

REMEDIES FOR UNREASONABLE ADMINISTRATIVE ACTION AFTER *VAVILOV*

KATE GLOVER BERGER*

*This article comments on *Pepa v. Canada* (Citizenship and Immigration), arguing that it departs from the Supreme Court's previous guidance on remedies in an unprincipled manner. The article outlines the remedial framework established in *Canada* (Minister of Citizenship and Immigration) v. *Vavilov*, traces its development over the past five years, discusses key departures from the general rule of remittal, and highlights the principles these departures reflect. It then examines the approach to remedies adopted in *Pepa*. This assessment shows that the *Pepa* majority's invocation of the "single reasonable interpretation" exception to the general rule of remittal departs from the core *Vavilov* values of restraint, deference, justification, and respect for administrative action. In this sense, *Pepa* does not fit the pattern of principled exceptions seen in earlier cases. Rather, it is a case in which remedial practice and principles are out of alignment. As a result, while *Pepa* is a strong example of persuasive reasonableness review, its application of the law of remedies should be read with caution.*

TABLE OF CONTENTS

INTRODUCTION.....	1
I. <i>VAVILOV</i> 'S REMEDIES RULE AND DEPARTURES FROM IT	3
II. A BRIEF OF <i>PEPA V CANADA</i>	8
III. <i>PEPA</i> 'S CONTRIBUTION TO THE LAW OF REMEDIES.....	11
IV. CONCLUSION: HOW TO READ <i>PEPA</i>	14

INTRODUCTION

Pepa v. Canada (Citizenship and Immigration) marks the Supreme Court of Canada's latest contribution to the law on judicial review remedies.¹ And, specifically, it marks the Supreme Court's most recent departure from the default remedy for unreasonableness, namely remittal of the matter to the administrative decision-maker. The general rule was set in *Canada* (Minister of Citizenship and Immigration) v. *Vavilov*: Out of respect for legislative choices, unreasonable public action should usually be remedied by remitting the matter to the administrative decision-maker for reconsideration with the benefit of the court's reasoning.² Under *Vavilov*, the general rule can cede to countervailing principles and priorities, namely concerns about the sound administration of the justice system, promoting access to justice,

* Associate Professor, Osgoode Hall Law School, York University. Warm thanks to Gerard Kennedy, Mark Mancini, and Paul Daly for inviting me to participate in the *Vavilov* at 5 Conference, for which this paper was written; to all participants at the conference for their active and insightful engagement; to the editorial team at the *Alberta Law Review* for their excellence and professionalism; and to Dorsa Fardaei (JD Candidate, Osgoode Hall, 2027) for her outstanding research assistance.

¹ 2025 SCC 21 [*Pepa*].

² *Canada* (Minister of Citizenship and Immigration) v *Vavilov*, 2019 SCC 65 at para 140 [*Vavilov*].



and the imperative of timely and cost-effective decision-making.³ With these principles in mind, *Vavilov* allows for an exception to the general rule when remittal would serve no useful purpose, such as when disputed statutory language can only reasonably bear one interpretation. This is the exception invoked in *Pepa*.

Pepa arose from an interpretation of section 63(2) of the *Immigration and Refugee Protection Act*⁴ by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. Section 63(2) provides a right of appeal from an exclusion order by the Immigration Division to the IAD in certain circumstances. The IAD interpreted this provision narrowly, denying Dorinela Pepa the right to appeal an exclusion order because her permanent resident visa had expired by the time the order was issued, despite its validity when she entered Canada. The Supreme Court found this interpretation unreasonable and held that there was only one reasonable reading of the statute: that the right of appeal provided for in section 63(2) was available as long as the visa was valid at the time the person entered Canada.⁵ Having settled the jurisdiction issue, the majority set aside the decisions of the IAD, the Federal Court, and the Federal Court of Appeal, and remitted the matter to the IAD to determine Ms. Pepa's appeal on its merits.

Pepa exemplifies robust reasonableness review and underscores the burden of justification on administrative decision-makers, particularly the burden to explain and rationalize relying on certain precedents and distinguishing others. At the same time, the decision raises important questions about the relationship between principle and practice in the law of judicial review remedies. Although the majority reaffirms the established framework for remedying unreasonable administrative action, its conclusion — that the term “holds” in section 63(2) of the *IRPA* admits of only one reasonable interpretation⁶ — sits uneasily with the principle of deference to legislative choice and the high threshold for judicial declarations of a single permissible reading of a decision-maker's enabling statute. The question then becomes what to make of the tension between remedial practice and principle found in *Pepa*.

This article considers this question. It offers a case comment on *Pepa*, focusing on the decision's implications for the post-*Vavilov* jurisprudence on remedying unreasonable administrative action. Part I outlines the remedial framework established in *Vavilov* and traces how it has developed over the past five years, highlighting key departures from the general rule of remittal and the principles they reflect. Part II turns to *Pepa*, examining the facts, procedural history, and majority reasoning, with particular attention to the remedies issue.

Part III evaluates *Pepa*'s contribution to the law of remedies. Formally, the majority's reasoning adheres to the *Vavilov* framework: it states the general rule, considers whether an exception applies, and ultimately invokes the futility exception to avoid remittal. However, in substance, *Pepa* departs from the core *Vavilov* values of restraint, deference, and respect for administrative action because of the legislative choices it reflects. Accordingly, this article

³ *Ibid* at para 140, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55 [*Alberta Teachers*].

