CANADIAN IMMIGRATION AND REFUGEE LAW

SIGNIFICANT DECISIONS 2017-2018

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SUPREME COURT OF CANADA

TRAN V. CANADA (MPSEP), 2017 SCC 50

- "Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* "a term of imprisonment" under s. 36(1)(a) of the IRPA?"
  - No.

- "Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the IRPA refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force at the time admissibility is determined?"
  - "It refers to the maximum term of imprisonment available at the time of the commission of the offence."

TRAN V. CANADA (MPSEP), 2017 SCC 50 CONTINUED

Subsequent IAD decisions

- ***Jin et Canada (MSPPC), Re*, 2017 CarswellNat 7131**: Appeal of removal order allowed.

- ***Gabriel and Canada (MPSEP), Re*, 2018 CarswellNat 1304**: Application to re-open appeal granted.

- ***Pham and Canada (MPSEP), Re*, 2018 CarswellNat 1176**: Application to re-open appeal and application for an extension of time to file an appeal denied.

LEAVE TO APPEAL DISMISSED

- ***Henry Majebi, et al. v. Canada (MCI)*, 2017 CarswellNat 2527:** Article 1E.
  - 2016 FCA 274

- ***Gennai v. Canada (MCI)*, 2017 CarswellNat 3268:** Incomplete applications for permanent residence.
  - 2017 FCA 29

- ***Nisreen Ahamed Mohamed Nilam v. Canada (MCI)*, 2017 CarswellNat 3788:** Cessation and citizenship.
  - 2017 FCA 44

FEDERAL COURT OF APPEAL

GLADUE PRINCIPLES

***Lewis v. Canada (MPSEP)*, 2017 FCA 130**

- "Do the principles set out by the Supreme Court of Canada in *R. v Gladue*, *R. v Ipeelee*, and *R. v Anderson* apply, *mutatis mutandis*, to removals under section 48 of the IRPA such that there must be a full consideration of the impact on an Aboriginal child of the removal from Canada of her non-citizen custodial parent prior to the execution of the removal order?"
  - Answer: No.
- "Does Section 7 of the *Charter of Rights and Freedoms* mandate *Gladue*-like consideration of the impact of the removal of an Aboriginal child's custodial parent prior to the execution of the removal order?"
  - Answer: No.

CITIZENSHIP

***Vavilov v. Canada (MCI)*, 2017 FCA 132**

- "Are the words "other representative or employee [in Canada] of a foreign government" found in paragraph 3(2)(a) of the *Citizenship Act* limited to foreign nationals [falling within these words] who [also] benefit from diplomatic privileges and immunities?"
  - Answer: Yes.

- Leave to appeal to the Supreme Court has been filed: 2017 CarswellNat 5571.

SECURITY CERTIFICATES

***Mahjoub v. Canada (MCI & MPSEP)*, 2017 FCA 157**

- The Federal Court of Appeal upheld the reasonableness of the security certificate, upheld the present security certificate regime as constitutional, upheld the constitutionality of sections 33 and 34 of the IRPA, and dismissed a number of arguments put forward by the applicant that the proceedings against him constituted an abuse of process.

- Leave to appeal to the Supreme Court has been filed: 2017 CarswellNat 5889.

FEDERAL SKILLED TRADES CLASS

***Cabral v. Canada (MCI)*, 2018 FCA 4**

- Federal Skilled Trades Class (s.12(2) of the IRPA and s.87.2 of the IRPR).

- Proposed class proceeding re. language requirements (International English Language Testing System test).

- The Federal Court did not err in finding that the interpretive issues raised by the appellants failed to disclose a genuine issue for trial.

IMPROPERLY CERTIFIED QUESTIONS

- ***Sran v. Canada (MCI)*, 2018 FCA 16:** "Given that s 133(1)(j) and s 34 of the Immigration and Refugee Protection Regulations were amended and came into force on January 2, 2014, should the [Immigration Appeal Division of the Immigration and Refugee Board of Canada (the IAD)] have retroactively applied the amended version of these regulations given that the Applicant's sponsorship application for permanent residence on behalf of her father and her brother was received on June 5, 2008?"

