Federal Court of Appeal | Cour d'appel fédérale

Date: 20210823

Docket: A-18-20

Citation: 2021 FCA 171

CORAM: **NADON J.A.**
STRATAS J.A.
RIVOALEN J.A.

BETWEEN:

ANDRIY VOLODYMYROVYCH PORTNOV

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on May 11, 2021.

Judgment delivered at Ottawa, Ontario, on August 23, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Foreign states sometimes find themselves in political uncertainty or internal turmoil. For the unscrupulous, this presents an opportunity for personal gain. Public offices can be exploited. Public property can be pilfered and hidden abroad.

[2] When a measure of normalcy returns to foreign states, they sometimes want to trace the property, freeze it from further dispersal, and bring it back home. To assist them, Canada has passed a law: *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10.

[3] Under section 4 of the Act, when foreign states ask for assistance and when the Governor in Council is satisfied the statutory prerequisites are met, the Governor in Council can issue an order or regulation restricting or prohibiting any dealings with certain property held by designated individuals.

[4] That happened here. The Governor in Council passed a regulation in response to a request from Ukraine: *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, S.O.R./2014-44 (the "2014 Regulations"). According to the Regulatory Impact Analysis Statement for the 2014 Regulations, Ukraine's former President, Viktor Yanukovych, his senior officials, close associates, and family members had "misappropriated state funds, or obtained property inappropriately" from "their [public] office[s] or family, business or personal connections". This was said to be part of "[r]ampant corruption and other abuses by senior government officials" in Ukraine that "weakened the Ukrainian economy and depleted government coffers", causing "billions of dollars" to be "stolen or diverted". See Regulatory Impact Analysis Statement, (2014) C. Gaz. II, Vol. 148, No. 7 at p. 739.

[5] The 2014 Regulations designated eighteen individuals, restricting and prohibiting their dealings with certain property for up to five years. Mr. Portnov was one of the eighteen.

[6] Mr. Portnov challenged the *vires* of the 2014 Regulations in the Federal Court: 2018 FC 1248. His challenge failed on the ground that the statutory prerequisites for the 2014 Regulations and their application to Mr. Portnov were met at the time the 2014 Regulations were made.

[7] Under section 6 of the Act, the Governor in Council can order the extension of regulations previously made under section 4. In this case, on the day before the 2014 Regulations expired, the Governor in Council did just that: *Order extending the application of the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, S.O.R./2019-69 (the "Extending Order"). At the same time, it amended the 2014 Regulations to remove two of the eighteen individuals: *Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, S.O.R./2019-68 (the "2019 Regulations"). Mr. Portnov was one of the sixteen who remained subject to the restrictions and prohibitions imposed by the 2014 Regulations.

[8] Mr. Portnov applied to the Federal Court for an order quashing the Extending Order and the 2019 Regulations. The Federal Court dismissed his application: 2019 FC 1648 (*per* Fothergill J.). Mr. Portnov now appeals to this Court.

[9] For the following reasons, I would dismiss Mr. Portnov's appeal with costs.

A. The standard of review: reasonableness review

[10] The Federal Court selected reasonableness as the standard of review. I agree with the Federal Court. None of the exceptions to reasonableness review recognized in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 apply here.

[11] Mr. Portnov submits that one of those recognized exceptions applies. He says that this case raises "a question of central importance to the legal system as a whole". Thus, he says that we must review the Governor in Council's decision for correctness.

[12] Questions of central importance to the legal system as a whole must be "general questions of law" of "fundamental importance" and "broad applicability" with "significant legal consequences" for "the legal system", "the justice system", "the administration of justice as a whole", or "other institutions of government". They must be questions that require "uniform", "consistent", "final" and "determinate" answers, failing which the constitutional principle of the rule of law will suffer. See *Vavilov* at paras. 58-59; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 60.