⁴ SC 2001, c 27 [*IRPA*].

⁵ *Pepa*, *supra* note 1 at para 119.

⁶ *Pepa*, *supra* note 1 at paras 97–98.

argues that *Pepa* does not fit the pattern of principled exceptions seen in earlier cases. Rather, *Pepa* is a case in which practice and principles are out of alignment. As such, the application of the law on remedies in *Pepa* should be read with caution in the ongoing development of remedial practices and principles in reasonableness review.

I. *VAVILOV*'S REMEDIES RULE AND DEPARTURES FROM IT

The remedial framework established in *Vavilov* counsels judicial restraint when crafting remedies for unreasonable administrative action. As a general rule, such decisions are to be remitted to the original decision-maker for reconsideration with the benefit of the reviewing court's reasons.⁷ This approach is rooted in respect for legislative intent and the corollary that administrative bodies, not courts, are the institutions designated to decide the merits of matters within their purview. However, under *Vavilov*, this general rule can be displaced in certain situations: where remittal would trigger an "endless merry-go-round" of reviews and reconsiderations, or where remittal would serve no useful purpose because the outcome is inevitable.⁸ Departures from the general rule can also be justified by contextual factors such as delay, fairness, urgency, the nature of the regulatory regime, the decision-maker's opportunity to consider the issue, cost implications, and efficient use of public resources.⁹

The structure of *Vavilov*'s remedial analysis sends a mixed signal. On the one hand, the general rule of remittal is intended to serve as a norm. On the other hand, the framework embeds a contextual analysis that requires courts to consider — in every case — whether the context supports departure. This structure facilitates deviation from the default remedy by making context a necessary part of the inquiry. In each case, a reviewing court must consider whether the relevant context supports or undermines remittal.¹⁰

Nonetheless, a closer reading of *Vavilov*, one that studies the framework's structure alongside its content, reveals that the majority sought to use a strong set of principles to

⁷ *Vavilov*, *supra* note 2 at paras 139–42.

⁸ *Ibid* at para 142.

⁹ *Ibid*.

¹⁰ *Ibid*. I argue elsewhere that the eras of Canadian administrative law are characterized by an ambivalence to contextual analysis: Kate Glover Berger, "Ambivalence and Context in the Eras of Administrative Law" (Paper delivered at The Supreme Court of Canada at 150 Conference, University of Ottawa, June 2025). *Vavilov* reflects this ambivalence insofar as the majority adopts different forms of contextual analysis for different issues (see generally *Vavilov*, *supra* note 2). For example, under *Vavilov*, the analysis for choosing the applicable standard of review is acontextual. There is a presumption that is rebutted if the circumstances fall into one of the available defined categories. In contrast, the reasonableness analysis established in *Vavilov* is fully contextual. The reasonableness of administrative action is assessed according to the relevant context. A final kind of contextual analysis is adopted with respect to remedies. Here, the approach is hybrid or semi-contextual. There is a general rule that applies in all cases. But this general rule can be displaced by context. This is not the only way to structure a semi-contextual analysis. A different form of semi-contextual structure is found in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. Under the *Dunsmuir* approach to standard of review, the applicable standard is identified according to precedent, categories, or a presumption. Contextual analysis is relied on only if the initial acontextual considerations are inconclusive. On this approach, contextual analysis was an understudy, called upon only if necessary. This latter structure usually offers fewer opportunities for departing from established categories and outcomes than the semi-contextual approach in *Vavilov*. This is likely especially true over time because a fuller contextual picture is considered less frequently.

entrench the general rule and its position as the expected norm. For the majority, when an administrative decision is unreasonable, “the choice of remedy must be guided by the rationale for applying that 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.”¹¹ The legislature brought the decision-maker to life — and imbued it with a purpose and powers — through legislation. Accordingly, when that administrative decision-maker acts unreasonably, the legislature’s choices are best respected by returning the matter to the decision-maker for reconsideration with the benefit of the court’s insight into the decision’s shortcomings.

However, the *Vavilov* approach permits courts to displace the general rule where the context so warrants. The majority emphasized that remittal is not invariably appropriate, and indeed, that departing from the general rule is sometimes an expression of legislative intent, particularly where remittal would obstruct timely and effective resolution of a matter in ways “no legislature could have intended.”¹² The two enumerated exceptions — futility and endless litigation cycles — represent situations in which legislative intent is presumed to favour finality and efficient use of public resources over deference.¹³ In addition, the majority in *Vavilov* affirmed that the principles and priorities relevant to choice of remedy are not exhausted by respect for the legislature’s institutional design choices. Accordingly, the general rule may be displaced to uphold broader principles: the proper administration of justice, access to justice, and the efficient functioning of the administrative system, “which often [motivate] the creation of specialized administrative tribunals in the first place.”¹⁴ These concerns ultimately set the limits for which contextual features are relevant when deciding whether to deviate from the general remedies rule. The majority held that the court’s discretion not to remit a matter may be influenced by contextual features, including “concerns for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources.”¹⁵

Since *Vavilov*, the principles, analytical framework, and high burden for invoking exceptions to the general rule of remedies have been consistently reiterated by the Supreme Court and lower courts alike.¹⁶ The doctrine has been stable and clear. And, when applying the doctrine, the jurisprudence has recognized remittal as the default remedy for unreasonable administrative action.¹⁷ Courts have repeatedly emphasized the high threshold for departing from the general rule.¹⁸ Reasonableness review, grounded in deference and respect not only for legislative choices but also for “the legitimacy and competence of administrative decision makers in their area of expertise,” requires that the discretion to depart from remittal should

¹¹ *Vavilov*, *supra* note 2 at para 140.

