Federal Court  Cour fédérale

Date: 20200409

Docket: IMM-2283-19

Citation: 2020 FC 506

Ottawa, Ontario, April 9, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ELOI BIQUER SILVA ROSA GOMES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This case relates to the role of the Refugee Appeal Division [RAD] as a safety net to correct any errors on the part of the Refugee Protection Division [RPD], as well as to the responsiveness of its reasons so as ensure that the decision as a whole is transparent, intelligible and justified.

I. Facts

[2] A little context is in order.

[3] The Applicant is a citizen of Guinea-Bissau. Since his parents are members of Guinea-Bissau's main opposition party, the *Resistência da Guiné-Bissau-Movimento Bafatá* [RGB or Resistance of Guinea-Bissau-Bafatá Movement], his family is known for its political activism.

[4] After suffering at the hands of militia members, and living through the kidnapping, torture and death of his father, the Applicant left the country for neighbouring Senegal at the outbreak of the Guinea-Bissau Civil War (1998-1999). In June 1999, he returned to Guinea-Bissau.

[5] Soon thereafter, the Applicant participated in a national reconciliation conference, seeking to raise awareness for the need for retribution for the human rights violations committed during the civil war. According to the Applicant, death threats followed, and, fearing for his life, he travelled to Brazil in February 2001 to study, eventually graduating with a degree in agronomy engineering.

[6] Following graduation, the Applicant returned to Guinea-Bissau and worked as a support technician for Mona Terra, a non-profit land reform advocacy organization, thereby attracting the ire of the local traditional chiefs. According to the Applicant, more death threats followed. Hence, in August 2007, he again left Guinea-Bissau for a third time, returning to Brazil where he completed two graduate-level degrees.

[7] In December 2009, the Applicant returned to Guinea-Bissau. According to him, threats to his life continued, prompting him to leave Guinea-Bissau a fourth and final time in March 2010, returning to Brazil to continue his studies.

[8] While in Brazil, the Applicant joined the PDD (*Parti démocratique pour le développement*), a political party conceived to mobilize members of the Bissau-Guinean diaspora in Brazil to promote social and human rights reform in Guinea-Bissau. According to the Applicant, his activity put him in the crosshairs of the Bissau-Guinean government, and in January 2015, the Bissau-Guinean Embassy in Brazil terminated the Applicant's financial support as an international student, refused to renew his passport and denied him access to the Embassy, the only reason being, according to him, his political activism.

[9] The Applicant then left Brazil for Canada, arriving in January 2016 where he claimed refugee protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], on the basis of his political opinions and activism in Guinea-Bissau and Brazil.

[10] In particular, the Applicant stated four grounds of persecution: (1) as the son of two members of the RGB, (2) as an activist at the national reconciliation conference, (3) as an employee of Mona Terra, and (4) as a political activist in Brazil. He relies on a series of documents in support of his asylum claim.

[11] On October 27, 2017, in a lengthy 25-page, 122-paragraph decision, the RPD rejected the Applicant's claim.

[12] As to the first ground of alleged persecution, the RPD found that the Applicant did not demonstrate a serious risk of persecution on family grounds in view of his ability to study in Brazil, his sibling's continued residence in Guinea-Bissau, his repeated returns to Guinea-Bissau, and of the fact that 15-years had elapsed since the persecution against his father.

[13] The RPD was silent as to the financial support that the Applicant was receiving from the Bissau-Guinean government allowing him to study in Brazil; support which was withdrawn in January 2015.

[14] As to the second ground, the RPD identified inconsistencies in the evidence relating to the Applicant's fear on account of his participation in the national reconciliation conference and in his description of a threat incident in 2010, and noted important omissions in his FDA relating to the threats to his brother in 2010.

[15] As to the third ground of persecution, the RPD rejected the Applicant's claim in relation to his work for Mona Terra because the documentary evidence failed to show that traditional chiefs threatened their political opponents.

[16] Finally, the RPD found that the Applicant's profile did not match the type of individual who would be at risk in Guinea-Bissau, and that some of his key assertions were inconsistent

with the documentary evidence in the National Documentation Package [NDP] for that country. The RPD also found that the Applicant was rather unclear on key issues, which affected his credibility.

