



THE REFUGEE APPEAL DIVISION - AN UPDATE

Ottawa Immigration Law Conference

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DESLOGES.CA

ORGANIZATION OF MEMORANDUM

- Overview statement:
 - Summary of basis of claim, what you agree with in the RPD decision, what you don't and why it should be overturned
- Facts:
 - Summary of facts and evidence provided to support facts; update with new information after refugee hearing or new evidence
- Arguments:
 - Scope of appeal, New evidence – why it should be admitted and impact, Errors that should be overturned, Summary as to why Appellant is a refugee, Order Sought – if seeking an oral hearing, address why

ADDRESSING STANDARD OF REVIEW

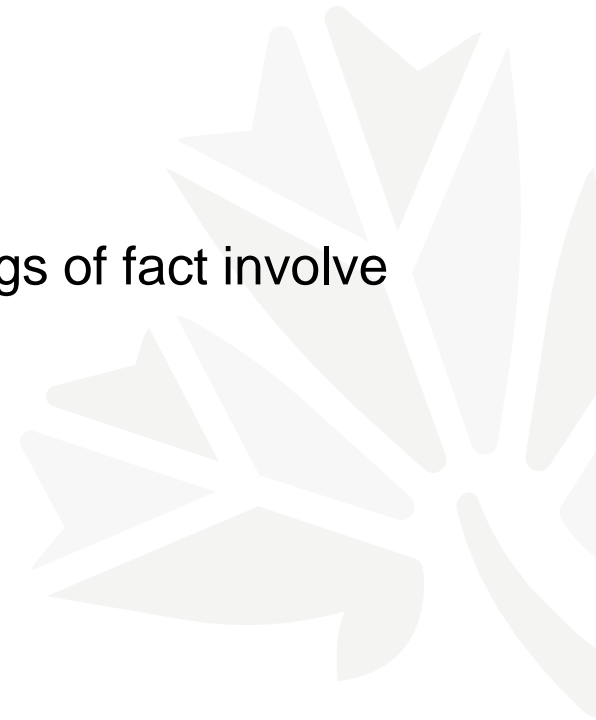
- Explain and define how RAD should apply its appellate powers
 - Define scope of appeal & How this is applied to the findings made by the RPD
- Leading decision: *MCI v. Huruglica*, 2016 FCA 93
 - Underlying FC decision introduced “hybrid appeal” – combination of independent assessment by RAD with deference to RPD where RPD is in an advantageous position

ADDRESSING STANDARD OF REVIEW

- Certified question: Was it reasonable for the RAD to limit its role to a review of the reasonableness of the RPD's findings of fact (or mixed fact and law), which involved no issue of credibility?
 - Rejection of reasonableness as standard of review for RAD
 - Rejection of palpable and overriding error
 - The RAD is to apply the correctness standard of review in considering the RPD's finding of fact, or mixed law and fact, where no issue of credibility
 - Questions of law also reviewed on correctness standard

ADDRESSING STANDARD OF REVIEW

- Credibility?
 - Maybe deference to RPD where findings of fact involve assessment of oral evidence
 - Determined on a case-by-case basis
 - *Huruglica*, 2016 FCA 93, para. 69-74



ADDRESSING STANDARD OF REVIEW

- Did the RPD truly benefit from an advantageous position over RAD in making findings of fact or mixed fact and law?
 - If so, RAD must determine whether can still make a final decision, to confirm or substitute its own determination
 - If not, RAD may conclude that proper to refer back to RPD with specific directions

ADDRESSING STANDARD OF REVIEW

- Define what should be reviewed on correctness standard
 - Important to consider type of finding that is made and being challenged
 - law, fact and law, fact
 - whether credibility is engaged
- Pre-*Huruglica* FCA decisions re treatment of documentary evidence
 - for ex: *Dowansingh*, 2015 FC 933; *Sow*, 2015 FC 895; *Allen*, 2015 FC 994; *Brodrick*, 2015 FC 491

ADDRESSING STANDARD OF REVIEW

- Define whether even if credibility engaged, it is truly a situation where the RPD is in an advantageous position?
 - Consider type of credibility assessment ... inconsistency, plausibility, omission
 - And basis for finding ... oral, documentary evidence or combination?

ADDRESSING SCOPE OF APPEAL: CREDIBILITY

- Differing ideas re: credibility & how much deference to show
 - Plausibility (for ex: *Ajaj*, 2015 FC 928; *Basran*, 2015 FC 1221)
 - Oral testimony alone or determinative (for ex: *G.L.N.N. (Njeukam)* 2014 FC 859; *Ali*, 2015 FC 500; *Desalegn*, 2016 FC 12; *Paldenn*, 2015 FC 787)
 - Oral testimony in combination with documentary evidence (For ex: *Yetna*, 2014 FC 858)
- Above decisions rendered before FCA decision in *Huruglica*

ADDRESSING SCOPE OF APPEAL: CREDIBILITY

- Define whether even if credibility engaged, it is truly a situation where the RPD is in an advantageous position?
 - Plausibility determination based on documentary evidence
 - Determination of inconsistency based on oral testimony
 - Clear misunderstanding of testimony
- Define whether there are any situations where RPD is in advantageous position ... and explain why the RAD can still make the ultimate determination
 - Are there any limits to the hybrid appeal in your case?

RAD: ERRORS

- Remember that in memorandum have to identify the errors that are the grounds of appeal [RAD Rules 3(g)(i)]
- Remember that in considering error, error does not have to rise to level of reasonableness
 - Guided by IRPA appeal grounds – that decision is wrong in fact, law or fact/law
- Explain why wrong in light of evidence or legal principles
- Reference case law on point as to what you think RAD should do with RPD findings

RAD JURISDICTION

- Can RAD assess issues or credibility findings not considered by RPD?
 - Useful to define what should or should not be considered by RAD
 - Consider what amounts to a new issue at the RAD

RAD JURISDICTION

- Could be a question of law:
 - *Jianzhu*, 2015 FC 551: RAD made independent evaluation on *sur place* claim. Finding: RAD lacked jurisdiction to consider new issue – no RPD decision to set aside on this matter; should have referred back to RPD if felt needed to be addressed
 - *Ojarikre*, 2015 FC 896 – IFA not examined in RPD Decision, therefore not subject matter of appeal

HYBRID APPEAL: JURISDICTION

- Could be related to documents or credibility:
 - *Zhang*, 2015 FC 1031: document from NDP not disclosed by the RPD
 - *Ortiz*, 2016 FC 180: assessment of genuineness of police report which was not discussed by RPD
- What does not count as a new issue at the RAD?
 - *Koffi*, 2016 FC 4: making additional findings on an issue known to the applicant
 - *Sary*, 2016 FC 178: Referring to other documentary evidence in the appeal record which support the RPD credibility findings

HYBRID APPEAL: JURISDICTION

Husian, 2015 FC 684, para. 9-10:

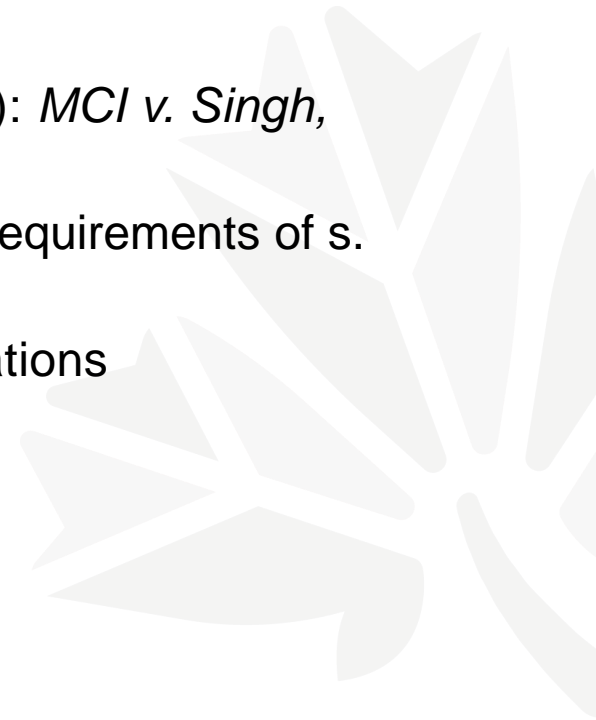
“Had the RAD simply reviewed the findings of the RPD as to the adequacy of the Applicant’s evidence and agreed with it, that would have ended the matter. It did not. For whatever reason, the RAD went on to give further reasons, based on its own review of the record, as to why the Applicant’s evidence was not to be believed. ... The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.”

INTRODUCTION OF NEW EVIDENCE

- Introduced by way of “written statement” (RAD Rule 3)
- Memorandum should address how the new evidence meets s. 110(4) test
 - Only evidence that arose after rejection of claim; or
 - That was not reasonably available; or
 - That the person could not have reasonably have been expected in the circumstances to have presented, at the time of the rejection
- Don't assume that RAD can see why it meets explicit requirements ...
 - Explain which ground of “newness” it meets

INTRODUCTION OF NEW EVIDENCE

- Leading decision re: Interpretation of *IRPA* s. 110(4): *MCI v. Singh*, FCA, 2016 FCA 96
 - RAD must ensure compliance with explicit requirements of s. 110(4)
- At same time, RAD to be guided by *Raza* considerations
 - Credibility
 - Relevance
 - Newness
 - Materiality



INTRODUCTION OF NEW EVIDENCE: RAZA / SINGH FACTORS

- Credibility: consider source and circumstances in which came evidence came into existence (*Raza*, para. 13)
- Relevance: Is it capable of proving or disproving a fact relevant to claim for protection? (*Raza*, para. 13)
- Newness: Redundant, doesn't really add to explicit requirements of IRPA s. 110(4) (*Singh*, para. 46)

INTRODUCTION OF NEW EVIDENCE: RAZA / SINGH FACTORS

- Materiality: must be assessed in context of IRPA s. 110(6), for sole purpose of determining whether RAD may hold a hearing (certified question answer)
 - “The RAD... has a much broader mandate and may intervene to correct any error of fact, of law, or of mixed fact and law. As a result, it may be that although the new evidence is not determinative in and of itself, it may have an impact on the RAD’s overall assessment of the RPD’s decision.” [*Singh*, para. 47]
 - “[i]t would be redundant to require materiality of evidence for it to be admissible as new evidence, to then subject the conduct of a hearing to the same criterion.” [*Singh*, para. 48]

INTRODUCTION OF NEW EVIDENCE

- Reference to FC case law on application of *Raza* and pre-*Singh* FCA:
 - Useful if illustrates what should be found to be new evidence
 - But remember ... FC applies reasonableness, RAD does not
 - Also be wary of cases that hinge on materiality
- Suggestion: Introduce new evidence by way of affidavit from Appellant
 - Explain circumstances in which evidence arose
 - Where did evidence come from?
 - How did they get the evidence?
 - Why not available before?

IMPACT OF NEW EVIDENCE

- If there is no oral hearing, need to address why evidence is credible, relevant and new to refugee claim
- Explain how it changes or contradicts RPD findings
 - how it proves claim or elements of claim
 - how it interacts with the other evidence and testimony of the claimant
 - Does it raise new facts not known at time of RPD or add verification to facts previously known but in dispute?
 - Does it go to new facts and events all together?

ORDER SOUGHT: REQUEST FOR ORAL HEARING

- Request must be made by way of written statement (RAD Rule 3)
- “May hold a hearing” = discretionary: *Koffi*, 2016 FC 4
- All **three** elements of s. 110(6) must be met
 - Not enough to just have (new) documentary evidence
 - Credibility key
- Memorandum: Why the oral hearing is necessary in this case
 - Explain why this is consistent with IRPA s. 110(6)
 - And materiality factor per *Singh* FCA

ORDER SOUGHT: REQUEST FOR ORAL HEARING

- Discretion to hold a hearing not engaged where RAD relied on record of RPD, not new evidence
 - for ex: *Sanmugalingam*, 2016 FC 200; *Ching*, 2015 FC 725
- Oral hearing generally required when statutory criteria have been satisfied
 - for ex: *Zhuo*, 2015 FC 911
- If documentary evidence goes to issue other than credibility (such as state protection / credibility not at issue), is there a basis for the hearing?

REMEDY / ORDER SOUGHT

- Three main remedies – IRPA s. 111(1) and (2):
 - Confirm RPD decision
 - Substitute own determination
 - Refer back to RPD with directions (where it cannot make a decision without hearing evidence that was presented to RPD & RPD decision is wrong)
- Memorandum should address whether RAD can substitute or whether required to refer back

REMEDY / ORDER SOUGHT

- Consider: does RAD have all the evidence to substitute?
 - If so, pinpoint evidence / testimony that allows the RAD to substitute
- Consider: where credibility determinations / RPD advantage, can the RAD still make its own determination based on these findings?
 - May be issue of weight between old findings and new based on evidence
 - May want to go back to RPD for redetermination for oral hearing on issues
- Consider: if feel that RPD overlooked important, key issue, can RAD substitute or are you arguing for return to RPD?

QUESTIONS?



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