¹² *Ibid* at para 142.

¹³ *Ibid*.

¹⁴ *Ibid* at para 140, citing *Alberta Teachers*, *supra* note 3 at para 55.

¹⁵ *Vavilov*, *supra* note 2 at para 142.

¹⁶ See e.g. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 71, 120–22 [*Mason*]; *Dugarte de Lopez v Canada (Citizenship and Immigration)*, 2020 FC 707 at para 32 [*Dugarte de Lopez*]; *Pothier v Canada (AG)*, 2024 FC 478 at paras 85–86 [*Pothier*].

¹⁷ For discussion of this point, see e.g. *Syncrude Canada Ltd v Alberta (Energy)*, 2024 ABCA 366 [*Syncrude*]; *Canada (AG) v Impex Solutions Inc*, 2020 FCA 171 [*Impex*].

¹⁸ See e.g. *Mason*, *supra* note 16; *Dugarte de Lopez*, *supra* note 16; *Pothier*, *supra* note 16.

be “exercised carefully, with prudence and parsimony.”¹⁹ As the Federal Court has warned, it would be “ironic” if the remedy associated with deference was used to reallocate “[administrative] decision makers’ powers to the courts of justice responsible for their supervision.”²⁰ Departures must therefore reflect judicial restraint and humility,²¹ and should be “rare,”²² “limited,”²³ and “exception[al].”²⁴

Despite this stated doctrinal clarity and the high standard, departures from remittal have not been uncommon. At the Supreme Court level, several cases that turned on statutory interpretation have led to departures on the basis that remittal would serve no useful purpose. *Vavilov* itself is one such case. The Supreme Court found the Registrar of Citizenship had unreasonably interpreted section 3(2) of the *Citizenship Act*,²⁵ but the majority declined to remit the matter because the only reasonable outcome was that Mr. Vavilov was a citizen under section 3(1)(a).²⁶ Thus, remittal “would serve no purpose.”²⁷ While the majority did not definitively interpret section 3(2) as a whole, it held that the Registrar had already had an opportunity to consider all the relevant arguments and evidence but failed to do so, and that there was “overwhelming support” for the conclusion that Parliament did not intend for section 3(2) to apply to children of people who do not have diplomatic immunity.²⁸ Because Mr. Vavilov’s parents had not been granted such immunities, section 3(2) could not apply to him. As this was the sole issue at stake in the case, nothing would be gained by returning the matter to the Registrar. Rather, the Supreme Court declared that because section 3(2) did not apply, Mr. Vavilov was a Canadian citizen under the *Citizenship Act*’s general rule in section 3(1)(a).²⁹

In considering Mr. Vavilov’s case, the majority acknowledged that during reasonableness review it may become apparent that a statutory provision permits only one reasonable interpretation. They explained that, in the course of reasonableness review, “it may sometimes become clear ... 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.”³⁰ In such cases, remittal would be futile. Nevertheless, the majority urged caution: even where a clear answer emerges, courts should “generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.”³¹ While the definitive pronouncement might reflect concerns about access to justice and efficient use of resources, the pause reflects the overriding principle of respect for the

¹⁹ *Dugarte de Lopez*, *supra* note 16 at para 32. See also *Quele v Canada (Citizenship and Immigration)*, 2022 FC 108 at para 34 [*Quele*]; *Pothier*, *supra* note 16 at para 86.

²⁰ *Quele*, *supra* note 19 at para 34.

²¹ *Pothier*, *supra* note 16 at para 85.

²² *Quele*, *supra* note 19 at para 34. *Pothier*, *supra* note 16 at para 86.

²³ *Vavilov*, *supra* note 2 at para 142.

²⁴ *Pothier*, *supra* note 16 at para 86.

²⁵ RSC 1985, c C-29 [*Citizenship Act*].

²⁶ *Vavilov*, *supra* note 2 at para 194–95.

²⁷ *Ibid* at para 196.

²⁸ *Ibid* at para 195.

²⁹ *Ibid* at para 196; *Citizenship Act*, *supra* note 25, s 3(1)(a).

³⁰ *Vavilov*, *supra* note 2 at para 124.

³¹ *Ibid*.

legislature. Achieving this balance — between efficiency, finality, and institutional deference — is central to *Vavilov*'s remedial logic.

Subsequent decisions such as *Mason*, the Mandate Letters decision,³² and *Pepa* reflect similar reasoning. In each, the Supreme Court found the administrative interpretation of statutory language to be unreasonable and declined to remit the matter because reasonableness review had revealed that a particular interpretation was “inevitable” or flowed “inexorably from the legal and factual constraints,”³³ such that remittal “would serve no useful purpose.”³⁴ These decisions, like *Vavilov*, combine concern for efficient resolution of matters involving unreasonable state action with recognition of the importance not to step into the legislative or administrative domain.