II. Decision under Review

[17] The Applicant appealed against the decision to the RAD. His appeal memorandum, which filled 27-pages and 97-paragraphs, raised three main grounds of appeal:

1. Whether the RPD erred in the assessment of the evidence;

2. Whether the RPD drew conclusions from the evidence in a capricious and perverse fashion; and

3. Whether the RPD erred in assessing the Applicant's credibility by drawing capricious and perverse conclusions from ambiguities in the Applicant's testimony.

[18] Each ground of appeal was extensively argued and the Applicant also argued that the RPD:

1. Failed to assess the Applicant's risk factors cumulatively;

2. Erred in minimizing the risk faced by the Applicant in the light of the documentary evidence; and

3. Relied on very minor inconsistencies in the Applicant's testimony to impugn his credibility.

[19] After setting out the facts of the case, the RAD dismissed the appeal in a two-page decision; its discussion contained three-paragraphs.

[20] In short, without making any determination of its own, the RAD simply ruled that the RPD did not commit any error in its discussion of the Applicant's past, including his professional and political activities, nor in its discussion of his credibility and of the events relating to his father.

[21] The Applicant now seeks the judicial review of this decision.

[22] The decision of the RAD failed to make explicit findings on any of the key elements of the case: it simply stated that the RPD had committed no errors. The RAD thereby failed to provide explicit findings and meaningful justifications of its decision regarding the central issues and concerns raised by the Applicant in a transparent and intelligible manner.

[23] As a result, I allow the application for judicial review.

III. Issues

[24] This case raises two issues:

1. Is the paucity of reasons indicative of a failure on the part of the RAD to undertake an independent assessment of the record before it?
2. Did the reasons of the RAD meet the requisite standard of justification, transparency and intelligibility?

IV. Standard of Review

[25] It is common ground between the parties that the standard of review of the RAD's decision is one of reasonableness in relation to the two issues raised in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[26] I agree. A reasonable decision is, *inter alia*, one "that is justified in light of the facts" and "meaningfully account[s] for the central issues and concerns raised by the parties", and under the reasonableness standard of review, "the reviewing court must consider only 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 83, 126, and 127).

[27] That said, the sole role of this Court on judicial review consists in ascertaining that the tribunal's decision is consistent with the rule of law (*Mission Institution v Khela*, 2014 SCC 24 at para 37; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 11 [*Rozas del Solar*]; *Vavilov* at paras 2, 82).

V. Discussion

[28] The three paragraphs of analysis in the RAD decision read as follows:

> [TRANSLATION]
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> [5] After conducting my own analysis of the record, I conclude that the RPD did not enjoy a meaningful advantage, and the standard of correctness must be applied. [footnote 6] In my opinion, the RPD did not err as alleged. My reasons are as follows.

> [6] The RPD did not err in concluding, after taking into account his professional and political activities as well as his past, including what happened to his father, that the appellant had failed to establish that he would face a serious possibility of persecution because of his political opinion. The RPD's reasons for decision show that it conducted a detailed and nuanced analysis of both the appellant's testimony and the totality of the documentary evidence concerning people who are politically active in Guinea Bissau and oppose the authorities. I disagree with the appellant that the RPD analyzed the documentary evidence in a perverse and capricious manner or by limiting itself to certain details. I disagree with the appellant that the RPD made perverse and capricious findings regarding his credibility.
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> [7] I will take the example of the appellant's political activities. In his memorandum, he states that the RPD should have noticed that his overall profile shows him to be a political activist with increased visibility because of his professional activities and his family. [footnote 7] Based on my own analysis of the record, I conclude that the RPD carefully considered his political and professional activities, his family membership and the resulting consequences. The RPD analyzed all of the appellant's allegations, taking into account his testimony and the documentary evidence. Distinguishing what may have been true in the past from the current situation, [footnote 8] and distinguishing the situation of current political party opposition leaders from that of the appellant, who has not carried out any political activities in Guinea Bissau since XXXX 2010, [footnote 9] does not constitute a perverse and capricious analysis of the documentary evidence. Noting contradictions in the appellant's testimony [footnote 10] and the fact that he failed to mention in his BOC Form that his brother was allegedly questioned by the military in 2010 [footnote 11] does not constitute a capricious analysis of his credibility.
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> [Emphasis added; footnotes 8 to 11 specifically cite the relevant paragraphs in the RPD decision]

