Federal Court of Appeal Cour d'appel fédérale

Date: 20221026

Docket: A-319-20

Citation: 2022 FCA 181

CORAM: **STRATAS J.A.**
LOCKE J.A.
MONAGHAN J.A.

BETWEEN:

THE MINISTER OF JUSTICE

Appellant

and

D.V.

Respondent

Heard at Toronto, Ontario, on November 22, 2021.

Judgment delivered at Ottawa, Ontario, on October 26, 2022.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LOCKE J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The Ontario Court of Justice convicted the respondent, a young offender, of sexual assault. It sentenced him to 60 days in custody, 30 days of community supervision, and two years

of probation. He appealed. The Court of Appeal for Ontario dismissed the appeal: 2006 CanLII 35185. He sought leave to appeal. The Supreme Court refused: 2007 CanLII 67881.

[2] Two years later, the respondent applied to the Minister for a review of his conviction under section 696.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. Under that section, people may ask for a review of their convictions on the ground that there has been a miscarriage of justice. The Minister dismissed the application.

[3] Nine years after that, the respondent again applied for Ministerial review. The first step in Ministerial review is for the Minister to conduct a preliminary screening for potential merit to the application. The Minister did that here and dismissed the respondent’s application: there was no reasonable basis to conclude that a miscarriage of justice likely occurred.

[4] In response, the respondent brought an application for judicial review in the Federal Court, asking it to quash the Minister’s decision. The Federal Court (*per* Simpson J.) granted the application and quashed the Minister’s decision: 2020 FC 1118. The Minister now appeals to this Court.

[5] The appeal must be granted and the Federal Court’s judgment set aside. The Federal Court failed to conduct reasonableness review: instead, it improperly substituted its view of the matter for that of the Minister. In the course of its analysis, rather than conducting reasonableness review, the Federal Court applied its own view of the Ministerial review provisions, a view very much contrary to any reasonable interpretation of those provisions.

[6] In a case like this, we are to conduct reasonableness review anew: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585.

[7] For the reasons that follow, the Minister's decision passes muster under reasonableness review. Accordingly, I would allow the appeal, set aside the judgment of the Federal Court, dismiss the respondent's application for judicial review and restore the Minister's decision.

B. The screening process under the Ministerial review provisions

[8] In these reasons, the administrative decision-maker that decided the respondent's application for Ministerial review is described as the "Minister". In practice, the Minister's Criminal Conviction Review Group conducts the preliminary screening of applications. But it does so in the Minister's name. The Minister is the legal decision-maker.

[9] In an application for Ministerial review under sections 696.1-696.6 of the *Criminal Code*, the Minister conducts a preliminary assessment of the application: *Regulations Respecting Applications for Ministerial Review—Miscarriages of Justice*, S.O.R./2002-416, s. 3(*b*).

[10] If the Minister finds that there "may be a reasonable basis to conclude a miscarriage of justice likely occurred", the Minister goes on to conduct an investigation into the application: *Regulations*, s. 4(1)(*a*). However, if, among other things, the Minister is "satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred", the Minister need not

conduct an investigation into the application: *Regulations*, s. 4(1)(*b*)(ii). In that circumstance, the application is screened out and dismissed. That happened here.

[11] Preliminary assessments of applications for Ministerial review are guided by the considerations set out in section 696.4 of the *Criminal Code*. These considerations suggest that applications only rarely succeed. The considerations are as follows:

- the application must be "supported by new matters of significance" not previously considered by the courts or previously considered by the Minister elsewhere in the *Criminal Code*;

- the information presented with the application must be reliable and relevant; and

- the application must be more than "a further appeal".

Overall, any remedies granted as a result of Ministerial review are to be "extraordinary".

[12] In the preliminary assessment of the respondent's application for Ministerial review, the Minister found no reasonable basis to believe that a miscarriage of justice likely occurred. Thus, the Minister dismissed the application under the authority of paragraph 696.3(3)(*b*) of the *Criminal Code*. As mentioned, in its judgment, the Federal Court quashed the dismissal. The Minister now asks us to set aside the Federal Court's judgment.