[13] While the Supreme Court has heard nearly a hundred judicial reviews over the last twelve years—each one selected for hearing because of its high public importance—the number that have qualified under this exception can be counted on one hand: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (prayer at municipal council meetings); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016]

2 S.C.R. 555 (privacy interests and solicitor and client privilege); *Chagnon v. Syndicat de la fonction publique et parapublique du Québec,* 2018 SCC 39, [2018] 2 S.C.R. 687 (parliamentary privilege). Each of these raised a sweeping, transcendent point suffused with constitutional or quasi-constitutional principle.

[14] Questions "of wider public concern" or that touch "on an important issue" in a "general or abstract sense" are "not sufficient" and fall short of the mark: *Vavilov* at para. 61, citing eight Supreme Court decisions; see also tens more from this Court to the same effect.

[15] In assessing whether this narrow exception applies, we must assess the "real essence" and "essential character" of Mr. Portnov's case: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 458 D.L.R. (4th) 125 at para. 48; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[16] Mr. Portnov wants to end the continuing effect of the 2019 Regulations. If successful, he would no longer be subject to restrictions and prohibitions. His central submission is that the Extending Order could not have been made and the 2014 Regulations could not have been extended unless all of the preconditions for making them in the first place were met. In other words, all of the criteria in section 4 must again be met before an extension can happen under section 6.

[17] This is a question of statutory interpretation to be analyzed through the prism of reasonableness. This question does not transcend the Act, nor does it smack of any constitutional or quasi-constitutional principle. Thus, it does not qualify as a question of central importance to the legal system as a whole.

B. Reviewing regulations

[18] The Attorney General agrees that Mr. Portnov wants to end the continuing effect of the 2019 Regulations. He says that to accomplish that, Mr. Portnov must satisfy a special rule for attacking regulations. The rule is found in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.

[19] There are three parts to the *Katz* rule: (1) when a party challenges the validity of regulations, the party bears the burden of proof; (2) to the extent possible, regulations must be interpreted so that they accord with the statutory provision that authorizes them; and (3) the party must overcome a presumption that the regulations are valid. On the third part, *Katz* suggests (at paras. 24 and 28) that the presumption is overcome only where the regulations are "irrelevant", "extraneous" or "completely unrelated" to the objectives of the governing statute. A leading commentator on Canadian administrative law calls this "hyperdeferential": Paul Daly, "Regulations and Reasonableness Review" in *Administrative Law Matters*, (29 January 2021), <www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/>. I agree.

[20] The first two parts of the *Katz* rule are well-accepted, judge-made principles. The third part—the presumption and the very narrow ways it can be rebutted—is more controversial. In my view, later jurisprudence from the Supreme Court, particularly *Vavilov*, has overtaken it.

[21] The presumption of validity and the very narrow ways it can be rebutted were first introduced into Canadian law at a time when "legislative" decisions (*e.g., Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261, 120 D.L.R. (3d) 577 at p. 274 S.C.R.) or decisions of "public convenience and general policy" (*e.g., Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 at p. 111 S.C.R.) could not be set aside unless "jurisdiction" was lost through some rare and significant error. These included "egregious" exceedance of authority (see *e.g. Thorne's Hardware* and *Alaska Trainship*), pursuit of an improper purpose (*Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.)) and the taking into account of wholly irrelevant considerations. Tellingly, in developing the third part of the rule, *Katz* relies upon all of the cases in this paragraph—cases based on concepts of "jurisdiction"—and later cases that rely on them.

[22] Over the last half-century, the role of "jurisdiction" as a controlling idea in Canadian administrative law has been on the decline, along with the concomitant need for challengers to show exceedance of authority, improper purpose or the taking into account of wholly irrelevant considerations. Concepts of "patent unreasonableness" and "reasonableness" and, later, just "reasonableness" have been in the ascendancy. By 2008, only a last small vestige of "jurisdiction" remained—correctness review on "true questions of jurisdiction" such as the *vires* of regulations: *Dunsmuir* at para. 59, citing *United Taxi Drivers' Fellowship of Southern Alberta*

v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485. In 2019, *Vavilov* eradicated that last vestige. Thus, the third part of the *Katz* rule is an artefact from a time long since passed.