A. *Is the paucity of reasons indicative of a failure on the part of the RAD to undertake an independent assessment of the record before it?*

[29] The RAD has a duty to undertake an independent assessment of the record before it (*Rozas del Solar* at paras 122-126; *Canada (Citizenship and Immigration) v Huruglica*,

2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*]; *Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 at paras 37-39; *Ali v Canada (Citizenship and Immigration)*, 2016 FC 396 at para 4 [*Ali*]). It must consider the RPD's findings carefully and, unless otherwise shown, it is assumed to have taken into consideration the RPD's decision in its entirety (*Rozas del Solar* at para 99; *Cruz v Canada (Minister of Citizenship and Immigration)*, 2020 FC 22 at para 32 [*Cruz*]).

[30] The Applicant challenges the decision of the RAD on the basis that the RAD upheld errors on the part of the RPD; in addition, it is argued that the brevity and rigidity of the reasons provided by the RAD and its failure to address most of the key grounds of appeal reveal a failure to undertake an independent analysis of the issues.

[31] The Applicant submits that the RAD decision fails to provide sufficient 'clues' that it conducted an independent analysis of the evidence, and issued reasons which were "scarce", which itself is evidence of the fact that the RAD failed to address the key issues of the case or the Applicant's submissions on appeal.

[32] I appreciate that requiring the RAD to catalogue and expound upon each issue on appeal would frustrate the policy goals of administrative efficiency and access to justice, as well as the very purpose of the RAD (*Huruglica* at paras 79, 88, 98, 103; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 41-42; *Vavilov* at para 128). And although brevity, in and of itself, is not problematic, I must admit that the paucity of any meaningful findings by the RAD on the issues raised by the Applicant in this case is remarkable.

[33] The Respondent recognizes the duty of the RAD to conduct its own independent analysis of the record, but submits that the RAD, in fact, did so, that it did not overlook any important factor, and did not misapprehend the circumstances of the Applicant's case.

[34] In any event, on this first issue, I must agree with the Respondent. There is a presumption that the RAD has considered all of the evidence. The RAD is not required to restart the analysis from scratch (*Huruglica* at paras 79, 98, 103) in order for it to show that it conducted an independent review of the matter. I do not think that the length of the decision is itself indicative of any failure of the RAD to do so.

[35] It is certainly open to the RAD to adopt the RPD's lengthy and reasoned treatment of the record, so long as the RAD itself does examine the record. The approach followed by the RAD in this case does not imply that it failed to conduct its own analysis of the evidence.

[36] Here, I am not convinced that the presumption that the RAD considered all of the evidence and undertook its own independent analysis of the record is rebutted. I therefore do not agree with the Applicant on this issue.

B. *Did the reasons of the RAD meet the requisite standard of justification, transparency and intelligibility?*

[37] As I have indicated, there is nothing wrong with short reasons. The role of the RAD is that of a safety net: it is called to correct any errors made by the RPD (*Huruglica* at para 98). It is tethered to the RPD decision, and although it functions as an appeal body, a RAD hearing "is not

a true *de novo* proceeding" (*Rozas del Solar* at para 99; *Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 25; *Huruglica* at para 79; *Cruz* at para 32).

[38] The Respondent asserts that the standard of review under which the RAD reviews the RPD's decision is that of correctness, not reasonableness (*Huruglica* at para 103), and postulates that what this means is that the RAD is mostly concerned with whether the RPD committed any error – was the RPD correct or incorrect in coming to the findings set out in its decision?

[39] As such, argues the Respondent, and in this context, a more wholesome analysis beyond what was undertaken by the RPD would have only been required had the RAD found that the RPD erred in some aspect of its decision, at which point the RAD would have had to delve into why it is so.

