The Hits Keep Coming:

A Busy Year in Immigration and Refugee Law

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Supreme Court of Canada

Canada (MCI and MPSEP) v. Harkat 2014 SCC 37

- The *IRPA* scheme does not provide a perfect process. However, it meets the requirements of procedural fairness that are guaranteed by s. 7 of the *Charter*. **The discretion granted to designated judges is the crucial ingredient that allows the proceedings to remain fair from beginning to end**.... And in cases where the inherent limitations of the *IRPA* scheme create procedural unfairness, designated judges must exercise their discretion under s. 24(1) of the *Charter* to grant an appropriate remedy.

Hernandez Febles v. Canada (MCI), 2014 SCC 68

- Post-conviction factors – whether mitigating or exacerbating are *NOT* relevant to the issue of exclusion for serious non-political crimes pursuant to Article 1F(b) of the Refugee Convention.
- Article 1F(b) applies to anyone who has ***ever*** committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee.

Hernandez Febles cont'd

- On the threshold for seriousness (para. 62):
- Where a provision of the *Criminal Code* has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada **should not be presumptively excluded.** Article 1F (b) is designed to exclude only those whose crimes are serious…While consideration of whether a maximum sentence of ten years or more could have been imposed…is a useful guideline…the ten-year rule should not be applied in a **mechanistic, decontextualized, or unjust manner.**

Pending SCC Matters

- **Pending decisions**

  - *J.P., Hernandez, B306, B010 v Canada (MCI)*
  - Appulonappa v. R.
  - *Kanthasamy v. Canada (MCI)*

Federal Court of Appeal

Attaran v. Canada (AG) 2015 FCA 37

- Complaint to the CHRC, alleging that CIC's processing times for the sponsorship of PR applications for parents or grandparents was discriminatory on the basis of both age and family status.
- **[The] explanations provided by CIC confirm that the practice was discriminatory – CIC was differentiating adversely based on family status in processing sponsorship applications for parents more slowly than those for spouses and children.**
- [P]erhaps there is a *bona fide* justification for this different treatment. However, there is no indication that either the investigator or the CHRC determined that the matter should be dismissed based on a *bona fide* justification for the practice of CIC in treating sponsorship applications for parents differently.

Habtenkiel, 2014 FCA 180
Seshaw, 2014 FCA 181

- The limitation on the IAD's H&C jurisdiction in IRPR s.117(9)(d) cases means that there is no effective right of appeal to the IAD and, as such, applications for judicial review of s.117(9)(d) H&C decisions may be brought directly to the Federal Court.

Najafi v. Canada (MPSEP), 2014 FCA 262

- Do Canada's international law obligations bar a finding of inadmissibility under paragraph 34(1)(b) for those who have engaged in subversion of a government in furtherance of an oppressed people's claimed right to self-determination?
- Section 34(1)(b) is clearly meant to impose inadmissibility for subversion of *any* government, be it despotic or democratic.

Kanthasamy, 2014 FCA 113

- The facts and evidence adduced in support of a refugee claim may form part of a constellation of facts that give rise to humanitarian and compassionate grounds warranting relief under subsection 25(1)

Austria v. Canada (MCI) 2014 FCA 191

- Joint appeal of approximately 1400 appellants, each of whom sought to challenge the government's decision to terminate outstanding skilled worker applications filed before February 2008.
- The enactment of s.87.4(1) was not intended to create an individualized process for the discretionary termination of relevant skilled worker applications.

Kanagendren v. Canada (MCI) 2015 FCA 86

- Application of *Ezokola*, 2013 SCC 40, to the meaning of membership under s.34(1)(f) of IRPA:
- Section 34(1)(f) neither requires nor contemplates a complicity analysis in the context of determining membership: para. 22.

