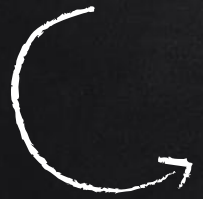
Canadian immigration and refugee law



Year in review

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Ottawa Immigration Confernence – May, 2017

SUPREME COURT OF CANADA

Standard of Review

"Frankly, I think watching paint dry has been given a bad press."

Wilson v. Atomic Energy, 2016 SCC 29
Edmonton (City) v. Capilano, 2016 SCC 47

- ✘ Cases reveal discord at the SCC on basic principles of standard of review, such as when to apply the correctness standard and more profoundly whether there should be a correctness standard.

- ✘ Disagreement on use of correctness standard where:

  - ➢ There is pervasive inconsistency in the established jurisprudence
  - ➢ Existence and impact of jurisdictional questions
  - ➢ Role of statutory appeals in SofR analysis

The most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness…Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have. I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it…

Wilson v. Atomic Energy, 2016 SCC 29
Edmonton (City) v. Capilano, 2016 SCC 47

- **Why is this important?**

  - As SCC shifts toward greater deference and as this shift slowly takes hold in the lower courts, arguments should be tailored accordingly

  - Emphasize natural justice angles

  - Specifically tailor arguments to reveal why a decision is not transparent, justified and intelligible

Applying the Reasonableness Standard

Jakutavicius v. Canada (A.G.), 2011 FC 311

- ✘ What, precisely, do justification, transparency and intelligibility mean?

  - ➢ Justification requires a decision maker to focus on relevant factors and evidence.

  - ➢ Transparency requires a decision maker to clearly state the basis for the decision reached.

  - ➢ Intelligibility requires a decision maker to reach a result that clearly follows from the reasons provided.

SCC Decisions – Pending and Scheduled

- ✘ *Tran*, 2016 CanLII 20455 – Conditional sentences and immigration appeals
- ✘ *Wong*, 2017 CanLII 16824 (S.C.C.) – Competency of defence counsel in criminal matters involving non-citizens
- ✘ *Majebi*, SCC Docket No. 37437

Federal COURT OF appeal

Atawnah v. Canada (MPSEP), 2016 FCA 144

Constitutionality of the DCO 36 month PRRA Bar

- ✘ The supervisory role of the Federal Court, together with the ability of the Minister to exempt an applicant from the application of the PRRA bar (set out at A112(b)(2.1)), act as "safety valves" such that the PRRA bar is not overbroad, arbitrary or grossly disproportionate and therefore contrary to s.7 of the Charter.

- ✘ SCC Denied Leave: 2016 CanLII 82912

Siddiqui, 2016 FCA 134

"Refugee protection" is conferred on resettled refugees and, as such, they are subject to the same cessation considerations as those found to be Convention refugees in Canada

Tretsetsang, 2016 FCA 175

- ✘ "Country of nationality" for the purposes of refugee determination includes a country where the claimant is a citizen and may face only an "insignificant or minor impediment to accessing state protection"
- ✘ It may not include a country where the claimant is a citizen and faces a significant impediment, such as the need to resort to litigation, to accessing state protection from that country.
- ✘ SCC Denied Leave: 2017 CanLII 4176

Mudrak v. Canada (MCI), 2016 FCA 178

- ✘ Appeal of wide-ranging lower court decision on the perceived divergence of views at the Federal Court on the issue of state protection

I. Appeal dismissed as the applications judge should not have certified questions of general importance

II. The suggestion of the applications judge that some FC decisions might be interpreted as imposing an onus on the Board to demonstrate "operational adequacy" of state protection is wrong (at para.31):

With respect, the inference that the onus shifts on the Board to demonstrate "operational adequacy" of protection measures is wrong. The cases cited by the Judge do not stand for that principle. Simply put, these cases determined that the Board's decisions could not stand because they ignored relevant evidence or because the syllogism was flawed, which were legitimate grounds to intervene.

Canada (MCI) v. Young, 2016 FCA 183

- ✘ Appeal concerning citizenship applications for adopted children

- ❖ There are basic conceptual differences between "marriages of convenience" and "adoptions of convenience"

"An infant cannot go, or be sent, on its way once it has been granted citizenship. It requires care and nurturing. If an adoptive parent undertakes to provide that care and nurturing, it is difficult to see how the adoption could be said to be an adoption of convenience."

- ❖ While the best interests of the adopted child must be considered, the central question for the visa officer is not whether the child will be better served by staying in the natural mother's home. The question, rather, is:

"whether the adoption was undertaken for a purpose other than providing a true home for the child. If it was, it is not in the best interests of the child"

Canada (MCI) v. Goodman, 2016 FCA 126

- ✘ Federal Court stayed respondent's judicial review of an ID inadmissibility decision related to s.34 and s.36 of the IRPA
- ✘ Stay was to continue until 15 days *after* a final decision made on G's application for ministerial relief under s.34(2) of the IRPA (now s.42.1)
- ✘ Minister appealed stay order, arguing jurisdictional error – that FC exceeded its jurisdiction by removing the Minister's discretion to await the outcome of the JR before making ministerial relief decision
- ✘ Court of Appeal rejected this argument – Minister does not possess asserted discretion – on the contrary the courts have ordered relief applications to be made where there has been an unreasonable delay.

