Division to issue a removal order for visa holders. What is in issue is whether someone whose permanent resident visa has expired between their arrival in Canada and the time when the removal order is issued can bring such an appeal. The determination of this question of statutory interpretation will decide whether or not the IAD has jurisdiction in this matter.
- [136] Before *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the standard of review would have been determined based on whether this question constitutes a “[t]rue questio[n] of jurisdiction” (para. 65, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59), as it is (to use older terminology) a preliminary question of law going to jurisdiction.
- [137] *Vavilov* eliminated “jurisdictional questions as a distinct category attracting correctness review” (para. 65). *Vavilov* held that “[a] proper application of the reasonableness standard will enable 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 ‘truly’ or ‘narrowly’ jurisdictional issue and without having to apply the correctness standard” (para. 67).
- [138] Such questions of law relating to jurisdiction were not “abolished” by *Vavilov*, as they will continue to arise from time to time. Rather, *Vavilov* provided that the standard of review to decide such questions is reasonableness. This was a departure from the standard of review analysis described in *Dunsmuir*, which affirmed the contextual “pragmatic and functional approach” (para. 63; see also paras. 55-62 and 64).
- [139] In other words, while *Vavilov* recognizes that these types of questions (statutory interpretation of provisions that circumscribe a decision maker’s jurisdiction) continue to exist, they do not attract the correctness standard of review.
- [140] Thus, I agree with the majority that the standard of review is reasonableness. In doing so, I leave behind whether the question in this case would have been characterized as a true question of jurisdiction under pre-*Vavilov* jurisprudence.

II. IAD’s Decision Is Unreasonable

- [141] I am in substantial agreement with the analysis set out by the majority as to why the IAD’s decision was unreasonable.

III. Remedy: “Single Reasonable Interpretation” Versus Remitting the Matter to the Decision Maker

[142] I respectfully disagree with my colleagues that we should go beyond this to conclude there is a single reasonable interpretation. By substituting its own interpretation, the majority risks slipping into “disguised” correctness review.

A. Governing Principles

[143] Vavilov noted that “the choice of remedy must be guided by the rationale for applying [the reasonableness] standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide” (para. 140).

[144] Where a decision is unreasonable, “it will most often be appropriate to remit the matter to the decision maker” for redetermination, with guidance that arises from the court’s reasonableness analysis (Vavilov, at para. 141). Thus, ordinarily, the courts should not substitute its own reasons and outcome for that of the administrative decision maker.

[145] That said, Vavilov provided for limited circumstances for courts, properly, to do so. A reviewing court may decline to remit a matter to the decision maker where it “becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose” (Vavilov, at para. 142). The rationale is to avoid an exercise in futility, with accompanying waste of resources and delay, as a single outcome is “inevitable”.

[146] This is so where, in conducting a reasonableness review, it becomes clear that “the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision . . . that is at issue” (Vavilov, at para. 124).

[147] As part of reasonableness review, a court must avoid undertaking its own analysis as to the correct interpretation of a provision; our function is judicial review, not de novo analysis. Vavilov warns that reviewing courts “should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker” (para. 124).

[148] Such caution is warranted to avoid slipping into a pattern of “disguised” correctness review in which courts correct decisions with which they disagree and defer to decisions with which they agree. That would undermine the clarity, transparency and predictability in judicial review that was achieved in Vavilov.

B. Application

[149] Where I differ from the majority is with respect to remedy. In my view, the appropriate remedy is to remit the matter to the IAD for redetermination with the guidance that is provided in this Court’s reasonableness analysis.

[150] The majority concludes that its interpretation is the only one not tainted by the arbitrariness and absurdity that it ascribes to the interpretation by the IAD and, by implication, to the decisions on which the IAD based its interpretation. This takes reasonableness analysis further than it need go; in so doing, this Court runs an unnecessary risk of creating its own absurdities.

[151] In this, I am mindful of the uncontroverted submission by the Minister of Citizenship and Immigration that the IRPA and the Immigration and Refugee Protection Regulations, SOR/2002-227, contain multiple provisions that refer to “holding” or a “holder” of a visa (or other document) (R.F., at paras. 86 and 92). The Minister of Citizenship and Immigration submits that adopting Dorinela Pepa’s interpretation of the term “holds” in the context of s. 63(2) of the IRPA would lead to “absurd” consequences when applied to other provisions (para. 92). Ms. Pepa responds that the interpretation she prefers could be limited to the meaning of “hold” in circumstances similar to those in this case.

[152] If this Court itself interprets the relevant provision, there may well be consequences for the legislative scheme which we cannot contemplate, but that the IAD would more readily appreciate. This very much favours referring the matter back with guidance rather than deciding it on the basis of a single reasonable interpretation.

[153] Accordingly, I would allow the appeal, set aside the decisions of the IAD, the Federal Court and the Federal Court of Appeal and remit the matter to the IAD for redetermination.

The following are the reasons delivered by

Côté and O’Bonsawin JJ. —

I. Overview

[154] Our Court has consistently reiterated that the “most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada” (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para. 46, citing *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733). This principle should guide our approach in this appeal.