[23] So how should we go about reviewing regulations today? We must begin by reminding ourselves that in answering questions like that we should concentrate on real substance, not superficial form: *Canadian Council for Refugees*; *JP Morgan*. In substance, regulations, like administrative decisions and orders, are nothing more than binding legal instruments that administrative officials decide to make—in other words, they are the product of administrative decision-making. This suggests that the proper framework for reviewing regulations must be the one we use to review the substance of administrative decision-making: see *e.g. Terrigno v. Calgary (City)*, 2021 ABQB 41, 21 Alta. L.R. (7th) 376.

[24] Indeed, many Supreme Court cases considering regulations and subordinate legislation during the *Dunsmuir* era used that very framework, not the framework in *Katz*: see *e.g. Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; see also the analysis in John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov", (18 June 2020), <dx.doi.org/10.2139/ssrn.3630636>.

[25] Today, the framework for reviewing the substance of administrative decision-making is *Vavilov*. It is intended to be sweeping and comprehensive—a "holistic revision of the framework for determining the applicable standard of review" (at para. 143). We are to draw upon *Vavilov*,

not cases like *Katz*: we must "look to [the] reasons [in *Vavilov*] first in order to determine how [*Vavilov's*] general framework applies to [a] case" (*ibid.*).

[26] *Vavilov* offers us even more justification for not following *Katz*. *Vavilov* instructs us (at para. 143) that cases under the now-discarded category of "true questions of jurisdiction"—of which *Katz* is one—"will necessarily have less precedential force". As well, in the course of its discussion abolishing the category of "true questions of jurisdiction", *Vavilov* mentions that there are "cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute" (at para. 66) yet makes no attempt to carve out a special rule for regulations: see also the analysis in *Morris v. Law Society of Alberta (Trust Safety Committee)*, 2020 ABQB 137, 12 Alta. L.R. (7th) 189 at para. 40; *TransAlta Generation Partnership v. Regina*, 2021 ABQB 37 at para. 46.

[27] More fundamentally, *Vavilov* instructs us to conduct reasonableness review of all administrative decision-making unless one of three exceptions leading to correctness review applies. This applies to regulations as a species of administrative decision-making: Federal Court's reasons at para. 23; *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, 445 D.L.R. (4th) 448 at para. 39. For good measure, *Vavilov* cites *Green* and *West Fraser* with approval—cases that conducted reasonableness review without applying the *Katz* rule: see paragraph 24, above. Finally, the *Katz* rule applies across-the-board to all regulations regardless of their content or context. This sits uneasily with *Vavilov* which adopts a contextual approach to reasonableness review.

[28] Thus, in conducting reasonableness review, I shall not apply *Katz*. I shall follow *Vavilov*.

C. Conducting reasonableness review

[29] The Federal Court found the Governor in Council's decision to enact the extending Regulations reasonable. It properly so found.

[30] Mr. Portnov rests his case mainly on one central submission: the Governor in Council had to fulfil the preconditions for making the 2014 Regulations under section 4 of the Act once again before extending them under section 6 of the Act. These preconditions include a request from the foreign state "in writing", an assertion in the writing that "a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship" (s. 4(1)), and findings that Mr. Portnov is "in relation to the foreign state, a politically exposed foreign person" (para. 4(2)(*a*)), "there is internal turmoil, or an uncertain political situation in the foreign state" (para. 4(2)(*b*), and "the making of the order or regulation is in the interest of international relations" (para. 4(2)(*c*)).

[31] Mr. Portnov says that the Governor in Council, by not requiring fulfilment of the section 4 preconditions before extending the 2014 Regulations, unreasonably interpreted section 6.

[32] Did the Governor in Council interpret section 6 in a reasonable way? *Vavilov* sets out the methodology for assessing the reasonableness of legislative interpretations reached by administrators. This Court recently summarized that methodology in *Canada (Citizenship and*

Immigration) v. Mason, 2021 FCA 156. Although *Mason* was decided after this case was heard, it does nothing more than collect the disparate bits of guidance in *Vavilov* and consolidate them for the purposes of clarity.