O'Brien v. Canada (MCI) 2016 FCA 159

- ✘ Appellant was divorced at the time of his spousal sponsorship appeal before the Immigration Appeal Division – IAD dismissed appeal on this basis

- ✘ FC upheld the dismissal but certified the following question:

  In an appeal pursuant to s. 63(2) of the *Immigration and Refugee Protection Act*, in relation to what period in time should an assessment of membership in the family class under s. 65 be conducted by the Immigration Appeal Division?

- ✘ Appeal dismissed, while the Federal Court was correct in dismissing the appellant's application, it should not have certified a question of general importance as the board simply could not confer permanent resident status on the appellant or compel an immigration officer to land the appellant.

Canada (MCI) v. Nilam, 2017 FCA 44

- ✘ FCA considered whether the Minister can suspend the processing of an application for citizenship pursuant to s. 13.1 of the *Citizenship Act*, to await the results of cessation proceedings under s.108 of the IRPA.

- ✘ FCA granted Minister's appeal, concluding that the Citizenship Officer's interpretation of s.13.1 of the *Citizenship Act* was reasonable.

- ✘ Cessation applications may lead to inadmissibility and possible removal.

- ✘ Section 13.1 of the C.A. specifically contemplates the suspension of a citizenship applications for the purpose of assessing admissibility and possible removal orders. As cessation proceedings may lead to both inadmissibility and removal, the Minister's interpretation of the applicable provisions was reasonable.

- ✘ Minister was under no public legal duty to continue processing the respondent's citizenship application – so respondent's mandamus application had no basis

Canada (MCI) v. Paramo de Gutierrez, 2016 FCA 211

- ✘ While claimants' claims were pending, they were contacted by a CBSA officer and asked to attend an interview that same day.
- ✘ CBSA had notice that claimants were represented by counsel, but did not contact their lawyer – claimants attended it on their own.
- ✘ After the interview the Minister intervened in claim based in part on the interview
- ✘ At the hearing, the respondents applied to exclude the documents pertaining to the interview – RPD rejected this application and denied the claims, primarily on the basis of credibility concerns arising from the interview with the official.
- ✘ RAD overturned the RPD decision, finding that it ought to have excluded the interview evidence because it was obtained in breach of the respondents' right to counsel.

Canada (MCI) v. Paramo de Gutierrez, 2016 FCA 211

- FC upheld RAD decision on the right to counsel and further found that the CBSA no longer retained jurisdiction to interview the respondents once the claim was referred.

- **FCA affirmed FC decision on the right to counsel.** Section 167(1) of the IRPA includes the right to have counsel present at an interview held in respect of a refugee claim. Failure of the CBSA to notify counsel was a breach of procedural fairness, **warranting the exclusion of the interview evidence.**

- On the jurisdiction of the officer to conduct an interview, however, the court found the applications judge to have erred in failing to consider the significance of s.16(1.1) of the IRPA, which authorizes an officer to request a person who has made an application to appear for an examination.

- A refugee claimant's application exists until the claimant's claim has been decided and, therefore, that s.16(1.1) of **the Act authorizes the Minister of Public Safety to conduct the interview after the referral.**

N.O. v. Canada (MCI), 2016 FCA 214

- ✘ Prior to hearing an appeal related to her refugee claim, the applicant's unrelated application for PR status was granted
- ✘ Minister brought a motion to dismiss the appeal as being moot
- ✘ Appellant argued that the appeal was not moot because she could still be subject to deportation if she lost her PR status.
- ✘ Court granted the motion. Appellant no longer faced threat of deportation and the appeal would have no immediate effect.
- ✘ Possibility that appellant could lose her permanent resident status at some point was too speculative to justify proceeding

Canada (MCI) v. R.K., 2016 FCA 272

- ✘ RAD admitted new evidence and conducted a hearing – then dismissed the appeal on credibility grounds, related to that evidence
- ✘ FC granted judicial review, finding that the RAD failed to conduct a full *de novo* review on the basis of all of the evidence – certified Q.
- ✘ FCA declined to answer the certified question, but granted the Minister's appeal on the basis that R.K. **failed to request a *de novo* hearing** and so waived their right to raise this issue on judicial review.
- ✘ As the issue was not properly before the Federal Court, it should not have pronounced judgment on it. On this basis the court allowed the appeal and dismissed the application for judicial review.

Majebi v. Canada (MCI), 2016 FCA 274

- ✘ Appellants were excluded from refugee status on the basis of Article 1E
- ✘ RAD rejected new evidence and dismissed appeal, concluding on the basis of *Zeng*, 2010 FCA 118, that the appellants' status should be considered **as of the date of the RPD hearing and *not* as of the date of the appeal**
- ✘ FC upheld this decision, but certified following questions:

    1. Should the RPD assess exclusion under Article 1E at the time of the refugee hearing?

    2. When the RPD correctly concludes that a claimant is or is not excluded under Article 1E of the *Convention*, can the RAD reassess exclusion on the basis of facts that arise after the hearing before the RPD?