In other cases involving unreasonable or incorrect administrative action that does not turn on statutory interpretation, the Supreme Court has also resisted the general rule. In *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)* and *York Region District School Board v. Elementary Teachers' Federation of Ontario*,³⁵ remittal was declined due to mootness, further illustrating how futility continues to play a central role in shaping remedial outcomes for the Supreme Court after *Vavilov*. In the lower courts, futility is also frequently cited to justify departing from the general rule of remittal,³⁶ though it is acknowledged to be a ground that should be relied upon only in the “clearest of circumstances.”³⁷ Indeed, in the five years since *Vavilov*, the Supreme Court has remitted matters to a decision-maker only once after a finding of unreasonableness.³⁸

Significantly, lower courts have also developed a body of post-*Vavilov* case law in which departures from the general rule are justified not solely on futility grounds but based on contextual factors.³⁹ In these cases, courts cite the non-exhaustive list of contextual features set out in *Vavilov* — in particular, delay, whether the decision-maker had the opportunity to weigh in on the issue, fairness to the parties, and resource efficiency — to justify remedies

³² *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

³³ *Pepa*, *supra* note 1 at para 125.

³⁴ *Mason*, *supra* note 16 at para 120, citing *Vavilov*, *supra* note 2 at paras 124, 142.

³⁵ 2023 SCC 31; 2024 SCC 22.

³⁶ See e.g. *Pringle v Peace River (Regional District)*, 2024 BCCA 322 at paras 45–48; *Maasanen v Furtado*, 2023 BCCA 193 [Maasanen]; *Dowling v Heitner*, 2024 BCSC 2139 [Dowling]; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 102 [Entertainment Software Association]; *Tesfaye v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 2040 [Tesfaye]; *Manitoba Government and General Employees' Union v The Minister of Finance for the Government*, 2021 MBCA 36 at paras 102–09; *Alexis v Alberta (Environment and Parks)*, 2020 ABCA 188 at paras 77–78; *Canadian Blood Services v Saskatchewan Union of Nurses, Local 98*, 2022 SKQB 19 at paras 64–69; *South East Cornerstone School Division No 209 v Oberg*, 2021 SKCA 28 at paras 139–41; *Canada (AG) v Pettinger*, 2023 FCA 51 at paras 13–14; *Canada (AG) v Burke*, 2022 FCA 44 at para 117 [Burke]; *Canada (AG) v Chu*, 2022 FCA 105; *Farrier v Canada (AG)*, 2020 FCA 25 at para 31.

³⁷ *Impex*, *supra* note 17 at paras 90–92.

³⁸ *Yatar v TD Meloche Monnex*, 2024 SCC 8 [Yatar].

³⁹ See e.g. *Maasanen*, *supra* note 36; *Dowling*, *supra* note 36; *Blue v Canada (AG)*, 2021 FCA 211 [Blue]; *Key First Nation v Lavallee*, 2021 FCA 123 [Key First Nation]; *Entertainment Software Association, supra* note 36; *Public Service Pension Plan Corporation v Boyles*, 2023 NLCA 10 [PSPPC]; *Tesfaye*, *supra* note 36; *L'hirondelle v Alberta (Director of Saferoads)*, 2024 ABKB 543 [L'hirondelle].

other than remittal.⁴⁰ Importantly, these cases have also added to the list of contextual features that can justify departing from the general rule. Whereas the relevant features listed in *Vavilov* are primarily institution- and system-centric, the post-*Vavilov* case law highlights the relevance of concerns related to an affected party's individual circumstances and experience when it comes to choice of remedy. This line of cases has focused on individual-specific circumstances, such as age, physical and mental health status, the benefit being applied for, the experience of the affected party in the administrative process, and the importance of the decision to the affected party, as relevant to determining whether remittal is appropriate.⁴¹ This shift signals an evolution in the contextual analysis envisioned by *Vavilov*, with the cases increasingly acknowledging that judicial review is not merely an exercise in managing institutional power dynamics but also — and necessarily — a site of addressing the individual impact of administrative harm.

While not exhaustive, this survey illustrates that remedial practice post-*Vavilov* is more varied than the doctrinal framework might suggest. This account of the law raises some skepticism about whether reviewing courts' remedial practices are fully in line with *Vavilov*'s guidance to deviate from remittal only in "rare" or "exceptional" cases of unreasonableness. Remittal remains the default remedy, with the original decision-maker then benefiting from the court's reasonableness analysis and any direct guidance the reviewing court provides to the decision-maker.⁴² But courts decline to remit in a variety of circumstances that are difficult to describe as "limited" or "exceptional."

In turn, examining the remedial practices of reviewing courts suggests that a principle not expressly articulated in *Vavilov* could be at play in decisions about how to respond to unreasonable administrative action. Namely, that individualized circumstances are a necessary — and powerful — consideration in the choice of remedy for unreasonableness. The practice of remedying unreasonableness has surfaced a principle of remedial decision-making that is seemingly implicit in *Vavilov*. *Vavilov* focused on principles engaging with the institutional and systemic dimensions of decisions about remedies, principles about constitutional roles, and preserving the integrity of the justice system. However, application of *Vavilov*'s remedial framework has revealed a principle concerned with justice at the level of the individual case. This affirms what is already expressed in the very structure of *Vavilov*'s contextual analysis: that the particular context of each case must be considered when choosing a remedy. Indeed, the rule of law demands such context-sensitivity and flexibility. In a complex and diverse administrative state, a one-size-fits-all remedy for all unreasonable decisions would be ill-suited to the range of harms — both systemic and individual — that can arise from unreasonable state action.

It was against this jurisprudential backdrop that *Pepa* came to the Supreme Court, the case to which this paper now turns.