- [155] Section 63(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (“IRPA”), provides a foreign national who “holds a permanent resident visa” with the right to appeal to the Immigration Appeal Division (“IAD”) of the Immigration and Refugee Board “against a decision to make a removal order against them” made under s. 44(2) of the IRPA or made at an admissibility hearing.
- [156] The central issue in this appeal is whether the IAD reasonably interpreted s. 63(2) of the IRPA as granting a right of appeal only to foreign nationals holding valid, unexpired visas at the time a removal order is issued.
- [157] We agree with our colleagues that the standard of review is reasonableness. Our colleagues are of the view that the IAD’s decision — a decision not disturbed on judicial review before the Federal Court, or on appeal before the Federal Court of Appeal — was unreasonable. We disagree. For the reasons that follow, we are of the view that the IAD’s decision was reasonable.
- [158] We also disagree with our colleague Martin J. with respect to remedy. The relevant legal constraints do not point overwhelmingly to a single reasonable interpretation of s. 63(2). Rather, the IAD, as the administrative decision maker entrusted by the legislature to interpret its governing statutory scheme, is best positioned to resolve the interpretative question, with the benefit of our Court’s reasons.
- [159] We would dismiss the appeal.

II. Background

- [160] The relevant facts are outlined below. At the outset, we point out that although the majority places considerable focus on the circumstances surrounding the appellant, Dorinela Pepa’s marriage, it has no bearing on this appeal.
- [161] The appellant is a citizen of Albania and a “foreign national” of Canada (IRPA, s. 2(1)). On February 4, 2018, she was issued a permanent resident visa and a confirmation of permanent residence as a dependent child of her father, the principal applicant. Her visa was set to expire on September 16, 2018.
- [162] A “dependent child” is defined in s. 2 of the Immigration and Refugee Protection Regulations, SOR/2002-227 (“IRPR”), as including a child who “is less than 22 years of age and is not a spouse or common-law partner”. At the time her visa was issued, the appellant was 20 years old. The confirmation of permanent residence listed the appellant’s marital status as “single”.
- [163] On February 27, 2018, the appellant married in Albania. Her change in marital status meant that she no longer qualified as a “dependent child” within the meaning of s. 2 of the IRPR.

- [164] The appellant did not advise Canadian immigration officials of her change in marital status until her arrival at a port of entry in Canada on March 20, 2018. As a result, the appellant was not granted permanent resident status upon arrival but was authorized to enter Canada for further examination pursuant to s. 23 of the IRPA.
- [165] The examination occurred on April 6, 2018. On July 13, 2018, an officer issued a report under s. 44(1) of the IRPA, expressing the view that the appellant was inadmissible to Canada pursuant to s. 40(1)(a). The latter provision provides that a foreign national is inadmissible for “directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act”. On July 24, 2018, a delegate of the Minister of Citizenship and Immigration (“Minister”) referred the report to the Immigration Division (“ID”) of the Board for an admissibility hearing.
- [166] On September 16, 2018, the appellant’s visa expired. Nearly ten days later, on September 25, 2018, the admissibility hearing before the ID commenced.
- [167] On October 16, 2018, the ID found that the appellant was inadmissible to Canada for misrepresentation under s. 40(1)(a) of the IRPA. The ID issued a removal order against the appellant, prohibiting her from entering Canada for five years following her removal absent the Minister’s authorization (IRPR, ss. 223 and 225). The ID added that the appellant “retains her right of appeal” to the IAD (A.R., vol. I, at p. 18).
- [168] The appellant set out to appeal the ID’s decision to the IAD. On August 27, 2019, the IAD dismissed the appeal on the threshold issue of lack of jurisdiction, finding that the appellant did not have a right of appeal pursuant to s. 63(2) of the IRPA because she did not hold a valid visa at the time of the issuance of the removal order (2019 CanLII 145325 (“IAD decision”)).
- [169] On October 18, 2019, the appellant brought applications for leave and judicial review before the Federal Court of both the ID’s decision to issue a removal order (IMM-6268-19) and the IAD’s decision (IMM-6270-19). Leave was granted on February 4, 2021, and on April 21, 2021, both applications for judicial review were dismissed (2021 FC 348). In dismissing the application for judicial review of the IAD’s decision, the court certified the following serious question of general importance for appeal to the Federal Court of Appeal:
- For the purposes of determining its jurisdiction to hear an appeal pursuant to s. 63(2) of the IRPA, shall the validity of the permanent resident visa be assessed by the IAD at the time of arrival in Canada, at the time the report under s. 44(1) is made, at the time it is referred to the ID, as the case may be, or at the time the exclusion order is issued?
- [170] On May 12, 2023, the Federal Court of Appeal dismissed the appeal from the Federal Court (2023 FCA 102, 97 Imm. L.R. (4th) 68). The Federal Court of Appeal reformulated the certified question and answered it in the affirmative:

Is it reasonable for the IAD to find that it does not have jurisdiction to hear an appeal pursuant to s. 63(2) of the IRPA if the permanent resident visa is expired at the time the removal order is issued?