Majebi v. Canada (MCI), 2016 FCA 274

- ✘ SofR of the RAD's interpretation of the Refugee Convention is reasonableness
- ✘ It was reasonable for the RAD to rely on the *Zeng* decision to conclude that the relevant date for the Article 1E analysis was the date of the RPD hearing.
- ✘ RAD could not intervene in RPD decision where it found the decision of the RPD was correct at the time of the hearing
- ✘ Unless the RAD concludes that the RPD decision was made in error, the RAD *may not reconsider* on a de novo basis the issue of exclusion pursuant to Article 1E.

Canada (MCI) v. Singh, 2016 FCA 300

✗ The Refugee Protection Division is precluded from making a finding that a claim has no credible basis or is manifestly unfounded *after* it has found that the claimant is excluded under Article 1F of the Refugee Convention.

Rrotaj v. Canada (MCI), 2016 FCA 292

- The Federal Court certified the following question:

  > Does Article 1E of the Refugee Convention, as incorporated into *IRPA*, apply if a claimant's third country residency status (including the right to return) is subject to revocation at the discretion of that country's authorities?

- FCA: Whether or not there is a right to return to a country is part and parcel of the test already set out in *Zeng*, 2010 FCA 118.

- As a result, the certified question was not one of general importance, as it had already been answered.

Sharma v. Canada (MPSEP), 2016 FCA 319

- ✘ Applicant sentenced to 2 years less a day to avoid immigration consequences
- ✘ After legislative changes, applicant was referred for an inadmissibility hearing
- ✘ FCA: duty of fairness in s.44 matters, even for permanent residents, is "clearly not at the high end of the spectrum…."
- ✘ There is no duty to provide a s.44(1) inadmissibility report to an individual prior to a s.44(2) referral to the Immigration Division.

Gennai v. Canada (MCI) 2017 FCA 29

- ✘ Is an incomplete immigration application nevertheless an application? <<NO>>
- ✘ Section 12 of the Regulations provides that the entirety of an application that has failed to meet the requirements under s.10 of the Regulations is returned to the applicant.
- ✘ When CIC assessed the appellant's 2nd application, it only had authority to do so on the basis of the scheme in place at that time and not in reference to his previous incomplete application.
- ✘ An incomplete application is not an application within the meaning of the IRPA and its corresponding Regulations.

Canada (MCI) c. Yansane 2017 CAF 48

- ✘ FC granted JR of a negative PRRA decision (for the 4th time) on the basis that the PRRA officer failed to comply with the previous directions of the FC.

- ✘ Court of Appeal granted the Minister's appeal: the applications judge misapprehended the role of superior courts in reviewing the decisions of administrative tribunals. This role is not to substitute its decision for that of the tribunal, but rather to verify the legality and reasonableness of the decision under review and to remit the matter if it was incorrectly or unreasonably determined.

- ✘ Only those directions that are formulated in the "operative part of a judgment" (the Order) may bind a subsequent decision-maker

Chung v. Canada (MCI), 2017 FCA 68

- Q: Does the IAD err in considering adverse to an appellant a lack of remorse for an offence for which the appellant has pled not guilty but was convicted?

- A: No

- While in the criminal sentencing context, courts do not consider a not-guilty plea or an ongoing assertion of innocence as an aggravating factor, there is a significant difference between the sentencing context and the context of immigration appeals – namely the presumption of innocence.

Wong v. Canada (MCI) 2016 FCA 229

- ✘ Think twice before seeking reconsideration of a decision denying leave, and then appealing the reconsideration decision!
- ✘ Appeal dismissed
- ✘ Costs ordered against counsel personally

Federal COURT

B.B. and JCY v. Canada, IMM-5754-15 (unreported)

- The Federal Court granted a consent order recognizing that the best interests of children who accompany detained parents, but are not themselves legally detained, can be considered in detention reviews. The Order further confirms that:
  1. The factors to be considered by the ID when deciding whether to detain or release are not limited to those enumerated under R.248 of the Regulations.

  2. The ID has the jurisdiction to consider the interests of a child who is a "guest" at an immigration holding centre.

  3. The interests of a child may be taken into account (but are not a primary consideration) when determining whether a person is a flight risk under R.245.

B.B. and JCY v. Canada, IMM-5754-15 (unreported)

- ✘ As part of the settlement, CBSA Hearings Officers have also been instructed to bring the Order to the attention of Immigration Division members, and have been advised that the decision of the Federal Court in *Shote*, 2004 FC 11, often relied on by CBSA to curtail consideration of the best interests of detained children, does not in fact stand for the proposition that BIOC may not be considered by the Immigration Division.

Canada (MPSEP) v. Lunyamila, 2016 FC 1199

- ✘ Certified the following question:

> Can a person who has been detained for removal from Canada pursuant to a valid removal order and who has been found either to be a danger to the public or unlikely to appear for his removal…avoid continued detention by (i) refusing to take steps that may realistically contribute in a meaningful way to effecting such removal, and then (ii) relying on the length of his detention to argue that his release from detention is warranted…