C. Conducting reasonableness review

[13] The Federal Court's task was to review the Minister's decision for reasonableness. Under that standard of review, reviewing courts must review the outcome reached by the Minister and ensure that a reasoned explanation for the outcome can be discerned: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 74, 82-87.

[14] In reviewing the outcome reached by an administrative decision-maker for reasonableness, reviewing courts are to review "holistically and contextually" any written reasons in light of the entire context, including the evidentiary record and the submissions made, with "due sensitivity to the administrative regime": *Vavilov* at paras. 94, 97, 103 and 123. Simply put, reviewing courts look to the reasons provided and anything in the legal backdrop and the record before the reviewing court that can shed light on where the administrator was coming from.

[15] In doing that, reviewing courts must keep front of mind the fact that Parliament has made the administrative decision-maker—here the Minister—the decider of the merits on the facts and the law. This means that it is not for reviewing courts to analyze the facts and law themselves, reach a definitive conclusion on the merits of the administrative decision, and then impose their own conclusion, finding any disparity in the administrative decision to be "unreasonable": *Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117; see also *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at para. 28 and *Girouard v. Canada (Attorney General)*, 2020 FCA 129 at para. 42. Nor is the reviewing court to conduct a

"line-by-line treasure hunt for [any] error": *Vavilov* at para. 102, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54.

[16] Rather, reviewing courts are to consider "the limits and contours of the space in which the decision-maker may act [which can vary according to the context] and the types of solutions it may adopt" and ask whether the decision was within that space or was otherwise a permissible solution: *Vavilov* at para. 90. Reviewing courts must start with the administrator's decision and the bases for it, giving any reasons respectful attention, with due regard for expertise, experience and regulatory history, all with a view to understanding where the administrator was coming from, detecting any "sufficiently central", "significant", "sufficiently serious shortcomings", and assessing whether any constraints were exceeded: *Vavilov* at paras. 93, 100-103, 127-128.

[17] Reviewing courts must also be able to discern an "internally coherent and rational chain of analysis" on "critical point[s]" from the reasons or the context that informs an understanding of the reasons: *Vavilov* at paras. 85, 100-103, 127-128. For this reason, the rationale for a decision, sufficient to sustain its reasonableness, is sometimes said to be implicit: *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156 at para. 41. Administrators also fall short when they "fail to reveal a rational chain of analysis", supply a "flawed basis", or rely on "an unreasonable chain of analysis" such as "logical fallacies", "circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104. Reasoned explanations are adequate when "the parties [are assured] that their [main] concerns have been heard", the administrator has shown that it was "actually alert and sensitive to the

matter before it" and reviewing courts "can assess, meaningfully, whether the [administrator] met minimum standards of legality": *Vavilov* at paras. 127-128; *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 F.C.R. 425 at para. 16. See also *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157.

[18] Here again, reasonableness review must not be turned into correctness review by, for example, using a "standard of perfection" or applying the "standards of academic logicians": *Vavilov* at paras. 91 and 104.

[19] Even before *Vavilov*, the Federal Courts have conducted reasonableness review of Ministerial review decisions in this manner: *Winmill v. Canada (Justice)*, 2016 FCA 250; *Walchuk v Canada (Justice)*, 2015 FCA 85, 469 N.R. 360; *Timm v. Canada (Attorney General)*, 2012 FCA 282, 451 N.R. 250; *Timm v. Canada (Attorney General)*, 2015 FCA 199. In many ways, in *Vavilov* the Supreme Court ratified the approach of this Court to reasonableness: *Entertainment Software Ass'n v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at paras. 23-37, aff'd 2022 SCC 30.

[20] In *Winmill*, this Court specifically addressed how reasonableness review of decisions made at the preliminary assessment phase should be conducted. A reviewing court is to "ensure that during the preliminary assessment phase the Minister followed a methodology appropriate to the purposes of the legislative framework and had a firm evidentiary basis for the decision" (at para. 11). A reviewing court cannot "engage in [its own] *de novo* weighing and assessment of facts, substituting [its own] conclusions for those of the Minister" (at para. 11).