⁴⁰ See e.g. *Sibbald v Canada (AG)*, 2022 FCA 157; *PSPPC*, *supra* note 39; *L'hirondelle*, *supra* note 39; *Burke*, *supra* note 36 at para 116; *Blue*, *supra* note 39 at para 51; *Key First Nation*, *supra* note 39 at para 76.

⁴¹ See e.g. *Burke*, *supra* note 36; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1643 at para 38; *PSPPC*, *supra* note 39; *Key First Nation*, *supra* note 39 at para 76.

⁴² *Sexsmith v Canada (AG)*, 2021 FCA 111; *Safe Food Matters Inc v Canada (AG)*, 2022 FCA 19.

II. A BRIEF OF *PEPA V. CANADA*

The central issue in *Pepa* was the interpretation of section 63(2) of the *IRPA*, which provides a right of appeal against a removal order to a “foreign national who holds a permanent resident visa.”⁴³ The dispute concerned when the visa must be held in order to trigger this right.

Dorinela Pepa arrived in Canada in 2018 with her father. They both held permanent resident visas. Upon arrival, Ms. Pepa disclosed, to the surprise of her father, that she had recently married, a change in status that disqualified her from permanent residency as a dependent child. She was admitted for further examination, but her admissibility hearing did not occur until after her visa expired. A removal order was issued, barring her from Canada for five years.⁴⁴

Ms. Pepa appealed. The IAD held that it lacked jurisdiction to hear the appeal because Ms. Pepa’s visa had expired by the time the removal order was issued. Accordingly, she was not a foreign national holding a valid permanent resident visa at the relevant time. The IAD also dismissed the argument that the time between Ms. Pepa’s admission to Canada and the exclusion order amounted to an abuse of process. In the IAD’s opinion, there was no evidence to conclude that Ms. Pepa’s experience was “outside the normal time for processing such matters.”⁴⁵

Ms. Pepa was unsuccessful on judicial review at the Federal Court and again on appeal to the Federal Court of Appeal. But a majority of the Supreme Court sharply disagreed with the courts below. Writing for the majority, Justice Martin applied the standard of reasonableness and concluded that the IAD’s interpretation of its jurisdiction under section 63(2) was unreasonable and must be set aside.⁴⁶

The majority concluded that the IAD’s decision was unreasonable on three grounds: in its use of precedent; in light of the principles of statutory interpretation; and in its impact on Ms. Pepa. With respect to precedent, Justice Martin observed that the IAD based its interpretation of section 63(2) on past cases rather than engaging directly with the statutory text, context, and purpose. The IAD treated these precedents as dispositive, without acknowledging that the cases in question were distinguishable either because they addressed different statutory provisions or arose from materially different factual circumstances. The IAD’s failure to confront these differences or to justify its reliance on the precedents rendered its approach unreasonable.⁴⁷

On the second point, Justice Martin affirmed that administrative decision-makers are not required to engage in comprehensive statutory interpretation in every case. However, she explained, they must do so where the proposed interpretation is “clearly incongruous with a statutory provision’s text, context, or purpose.”⁴⁸ Indeed, the decision-maker’s failure to

⁴³ *IRPA*, *supra* note 4, s 63(2).

⁴⁴ *Pepa*, *supra* note 1 at paras 16–21.

⁴⁵ *Ibid* at para 27, citing *Pepa v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 145325 at para 25 (CAIRB).

⁴⁶ *Pepa*, *supra* note 1 at paras 28–34, 132.

⁴⁷ *Ibid* at paras 66–85.

⁴⁸ *Ibid* at para 86, citing *Vavilov*, *supra* note 2 at para 122.

engage with these interpretive elements “would be indefensible, and unreasonable in the circumstances.”⁴⁹ Justice Martin held that, in Ms. Pepa’s case, had the IAD sought to interpret section 63(2) according to the principles of statutory interpretation, it would have necessarily arrived at a different result, specifically “a reading of s. 63(2) which did not support absurd, arbitrary, and potentially unfair consequences.”⁵⁰ The majority was particularly moved by the harsh consequences of the IAD’s interpretation.⁵¹ On the IAD’s reasoning, a foreign national could lose their right to appeal before a decision on admissibility is made, indeed, before an initial hearing on the issue even begins, as was the case for Ms. Pepa. The majority found it unreasonable to conclude that Parliament intended to deprive individuals of statutory appeal rights in such an absurd and arbitrary result.⁵² Finally, Justice Martin concluded that the IAD’s interpretation was unreasonable given the broader statutory and soft law context of section 63(2). In other circumstances, the *IRPA* allows for permanent resident status to be granted to individuals with expired visas, provided that the visa had not expired at the time the person arrived in Canada.⁵³ The IAD failed to situate section 63(2) within this broader context, further underscoring the unreasonableness of its decision.

Turning to the third ground, Justice Martin addressed the personal impact of the decision on Ms. Pepa. Citing *Vavilov*, she reiterated that where an administrative decision has particularly severe or harsh consequences, the decision-maker must explain how its interpretation best aligns with legislative intent.⁵⁴ A failure to do so raises possible concerns about arbitrariness that “may well be unreasonable.”⁵⁵ In this case, the IAD failed to address the “significant” and “severe” impact of its decision on Ms. Pepa, given her personal and family circumstances in Albania and Canada.⁵⁶ Nor did it attempt to justify this impact on principled or practical grounds. Rather, the reasons were silent as to how the chosen interpretation reflected Parliament’s intent.

