THE LAWYER'S DAILY

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Family

Importance of Vavilov to family law mediation/arbitration process: Further signficance

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(March 23, 2020, 1:23 PM EDT) -- *Vavilov* will have a significant effect on the family law mediation/arbitration process as the majority has raised the bar for the requirements in reasoning of the arbitrator. Although the majority discusses these requirements within the context of the scope of a "reasonableness review", it explicitly states that "administrative decision-makers must adopt a culture of justification." Thus, the heightened threshold established in *Vavilov* will likely apply to all arbitral reasoning.

The majority in *Vavilov* suggests that reasons which will meet this new standard:

- Will be based on reasoning that is both rational and logical;
- The conclusion reached will follow from the analysis undertaken;
- Will not simply repeat statutory language, summarize arguments made and then state a peremptory conclusion;
- Will not fail to reveal a rational chain of analysis or reveal that the decision was based on an irrational chain of analysis;
- Will not exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise;
- The reasons read in conjunction with the record will make it possible to understand the decision maker's reasoning on a critical point; and
- The reviewing court will be satisfied that the decision maker's reasoning "adds up."

Further, a decision must be justified in light of the "legal and factual constraints" that bear on the decision, including:

- The governing statutory scheme;
- Other relevant statutory or common law;
- The principles of statutory interpretation;
- The evidence before the decision maker and facts of which the decision maker may take notice;
- The submissions of the parties;
- The past practices and decisions of the administrative body; and
- The potential impact of the decision on the individual to whom it applies.

The leading scholar Paul Daly has stated: "Plainly, these are intended as examples which illustrate a general point — the absence of logic and reason — and not as a set of categories into which dubious administrative decisions can be pigeonholed by reviewing courts (though, I am sure, this will be a tempting course of action for lower courts, urged upon them by clever counsel)."

The minority in *Vavilov* suggests that, notwithstanding the protestations of the majority, these factors will be used as a checklist that will be used by a reviewing court in a "line-by-line treasure hunt for error."

Of further specific relevance to the family law med/arb process, the majority emphasizes that the need for clear, logical reasoning is heightened in cases where there is vulnerability, which suggests a heightened threshold in an arbitrator's reasoning in matters of custody and parenting, for example.

Thus *Vavilov*, by creating a new "culture of justification" within which lens arbitration awards will now be viewed, has raised the bar for the reasoning of the arbitrator in the family law med/arb process.

Even though discussed within the context of a reasonableness review, as noted, it seems likely that these new requirements will set a higher threshold of requirements regarding an arbitrator's reasoning in an appellate review context as well. Failure to meet this new bar will no doubt give rise to arguments that the arbitrator is in error on appeal.

This seems even more likely in view of the majority's observation that "reasons shield against arbitrariness" and the purpose of reasons is to demonstrate "justification, transparency and intelligibility."

Vavilov may also have the effect of returning us to three possible standards of review if an appeal of an arbitrator's award is combined with an application for judicial review for manifest unfairness or on the grounds that natural justice was otherwise denied. *Vavilov* clearly distinguishes between the remedies of a statutory right of appeal and judicial review, and further states that the default position of judicial review from an administrative decision maker is "robust reasonableness."

The logical conclusion is that a conjoined appeal and judicial review from a family law arbitration award can potentially have three standards of review:

1. In an appeal, the correctness standard for questions of law;
2. In an appeal, the palpable and overriding error standard for questions of fact or mixed fact and law, and
3. In a judicial review for manifest unfairness or breach of natural justice, the "robust reasonableness" standard.

The "recalibrations" introduced by *Vavilov* to the administrative law will thus have substantive implications for the family law med/arb process.

This is part two of a two-part series. Part one: Importance of Vavilov to family law mediation/arbitration process.

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