[21] It also goes without saying that the reviewing court must focus on whether the Minister has adopted a reasonable interpretation of the Ministerial review provisions in the *Criminal Code* and not conduct its own interpretation of the provisions or, worse, impose on the Minister its own view of what the provisions ought to say.

D. What the Federal Court did

[22] At one point in its reasons, the Federal Court asked itself (at para. 23) whether it was reasonable for the Minister to conclude that the grounds raised by the respondent did not raise new and significant issues within the meaning of the statutory provisions.

[23] That was the right question. The Federal Court should have stopped there and analyzed the Minister's reasons for decision in light of the record and overall context. However, the Federal Court did something different. It conducted its own analysis of the evidence before the respondent's criminal trial and criminal appeal, formed its own views as to the merits of the respondent's application for Ministerial review, and used those views as a yardstick to measure the Minister's views. That was correctness review, not reasonableness review.

[24] In fact, the Federal Court went further beyond its role as a court reviewing for reasonableness. It asked itself whether the Minister considered whether the elements of the offence of sexual assault had been proven at trial (at para. 38). In doing so, the Federal Court assigned to the Minister a role in Ministerial reviews that does not appear in sections 696.1-696.6 of the *Criminal Code*.

[25] And, as we shall see, in reviewing what the Minister did in carrying out that role, the Federal Court acted like a criminal appeal court exercising sweeping powers of *de novo* review, sifting the record before the Ontario Court of Justice and the Court of Appeal for Ontario, scrutinizing convictions for any error. This was a role even broader than that of the Court of Appeal for Ontario in criminal appeals, let alone the role of a reviewing court conducting reasonableness review.

[26] This is underscored by certain parts of the Federal Court's analysis that the Minister says are at odds with the judgments of the Ontario Court of Justice and the Court of Appeal for Ontario and are at odds with the evidentiary record. I do not pass judgment on these, for that is not my job on reasonableness review. But these do show that the Federal Court for the very best of motives—trying to protect the interests of the unrepresented respondent—departed from being a reviewing court conducting reasonableness review and became something like a criminal appeal court exercising sweeping powers of *de novo* review. No interpretation of sections 696.1-696.6 of the *Criminal Code*, nor any reading of *Vavilov*, supports that transformation.

[27] The Minister raises the following:

- The Federal Court assessed the evidence before the criminal trial court, noting that the complainant "acknowledged that she was not restrained" (at para. 5), and placed weight on this. It also suggested that the complainant's lack of objection should have been interpreted by the criminal trial judge as consent. In response, the Minister says that the Federal Court wrongly cherry-picked the evidence. In

the Minister's view, other evidence was relevant to the consent issue. For example, the complainant testified that she felt she could not leave. As well, the complainant did not consent to her clothes begin removed or to being pulled onto the bed on top of the respondent. And even if the complainant were not restrained, "a belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law and provides no defence": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 356.

- The Federal Court relied on the fact that one passage from the trial judge's reasons was "partially in error" (at para. 7). However, the Minister says that when that passage is read in context, one can see that it was based on evidence before the trial judge.

- The Federal Court aggressively interpreted (at para. 8) the criminal trial judge's reasons to suggest that "he was prepared to accept that sexual conduct occurred with the complainant's consent". But the trial judge, with evidence in support, concluded that "[t]he complainant's conduct, as she described it in her evidence, ought to have made it clear to both the defendant and [the co-accused] that she did not consent."

- The Federal Court went into the evidence before the trial judge and divided the sexual activity into two phases, "foreplay" and "touching" and found that "there may have been" a lack of evidence at trial that the respondent had engaged in

unwanted sexual touching (at para. 38). This was not its proper task. The criminal trial judge did not artificially divide the acts carried out by the respondent and his co-accused into separate phases of "foreplay" and "touching"; rather he reached his conclusion that all of the constituent elements of the *actus reus* of the offence of sexual assault had been met. In the course of that overall finding, he found the respondent's testimony not credible.

- The Federal Court also examined inconsistencies between the complainant's testimony at the preliminary inquiry and the trial of a co-accused (at para. 36). The testimony at the preliminary inquiry was not even raised by the respondent in his application for Ministerial review.

