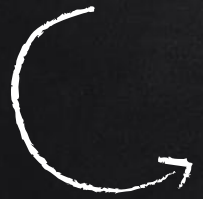
Canadian immigration and refugee law



Year in review

Angus Grant – LAOLAW

April, 2016

SUPREME COURT OF CANADA

BOIO v. CANADA, 2015 SCC 58

APPULONAPPA v. R., 2015 SCC 59

BO10 v. CANADA, 2015 SCC 58

✘ A37(1)(b) applies only to people who act to further illegal entry of asylum-seekers **in order to obtain, directly or indirectly, a financial or other material benefit**

✘ Acts of humanitarian and mutual aid of asylum seekers (including aid between family members) do not constitute people smuggling under the IRPA

✘ Limiting people smuggling to circumstances involving a material benefit will not leave Canada vulnerable to smuggling for other nefarious purposes, such as terrorism

✘ Court implied that Article 31 of the Refugee Convention applies to refugees who engage in mutual assistance

✘ Obiter: Court stated that the *Charter* was of no assistance to the appellants because s.7 of the *Charter* is not engaged in respect of inadmissibility determinations

APPULONAPPA v. CANADA, 2015 SCC

✘ Purpose of s.117 is not to catch all acts that assist the entry of undocumented migrants

✘ Focus is simply to **COMBAT PEOPLE SMUGGLING**

✘ Purpose derived from: its wording, its larger legislative context, its history and international law

✘ Scope of s.117 plainly exceeds its objective and is therefore overbroad

✘ Overbroad purpose cannot be cured by prosecutorial discretion per 117(4)

✘ Provision read down: does not apply to persons who assist asylum seekers for humanitarian reasons or for reasons of mutual aid or family assistance

KANTHASAMY V. CANADA, 2015 SCC 61 ☺

✘ In rendering decisions under s.25(1), officers must substantively consider and weigh *all* relevant facts – despite s.25(1.3), an officer may consider facts underlying a refugee claim in determining H&C

✘ Unusual and undeserved or disproportionate hardship is descriptive, but does not create thresholds for relief separate from the humanitarian purpose of s.25(1)…Analysis should adhere to humanitarian purpose of the provision.

✘ Decision-makers must do more than *state* that the interests of a child have been considered. Those interests must be well identified and examined with a great deal of attention in light of all the evidence

Federal COURT OF appeal

Huruglica, 2016 FCA 93

Singh, 2016 FCA 96

Huruglica, 2016 FCA 93

Three Standards at issue:

- Appellate Standard of Review – Reasonableness
- Federal Court Standard of Review – Reasonableness
- RAD Standard of Intervention

RAD process is a hybrid appeal that is to apply a correctness standard on all questions: law, fact, mixed fact and law

Other appeal pending: *R.K.*, 2015 FC 1304 on deference and credibility

...the RAD carries out its own analysis of the record to determine whether . . . the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim: para 103

Singh, 2016 FCA 96

✘ Scope of admissible evidence before the RAD per s.110(4)

✘ Federal Court: PRRA-related *Raza* factors not directly applicable

✘ FCA: It was reasonable for the RAD to be guided by the *Raza* factors, in light of the similar statutory language in RAD and PRRA contexts

✘ Charter values not engaged by RAD decisions on evidence

Savuntharasa v. Canada (MPSEP) 2016 FCA 51

✘ Constitutionality of the PRRA Bar – See also *Atawnah*, 2015 FC 774, just argued at FCA

✘ FC: Wide-ranging decision on removals process and assessment of risk

✘ FCA: Risks of harm actually asserted by the appellants may already be considered by enforcement officers in the removal/deferrals process – enforcement officers may consider risks of "death, extreme sanction or inhumane treatment" that have arisen since the last assessment of risk – these were the risks asserted by the appellants.

✘ Proper Approach:

- What is the precise nature and scope of risk asserted by the applicant?
- Would any such risks *not* be assessed by an enforcement officer?
- Would any risks not considered by an enforcement officer engage s.7 interests?
- Would any deprivation of an applicant's s.7 interests be in accordance with the principles of fundamental justice?

Canada (MPSEP) v. Tran 2015 FCA 237

✘ For the purposes of s.36 of the IRPA, a sentence of imprisonment should be understood to include conditional terms of imprisonment