III. Relevant Statutory Provision

[171] Section 63(2) of the IRPA provides:

- (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

IV. Analysis

A. The Standard of Review Is Reasonableness

[172] The majority reviews the case law surrounding the standard of review and concludes that the presumptive standard of reasonableness applies (paras. 35-41). On this point, we agree. The standard of review that applies to the IAD's interpretation of its enabling statute is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 25.

B. Reasonableness Review

[173] Having concluded that the reasonableness standard applies, we will now outline what a reasonableness review of an administrative decision entails. This section reviews Vavilov's guidance on conducting a reasonableness review, including the role of the modern principle of statutory interpretation in an administrative decision maker's interpretive exercise.

(1) Guidance From Vavilov

[174] In Vavilov, our Court provided extensive guidance on the indicators of a reasonable decision. A reasonable decision is one that is both based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision (paras. 85 and 99). Several contextual elements that constrain an administrative decision maker are relevant in assessing whether a decision maker has met its burden of justification, including the governing statutory scheme, the common law and past administrative decisions, and the principles of statutory interpretation (para. 106).

(a) Governing Statutory Scheme

[175] An administrative decision maker must properly justify its interpretation of its statutory grant of authority (Vavilov, at para. 109). Whether an interpretation is justified depends "on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority" (para. 110). Precise and narrow language chosen by the legislature will "constrai[n] the decision maker's ability to interpret the

provision”, while broad and open-ended legislative language affords greater flexibility to the decision maker’s interpretation (para. 110).

(b) Relevant Common Law and Past Administrative Decisions

[176] Administrative decision makers must consider relevant precedents in arriving at their decisions. This includes decisions in which a court interpreted the same statutory provision. Administrative decision makers who seek to depart from binding precedents must explain “why a different interpretation is preferable” (Vavilov, at para. 112). This justification may include, for example, “explaining why the court’s interpretation does not work in the administrative context” (para. 112).

[177] An administrative tribunal’s past decisions are approached somewhat differently. Vavilov instructs that “[a]dministrative decision makers are not bound by their previous decisions in the same sense that courts are bound by stare decisis” (para. 129). Still, administrative decisions makers must remain alive to the general consistency of their decisions. Where an administrative decision maker seeks to “depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons” (para. 131).

[178] Our colleague Martin J. states that reviewing courts ought to exercise caution when examining the soundness of precedents relied on by the administrative decision maker. Specifically, she says that reviewing courts must not overstep their role by wrestling with the correctness of past administrative decisions, or overturn by proxy a judicial precedent (para. 68). We agree with her statement on this point. Nonetheless, for the reasons outlined below, we are of the view that our colleague does just that when engaging with the precedents relied on by the IAD.

(c) Principles of Statutory Interpretation

[179] Matters of statutory interpretation are informed by the standard of review. A court reviewing the reasonableness of an administrative decision involving a question of statutory interpretation “does not undertake a de novo analysis of the question or ‘ask itself what the correct decision would have been’” (Mason v. Canada (Citizenship and Immigration), 2023 SCC 21, at para. 68, quoting Vavilov, at para. 116; see also Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 40; McLean v. British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 40). Reviewing courts ought not to make their own yardstick “and then use that yardstick to measure what the [administrative decision maker] did” (Canada Post Corp., at para. 40, quoting Delios v. Canada (Attorney General), 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28). Rather, reviewing courts must examine the decision as a whole, including the decision maker’s reasons and the outcome that was reached, bearing in mind that administrative decision makers “hol[d] the interpretative upper hand” (McLean, at para. 40; Canada Post Corp., at para. 40; Vavilov, at para. 116).

- [180] For its part, an administrative decision maker's interpretation of its governing legislation must be consistent with the "modern principle" of statutory interpretation, which focusses on the text, context, and purpose of a provision (Vavilov, at para. 118; Mason, at para. 69). The decision maker's reasons must be "alive to those essential elements" (Mason, at para. 69; Vavilov, at para. 120). This does not require an administrative decision maker "to engage in a formalistic statutory interpretation exercise in every case" (Vavilov, at para. 119). For example, it may "find it unnecessary to dwell on each and every signal of statutory intent", or choose "to touch upon only the most salient aspect of the text, context or purpose" (para. 122). The key question for a reviewing court is always whether any omission causes it "to lose confidence in the outcome reached by the decision maker" (para. 122).
- [181] Where a reviewing court concludes that a decision cannot be upheld after conducting a proper reasonableness review, it is then faced with the question of the appropriate remedy. It is most often appropriate to remit the matter to the administrative decision maker to reconsider its decision (Vavilov, at para. 141). In some instances, however, a reviewing court may conclude that "the interplay of [the] text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" (para. 124, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 72-76; Mason, at para. 71). Where such an outcome is inevitable, the court would decline to remit the interpretative question to the original decision maker because doing so would serve no useful purpose (Vavilov, at paras. 124 and 142; see, e.g., Mason, at para. 121; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, at para. 61). The underlying rationale of this remedial discretion is to avoid an exercise in futility, including the accompanying delay and inefficient use of resources (Vavilov, at para. 142; Rowe J.'s reasons, at para. 145). Even so, Vavilov warns that reviewing courts "should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker" (para. 124). We agree with our colleague Rowe J. that this caution seeks to prevent courts from engaging in a disguised correctness review in which they go beyond their reviewing role and decide the issue themselves (para. 148). Disregarding this warning would undermine the continued approach to reasonableness review that has animated our Court's administrative law jurisprudence in the wake of Vavilov.