Having concluded that the IAD’s interpretation was untenable in light of the operative constraints, the majority turned to the issue of remedy. Reiterating all the relevant rules and principles from *Vavilov*, Justice Martin declined to remit the statutory interpretation issue to the IAD.⁵⁷ She invoked the exception authorized in *Vavilov*, whereby a reviewing court may pronounce the only reasonable interpretation of a statutory provision if it is clear that no other interpretations could be sustained.⁵⁸ For the majority, it was not surprising that reasonableness review could reveal that disputed statutory language has only one reasonable meaning both because of the robust nature of reasonableness review and because “when legislatures speak, they intend to speak with clarity and purpose.”⁵⁹ Justice Martin noted the high threshold for invoking this exception: the single interpretation should be impossible to avoid. And she observed that it is most likely in cases in which “the question of interpretation is narrow, the

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at para 88.

⁵¹ *Ibid* at para 99.

⁵² *Ibid.*

⁵³ *Ibid* at paras 107–13.

⁵⁴ *Ibid* at para 119.

⁵⁵ *Ibid* at paras 116, citing *Vavilov*, *supra* note 2 at para 134.

⁵⁶ *Pepa*, *supra* note 1 at paras 118–19.

⁵⁷ *Ibid* at paras 121, 125.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at para 125.

statutory language is highly precise, and there are functionally very few options to choose from.”⁶⁰

Justice Martin concluded that this high threshold was satisfied in the present case. The only reasonable interpretation of section 63(2), in her view, is that a person must hold a valid permanent resident visa at the time of arrival in Canada to benefit from the statutory right of appeal against a removal order. This interpretation, unlike the IAD’s interpretation, avoids absurd outcomes, such as the loss of an appeal right due to administrative delays occurring after entry into Canada through no fault of the visa holder. Accordingly, on the IAD’s interpretation an individual could comply with all legal requirements — arriving in Canada on time and cooperating with the process — yet still be denied an appeal due to the natural timeline of examination procedures. The majority found that such outcomes would undermine both the purpose of the visa system and the integrity of the right to appeal. As a result, the IAD’s decision was unreasonable and could not stand. The merits of Ms. Pepa’s appeal of the exclusion order were remitted to the IAD for determination, with her right of appeal affirmed.

Justice Rowe, dissenting in part, agreed that the IAD’s interpretation of section 63(2) was unreasonable but he disagreed, strongly, on remedy. In his view, *Vavilov* entails that a reviewing court can conclude that disputed statutory language has one reasonable interpretation only in exceptional circumstances. Failing to respect this high threshold risks converting reasonableness review into disguised correctness review and jeopardizes the prevailing design of judicial review established in *Vavilov*:

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.”

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*.⁶¹

Applying this approach to Ms. Pepa’s appeal, Justice Rowe concluded that the statutory interpretation issue should be remitted to the IAD for reconsideration in light of the Supreme Court’s reasons. He argued that the majority had gone too far when it concluded that only one interpretation — the majority’s interpretation — avoided absurd or arbitrary consequences. He expressed concern that the majority’s interpretation could have unintended consequences elsewhere in the legislative scheme that the Supreme Court “cannot contemplate,” particularly in light of other provisions of the *IRPA* that refer to “holding,” or being a “holder” of, a visa.⁶² On this basis, the IAD, who is immersed in the granular details of administering the *IRPA*, was much better placed to interpret section 63(2) than the Supreme Court. Accordingly, Justice Rowe would have allowed the appeal, set aside the decisions of the

⁶⁰ *Ibid.*

⁶¹ *Ibid* at paras 147–48 [citations omitted].

⁶² *Ibid* at paras 152, 151.

decision-makers below, and remitted the matter to the IAD for redetermination of the jurisdiction issue.

In the dissenting reasons, Justices Côté and O'Bonsawin held that the IAD reasonably interpreted section 63(2) of the *IRPA*. They concluded that the IAD's interpretation was justified in light of precedent (at both the judicial and administrative level), the broader statutory scheme, and the accepted principles of statutory interpretation.⁶³ In their view, the "relevant legal constraints" did "not point overwhelmingly to a single reasonable interpretation of s. 63(2)."⁶⁴ They cautioned that a reviewing court's discretion to announce the only reasonable interpretation of a statute "should only be exercised in the clearest of cases."⁶⁵ Any alternative, they wrote, "runs counter to the guiding principles animating *Vavilov*," and in particular, the institutional roles of the legislature and the administrative state.⁶⁶ For Justices Côté and O'Bonsawin, the IAD was "the administrative decision maker entrusted by the legislature to interpret its governing statutory scheme" and so it "is best positioned to resolve the interpretative question."⁶⁷

Given the history of administrative law cases at the Supreme Court, *Pepa* stands out because the most significant jurisprudential divide at stake in the case concerns not the standard of review, but rather the proper remedial response to unreasonable administrative action. That said, *Pepa* also reveals that even when the site of the divide shifts from standard of review to remedies, the issues at stake remain constant. While the majority concluded that under *Vavilov*, it was justified in pronouncing the only reasonable interpretation of section 63(2). But in this case, the dissenting judges expressed serious concern about judicial overreach. For Justice Martin, the unreasonableness of the IAD's decision, coupled with the narrowness and clarity of the interpretive issue, justified the Supreme Court in substituting its own interpretation of section 63(2). By contrast, for Justices Rowe, Côté, and O'Bonsawin, the majority's remedial approach blurred the distinction between review and substitution, between reasonableness and correctness review, thereby undermining the respect owed to the legislatures and the consequent deference owed to administrative decision-makers under *Vavilov*. These are enduring tensions at the Supreme Court and *Pepa* dispels any myth that *Vavilov* resolved the Supreme Court's ongoing effort to define the proper relationship between courts, the legislature, and the administrative state. The site of the effort might shift, but the tension remains.