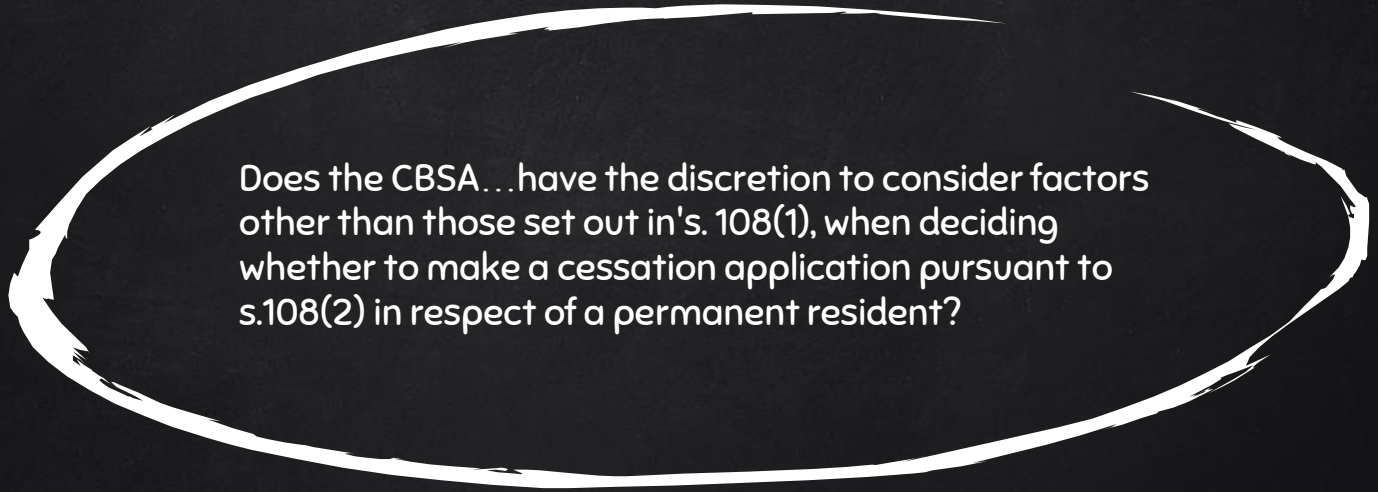
✘ The fact that conditional sentences may be applied to less serious offences at criminal law does not necessarily mean that they will not be considered serious for immigration purposes

✘ Reasonable to assess seriousness of offence at time of immigration determination, not at time of conviction

SCC has granted leave 

BERMUDEZ v. CANADA (MCI) 2016 FCA 131

✘ Certified Question



✘ A: No – Role of CBSA/CIC is to determine whether a *prima facie* case for a cessation application exists under s.108(1) – if it does, the official proceeds with the application. The Hearings Officer's role ends there.

Oberlander v. Canada (AG), 2016 FCA 52

✘ Decision on appeal: GIC reaffirmed earlier finding that the appellant had been complicit in war crimes and failed to make out duress.

✘ FC failed to consider the impact of maintaining the previous complicity findings on the GIC's current determination of the duress – link between duress and complicity is well-settled at law

Haqi v. Canada (MPSEP) 2015 FCA 256

Q: Is a notice of an ineligible refugee claim per s.104 of the IRPA a discretionary administrative decision amenable to judicial review?

A: No! The use of the word "may" in s.104 does not confer discretion

Zaric v. Canada (MPSEP), 2016 FCA 36

✘ Test for Intervention:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)?

II. Does the proposed intervener have a genuine interest in the matter before the Court?

III. In participating in the appeal, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing the just, most expeditious and least expensive determination of every proceeding on its merits?

Ontario COURT OF appeal

Chaudhary et al v. Canada (MPSEP) 2015 ONCA 700

✘ Assumption of Court: FC does not have habeas corpus jurisdiction, but see *Warssama*, 2015 FC 1311

✘ Where detention has become illegal, challenge is not to the immigration scheme itself but to the lawfulness of detention under sections 7 and 9 of the *Charter*.

✘ In this situation, the Superior Court's habeas corpus jurisdiction should be available as its ambit of review is broader and more advantageous to the detainee than the scheme established by the *IRPA*: para. 5.

R v Shiwprashad, 2015 ONCA 577

✘ Appeal of guilty plea, based on allegations of ineffective assistance of counsel related to immigration consequences of plea

✘ Criminal counsel told client to see immigration lawyer but never followed up

✘ ONCA found that appellant had not made out claim of incompetence, but noted:

- LawPRO has advised criminal lawyers to identify clients' immigration status before entering plea and/or sentence negotiations in order to avoid exposure to possible claims.

- Commentary suggesting that counsel "will well be advised to discuss the immigration consequences of matters with a member of the immigration bar and to refer clients accordingly."

Federal COURT

RAD JURISDICTION

✘ *Y.Z.*, 2015 FC 892 – Constitutionality of RAD bar re: DCOs

✘ *Zhao*, 2015 FC 1384 – RAD maintains jurisdiction for those exempt from STCA because of inland claim

✘ *Kreishan*, IMM-3193-15 – Constitutionality of RAD bar re: STCA

Article 1FB – Defining 'serious' non-political crimes

✘ 10 year threshold for assessing seriousness should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the *Criminal Code* has a large sentencing range, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded – see *Febles*, 2014 SCC 68 at para. 62

✘ *Jung*, 2015 FC 464

✘ *Tabagua*, 2015 FC 709

✘ *Mohamed*, 2015 FC 1006

✘ *Reyes*, 2015 CF 1015 – DV case: Exclusion upheld

CESSATION

✘ Bermudez, 2015 FC 639 – See appeal

✘ Esfand 2015 FC 1190 & Gezik 2015 FC 1268 – Cessation can't be brought against accompanying family member of resettled refugees – Under appeal

✘ Balouch, 2015 FC 765 – No duty to consider risk

✘ Cerna, 2015 FC 1074 – Protection provided by PR status as defence to reavailment

Removal and mootness

✘ *ISSUE:* Is a JR of an RPD decision moot where the individual who is the subject of the decision has involuntarily returned to his or her country of nationality, and, if yes, should the Court normally refuse to exercise its discretion to hear it?