E. Assessing the reasonableness of the Minister's decision

[28] We must now assess afresh the reasonableness of the Minister's decision. On the authority of *Vavilov*, there is no doubt that reasonableness is the presumptive standard of review and none of the exceptions to reasonableness review recognized by the Supreme Court apply: *Vavilov* at paras. 17, 69-70.

[29] First, this Court must examine the Minister's evaluation of the scope and substance of the respondent's application for Ministerial review. The respondent's application raised inconsistencies between the complainant's testimony at the trial of a co-accused and her testimony at the respondent's trial. It also raised "such further and other new matters and

misapprehensions of the evidence" that the respondent appreciated only after the Supreme Court dismissed his leave to appeal. In later correspondence, the respondent added further grounds for Ministerial review. In all, the Minister found that the applicant had raised fourteen separate grounds. Based on the record before the Minister, that finding was supportable and, thus, reasonable.

[30] Next, the Minister listed the grounds and the material available for the review. The Minister also set out an analysis of the nature of Ministerial reviews under sections 696.1-696.6 of the *Criminal Code* and accompanying *Regulations*. These findings were reasonable based on the material before the Minister and the legislative framework.

[31] Next, the Minister set out the meaning of "new matters of significance" in subsection 696.4(*a*)—or, in words used in the Minister's reasons, "new and significant information". The Minister analyzed the text, context and purposes of that provision and related provisions. Among other things, the Minister emphasized that Ministerial review "is not meant to be another level of appeal nor a mechanism that allows the Minister to substitute his or her decision for that of the courts". The Minister added that it is not enough to argue "that there were weaknesses in the evidence presented at trial or on appeal or simply repeating the same evidence or legal arguments that were presented to the trial court and the appeal court". Finally, the Minister also noted the high test for the admission of evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212. All of these observations and conclusions are sustainable on a reasonable reading of the relevant legislative provisions.

[32] The Minister noted that his department has developed a test for “new information” for the purposes of subsection 696.4(*a*): “the courts did not consider it at trial or on appeal” and the convicted person “became aware of it only after all court proceedings were completed”. Where evidence was available but was not introduced for tactical reasons, “the new information should give strong reason to doubt the factual accuracy of the verdict”.

[33] For the Minister, information is “significant” under subsection 696.4(*a*) if it is admissible under the rules of evidence, reasonably capable of belief, relevant to a decisive issue and could have affected the verdict if it had been presented at trial.

[34] These tests for newness and significance are reasonable in light of the express wording and the overall purposes of the Ministerial review provisions in the *Criminal Code*.

[35] Next, the Minister summarized with admirable detail the evidence adduced at trial, the trial proceedings and the appeal proceedings, including the outcome of the respondent’s application for leave in the Supreme Court of Canada.

[36] Finally, in nine pages of single-spaced reasons full of relevant detail assiduously culled from the evidentiary record, the Minister reviewed each of the fourteen grounds, showing that each was either without legal merit or did not supply “new and significant information”. Here, the Minister’s analysis was thorough and logical, grounded in the evidence and supported throughout by the text and purposes underlying the Ministerial review provisions of the *Criminal Code*, which earlier the Minister had interpreted reasonably.

[37] Overall, then, the Minister’s decision dismissing the respondent’s application for Ministerial review is reasonable.

F. Proposed disposition

[38] Therefore, for the foregoing reasons, I would allow the appeal and set aside the judgment of the Federal Court. Making the judgment the Federal Court should have made, I would dismiss the application for judicial review. The Minister does not seek costs and so I would not order any.

“David Stratas”

J.A.

“I agree
George R. Locke J.A.”

“I agree
K.A. Siobhan Monaghan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-319-20

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE SIMPSON DATED DECEMBER 3, 2020, NO. T-1420-19

STYLE OF CAUSE:	THE MINISTER OF JUSTICE v. D.V.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 22, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LOCKE J.A. MONAGHAN J.A.
DATED:	OCTOBER 26, 2022

APPEARANCES:

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