- ***Lunyamila v. Canada (MPSEP)*, 2018 FCA 22:** "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 from Canada, 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, assuming there has been no significant change in other factors to be considered in the assessment contemplated by s. 248 of the *Immigration and Refugee Protection Regulations*?"

FEDERAL COURT

REFUGEES

When is an inland refugee claim "made"?

- ***Mehmood v. Canada (MCI)*, 2017 FC 962:** "When is an inland refugee claim 'made' for the purposes of subsection 25.1(9) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [sic] ?"
  - Note: 25.1(9) of the Regulations

"…it would be absurd to say, as this officer did, that there is no claim for protection made by a claimant, until an officer determines, based on application forms submitted by the claimant, that he or she is eligible to make the claim and thus schedules a hearing before the Refugee Protection Division. Taking that view would mean that the Minister's "Generic Application Form for Canada" submitted by Mr. Mehmood is not an application at all; but what is it? – an application to apply!"

REFUGEES CONTINUED

Exclusion under Article 1F(b) – serious non-political crimes

- ***Nwobi v. Canada (MCI)*, 2018 FC 317**: One, non-violent drug trafficking offence can be the basis for exclusion.

REFUGEES CONTINUED

Compelling reasons exception

- ***Umwizerwa v. Canada (MCI)*, 2017 FC 564**: Rwandan genocide.
- ***Velez v. Canada (MCI)*, 2018 FC 290**: FARC attacks in Colombia.

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(e) the reasons for which the person sought refugee protection have ceased to exist.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

SPONSORSHIP

Eligibility under s.117(h) of the IRPR

- ***Bousaleh v. Canada (MCI)*, 2017 FC 716:** "Does determination of a person's eligibility to sponsor a relative under s 117(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 require consideration of whether an application to sponsor a person enumerated in s 117(1)(*h*) has a reasonable prospect of success?"

Authorization to Return to Canada [ARC]

- ***Momi v. Canada (MCI)*, 2018 FC 110:** "Does the IAD have the authority on an appeal from a family sponsorship refusal brought under subsection 63(1) of the IRPA to consider and set aside an earlier refusal of an ARC to the sponsored family member?"

SPONSORSHIP CONTINUED

Minimum necessary income requirements

- ***Nematollahi v. Canada (MCI)*, 2017 FC 755:** The court explicitly rejected the respondent's argument that the phrase "three consecutive taxation years immediately preceding the date of filing of the sponsorship application" (IRPR, s.133(1)(j)(i)(B)) must be read as including the words "for which there are notices of assessment issued by the Minister of National Revenue (or the Canada Revenue Agency, "CRA")."

H&C APPLICATIONS

Assessing hardship

- ***Miyir v. Canada (MCI)*, 2018 FC 73** (at para 33):

1. An H&C applicant may allege that he or she will face "hardship" upon return to his or country of origin, and such a circumstance must then be factored into the consideration of whether to grant H&C relief;

2. Where the alleged "hardship" in the country of origin is based on facts found not to be credible in a failed refugee claim, nothing precludes the applicant from raising those same facts in an H&C application. However, it is the applicant's onus to overcome those prior negative credibility determinations;

H&C APPLICATIONS CONTINUED

Assessing hardship (continued)

- ***Miyir v. Canada (MCI)*, 2018 FC 73** (at para 33):

3. If "hardship" is argued based upon facts that the H&C officer indeed accepts, the officer must then consider whether "hardship" justifies H&C relief, in a holistic, flexible, and equitable manner as required by *Kanthasamy*; and

4. The H&C officer must be careful not to conflate the refugee analysis with the "hardship" the applicant may face applying from abroad. For instance, an H&C applicant need not show that adverse country conditions affect him or her more severely than the general population. Further, an applicant need not lead direct evidence of discrimination if he or she belongs to a group that experiences discrimination.