(2) Modern Principle of Statutory Interpretation

- [182] We have canvassed the general approach to reasonableness review on matters of statutory interpretation. To recall, this approach assumes those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with the modern principle of statutory interpretation (Vavilov, at paras. 118 and 120). It is now necessary to turn to the modern principle itself.

- [183] The modern principle of statutory interpretation requires the words used in a statute to be considered “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21, and Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).
- [184] In other words, courts should interpret statutory language “according to a textual, contextual and purposive analysis” (Piekut v. Canada (National Revenue), 2025 SCC 13, at para. 43, quoting Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). Even for courts, these three elements need not be addressed separately or in a formulaic way, as they are closely related or interdependent (Piekut, at para. 43; Bell ExpressVu, at para. 31; Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 28). Ultimately, in all cases, courts must try to find a meaning of the provision “that is harmonious with the Act as a whole” (Canada Trustco, at para. 10).
- [185] Section 12 of the Interpretation Act, R.S.C. 1985, c. I-21, lends additional support to the modern principle when interpreting federal legislation. This provision states that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”
- [186] When applying the modern principle, the statute’s purpose and context cannot overwhelm the text. The focus must remain on the text of the statute, which acts as the anchor in the interpretive exercise (Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A, 2024 SCC 43, at para. 24, citing M. Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022), 59 Alta. L. Rev. 919, at p. 927). Therefore, while the objective of both the statute and the specific provision at issue as well as the surrounding context remain important to the analysis, they must be considered in light of the text of the statute (see R. v. Breault, 2023 SCC 9, at para. 26, citing MediaQMI inc. v. Kamel, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39). This is especially the case where “the words of a provision are precise and unequivocal” (Canada Trustco, at para. 10; Vavilov, at para. 120). As this Court explained in Commission des droits de la personne et des droits de la jeunesse, the text plays a central role in specifying the means and qualifications thereof that the legislature selected to achieve its purposes, or “how far a legislature wanted to go in achieving” its goal (para. 24, quoting Mancini, at p. 927).

C. The IAD’s Decision Was Reasonable

- [187] The appellant argues that the IAD unreasonably “extrapolated select paragraphs” of jurisprudence to arrive at its desired outcome (A.F., at para. 101). Instead, she suggests that the governing statutory scheme and the principles of statutory interpretation lend support to an interpretation where the validity of a visa only needs to be assessed at the port of

entry to engage the right of appeal under s. 63(2) of the IRPA. In her view, a foreign national who holds an unexpired visa at the time of arrival at a port of entry remains a visa holder with a right of appeal under s. 63(2) even after the visa's expiry, unless the visa is revoked prior to the completion of the port of entry officer's examination (paras. 41-42). We disagree.

- [188] We are of the view that the IAD reasonably interpreted s. 63(2) of the IRPA as requiring the appellant to hold a valid, unexpired visa at the time the ID issued the removal order. We reach this conclusion after reviewing the IAD's justification, in light of the legal and factual constraints bearing on the decision. The IAD had regard to instructive precedents and its own past decisions, the governing statutory scheme, and the principles of statutory interpretation. Taken together, it is clear that the IAD's decision was reasonable. If we are to faithfully apply the guidance set out by our Court in *Vavilov*, we see no basis for appellate intervention.
- [189] The IAD appropriately relied on instructive precedents and its own past decisions in interpreting s. 63(2) of the IRPA (*Canada (Minister of Citizenship and Immigration) v. Hundal*, [1995] 3 F.C. 32, aff'd (1996), 206 N.R. 184 (F.C.A.); *Ismail v. Canada (Public Safety and Emergency Preparedness)*, 2013 CanLII 98012 (I.R.B. (Imm. App. Div.)), aff'd 2015 FC 338, [2015] 4 F.C.R. 426 ("Ismail FC"); *Zhang v. Canada (Public Safety and Emergency Preparedness)*, 2006 CanLII 52286 (I.R.B. (Imm. App. Div.)) ("Zhang IAD"), aff'd 2007 FC 593, [2008] 1 F.C.R. 716 ("Zhang FC"); *Asif v. Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 131198 (I.R.B. (Imm. App. Div.)); *Far v. Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 90984 (I.R.B. (Imm. App. Div.)); cf. *McLeod v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 257 (C.A.)). Had the IAD interpreted the provision without regard to these binding and relevant precedents, its decision would have been unreasonable (*Vavilov*, at paras. 112 and 131).
- [190] The IAD turned its mind to the Federal Court's decision in *Hundal*. There, Rothstein J. (as he then was) considered whether a change in circumstances, namely the withdrawal of sponsorship following the issuance of a permanent resident visa but before arrival in Canada, deprived the IAD of jurisdiction to consider an appeal pursuant to s. 70(2)(b) of the Immigration Act, R.S.C. 1985, c. I-2, which read:
- (2) Subject to subsections (3) and (4), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who
- ...
- (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