[40] I agree that the standard of review, being the lens through which the RAD conducts its analysis of the RPD's decision to determine whether judicial intervention is warranted, is one of correctness, and that the role of the RAD is to not intervene unless the RPD has made an error of law, of fact, or mixed fact and law (*Huruglica* at paras 98, 103; *Rozas del Solar* at paras 13, 122-125).

[41] After discussing the role of deference in the distinction between the standards of correctness and reasonableness, Mr. Justice Diner in *Rozas Del Solar* continued at paragraphs 21 and 22:

> [21] Ultimately, the difference between correctness and reasonableness comes down to deference. Deference is the attitude

> that must be adopted when conducting a reasonableness review. Deference means that on some questions, the reviewer must respect the decision-maker's conclusions and accept them, even if the reviewer would have concluded differently based on the same arguments and evidence. This is because certain questions can be legitimately answered by an administrative decision-maker in more than one way (*Dunsmuir* at para 47).
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> [22] A correctness standard, on the other hand, requires no deference – the decision lies with the reviewer and no margin for error exists for the decision-maker below. The reviewer undertakes its own analysis of the question raised (*Dunsmuir* at para 50; *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 28).
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> [Emphasis added.]

[42] That said, as cautioned by Mr. Justice Diner in *Rozas Del Solar*, we must be mindful not to conflate, on the one hand, the RAD's application of the standard of review to its analysis when considering the RPD's factual and legal conclusions with, on the other hand, the RAD's duty to provide sufficient reasons for its decision (*Huruglica* at para 35; *Rozas Del Solar* at para 25). I agree. The former requires an upstream focus, while the latter has a downstream purpose, i.e., for the benefit of the audience, particularly the parties and admittedly of any subsequent reviewing court which is itself applying in most cases a reasonableness standard, and tasked with determining whether the RAD's process and conclusions are justified, transparent and intelligible in the light of its underlying rationale (*Rozas Del Solar* at para 26; *Vavilov* at para 15).

[43] In addition to conducting its own independent analysis, the RAD must provide reasons for its decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 39 and 43); the absence of reasons amounts to unfair treatment that may prejudice further

review proceedings. As stated by the Court in *Taabea v Canada (Refugee Status Advisory Committee)*, [1980] 2 FC 316 at paragraph 33, it comes down to optics:

> In my opinion, the long-established rule in judicial proceedings that justice must not only be done but must appear to be done, may be paraphrased for cases where the requirement is simply that of fair dealing, by saying that in such cases not only must the person involved be dealt with fairly but it must be apparent that they are being so dealt with.

[44] According to the Respondent, it is only where the RAD concludes that the RPD erred does it have to provide more cogent reasons to show where the RPD essentially erred.

[45] I disagree. Regardless of whether the RAD agrees or disagrees with the findings of the RPD, it is not enough to simply provide sufficient reasons; reasons must address the key issues relevant to the decision. As stated in by the Supreme Court in *Vavilov* at paragraph 128:

> […] a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning.
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> [Citation omitted; emphasis added.]

[46] This, of course, begs the question as to what is meant by "meaningfully grappl[ing] with the key issues or central arguments raised by the parties".

[47] First of all, I see nothing unreasonable in the approach taken by the RAD in so far as it concentrated its analysis on whether an error was committed (*Huruglica* at para 78). However,

nowhere in its decision does the RAD state whether it actually agrees or disagrees with any of the findings of the RPD on any of the key issues raised by the Applicant.

[48] I would think that if the RAD is to ‘meaningfully grapple with the issues’ under the correctness standard of review, in addition to independently reviewing the evidence, and quite apart from the obligation to render reasons, the RAD must explicitly state its own findings by more than simply limiting itself to commenting as to whether the RPD committed any errors in its assessment of the evidence.

[49] The RAD disagrees with the Applicant when he asserts that the RPD had analyzed the documentary evidence in a capricious and perverse manner or in limited detail, but does not say why. The RAD also disagrees with the Applicant when he states that the RPD made capricious and perverse conclusions about his credibility, but again, without setting out why, other than a simple example that does not explicitly express the RAD’s view on the issue, thus leaving it to the reader to try and connect the dots.