H&C APPLICATIONS CONTINUED

Refugee claim pending

- ***Yuris v. Canada (MCI)*, 2017 FC 981:** "Does the term "foreign national" in subsection 25(1.2)(b) of the IRPA pertain only to the section 25(1) request of a principal applicant, or does it also preclude the Minister from examining section 25(1) requests from all foreign nationals in Canada included in the application for permanent resident status, who have a claim for refugee protection pending before the RPD or the RAD?"

H&C APPLICATIONS CONTINUED

Treatment of individuals with HIV/AIDS

- ***Fulu-Shungu v. Canada (MCI)*, 2017 FC 881**: Decision devoid of compassion.
- ***A.B. v. Canada (MCI)*, 2017 FC 1170**: IAD as the "moral police."
- ***X.Y. v. Canada (MCI)*, 2018 FC 213**: Hiding HIV positive status.
- ***Z.W. v. Canada (MCI)*, 2017 FC 963**: Stigma and discrimination.

INADMISSIBILITY

Misrepresentation

- ***Canada (MCI) v. Singh Sidhu*, 2018 FC 306**: "Under s. 40 (1) (a) of the Immigration and Refugee Protection Act, which reads: 'A permanent resident or a foreign national is inadmissible for misrepresentation (a) or directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this act'...is a permanent resident inadmissible for indirectly representing a material fact if they are landed as a dependent of a principal applicant who misrepresented material facts on his application for landing."

- ***Li v. Canada (MPSEP)*, 2017 FC 1151**: "Can a permanent resident be inadmissible for misrepresentation under s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 where that permanent resident is the sponsor of another person or other persons and the misrepresentation is made in the sponsorship of another person or other persons?"

INADMISSIBILITY CONTINUED

Loss of appeal rights to the IAD

- ***Cano Granados v. Canada (MCI)*, 2018 FC 302:** Parliament clearly indicated that s.64 would apply to all cases of inadmissibility on grounds of serious criminality that had not been written up and referred to the ID before June 19, 2013.

> 64.(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
>
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

INADMISSIBILITY CONTINUED

Discretion under ss.44(1) and (2) of the IRPA

- ***McAlpin v. Canada (MPSEP)*, 2018 FC 422** (at para. 70):

1. In cases involving allegations of criminality or serious criminality on the part of permanent residents, there is conflicting case law as to whether immigration officers and ministerial delegates have any discretion under subss. 44(1) and (2) of the IRPA, respectively, beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible, or that an officer's report is well founded.

2. In any event, any discretion to consider H&C factors under subss. 44(1) and (2) in such cases is very limited, if it exists at all.

3. Although an officer or a ministerial delegate may have very limited discretion to consider H&C factors in such cases, there is no general obligation or duty to do so.

INADMISSIBILITY CONTINUED

Discretion under ss.44(1) and (2) of the IRPA (continued)

- ***McAlpin v. Canada (MPSEP)*, 2018 FC 422** (at para. 70):

4. However, where H&C factors are considered by an officer or by a ministerial delegate in explaining the rationale for a decision that is made under subs. 44(1) or (2), the assessment of those factors should be reasonable, having regard to the circumstances of the case. Where those factors are rejected, an explanation should be provided, even if only very brief in nature.

5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, even only by listing those factors, to demonstrate that they were considered. A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.

DETENTION

Constitutionality of detention scheme

- ***Brown v. Canada (MCI & MPSEP)*, 2017 FC 710:** Detention scheme may be "mal-administered," but it is not unconstitutional.

- "Does the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?"

DETENTION CONTINUED

Habeas corpus applications in the Ontario Superior Court

- ***Ali v. Canada (AG)*, 2017 ONSC 2660:** Habeas corpus petitions involving immigration detainees may be heard in provincial superior courts in exceptional circumstances, namely, where the detention has become unduly lengthy, and its continuing duration is uncertain.