Arango, 2015 FCA 10

- **Q:** Once a PRRA officer has reached a final decision, and that decision has been communicated to the applicant, can the officer revisit that decision or does the doctrine of *functus officio* apply?
- **A:** PRRA officers may reconsider a final decision in appropriate circumstances because the doctrine of *functus officio* does not strictly apply in non-adjudicative administrative proceedings: para. 15

Sanchez v. Canada (MCI) 2014 FCA 157

- **Q:** What is the relevant date for assessing the equivalence of Canadian offences to foreign offences for the purposes of Article 1F(b)?
- **A:** The date of the hearing:
  - If a change to the penalty for the Canadian equivalent offence has occurred, the assessment should be done at the time when the Refugee Protection Division is determining the issue of the section 1F(b) exclusion.

Federal Court

Refugee Appeal Division Standard of ?????

- ***Huruglica v. Canada (MCI)* 2014 FC 799 – Appeal hearing pending**
- *Iyamuremye*, 2014 CF 494
- *Yetna*, 2014 CF 858
- *Spasoja*, 2014 CF 913
- *Alayafi*, 2014 CF 952
- *Njeukam*, 2014 FC 859
- *Alyafi*, 2014 FC 952
- *Diarra*, 2014 FC 1009
- *Akuffo*, 2014 FC 1063
- *Kurtzmalaj*, 2014 FC 1072
- *Triastcin*, 2014 FC 975
- *Bahta,* 2014 FC 1245
- *Tamay*, 2014 FC 1127
- *Aloulou*, 2014 CF 1236

Huruglica (cont'd)

- Hybrid process:

I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD s decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.

In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a palpable and overriding error .

RAD and New Evidence

- Singh v. Canada (MCI), 2014 FC 1022
- RAD and PRRA processes are different. The rapid timelines of the new refugee protection regime, together with the intent that the RAD be a "full, fact-based appeal on the merits," suggests that the new evidence analysis should be tailored to the particular context.
  - In considering the role of a PRRA officer and that of the RAD, does the test set out in *Raza*, 2007 FCA 385 (CanLII) for the interpretation of paragraph 113(*a*) of the *Immigration and Refugee Protection Act, SC 2001, c 27* apply to its subsection 110(4)?

RAD and New Evidence

- *Bahta v. Canada (MCI)* 2014 FC 1245

It was unreasonable for the RAD to have rejected post-RPD hearing evidence simply because the information it contained pre-dated the Board's hearing; the "salient point" was that the information was not available to the applicants: para. 18.

Removal and Mootness

- Section 96 of the IRPA relates to those with a well founded fear of persecution who are outside each of their countries of nationality
- Section 97 of the IRPA relates to persons in need of protection, but per s.112(1), only persons in Canada may make an application.

Removal and Mootness

- *Del Pilar Bravo*, 2014 FC 1099
- *Rosa v. Canada (MCI)*, 2014 FC 1234
- *Molnar v. Canada (MCI)*, 2015 FC 345
  - Is an application for judicial review of a decision of the Refugee Protection Division 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?

Assessing Serious Criminality: Conditional Sentences

- *Tran v. Canada (MPSEP)* 2014 FC 1040 (appeal pending)
- Do conditional sentences amount to a term of imprisonment per s.36?
- Conditional sentences are intended to provide an alternative to incarceration for less serious and non-dangerous offenders. This underlying purpose is at odds with the purpose of s.36 of the IRPA, which explicitly relates to **serious** criminality.

For those keeping score:

- *Sun Sea Cases on Nexus, Persecution and the Convention definition*
  - *Canada (MCI) v. A069* 2014 FC 341
  - *Y.S. v. Canada (MCI)* 2014 FC 234
  - *Canada (MCI) v. A049* 2014 FC 344
  - *Canada (MCI) v. A037* 2014 FC 754

Shifting Grounds: The Ability to change the grounds of detention

- *Canada (MPSEP) v. Ismail* 2014 FC 390
- Can an individual who was initially detained on one ground, then be ordered to remain in detention on the basis of a different ground?
- Yes
  - Is section 58(1)(c) of the *Immigration and Refugee Protection Act* only available as a ground for continued detention where it follows a detention under section 55(3) of the *IRPA*?

Section 97, Generalized Risk and a Risk of Torture

- The generalized risk limitation on s.97(1)(b) claims does NOT apply to claims to a risk of torture under s.97(1)(a).

  - Selvarajah, 2014 FC 769
  - *Balachandran*, 2014 FC 800

Immigration Processing, Delay and Damages

*Nkunzimana v Canada (MCI),*2014 FC 736

- The decision to deny H&C applications was not justified and violated Canada's international commitments and the objective of family reunification
- There was a sufficient causal link between the actions of the Crown and the harm that the plaintiffs experienced and the court awarded damages.

Sexual Orientation and Claims from Nigeria

- *Ladipo v. Canada (MCI)*
- Endorsing *Abioye*, 2014 FC 348 at para 11, that:
- "Under present conditions ...Canada should not be deporting homosexuals and bisexuals to Nigeria"

State Protection: Adequacy vs. Serious Efforts

- *Mudrak v. Canada (MCI),* 2015 FC 188
- The jurisprudence emphasizing operational adequacy has reversed the presumption of state protection effectively imposing on a government an obligation to demonstrate the adequacy of newly instituted protection measures

State Protection: Adequacy vs. Serious Efforts

- Certified Questions:
- Whether the Refugee Protection Board commits a reviewable error if it fails to determine whether protection measures introduced in a democratic state to protect minorities have been demonstrated to provide **operational adequacy** of state protection in order to conclude that adequate state protection exists?
- Whether refugee protection claimants are required to complain to policing oversight agencies in a democratic state as a requirement of accessing state protection, when no risk of harm arises from doing so?

Discretion and the termination of refugee claims

- *Haqi v. Canada (MPSEP)*, 2014 FC 1246
- Section 104 does not confer discretion on CBSA officers to decline to give notice terminating a refugee claim once an officer has concluded that the claim is ineligible for consideration by the RPD on security grounds.

Discretion and cessation

- Olvera Romero v. Canada (MCI), 2014 FC 671

In connection with's. 108(2) of the IRPA and in light of the amendments to's. 46(1) and 40.1(1)(c.1):

- (a) is a CBSA officer who intends to interview a permanent resident and protected person obliged to inform that person of the purpose of the interview, being a potential cessation application;
- (b) is the CBSA officer…obliged to provide that person with an opportunity to make submissions prior to the making of a cessation application;
- (c) does the CBSA hearings officer…have the discretion to consider factors other than those set out in's. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to's. 108(2)?

IRPA s.112(2)(b.1) PRRA Bar

- *Peter v. Canada (MPSEP)*, 2014 FC 1073
- In the context of a removal scheme that allows for requests for deferral and stay applications before the Federal Court, the PRRA bar is not arbitrary, overbroad, or grossly disproportionate and does not violate s.7 of the *Charter*.

IRPA s.112(2)(b.1) PRRA Bar

- The risk considerations associated with deferral requests, i.e., whether the applicant will face a "risk of death, extreme sanction or inhumane treatment," are substantially similar to those that would be considered in a PRRA application
- The definition of persecution under s.96 of the IRPA is essentially subsumed under the definition of inhumane or cruel and unusual treatment, meaning that the applicants' argument that the removals test for harm was too narrow was largely "accommodated"

Refugee Healthcare

- ***Canadian Doctors for Refugee Care v Canada*, 2014 FC 651**
- The IFHP changes violated the guarantee against cruel and unusual treatment under s.12 of the *Charter*. The decision to amend the IFHP was not a neutral decision that only incidentally had a negative impact on historically marginalized individuals:

  > [the executive had] intentionally targeted an admittedly vulnerable, poor and disadvantaged group for adverse treatment, making the 2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada.

- This was clearly illustrated by the government's own stated objectives in initiating the IFHP changes, one of which was to deter (allegedly fraudulent) prospective asylum seekers from coming to Canada.

Refugee Healthcare cont'd

- The IFHP changes also discriminated against certain classes of refugee claimants based on their national origin, contrary to s.15 of the Charter.
- The changes clearly made a distinction between various classes of refugee claimants based explicitly on nationality, providing inferior service to DCO claimants than others.
- While there may be no *Charter*-based obligation to provide health insurance coverage to those seeking the protection of Canada, once it chooses to provide such a benefit, it is obliged to do so in a non-discriminatory manner