III. *PEPA'S* CONTRIBUTION TO THE LAW OF REMEDIES

Vavilov established a framework for determining the appropriate remedy following a finding of unreasonable administrative action. That framework reflects a set of sometimes competing principles that are not always reconcilable in any particular case: respect for legislative intent, access to justice, the sound administration of justice, and efficient and expeditious decision-making. Of these, respect for legislative design is foundational. It entails

⁶³ *Ibid* at para 158.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at para 216.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at para 158. See also *ibid* at para 217.

that the default remedy for unreasonable state action is remittal to the decision-maker and that the burden for departing from the general rule is high.

However, a line of post-*Vavilov* cases reveals another animating principle — one not expressly articulated in *Vavilov* but which is nonetheless inherent in the structure of the *Vavilov* remedial framework and has been guiding judges' remedial choices in practice: a context-sensitive understanding of the rule of law. These cases demonstrate that, in practice, it is not rare for circumstances to overwhelm the general rule of remittal. The contextual features that define the world into which a remedy is set are relevant to choosing between the available remedial options, and the contextual analysis is concerned with features of the institutional, systemic, and individual domains involved. The rule of law requires that these features be taken into account because a uniform rule cannot adequately serve a legal system as varied as Canada's administrative landscape.

This principle has not arisen spontaneously. It is built into the structure of the remedies analysis set out in *Vavilov*, and then it comes to life — and thus to light — through reviewing courts' practices in response to unreasonable administrative action. This line of post-*Vavilov* cases thus enriches understandings of the principles and aspirations underlying the remedies analysis. That is, when courts apply *Vavilov*'s principles and frameworks, they reveal that context always matters when determining how best to remedy unreasonable administrative action.

Pepa is the Supreme Court of Canada's most recent contribution to the list of departures from *Vavilov*'s general rule, and so it is worth exploring its place in, or impact on, the law governing a judge's decision not to remit. Two features of *Pepa* merit closer attention.

First, the majority in *Pepa* follows the formal structure of the *Vavilov* framework. After finding the IAD's decision unreasonable, the majority identifies the applicable principles and rules,⁶⁸ acknowledges the high bar for displacing the default remedy, and considers whether the circumstances fall within an established exception.⁶⁹ The majority ultimately declines to remit the matter, concluding that remittal would serve no useful purpose because the statute at issue — section 63(2) of *IRPA* — admits of only one reasonable interpretation. In form, then, *Pepa* is consistent with and an endorsement of the existing law. The concern with *Pepa* is not its account of the doctrine but rather its application of that doctrine, which is the second point of note.

Second, *Pepa*'s application of the remedial doctrine does not sit comfortably with *Vavilov*'s underlying principles. Although the *Pepa* majority relies on a recognized exception — futility — it does so without satisfying the exceptionally high threshold that applies when the “sole reasonable interpretation” rationale is invoked. This exception demands more than plausibility or coherence; it requires that the court's conclusion flow “logically and inexorably” from the constraints identified during the reasonableness review itself.⁷⁰ It is precisely because respect for legislative choice is so central to *Vavilov* that the

⁶⁸ *Ibid* at paras 121–25.

⁶⁹ *Ibid* at paras 121–31.

⁷⁰ *Ibid* at para 125.

presumption in favour of remittal is so strong. Remittal best respects the legislature's choice to entrust a matter to an actor within the administrative state.

Vavilov recognizes that the choice of remedy can engage other principles that legitimately overwhelm respect for legislative choice, principles such as access to justice, efficient and expeditious decision-making, the administration of justice, and a context-sensitive understanding of the rule of law. In many cases, departing from remittal is not particularly threatening to the *Vavilov* universe because when the circumstances of a specific case overcome the pressure of remittal, the consequences of the case are often contained to that particular case or to the specific configuration of contextual features involved.

But when a court determines the only reasonable interpretation of an administrative actor's enabling statute, its pronouncement has consequences far beyond the particular case involved. Such interpretations constrain the future exercise of delegated authority, potentially undermining legislative intent and administrative expertise. A trend of judicial interpretation of administrative actors' enabling statutes destabilizes a structural beam of the *Vavilov* architecture because it enhances judicial authority at the expense of legislative choice, administrative input, and promoting a culture of justification in the administrative sector. For this reason, *Vavilov*, *Mason*, and now *Pepa* caution against prematurely declaring a single reasonable interpretation. The "pause" urged in *Vavilov* is an expression of judicial restraint and respect for the legislative scheme, particularly when statutory interpretation is at issue.⁷¹ This pause represents an amplified degree of judicial restraint and humility that is layered onto the remedial assessment when issues of statutory interpretation are involved. These special considerations are also reflected in the high standards that must be met for a judge to determine the one statutory meaning, rather than remit the interpretation issue to the original decision-maker. These standards require that the interpretation be impossible to avoid, the support for the single interpretation must be overwhelming, and the conclusion must constitute the clearest of possible cases.