- [191] In affirming the IAD's jurisdiction over the matter, Rothstein J. outlined two key principles. The first principle is that the immigration process unfolds in two stages: (1) an officer's issuance of a visa before an applicant arrives in Canada; and (2) following an applicant's arrival at a port of entry in Canada, an officer's examination and determination of whether to grant permanent resident status, having regard to the legislative scheme (p. 39). Put simply, a permanent resident visa only entitles a foreign national to present themselves for examination at a port of entry (p. 39). It does not grant a right for an individual to remain in Canada indefinitely, but is a preliminary step towards admissibility in Canada (Medovarski, at para. 46).
- [192] Second, Rothstein J. outlined a general principle that a visa remains valid after it is issued (Hundal, at pp. 39-40). However, this principle is subject to four exceptions (pp. 40-41):
- (1) A visa becomes ipso facto invalid where "there is a frustration or impossibility of performance of a condition on which the visa was issued";
 - (2) A visa is invalid where "there is a failure to meet a condition of the granting of the visa itself before the visa is issued". The visa is then void ab initio;
 - (3) A visa ceases to be valid when it reaches its expiry date; and
 - (4) A visa is no longer valid if revoked or cancelled by a visa officer.
- [193] The IAD found that the third exception was applicable in this case, relying on Rothstein J.'s reasoning that "if there is an expiry date on a visa and the time expires, the visa will clearly not be valid after the expiry date" (p. 41). The majority in the instant case is of the view that the IAD erred in relying on this exception, in part because the IAD failed to recognize that Hundal was decided under s. 70(2)(b) of the Immigration Act, a provision that was repealed and replaced with s. 63(2) of the IRPA (paras. 69-72). The majority notes that s. 70(2)(b) of the Immigration Act granted a right of appeal in more specific and prescribed circumstances that required an individual to be "in possession of a valid immigrant visa" at "the time that a report with respect to the person was made by an immigration officer", while s. 63(2) of the IRPA does not explicitly require a valid visa, nor does it prescribe a time at which the visa must be held (para. 69). For the majority, these "significant textual changes . . . seriously call into question the transferability of the holding in Hundal to cases dealing with the new provision" (para. 69).
- [194] We disagree. In our view, the distinctions between these two provisions do not affect the reasonableness of the IAD's decision. Our colleague fails to recognize that Zhang — arising from the revocation of a visa prior to arrival in Canada — directly addresses the applicability of the holding in Hundal to the instant case. Before both the IAD and the Federal Court in Zhang counsel for Ms. Zhang sought to distinguish s. 70(2)(b) of the former Immigration Act, and the case law derived thereunder, from the iteration of s. 63(2) of the IRPA in force at the time of the decisions (subsequently amended by the Miscellaneous Statute Law Amendment Act, 2014, S.C. 2015, c. 3) (Zhang IAD, at para. 26; Zhang FC, at

paras. 6, 9 and 15). This previous iteration of s. 63(2) read as follows:

- (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

- [195] The IAD in *Zhang* concluded that the notion of validity was imported into s. 63(2), specifically the clause “who holds a permanent resident visa”, by necessary implication and legislative intent (paras. 27 and 31-34). For the IAD, the notion of validity was central to the concept of holding a permanent resident visa. Any other interpretation would be “absurd and contrary to the overall purposes” of the IRPA (para. 33). Therefore, regardless of the “textual changes” (majority reasons, at para. 69) between s. 70(2)(b) of the Immigration Act and s. 63(2) of the IRPA, the IAD in *Zhang* found that the legislative intent was the same (para. 34).
- [196] Before the Federal Court, de Montigny J. (as he then was) dismissed the application for judicial review on a correctness standard of review (*Zhang FC*, at paras. 8 and 18). Having engaged in a textual, contextual, and purposive analysis of the provision, de Montigny J. ultimately concluded that the right of appeal under s. 63(2) only applies to foreign nationals who hold valid visas (paras. 10 and 15-16).
- [197] Under a grammatical and ordinary meaning of the text, de Montigny J. recognized that s. 63(2) is written in the present tense. Accordingly, foreign nationals who once “held” a visa do not fall within the ambit of the provision (*Zhang FC*, at para. 11). Reading the text in its entire context, de Montigny J. relied on ss. 11(1) and 20(1)(a) of the IRPA as illustrating a continuous burden on foreign nationals to “demonstrate they are entitled to enter Canada” (para. 12). Section 11(1) provides that a visa can only be issued to foreign nationals if an officer is satisfied that they are not inadmissible and meet the legislative requirements. Section 20(1)(a) requires foreign nationals who seek to enter or remain in Canada, to become permanent residents, to establish that they “hold the visa or other document required under the regulations” and that they have come to Canada to establish permanent residence. Lastly, the purpose of the right to appeal a decision to issue a removal order is to provide recourse to foreign nationals with “legitimate” visas (para. 13).
- [198] Considering each of these three elements, de Montigny J. aptly recognized that extending the reach of s. 63(2) of the IRPA to apply to those who hold “invalid” visas would run counter to legislative intent and result in absurd consequences (*Zhang FC*, at paras. 10 and 14). Specifically, it would provide those “with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada” (para. 14; see generally *Medovarski*, at para. 46; *Chiarelli*, at p. 733). The same logic applies to expired visas (*Zhang FC*, at para. 16):

If subsection 63(2) applied to “invalid” visas, like those that have been revoked, would it also apply to ones that have expired? This logic defies common sense. From reading Ms. Zhang’s submissions, it appears that any foreign national holding a visa in his hand would be entitled to an appeal under subsection 63(2), regardless of whether the Canadian government intended to give that document any legal effect. The fact that Ms. Zhang still held the physical copy of her visa did not change the legal consequence of its revocation.

[199] Applied to the present matter, it is clear that neither the IAD nor the Federal Court failed to account for this change in legislation between s. 70(2)(b) of the Immigration Act and s. 63(2) of the IRPA (cf. majority reasons, at paras. 71-72). The IAD in this case reasonably understood that despite this change in legislation, the third exception outlined in *Hundal* continued to rebut the presumption of visa validity. To recall, the appellant’s visa expired on September 16, 2018, one month before the issuance of the removal order on October 16, 2018 (IAD decision, at paras. 15 and 19). We would add that since Zhang, s. 63(2) has undergone a further amendment that we expand on below. Although the majority does not appear to take issue with this, we are also of the view that it, too, has no bearing on this case.

[200] The majority’s remaining concerns surrounding the time at which a valid visa must be held are answered by another Federal Court decision, *Ismail*, that the IAD also considered in the instant case. *Ismail* involved applicants whose visas had been revoked after their arrival in Canada but before their examination had taken place. The day of their examination, removal orders were issued against them on the basis that their visas had been revoked. The IAD dismissed the appeal for lack of jurisdiction, concluding that foreign nationals who are not in possession of valid permanent resident visas at the time of the s. 44 report do not have a right of appeal to the IAD pursuant to the prior iteration of s. 63(2) of the IRPA (para. 23).

[201] Justice de Montigny dismissed the application for judicial review. He separated his analysis into two periods: visas that are revoked prior to a foreign national’s arrival at a port of entry, and those that are revoked after their arrival (*Ismail FC*, at para. 16). Relying on his prior decision in *Zhang FC*, wherein he interpreted s. 63(2) of the IRPA, de Montigny J. reiterated that foreign nationals whose visas are revoked prior to arrival at a port of entry do not have a right to appeal to the IAD (*Zhang FC*, at paras. 11-13; *Ismail FC*, at para. 16). Again, it is clear that de Montigny J. did not fail to account for this change in legislation, as our colleague Martin J. suggests (majority reasons, at para. 82).

[202] Turning to the second time period, de Montigny J. explicitly rejected the suggestion that the majority adopts, being that the validity of a visa need only be assessed upon arrival at a port of entry (*Ismail FC*, at paras. 16-17, citing *Hundal*; majority reasons, at para. 129). Rather, de Montigny J. reasoned that a textual, contextual, and purposive analysis of both the provision at issue and the IRPA as a whole reveal that “a right of appeal is granted only to a person who ‘holds’ a valid permanent resident visa at the time the exclusion report is issued” (*Ismail FC*, at para. 18). He then certified the following question for appeal:

For the purposes of determining its jurisdiction to hear an appeal pursuant to subsection 63(2) of the IRPA, shall the validity of the permanent resident visa be assessed by the IAD at the time of arrival in Canada or at the time the exclusion order is made? [Emphasis added; para. 21.]

[203] The IAD here relied on Ismail to resolve the question of “when a permanent resident visa would have to expire for an appellant to lose the right to bring an appeal to the IAD” (IAD decision, at para. 18 (emphasis in original), citing Ismail FC, at para. 18). Yet, the appellant and the majority take issue with the IAD’s reliance on Ismail as binding, arguing that Ismail concerns itself with a revoked visa, rather than an expired visa (majority reasons, at paras. 80-81).

[204] Their view unduly narrows the scope of Ismail. While the facts of that particular case deal with revocation, when read as a whole, it is clear the reasons of de Montigny J. are animated by the validity of the visa itself (Ismail FC, at paras. 16-18). In fact, he makes specific reference to the four Hundal exceptions, one of which is, of course, expiration (Ismail FC, at para. 17).

[205] In any event, their view is not shared by the IAD nor by the Federal Court, which both read Ismail as confirming that a foreign national must hold a valid visa when the decision to issue a removal order is made, whether at an examination, as in the case of Ismail, or at an admissibility hearing before the ID, as in the instant case (F.C. reasons, at para. 52). This is a reasonable conclusion at which to arrive, in light of de Montigny J.’s holding in both Ismail and Zhang that Parliament did not intend to grant appeal rights to foreign nationals with no legal right to be in Canada, regardless of whether their document lacks legal effect by way of revocation or expiration:

Parliament could have drafted that section differently, to include for example, persons who hold “or have held” a valid permanent resident visa. Parliament chose otherwise, and courts must enforce clear legislative intention. As stated by this Court in Zhang, a finding that the appeal right in subsection 63(2) of the IRPA would apply to an invalid or revoked visa would lead to the absurd consequence of granting persons with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. In the absence of clear words to the contrary, Parliament cannot be taken to have had that intention.

(Ismail FC, at para. 18)

To find that subsection 63(2) of the IRPA applies to applicants with invalid permanent resident visas would give persons with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. Further, the same person found to violate paragraph 20(1) (a) of the IRPA for not possessing a permanent resident visa could be deemed to hold a permanent resident visa under subsection 63(2). Their right to appeal the decision would directly contradict the reason they were originally found inadmissible.

(Zhang FC, at para. 14)

- [206] Beyond the above binding precedents, the IAD also reasonably considered *Far* and *Asif*, two of its past decisions. The majority is of the view that the IAD's reliance on these past administrative decisions was "not . . . sufficient" to justify its interpretation, absent any explanation as to why this may be (para. 73). As Vavilov instructs us, administrative decision makers "must be concerned with the general consistency" of their decisions (para. 129). The underlying rationale for such consistency is to foster predictability for those affected by these decisions (para. 129). As such, it was not only reasonable, but entirely appropriate for the IAD to consider its own decisions.
- [207] In *Far*, the foreign national arrived in Canada with a valid permanent resident visa. He was not granted permanent resident status upon arrival, but instead permitted to enter Canada for further examination pursuant to s. 23 of the IRPA. His visa expired before the examination was complete (para. 3). He was then referred to the ID for an admissibility hearing, where the ID found him inadmissible pursuant to s. 36(1)(c) of the IRPA and issued a removal order (para. 4).
- [208] Between the date of the notice of appeal to the IAD and the hearing of the matter, s. 63(2) was amended to its current iteration, that is, the one at issue before this Court. The IAD recognized this amendment, yet appropriately applied the predecessor iteration of s. 63(2) — the same version applied in *Zhang* and *Ismail* — in concluding that it lacked jurisdiction to hear the appeal because the foreign national's visa had expired prior to the completion of the examination process (*Far*, at paras. 13 and 16). In arriving at this conclusion, the IAD drew upon the third exception outlined in *Hundal* and reasoned that *Ismail* also applies to expired visas (paras. 42 and 55-58). Consequently, the IAD held that the foreign national "was not holding a valid permanent resident visa 'at the time the exclusion report [was] issued' because it [had] expired" (para. 58, citing *Ismail FC*, at para. 18). The IAD also found that it was the decision to issue a removal order that triggers the right of appeal to the IAD (*Far*, at para. 67). The IAD, as the administrative decision maker entrusted to interpret the scope of its authority under the statutory scheme, was of the view that these components of the legislative provision are tied together (cf. majority reasons, at para. 97). Said another way, the foreign national will have no right of appeal where their visa expired prior to the decision to issue a removal order (*Far*, at para. 67).
- [209] In *Asif*, the IAD considered the effect of expired visas under the current iteration of s. 63(2), that is, the provision that is at issue in the instant case. The facts in *Asif* are nearly identical to the facts in this case. The foreign nationals there did not advise immigration authorities of a change in circumstances that arose following the issuance of their permanent resident visas but before their arrival in Canada. Upon arrival at a port of entry, they were not granted permanent resident status but were permitted to enter Canada pursuant to s. 23 of the IRPA. Their visas expired after the issuance of the inadmissibility report under s. 44(1) but before the referral to the ID under s. 44(2) (paras. 4 and 6). Following an admissibility hearing, the ID issued removal orders against them.

- [210] The IAD concluded that it lacked jurisdiction pursuant to s. 63(2) of the IRPA because the foreign nationals' visas were not valid at the time the removal orders were issued (para. 10). The IAD arrived at this conclusion by reading the legislative scheme in conjunction with the jurisprudence, including Hundal, Ismail, and Zhang, in finding that "the appellants ceased to hold valid permanent resident visas when their visas . . . expired", which occurred before the issuance of the removal orders (para. 27 (emphasis in original)). The IAD also relied on its earlier decision in *Far* in support of the view that the "act" that triggers the right of appeal to the IAD is the "decision to make a removal order" (para. 30, citing *Far*, at para. 67). Here, the IAD reasonably relied on the conclusion drawn in *Asif* to support its decision that the right of appeal in s. 63(2) requires a valid, unexpired visa at the time a removal order is issued (para. 13).
- [211] Lastly, the IAD reasonably distinguished the Federal Court of Appeal's decision in *McLeod*. At issue in *McLeod* was whether the IAD correctly concluded that a change in circumstances — specifically, the death of the principal applicant — that occurred after the issuance of accompanying dependents' visas but before their arrival in Canada, rendered the visas invalid pursuant to s. 70(2)(b) of the Immigration Act (paras. 1-2 and 7). The accompanying dependents did not disclose this change of circumstances until their arrival in Canada, ultimately resulting in the issuance of removal orders against them (para. 1). In reviewing its prior decision in *Canada (Minister of Employment and Immigration) v. De Decaro*, [1993] 2 F.C. 408 (C.A.), the Federal Court of Appeal concluded that a "validly issued visa is not invalidated merely by a change in circumstances in respect of which it was issued occurring after its issue" (*McLeod*, at para. 20). In other words, the first exception outlined in *Hundal* ceased to apply. Accordingly, the dependents were "in possession of a valid immigrant visa" pursuant to s. 70(2)(b) of the Immigration Act, and the IAD's decision that it had jurisdiction over the appeals was affirmed (paras. 2 and 19).
- [212] The IAD in this case appropriately recognized that the question of the visa's validity in *McLeod* arose solely from a change of circumstances after its issuance (IAD decision, at para. 16). The question here, however, does not turn on a change of circumstances — a point that the majority concedes (para. 83). Even if it did, the holding in *McLeod* would simply mean that the appellant's changing circumstances prior to her arrival in Canada would not have automatically invalidated her visa. Rather, this case turns on whether a foreign national who does not hold a valid, unexpired visa at the time a removal order is issued has a right to appeal that decision to the IAD. The IAD reasonably found that the passage of time after the appellant's arrival in Canada did not constitute a "change in circumstances" in an analogous way to *McLeod* (IAD decision, at para. 16). The IAD had a sufficient basis to distinguish *McLeod* from the instant case in that regard, but also on the premise that this case addresses a fundamentally different question.
- [213] Reading the IAD's decision as a whole in light of the instructive precedents and past administrative decisions, the IAD's decision was reasonable. Foreign nationals who hold a permanent resident visa are entitled to present themselves to an immigration officer for