[33] In conducting reasonableness review, this Court is entitled to look at the reasons offered by the decision-maker, associated documents that shed light on the reasoning process, any submissions made to the decision-maker, and the record before the decision-maker. Reasons can be express or implied. See generally *Mason* at paras. 30-42 and the citations to *Vavilov* therein.

[34] In the specific case of decisions of the Governor in Council, reasoned explanations can often be found in the text of the legal instruments it is issuing (here, the 2019 Regulations and the Extending Order), prior legal instruments related to it (here the 2014 Regulations), and any associated Regulatory Impact Analysis Statements: see generally *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, [2020] 3 F.C.R. 3. As *Coldwater* demonstrates (at para. 74), express explanations can be quite brief yet still pass muster.

[35] In this case, these sources show that the Governor in Council viewed section 6 of the Act as permitting an extension of regulations if circumstances suggest the extension is necessary and consistent with the purposes of the Act. The Governor in Council did not interpret section 6 as requiring satisfaction of the preconditions in section 4. In reaching this interpretation, the Governor in Council was “alive to [the] essential elements” of text, context and purpose: *Vavilov* at para. 120; *Mason* at para. 42.

[36] The Governor in Council referred to "[i]nformation received by the Government of Canada [that] supports an extension of the Regulations", the need for "additional time for Ukraine to complete its criminal investigations and make actionable mutual legal assistance requests to Canada", the need to "ensure that misappropriated assets held by officials of the former government are frozen" so "foreign persons may be held accountable", and the objective of furthering the "accountability, rule of law, and democracy in Ukraine": Regulatory Impact Analysis Statement, (2019) C. Gaz. II, Vol. 153, No. 6 at p. 865. Implicit in this is a finding, quite sustainable, that section 6 aims to advance these purposes.

[37] Requiring all of the preconditions under section 4 of the Act to be met before regulations can be extended would frustrate these purposes. Take, for example, the precondition that "there is internal turmoil, or an uncertain political situation, in the foreign state" (para. 4(2)(*b*)). While there is turmoil and uncertainty in the foreign state, the foreign state may be unable to take measures to repatriate wrongly misappropriated property. Only when stability and certainty return to the foreign state can it finally take the measures necessary to repatriate misappropriated property. Mr. Portnov's interpretation of section 6 would prevent that from happening, thereby putting misappropriated property beyond the reach of the foreign state and frustrating the purposes of the Act.

[38] As for context, aside from section 4 (which will be considered below), Mr. Portnov has not pointed to any other sections in the Act that would bear upon the Governor in Council's interpretation.

[39] The text of section 6 also supports the Governor in Council's interpretation. Section 6 gives the Governor in Council discretion to extend a regulation for any period specified and further gives the Governor in Council the power to extend it more than once. If Parliament intended that a new request from the foreign state be required for each extension, it would have expressly included that requirement as it has done under legislative regimes with analogous sunset provisions: see *e.g. Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c. C-3, s. 10.01(4); *Customs Tariff*, S.C. 1997, c. 36, ss. 77(3), 77(4) and 77.3; *Insurance Companies Act*, S.C. 1991, c. 47, s. 21(2); *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.), s. 33(6).

[40] Further, if the preconditions in section 4 are read into section 6, then section 6 is rendered unnecessary. If extending a regulation requires the same steps as making the regulation in the first place, each extension becomes a fresh regulation, and there is no need for the sort of independent statutory power we see in section 6 to extend it.

[41] Mr. Portnov submits that if the Governor in Council's interpretation is left in place, the Governor in Council effectively becomes the foreign state making a request. He raises the spectre of the Governor in Council extending extremely restrictive measures against people like him forever without any justification. But no administrator has untrammelled power like that. Discretion is always subject to the limits imposed by a reasonable reading of the legislation granting it, including its purpose, and must always remain within those limits. See *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 110 D.L.R. (4th) 1; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157 at para. 40.