It is not obvious that the interpretation of section 63(2) in *Pepa* meets these thresholds. The majority rests its conclusion on perceived absurdities in alternative readings of section 63(2), specifically those that would link the appeal right to a visa's validity at any time other than the applicant's arrival in Canada. But this issue was not fully resolved through the majority's process of reasonableness review. This makes sense. The Supreme Court's role during that review was to assess whether the IAD had adequately justified its interpretation — not to exhaustively evaluate all plausible alternatives. The majority instead had to consider the plausibility of other possibilities in the remedies analysis, after unreasonableness had already been identified. Accordingly, the majority's analysis did not amount to a case in which the reasonableness review overwhelmingly supported the conclusion that only one interpretation was reasonable. The majority reached the conclusion that there was only one reasonable interpretation after it had already found the IAD decision to be unreasonable and the majority had moved on to the issue of remedy. This analysis therefore did not establish that the high threshold for the exception had been met and the Supreme Court only reached

⁷¹ *Vavilov*, *supra* note 2 at para 124.

the conclusion of one reasonable interpretation after what was effectively correctness review.⁷²

Moreover, the majority did not grapple with whether its own preferred interpretation might generate other absurdities — such as excluding individuals whose visas expired *en route* to Canada due to events beyond their control, or interpreting “hold” in a way that would create arbitrary or absurd consequences for other iterations of “hold” in the *IRPA*.⁷³ Nor did the Supreme Court consider whether other temporal markers might provide a more appropriate basis for triggering the appeal right. These questions would have been best addressed by the IAD, which could bring its expertise and experience with the *IRPA* to bear on the interpretation of section 63(2), along with the insights of the Supreme Court’s guidance. In short, the majority’s decision to resolve the interpretive question itself, rather than remit it, lacks the foundation required by *Vavilov*’s highest threshold for non-remittal.

Ultimately, the majority’s analysis of remedy in *Pepa* does not reflect either the judicial restraint or respect for legislative intent called for in *Vavilov* or in the discussion of the doctrine in *Pepa* itself. The majority’s refusal to remit may reflect a prioritization of efficiency — an accepted goal in judicial review. But efficiency alone cannot justify lowering the high bar that attaches to definitive statutory interpretation. If the threshold for invoking futility is eroded, particularly in routine cases of statutory interpretation, the risk is that courts will increasingly substitute their views for those of administrative decision-makers, undermining the foundational principle of deference that *Vavilov* seeks to preserve and the culture of justification it seeks to promote.⁷⁴ Further, if efficiency motivated the majority, it did so in a seemingly ordinary case of statutory interpretation in which the administrative actor involved would have had much to offer in the exercise of interpretation, especially with the benefit of the Supreme Court’s reasons as to the shortcomings of their first attempt.

The result is that *Pepa* cannot be comfortably situated within the jurisprudential trend identified in Part I. It is not a case in which courts refine or develop *Vavilov*’s principles by engaging deeply with contextual concerns. Nor is it a case in which the rule of law’s commitment to individualized justice clearly justifies a departure from the default remedy. Further, *Pepa* is not a case in which judicial practice advances the law’s understanding of the principles at stake in, and most relevant to, remedying unreasonable state action. Instead, *Pepa* seems to represent a disjunction between principle and practice. The majority declined to remit — but, by *Vavilov*’s own standards, it likely should have.

IV. CONCLUSION: HOW TO READ *PEPA*

The remedial framework set out in *Vavilov* affirms that respect for legislative intent is the cornerstone of judicial review remedies, with remittal to the decision-maker as the

⁷² On the majority’s slip into correctness review, see Paul Daly, “A *Pepa* Talk on Reasonableness Review and Remedies: *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21,” (27 June 2025), online (blog): [perma.cc/K735-W4WM].

⁷³ See *Pepa*, *supra* note 1 at paras 151–52. On the application of the absurdity doctrine in *Pepa*, see Mark P Mancini, “*Telus v FCM: Taming the Absurdity Doctrine in Statutory Interpretation*” (2025) Can J Admin L & Prac [forthcoming in Fall 2025].

⁷⁴ On the culture of justification, see *Vavilov*, *supra* note 2; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC). For deeper theoretical engagement see, David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279.

presumptive remedy for unreasonable administrative action. This framework is not rigid; it is animated by a set of often-agonistic principles — access to justice, efficient resolution of disputes, maintenance of public confidence in administration of the justice system, and a context-sensitive understanding of the rule of law. In practice, courts have drawn on these principles to justify departures from the general rule, recognizing that remedies must be tailored to the specific institutional, systemic, and individual contexts in which they arise. In this way, the post-*Vavilov* jurisprudence has surfaced the flexibility implicit in the architecture of *Vavilov*'s approach to remedies as a feature — not a flaw — of the remedial analysis.

The Supreme Court's recent decision in *Pepa* sits uncomfortably with this evolving jurisprudence. The majority's refusal to remit an issue of statutory interpretation to the IAD — despite the absence of overwhelming support for a single reasonable interpretation — is curious. It appears to weaken the high threshold that *Vavilov*, *Mason*, and *Pepa* itself insist must be met before courts substitute their own interpretation for that of the administrative decision-maker. In doing so, the Supreme Court risks tipping the balance of judicial review away from legislative design and administrative authority and toward judicial finality and expediency. But *Pepa* does not represent a principled departure justified by contextual urgency. Rather, it illustrates a case in which application of the law of remedies sits at odds with the principles presented as defining. Accordingly, while *Pepa* serves as a strong example of persuasive reasonableness review, its application of the law of remedies should be read with caution.