- ***Scotland v. Canada (AG)*, 2017 ONSC 4850:** "At some point, the adjudicator hearing a detention review under the IRPA must step back from the thick foliage of technical enforcement and have look [sic] at the trees."

REMOVAL

Discretion to defer removal

- ***Ortiz v. Canada (MPSEP)*, 2017 FC 931**: A deferral until an H&C application is determined is temporary in nature. While the imminence of a decision may be a relevant factor to consider, there is no basis to conclude that an officer has the authority to defer removal only in the case of imminent decisions.

Danger to the public

- ***Ramanathan v. Canada (MIRC)*, 2017 FC 834**: There is no basis to support the exclusion of economic crimes from the "danger to the public" assessment.

REMOVAL CONTINUED

***Revell v. Canada (MCI)*, 2017 FC 905**

- "Is section 7 engaged at the stage of determining whether a permanent resident is inadmissible to Canada and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting from Canada, and not from possible persecution or torture in the country of nationality?"

- "Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli*, which established that the deportation of a permanent resident who has been convicted of serious criminal offence, despite that the circumstances of the permanent resident and the offence committed may vary, is in accordance with the principles of fundamental justice. In other words, have the criteria to depart from binding jurisprudence been met in the present case?"

REMOVAL CONTINUED

***Moretto v. Canada (MCI)*, 2018 FC 71**

- "Is section 7 engaged at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to s.68(4) and if so, would section 7 be engaged where the deprivation of the right to liberty, security of the person of a permanent resident arises from their uprooting from Canada, not from possible persecution or torture in the country of nationality?"
- "Does the principle of *stare decisis* preclude this Court from reconsidering findings of the Supreme Court of Canada in *Chiarelli* which established that the deportation of a permanent resident who has been convicted of a serious criminal offence, despite that the circumstances of the permanent resident and the offence committed may vary, is in accordance with the principles of fundamental justice? In other words, have the criteria to depart from binding jurisprudence been met in the present case?"
- "Is a s.12 determination premature at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to s.68(4)?"

MENTAL HEALTH

- ***Nagarasa v. Canada (MCI)*, 2018 FC 313**: "Self-harm and suicide is not 'controllable' by a person who contemplates taking his or her own life."

- ***Sitnikova v. Canada (MCI)*, 2017 FC 1081**: Failure to seek follow-up treatment.

- ***Jang v. Canada (MIRC)*, 2017 FC 996**: Availability of treatment in country of origin.

- ***Cedana v. Canada (MCI) sub nom. Cedanasep v. Canada (MCI)*, 2017 FC 630**: "Undervaluing" a psychiatric report based on the applicant's own words.

COSTS

- ***Do v. Canada (MCI)*, 2017 FC 1064**: No costs. Officer's conduct displayed "a reckless disregard for procedural fairness." Had the Minister not sought to have the judicial review allowed prior to leave being granted, the court would have found it necessary to award costs.

- ***Sisay Teka v. Canada (MIRC)*, 2018 FC 314**: No costs. Applicant's counsel's errors were unintentional and the result of "sloppy drafting."

- ***Gerges v. Canada (MCI)*, 2018 FC 106**: No costs. Unexplained delay alone did not amount to special reasons justifying costs.

UNITED STATES OF AMERICA

Entitlement to a remedy

- ***Iheonye v. Canada (MPSEP)*, 2018 FC 375:** The "illegality inherent in this manner of entering Canada is not such that it disentitles all these people from seeking a remedy from this Court, which would be the result of the respondent's argument."

"Safe Third Country"

- ***Canadian Council for Refugees v. Canada (MIRC)*, 2017 FC 1131:** Public interest standing granted to the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches.

- ***Canadian Council for Refugees v. Canada (MCI)*, 2018 FC 396:** Application for judicial review consolidated with two other related proceedings.