examination at a port of entry in Canada (Hundal, at p. 39). This is not in dispute. At that stage of the immigration process, however, there is no removal order to appeal. Instead, it is the ID's or the Minister's subsequent decision to issue a removal order that triggers or crystallizes the right of appeal to the IAD under s. 63(2). It was reasonable for the IAD to conclude that it is at that moment that the foreign national must hold a valid, unexpired visa to have a right to appeal the decision to issue a removal order. Here, the appellant's visa had expired before the issuance of the removal order. There is no basis to justify appellate intervention.

V. Conclusion and Remedy

- [214] The IAD's decision was justified in light of the constellation of law and facts that were relevant to it (Vavilov, at para. 105). When examined against contextual constraints including instructive precedents and past administrative decisions, the governing statutory scheme, and the principles of statutory interpretation, the IAD reasonably interpreted s. 63(2) of the IRPA as requiring a foreign national to hold a valid, unexpired visa at the time of a decision to issue a removal order to have a right of appeal to the IAD. We arrive at this conclusion while bearing in mind the caution that our colleague Martin J. offers, to which we agree, respecting reviewing courts not overstepping their role while considering the soundness of past precedents. Short of unreasonableness, there is no basis for appellate intervention.
- [215] Given our conclusion that the IAD's decision was reasonable, we would emphasize that the ID erred in instructing the appellant that she retained her right of appeal to the IAD (A.R., vol. I, at p. 18). She could not "retain" her right of appeal, as she did not hold this right to begin with.
- [216] Upon conducting this reasonableness review, we do not agree with our colleague Martin J. that there is a single reasonable interpretation of the statutory provision (Vavilov, at para. 124). She states that a reviewing court "should make a pronouncement on that interpretation rather than remitting the matter pro forma for reconsideration" when it is "clear that there is only one reasonable interpretation" (majority reasons, at para. 121). In principle, this is an accurate statement of the law. In application, however, this remedial discretion should only be exercised in the clearest of cases. This approach ensures that reviewing courts avoid engaging in a disguised correctness review that runs counter to the guiding principles animating Vavilov, including respect for the legislature's choice to entrust a decision to administrative decision makers (paras. 83, 116 and 140-41).
- [217] In the instant case, it is far from "clear that there is only one reasonable interpretation". Rather, our colleague Martin J. slides into a disguised correctness review in concluding that the only reasonable interpretation of s. 63(2) is that a foreign national will have a right of appeal to the IAD if they hold a valid visa "at the time of arrival in Canada" (paras. 126-31). We agree with our colleague Rowe J., as well as the respondent's submissions, that this interpretation unnecessarily risks opening the door to absurd consequences in relation to

the legislative scheme that our Court cannot contemplate (Rowe J.'s reasons, at paras. 150-152). The IAD, as the administrative decision maker entrusted by the legislature, is best positioned to resolve the interpretive question with the benefit of our Court's reasons.

VI. Disposition

[218] We would dismiss the appeal.

Appeal allowed, Rowe J. dissenting in part and Côté and O'Bonsawin JJ. dissenting.

Solicitors for the appellant: Mary Lam, Toronto; Waldman & Associates, Toronto.

Solicitor for the respondent: Department of Justice, National Litigation Sector — Ontario Regional Office, Toronto; Department of Justice, National Litigation Sector — Atlantic Regional Office, Halifax.

Solicitors for the intervener Canadian Civil Liberties Association: Borden Ladner Gervais, Ottawa.

Solicitors for the intervener Canadian Association of Refugee Lawyers: Refugee Law Office, Toronto; Justin Jian-Yi Toh, Toronto; Annie O'Dell, Toronto.

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