✘ *Molnar*, 2015 FC 345 – Not moot

✘ *Mrda,* 2016 FC 49 – Not moot

✘ *Harvan*, 2015 FC 1026 – Moot

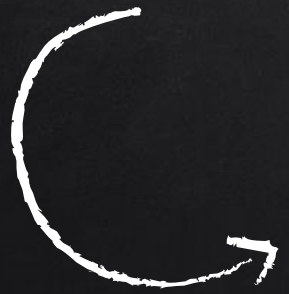
✘ *Rosa*, 2014 FC 1234 – Not moot (in the circumstances)

No credible basis findings

✘ *Pournaminivas,* 2015 FC 1099 – Credibility findings reasonable, NCB findings unreasonable

✘ *Singh,* 2015 FC 1415 – Exclusion and NCB, Q cert., Appeal pending

✘ *Mahdi*, 2016 FC 218 – RPD erred in NCB findings, JR paused pending RAD determination of jurisdiction



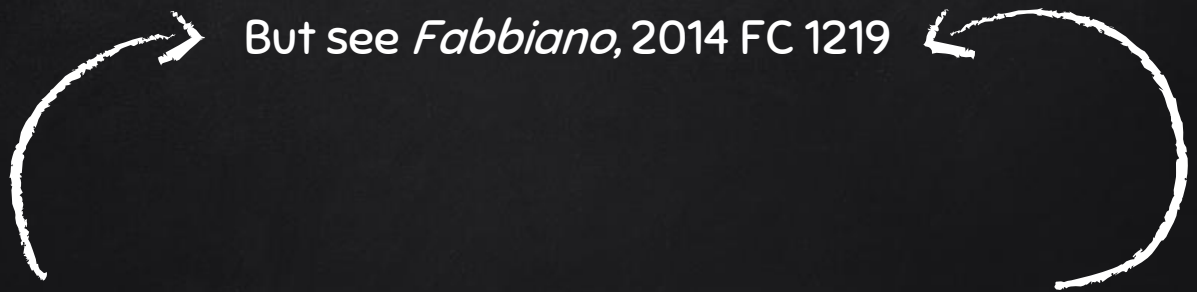
Mahdi, 2016 FC 422

Delays in s.44 processing and abuse of process

✘ Faroon, 2015 FC 931 – Re: 1999 & 2003 convictions

✘ Valdez, 2016 FC 377 – Re: 1999 Conviction

✘ Torre, 2015 FC 591 – Re: 1996 Conviction, Q cert., Appeal dismissed



Duty of fairness and s.44

✘ *Sharma,* 2015 FC 1315

✘ Sentenced before FRFCA and sentencing judge took immigration consequences into account; 8 Days later, FRFCA comes into effect

✘ FC: Applicant was made aware of the circumstances triggering the inadmissibility proceedings; he was told he was at risk of an inadmissibility finding; he was afforded an interview and given the opportunity to make additional submissions – this was sufficient

Certified Q:

Does the duty of fairness require that a report issued under section 44(1) of the IRPA be provided to the affected person before the case is referred to the Immigration Division under section 44(2)?

PRRA AND SANCTUARY

If the applicant wishes to have the benefit of a PRRA, then she must be close to removal and that is unlikely to happen so long as she remains in the church. It appears to the Court that if she wishes to have the benefit of a PRRA then she will have to leave sanctuary.

✘ *Asfaw*, 2016 FC 366

RPD REOPENING JURISDICTION

✘ *N.O.*, 2015 FC 1186 – Applicant sought reopening following JR refusal

✘ Language of s.170.2 is clear and specific: RPD has no authority to reopen a claim once a final determination has been made by the RAD or the Federal Court

✘ Section 170.2 also sufficiently clear to displace the board's constitutional jurisdiction over the provision

(1) Does s.170.2 of the IRPA …withdraw jurisdiction from the RPD to decide questions of law and, by implication, constitutionality, arising under that provision?

(2) In spite of the availability of other possible applications under the IRPA, does s.170.2 of the IRPA unjustifiably breach a claimant's rights under section 7 of the *Charter?*

Presumptions of Honesty & Authenticity

✘ Teweldebrhan, 2015 FC 418 – Presumption of authenticity of ID Docs applies unless reason to doubt it

✘ Chen, 2015 FC 1133 – Documents issued by foreign authorities are presumed to be valid…Where there is no evidence that a document *should* have contained additional security features there is no basis on which to displace the presumption

✘ Cuaton, 2015 FC 712 – Sworn testimony of an H&C applicant benefits from an initial presumption of truthfulness

✘ Rudoy, 2015 FC 1051 – Even where board acknowledges that presumption applies, it must in substance adhere to this principle