[50] By indicating that, following its assessment of the Applicant’s past activities and family history, the RPD did not commit any errors in finding that the Applicant had not shown the possibility of serious risk of persecution, is not the same as stating that the RAD agrees with the RPD’s findings on the prospective risks of persecution, nor does it address the components of the Applicant’s identified concerns with such assessment by the RPD.

[51] In addition, simply asserting its disagreement with the Applicant's submission that the RPD analyzed the evidence in a capricious and perverse manner is not the same as stating the RAD agrees with the RPD's specific findings on the evidence; nor is stating its disagreement with the Applicant's submission that the RPD's assessment on credibility was arrived at in a capricious and perverse fashion the same as stating the RAD agrees with the RPD's credibility findings, especially where the RAD had already confirmed that the RPD is not entitled to a particular advantage.

[52] It seems to me that it is not sufficient for the RAD to simply undertake its own analysis of the record; it must also explicitly express its own findings, thereby allowing the parties to transcend the strict letter of the decision to understand where the RAD stands on the key issues and the chain of analysis that led to the determination. Such an expression need not be lengthy, but it must allow the parties to understand, one way or the other, where the RAD comes down on the issues raised in the case (*Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at para 17 [*Patel*]).

[53] At paragraph 96 in *Vavilov*, the Supreme Court states:

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to

> justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[54] The outcome in this case is not the issue; it is the rationale for the RAD decision that is flawed. The RPD may have followed the correct process, yet, did the RAD agree with its findings on the key elements and issues raised by the Applicant? That question is never answered by the RAD.

[55] The RAD did not elaborate further after stating that the RPD did not commit an error in the manner in which it reached its findings. The reasons provided by the RAD only make vague references to the grounds of appeal raised by the Applicant; that is problematic.

[56] In this case, the failure by the RAD to make explicit findings on the key issues, even if only to agree with the findings of the RPD, is not merely superficial or peripheral as to the merits of the decision. It constitutes sufficiently serious shortcomings such that the decision, as a whole, cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.

[57] The manner in which the RAD expressed its findings is better tailored to an analysis using the reasonableness standard where what is required is not necessarily an expression of agreement or disagreement with the findings of the RPD, but rather where it must simply be determined whether the decision fell within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[58] In *Rozas Del Solar*, Mr. Justice Diner reviewed the role of the RAD. He stated at paragraphs 15 and 16:

> [15] Simply put, when a correctness lens is used, the reviewer decides the question before it exactly as it thinks it should. If the reviewer's conclusion ends up being different than the decision-maker's, the reviewer will substitute its own answer as the correct one (*Dunsmuir* at para 50).
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> [16] For other types of questions, there is no one correct answer. This is where a reasonableness standard of review applies, and where there is typically a range of acceptable approaches to and outcomes for the legal questions raised. The decision-maker will have a margin of appreciation, or a range of acceptable solutions (*Dunsmuir* at para 47). Even if the conclusion is not the reviewer's preferred solution, the decision-maker's process and outcome have to fall somewhere in that range of possible outcomes, although, sometimes there is only one possible outcome.

[59] I do not believe that the RAD was overly deferential to the RPD in any way, regardless of how it structured its reasons. However, I would add to the discussion as to what constitutes proper reasons flowing from an analysis conducted through the lens of correctness that the RAD must put a stake in the ground, and must decide the key and determinative issues by either expressing agreement or disagreement with the impugned findings of the RPD, otherwise refugee claimants are left, as submitted herein by the Applicant, not knowing what the RAD's own determination would be, one way or the other, on the issues raised in appeal.

[60] While the RAD may have been justified in rejecting the Applicant's submissions, assessing the process is not enough; the RAD must assess the RPD's key, determinative, findings and explicitly come to its own conclusions.

[61] Indeed, the post-*Vavilov* jurisprudence confirms that administrative decision-makers must provide "responsive reasons" in regard to the key facts and issues of the case (*Vavilov* at para 127). Reasons that are truly responsive to the issues and facts of the case "must", to borrow a phrase from Mr. Justice Diner in *Galusic v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 223 at paragraph 42 "do more than simply recite statutory language, summarize arguments and regurgitate boilerplate phrases."

[62] Responsiveness requires that decision-makers make determinations in regard to the arguments or issues raised by the parties, especially when the arguments are detailed (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 60; *Rodriguez Martinez v Canada (Citizenship and Immigration)*, 2020 FC 293 at paras 12-16; *Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 at paras 47-49).

[63] Under the requirement of responsiveness, a decision-maker must make a determination that addresses the key facts of the case (*Kotai v Canada (Citizenship and Immigration)*, 2020 FC 233 at paras 42-44; *Zhang v Canada (Citizenship and Immigration)*, 2020 FC 53 at paras 4-12; *Patel* at paras 14-22; *Begum v Canada (Citizenship and Immigration)*, 2020 FC 162 at paras 35-36; *Sadiq v Canada (Citizenship and Immigration)*, 2020 FC 267 at paras 14-31 [*Sadiq*]).

[64] In this case, when called to support its expressed disagreement with the Applicant's grounds of appeal, the RAD stated that distinguishing between past and present realities and political leadership in Guinea-Bissau does not constitute a capricious and perverse analysis of the evidence. The RAD simply focused on the nature of the Applicant's argument, but nowhere do I

see the RAD explicitly asserting its agreement or disagreement with any particular finding of the RPD on any of the issues raised by the Applicant, other than to cite specific paragraphs of the RPD decision in footnote references.

[65] I take issue with the position of the Respondent; that is not a simple question of semantics.

[66] The Respondent argues that the RAD must simply state a minimal explanation, if only to show why the RAD is in agreement with the findings of the RPD. I disagree.

[67] It is not enough for the RAD simply to express agreement with the manner in which the RPD rendered its decision, or to simply express disagreement with the Applicant's argument. The RAD decision must also show that it "meaningfully grapple[d] with key issues or central arguments raised by the parties" (*Vavilov* at para 128), something which is done by way of explicit findings, whether such findings are in agreement or disagreement with the findings of the lower tribunal.

[68] Indeed, like any other administrative decision-maker, the RAD is required to provide responsive reasons that show that it "actually listened to the parties" (*Vavilov* at para 127; *Sadiq* at paras 13, 30).

[69] To quote Mr. Justice Martineau in *Ali* at paragraph 4:

> It was not sufficient for the RAD to simply state that it "conducted an independent analysis of the evidence in order to decide, whether

> the RPD's reasons were supportable in regards to the viability of an internal flight alternative for the Appellant" [emphasis added]. In order to sustain the reasonableness of the RAD's decision, this Court must be satisfied that the RAD truly acted as an appeal tribunal and came to its own conclusion with respect to the correctness of the RPD's findings of law, fact or fact and law, even if the RAD refused to admit new evidence on appeal. In practice, this means that there must be some minimal discussion in the RAD's reasons of the errors raised by an appellant and their respective merit, in light of the relevant parts of the documentary evidence that were not considered by the RPD. The reasons provided by the RAD in this case do not meet this minimal standard.
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> [Further emphasis added.]

[70] A minimal discussion of the errors raised by the Applicant in this case does not mean that every single impugned finding of the RPD should be addressed, for a decision-maker is not required to make "an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 16.)

[71] An "explicit finding" is only required as regards the key, or "constituent" elements leading to a decision.

[72] Given the multiple issues at stake, and the specific issues raised by the Applicant, I cannot see how the unsupported assertions made by the RAD were "justified in light of the facts" and "meaningfully account[ed] for the central issues and concerns raised by the parties" (*Vavilov* at paras 126-127).

[73] As stated by Mr. Justice Norris in *Canada (Minister of Citizenship and Immigration) v Davoodabadi*, 2019 FC 350, after citing subsection 169(b) of IRPA, "[t]he RAD's reasons do not need to be perfect or exhaustive but they must say enough to permit the parties to understand why the result was reached, to allow the parties to make an informed decision about whether or not to seek judicial review and, if such review is sought, to be able to meaningfully advance their respective positions" (at para 26).

[74] In this case, the Applicant submits that he does not know how the RAD came to its conclusion; neither do I. I cannot see the decision as being based on an internally coherent and rational chain of analysis on the critical points (*Vavilov* at paras 85, 102), nor am I able to infer such reasons from the record (*Vavilov* at paras 91 and 97).

[75] The Respondent cites a pre-*Vavilov* case, *Kayitankore v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1030 [*Kayitankore*], where Mr. Justice Gascon stated at paragraphs 21 and 23:

> [21] The language used by the RAD in its decision could perhaps have been clearer in certain respects and could have explained in more detail how it "would have reached the same conclusions" as the RPD. However, it certainly does not fall outside the range of acceptable, possible outcomes. The RAD has not overlooked any important factor nor has it misapprehended the circumstances of Mr. Kayitankore. Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court should not intervene even if its assessment of the evidence might have led it to a different outcome. This is clearly the case here.
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> […]
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> [23] I do not agree with Mr. Kayitankore that the RAD was required to provide a "different analysis". The RAD was just required to conduct its own assessment. The fact that it followed

> and repeated the RPD legal analysis before concluding that it was correct and that it would have reached the same conclusion does not mean or imply that it did not do its own analysis. The RAD cannot be faulted for not having done its own independent assessment simply because it followed the approach and reasoning of the RPD, and found it convincing. In exercising its appeal function, the RAD was entitled to echo the RPD analysis and to agree with it. In this case, the RAD reviewed the RPD's reasoning and analysis of the record in detail, it determined that the RPD did not err and did use the correct legal tests under sections 96 and 96 of IRPA, and it confirmed the RPD decision. In doing so, the RAD clearly performed the analysis summarized in *Huruglica FCA* at para 103, applying a correctness standard.
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> [Emphasis added.]

[76] I stand by the principles set out by Mr. Justice Gascon; however, in *Kayitankore*, the RAD not only conducted its own independent analysis, but had also come to its own findings on key issues, although those findings echoed the findings of the RPD.

[77] Here, even read as a whole, there is no explicit indication that the RAD has made its own findings as to any of the key issues raised by the Applicant. All we are left with is that the RAD disagrees with the Applicant's submissions, and footnote references to certain paragraphs of the RPD decision. I am afraid that is not enough.

[78] The Respondent cites a case decided by Mr. Justice Annis, *Tekle v Canada (Citizenship and Immigration)*, 2017 FC 1040 [*Tekle*], for the proposition that the RAD need not reinvent the wheel when it finds that the RPD has committed no reviewable error, and where the RPD went to great length to set out reasons with which the RAD agrees.

[79] Although a pre-*Vavilov* decision, I read *Tekle* as standing for the proposition that the RAD need not address each component of Applicant's argument as long as the determinative issues are canvassed, and may express its findings by simply agreeing with the conclusions of the RPD without necessarily having to come up with its own fresh reasons.

[80] However, I do not find that *Tekle* is altogether helpful to the Respondent where the issue relates more to the sufficiency rather than to the method of delivery of the RAD's decision. In any event, in *Tekle*, the RAD did provide reasons in response to the submissions of the Applicant, and pointed to elements of the evidence to support its findings (at para 23). Here, the RAD did not.

[81] I wish to conclude with a comment taken from *Vavilov* at paragraph 15:

> What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> [Emphasis added.]

[82] It would have been possible to appreciate the decision that the RAD "would have reached", only if it had been explicit in its findings. This was not done here.

[83] In short, the decision of the RAD simply did not meaningfully grapple with the key elements of the case, and thus failed to provide justification of its decision regarding the central issues and concerns raised by the Applicant in a transparent and intelligible manner.

[84] For the reasons set out above, I find that the decision rendered by the RAD is unreasonable, and must be set aside. Given my reasons, I need not address the remaining issues raised by the Applicant regarding the alleged shortcomings of the RAD's decision.

VI. Conclusion

[85] Accordingly, I allow the application for judicial review.

JUDGMENT in IMM-2283-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is returned to a different panel member for reconsideration.

2. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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