[42] Overall, Mr. Portnov has not identified any "omitted aspect" in the Governor in Council's interpretation, *i.e.*, "a consideration that cannot be seen in the reasons and cannot be implied", whose importance is so great that it "causes the reviewing court to lose confidence in the outcome reached by the decision maker": *Vavilov* at para. 122; *Mason* at para. 42. He has not shown that the Governor in Council was oblivious "to [the] essential elements" of text, context and purpose: *Vavilov* at para. 120; *Mason* at para. 42.

[43] Assuming the Extending Order and the 2019 Regulations comply with a reasonable reading of section 6, Mr. Portnov submits that their application to him is unreasonable on the facts of this case. The Federal Court did not so find. I agree with the Federal Court.

[44] The assessment of reasonableness depends on the context: *Vavilov* at paras. 88-90; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 24-36. Several contextual considerations are relevant here and suggest that the Governor in Council's decision to extend the 2014 Regulations under section 6 of the Act is relatively unconstrained within the meaning of *Vavilov*. First, as mentioned above, section 6 requires the Governor in Council to determine whether an extension is necessary and consistent with the purposes of the Act. This is a factually suffused determination that draws upon the Governor in Council's access to sensitive state-to-state communications, its expertise in international relations, and its role at the apex of the Canadian executive in developing government policy in many disparate areas including international democracy, anti-corruption and accountability. These are matters not normally within the ken of the courts and so courts are reluctant to second guess: *Canadian Council for Refugees* at paras. 36-38; *League for Human*

Rights of B'Nai Brith Canada v. Odynsky, 2010 FCA 307, [2012] 2 F.C.R. 312 at para. 76; *Entertainment Software Association* at paras. 27-29 and 32. That being said, the impact upon Mr. Portnov is also part of the context; the Governor in Council must have some defensible reason consistent with the purposes of the Act to keep him subject to the 2014 Regulations.

[45] Another contextual consideration is that Mr. Portnov has challenged the 2014 Regulations and the Federal Court found them and their application to Mr. Portnov to be reasonable: 2018 FC 1248. The information concerning Mr. Portnov that the Governor in Council reasonably relied upon in making him subject to the 2014 Regulations combined with Ukraine's need for "more time to complete its criminal investigations and make actionable mutual legal assistance requests to Canada" (paragraph 36, above) goes some way towards supporting the reasonableness of the extension.

[46] Mr. Portnov tendered to this Court recent court orders from Ukraine. He says that they show that Ukraine "has effectively withdrawn its request" for assistance under the Act: Memorandum of Mr. Portnov at para. 80.

[47] These court orders purportedly go to the merits of whether the 2019 Regulations should continue. They should be submitted to the merits-decider under this legislative regime—the Governor in Council—not to this Court sitting in appeal of a reviewing court: *Mason* at para. 73; *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75. We do not receive and weigh new evidence relevant to the merits.

[48] In any event, Mr. Portnov presented these court orders to the Court without any expert evidence concerning the status of these orders and their effect under Ukrainian law, the speed with which they were obtained, the proceedings in which they were made and whether they are under appeal or can still be appealed. These issues matter, especially when there are "different positions emanating from different sources within Ukraine about [Mr. Portnov]": Memorandum of the Attorney General at para. 55.

[49] The Governor in Council has the power to repeal, amend, or vary the Regulations at any time: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(4). The Act provides certain administrative review mechanisms (see *e.g.* s. 13) but it neither precludes reconsiderations nor restricts the availability of judicial review. The situation is analogous to that in *Canadian Council for Refugees*, above. Thus, nothing in the Act, the Regulations or these reasons prevents Mr. Portnov from gathering new information supporting the removal of the restrictions and prohibitions affecting him, such as the court orders he has presented to us, and submitting the new information to the Governor in Council along with representations. Nothing prevents Mr. Portnov from applying for judicial review of any decision by the Governor in Council not to act on the new information, though that judicial review may be difficult due to the relatively unconstrained and factual nature of the decision.

[50] Applicants for judicial review bear the burden of proving their case. Accordingly, Mr. Portnov bears the burden of demonstrating that the extension is unreasonable. In oral argument, Mr. Portnov submits that it was impossible for him to get all the evidence necessary to mount a meaningful challenge against the extension. For example, in this case, the Regulatory Impact

Analysis Statement offered in support of the 2019 Regulations refers only to "[i]nformation received by the Government of Canada" without any specificity. He complains that this information was never disclosed to him.

[51] In his notice of application in the Federal Court and his notice of appeal in this Court, Mr. Portnov could have pleaded grounds that might have supported a plausible claim for disclosure of information. He did not do so. As well, Mr. Portnov requested information under Rule 317 and the Attorney General objected to disclosing it under Rule 318, but Mr. Portnov did not challenge the objection. Even if Mr. Portnov were ultimately unsuccessful in challenging the Attorney General's objection—for example, because of some valid assertion of a privilege—as a tactical matter the Governor in Council might still have had to disclose more information: see *Canadian Council for Refugees* at paras. 111-112. Finally, there were other ways by which Mr. Portnov or others on his behalf could have accessed information relied upon by the Governor in Council in making its decision and could have filed it in the judicial review proceedings without undermining important interests in confidentiality: see *Canadian Council for Refugees* at paras. 98-122.

[52] In his application for judicial review in the Federal Court and in his notice of appeal in this Court, Mr. Portnov did not raise the issue whether a sufficient reasoned explanation in support of the Governor in Council's decision could be discerned, as *Vavilov* requires. However, some of Mr. Portnov's oral submissions can be taken to touch lightly on that issue and so, in this instance, I am prepared to deal briefly with it.

[53] The requirement that a reasoned explanation for an administrative decision be discernable is one that depends on the context, including the nature of the administrator and constraints acting on the decision-maker: *Vavilov* at paras. 91-98; see also *Mason* and *Alexion*, both above. If the requirement is put too high, the very reason why the legislator entrusted this jurisdiction to the administrator in the first place may be undermined along with other legitimate state objectives: *Alexion* at para. 24. In this case, the context is a sensitive one, with confidentiality concerns relating to international relations, state-to-state communications, and the location and recovery of property that may have been misappropriated. For practical and legal reasons, the Governor in Council is limited in what it can provide by way of explanation.

[54] Thus, in this context, it would be inappropriate for a reviewing court to translate *Vavilov*'s requirement of a reasoned explanation into an obligation on the Governor in Council to provide a complete, comprehensive, public explanation why it extended the 2014 Regulations. As *Vavilov* shows, in some situations information about the basis for an administrative decision will necessarily be limited or non-existent: *Vavilov* at paras. 136-138, citing *Catalyst Paper*. In such situations, all a reviewing court can do is assess the reasonableness of the outcome the administrative decision-maker reached using surrounding documents and circumstances and whatever bits of reasoning or rationale, if any, it has before it, including any information the applicant for judicial review has been able to obtain using the methods described in paragraph 51 above: *ibid*. As *Vavilov* suggests (at paras. 136-138), a review conducted in that way can still be meaningful and effective and discharge the court's responsibility to enforce the rule of law.

[55] In the circumstances of this case, the express explanations given for the decision to extend the 2014 Regulations (summarized at paragraph 36 above), viewed in light of the legislation and the record, are adequate and do not suffer from any fatal, overriding flaws. They provide sufficient intelligibility, justification and transparency—particularly on the statutory interpretation issue that Mr. Portnov made the main focus of his judicial review. The standards in *Vavilov* have been met.

[56] Overall, I agree with the Federal Court that the decision to extend the 2014 Regulations, brought about by the Extending Order and the 2019 Regulations, is reasonable and, thus, valid.

D. Proposed disposition

[57] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree
M. Nadon J.A."
"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-18-20

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE FOTHERGILL DATED DECEMBER 20, 2019, NO. T-663-19

STYLE OF CAUSE:	ANDRIY VOLODYMYROVYCH PORTNOV v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MAY 11, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. RIVOALEN J.A.
DATED:	AUGUST 23, 2021

APPEARANCES:

Geoff R. Hall John W. Boscariol Robert A. Glasgow Ljiljana Stanic	FOR THE APPELLANT
Roger Flaim Andrea Bourke Samantha Pillon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Toronto, Ontario	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT