CANADIAN IMMIGRATION AND REFUGEE LAW

SIGNIFICANT DECISIONS 2018-2019

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Ottawa Immigration Law Conference

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OVERVIEW

- Supreme Court of Canada
- Refugees
- H&C applications
- Inadmissibility
- Detention
- Removal
- Sponsorship
- Citizenship

SUPREME COURT OF CANADA

COLLATERAL IMMIGRATION CONSEQUENCES

- ***R v. Wong*, 2018 SCC 25**
  - "Immigration consequences bear on sufficiently serious legal interests to constitute legally relevant consequences" (at para. 4).
  - "[A]n accused seeking to withdraw a guilty plea must demonstrate prejudice by filing an affidavit establishing a reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions" (at para. 19).

LEAVE TO APPEAL GRANTED

Granted

- ***Tusif Ur Rehman Chhina*:** leave to appeal from the Alberta Court of Appeal (2017 ABCA 248) granted. Access of immigration detainees to habeas corpus. Heard in fall 2018; awaiting a decision.

- ***Alexander Vavilov*:** leave to appeal from the Federal Court of Appeal (2017 FCA 132) granted. Re-visiting the standard of review. Heard in fall 2018; awaiting a decision.

LEAVE TO APPEAL DISMISSED

Dismissed

- ***Nguesso*:** (2018 CAF 145) re. organized criminality
- ***Begum*:** (2018 FCA 181) re. sponsorship
- ***Brown*:** (2018 ONCA 14) re. detention and damages
- ***Toure*:** (2018 ONCA 681) re. habeas corpus and *Charter* rights
- ***Mahjoub*:** (2017 FCA 157) re. security certificate

FEDERAL COURT
AND
FEDERAL COURT OF APPEAL

REFUGEES

The 36-month PRRA bar for DCO claimants is unconstitutional

- ***Feher*, 2019 FC 335:** Section 112(2)(b.1) of the IRPA violates s.15(1) of the *Charter,* and cannot be justified under s.1 of the *Charter*. The words "or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months" in s.112(2)(b.1) have no force or effect with respect to such nationals.

112(1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

(2) Despite subsection (1), a person may not apply for protection if

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

REFUGEES

Right of appeal to the RAD

- ***Kreishan*, 2018 FC 481:** Section 110(2)(d) of the IRPA does not infringe s.7 of the *Charter*.

110(2) No appeal may be made in respect of any of the following:

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

REFUGEES

RAD standard of review

❖ ***Rozas Del Solar*, 2018 FC 1145**

- It was reasonable for the RAD majority to conclude that it should apply two standards of review to RPD findings – correctness in most cases, and deference on occasion (at para. 60);

- The RAD majority erred in failing to outline for future panels when the RPD's general fact-finding advantage becomes a specific meaningful advantage which would justify the application of a deferential standard of review (at para. 107); and

- A deferential standard selected by the RAD majority cannot simply duplicate the supervisory role of the Federal Court on judicial review. The RAD reasonableness standard runs the risk of curtailing the opportunity to have flawed credibility determinations corrected (at para. 136).

REFUGEES

Exclusion – Article 1E

- ***Romelus*, 2019 CF 172:** An analysis of the fear of persecution in the country of permanent residence must be made before declaring that a person is subject to Article 1E.

- ***Jean*, 2019 CF 242:** Two interpretations are possible; the first focuses on the meaning of Article 1E, and the second focuses on the meaning of s.98. In the first interpretation, an analysis of the risk in the country of residence must necessarily be made before coming to a conclusion on the applicability of Article 1E, while in the second, the risk analysis for the country of residence may be done at any time.

Article 1E: This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

REFUGEES

Continuing substantive basis for exclusion

- ***Tapambwa*, 2019 FCA 34**
  - Do ss.112(3)(a) and (c) of the IRPA require the Minister, when conducting a PRRA, to confirm that there remains a substantive basis for excluding the applicant from refugee protection? **No**
  - If not, does s.25.2 of the IRPA provide the Minister discretion, in the absence of a pre-established policy, to exempt a person making an application for protection under s.112 of the IRPA from the restrictions that flow from s.112(3) of the IRPA, which discretion obliges the Minister to consider and make a decision on a request that such discretion be exercised? **No**
  - If not, does the combined effect of ss.112(3)(a) and (c), 113(d) and 114 of the IRPA violate s.7 of the *Charter* insofar as it deprives an applicant of the right to be recognized as a refugee without confirmation that there remains a substantive basis for excluding the applicant from refugee protection? **No**

REFUGEES

Eligibility to have a claim referred to the RPD

- ***Aghazadeh*, 2019 FC 99:** "In my view, it is this circumstance – whether a country's international obligations have been triggered – that paragraph 101(1)(d) is intended to capture" (at para. 38). See also ***Kalaeb*, 2019 FC 345.**

101(1) A claim is ineligible to be referred to the Refugee Protection Division if

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

REFUGEES

Gender Guidelines

- ***Harry*, 2019 FC 85:** "Omissions and contradictions are not, *per se*, a reason to exclude consideration of the Gender Guidelines. The purpose of the Gender Guidelines is to ensure that any assessment of omissions and contradictions takes into account the factors set out in the Gender Guidelines" (at para. 34).

- ***Olah*, 2019 FC 401:** "It does such claimants no favours, and undermines the integrity of the refugee determination process, simply to seal off such allegations from any examination, as this member did – especially when the decision-maker harbours concerns about the credibility of those allegations" (at para. 36).

REFUGEES

Credibility, probative value, weight and sufficiency

- ***Magonza*, 2019 FC 14:** Justice Grammond devoted a substantial portion of his reasons to clarifying the concepts used in the fact-finding process:
  - Credibility (at paras. 16-20)
  - Probative value (at paras. 21-26)
  - Weight (at paras. 27-31)
  - Sufficiency (at paras. 32-35)

- Justice Grammond also explained how three other terms which are used in the fact-finding process – reliability, relevance, and materiality – can be subsumed under the concepts of credibility, probative value, and weight.

REFUGEES

Quality of documents and typographical errors

- ***Mbang*, 2019 FC 68:** "A reasonable decision would consider the objective country condition evidence, not reject it for failing to conform to Canadian expectations. I find that the RAD, by rejecting the Applicant's credibility on the basis of typographical errors, the quality of materials, and unreasonably high expectations for security features, has failed to provide a cogent decision considering that these documents were produced in a developing nation" (at para. 23).

REFUGEES

Corroborative evidence

- ***Chen*, 2019 FC 162:** "There is no general requirement for corroboration and a panel errs if it makes an adverse credibility finding on the basis of the absence of corroborative evidence alone ... If there are valid reasons to question a claimant's truthfulness, the panel may also consider the claimant's failure to provide corroborative evidence, but only where the claimant could not give a reasonable explanation for the absence of such evidence" (at para. 28).

- ***Jiang*, 2019 FC 57:** "The fact that the RPD has such concerns, therefore, cannot be a freestanding reason to conclude that corroborative evidence is not genuine" (at para. 22).

REFUGEES

New evidence at the RAD

- ***Arisekola*, 2019 FC 275:** "While the list of factors to be considered in subsection 29(4) of the RAD Rules is not exhaustive, the use of the word 'including' rather than the words 'such as' before the list of factors indicates the intent that each be considered. A failure to do so gives rise to a breach of procedural fairness" (at para. 14). See also: ***Semykina*, 2019 FC 249.**

29(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the appeal; and

(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

REFUGEES

Cessation

❖***Din*, 2019 FC 425:** What constitutes re-availment?

➢The three requirements to terminate refugee protection are:

1) The refugee acted voluntarily;
2) The refugee intended to re-avail himself of his country of nationality; and
3) The refugee actually obtained such protection.

➢Obtaining a passport is not *necessarily* proof of intent to re-avail, or proof that the refugee actually obtained protection.

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:

(a) the person has voluntarily reavailed themself of the protection of their country of nationality;

REFUGEES

Treatment of summonses in Chinese cases

- *Huang*, 2019 FC 358
- *Li*, 2019 FC 307
- *Huang*, 2019 FC 94
- *Liang*, 2019 FC 90
- *Ye*, 2019 FC 67
- *Liang*, 2019 FC 58
- *Tan*, 2018 FC 1151
- *Wang*, 2018 FC 1124
- *Zhao*, 2018 FC 619

H&C APPLICATIONS

Exceptional or extraordinary circumstances

- ***Apura*, 2018 FC 762:** "When a decision-maker's H&C analysis suggests that the absence of 'exceptional' or 'extraordinary' circumstances forms the basis of the decision to deny relief, it is to impose the incorrect legal standard. It is to commit an error akin to that which was committed in *Kanthasamy*, where H&C decision-makers were incorrect to impose the 'unusual and undeserved or disproportionate hardship' threshold. Moreover still, it is to apply a standard that does not find expression in the text of s.25 of the *Immigration and Refugee Protection Act*" (at para. 23).

- In contrast, see ***Huang*, 2019 FC 265**, and ***Bakal*, 2019 FC 417.**

H&C APPLICATIONS

Addiction and criminality

- ***Magsanoc*, 2018 FC 821:** The court noted that the applicant's explanation for his criminal history – it was largely due to his addiction – could mitigate the blameworthiness of his conduct. Taken together with evidence of steps he had taken to address his addiction, it could also point to his capacity for rehabilitation. The officer was required to make a finding on this critical issue.

Mental health

- ***Apura*, 2018 FC 762:** "In the case at bar, the Officer did not need the doctor to contemplate the impact of return to make the Applicant's PTSD a live issue. The report provides a clear diagnosis of the condition, its stressors and symptoms, and thus it was incumbent upon the Officer to consider the impact that removal would have in light of that evidence" (at para. 29).

H&C APPLICATIONS

Best interests of the child

- ***Nagamany*, 2019 FC 187:** The decision tended to unreasonably discount any adverse impact on the children. The officer's analysis centered on the applicant's wife's ability to work, support the children, and meet their needs. The officer thus discounted the applicant's role in the support, raising, and education of his children.

H&C APPLICATIONS

General H&C comments

- ***Salde*, 2019 FC 386:** "But *compassionate* factors do not always fit neatly in a checklist or template. And the flexibility provided by this provision was never intended to do so" (at para. 23).

- ***Henson*, 2018 FC 1218:** The positive factors ended up "being filtered out through the prism of earlier conduct that required recourse to the H&C application in the first place. ... As a result of viewing the application through this lens, the H&C remedy, one which is available in the immigration forest, was lost amongst the trees" (at para. 38).

H&C APPLICATIONS

General H&C comments

- ***Samuel*, 2019 FC 227:** When taking lack of status into consideration, an officer must balance the need to respect Canada's immigration laws with the fact that s.25 of the IRPA frequently involves those who are without status. "[I]t is contrary to this need for balancing and therefore unreasonable to repeatedly discount positive H&C factors related to establishment because of non-status" (at para. 17).

- ***Mitchell*, 2019 FC 190:** "An H&C application invariably involves non-compliance with the IRPA. The nature and severity of the Applicant's non-compliance was a relevant consideration in this case" (at para. 27).

INADMISSIBILITY

Organized criminality – IRPA, s.37(1)(a)

- ***Nguesso*, 2018 CAF 145:** For the purposes of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, does the phrase "or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require that there also be evidence that the actions at issue constitute a criminal offence in the country where they occured? **Question improperly certified.** The application for leave to appeal to the SCC was dismissed.

> 37(1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
>
> (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

INADMISSIBILITY

Prescribed senior official – IRPA, s.35(1)(b) and IRPR s.16(d)

- Who is a "senior member of the public service" for the purposes of 35(1)(b) of the IRPA, and s.16(d) of the Regulations?

35(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;

16 For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes

(d) senior members of the public service;

INADMISSIBILITY

Prescribed senior official – IRPA, s.35(1)(b) and IRPR s.16(d)

- ***Kassab*, 2018 FC 1215:** "Given that a civil hierarchy may be less structured than a military hierarchy, when considering whether a civil appointment constitutes a senior member of the public service, a more fulsome examination should be done both from a purposive viewpoint and contextually. An officer may consider whether the individual's job title falls within the top half of the government hierarchy [the Top Half Test], but he or she should also look to evidence of the individual's responsibilities and duties, as well as the nature of the position held" (at para. 31).

INADMISSIBILITY

Definition of "terrorism" – IRPA, ss.34(1)(c) and (f)

- ***Alam*, 2018 FC 922:** The Federal Court upheld the officer's determination that the Bangladesh National Party [BNP] is an organization described by s.34(1)(f) of the IRPA. There is tension in the jurisprudence on this point. The question may have more to do with policy than legal interpretation.

- ***Rana*, 2018 FC 1080:** The court took a detailed look at the concepts of "terrorism" and "terrorist activity" as they are understood in the immigration and criminal law contexts.

- See also ***Saleheen*, 2019 FC 145**.

INADMISSIBILITY

Disclosure

- ***Durkin*, 2019 FC 174:** "The invitation to a person involved in the s 44 process to provide submissions is for the purpose of possibly avoiding a referral for an admissibility hearing. This is also the only point in the process that a person can call upon the Delegate for leniency notwithstanding the person's technical inadmissibility. At the later point of an admissibility hearing the only open issue is whether the grounds for establishing inadmissibility have been established. Accordingly, in a situation where disclosure is actually needed to support a claim for leniency to the Delegate, the duty of fairness may require it" (at para. 32).

INADMISSIBILITY

Is s.7 of the *Charter* engaged earlier than the removal stage?

- ***Ali*, 2018 FC 1187:** The applicant submitted that his security interest was engaged before removal because of the psychological stress he faced early on, and other consequences that flowed from his inadmissibility. The court found that the applicant had "sought to raise a new issue, not squarely addressed by the case law presented as dispositive of the issue" (at para. 90). Because the Immigration Division dismissed the applicant's s.7 submissions without engaging with them, the question of the applicability of s.7 had to be sent back for redetermination (at para. 99).

INADMISSIBILITY

Section 44(2) of the IRPA and *Charter* values

- ***Abdi*, 2018 FC 733:** "It is the exercise of discretion that 'triggers' the necessity to consider *Charter* implications" (at para. 76). The permissive language in s.44(2) of the IRPA (the word "may") confirms that the Minister's Delegate has options available to them in reaching their decision. In this case, the court was satisfied that the Minister's Delegate was required to consider the *Charter* implications to the applicant, and to render a decision on those *Charter* considerations (at para. 79).

44(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

DETENTION

Habeas corpus

- ***Wang*, 2018 ONCA 798:** "In the end result, the issue before this court is a very narrow one. It is simply whether habeas corpus can apply where a person seeks to challenge a deprivation of liberty that arises from a situation other than being held in a custodial facility, that is, other than detention in its strictest form. Contrary to the conclusion of the application judge, I say that it can" (at para. 33).

REMOVAL

Stay of removal

- ***Thuo*, 2019 FC 48:** The court granted the motion because the enforcement officer failed to appreciate that the risk the applicant would face on return, which was *prima facie* serious, had never been assessed by any decision-maker.

Mental health

- ***Konaté*, 2018 FC 703:** "There is no doubt that the prospect of imminent removal may worsen an individual's psychological state and trigger a suicide attempt. In these cases, suicidal ideation is not 'voluntary' and cannot be equated with a mere scheme to skirt the obligation to leave Canada…suicidal ideation is not a matter of 'choice'" (at para. 14).

SPONSORSHIP

Section 133(1)(j) of the Regulations

133(1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor

(j) if the sponsor resides

(i) in a province other than a province referred to in paragraph 131(b),

(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or

(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(I) the sponsor's mother or father,

(II) the mother or father of the sponsor's mother or father, or

(III) an accompanying family member of the foreign national described in subclause (I) or (II), and

(ii) in a province referred to in paragraph 131(b), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred to in that paragraph; and

SPONSORSHIP

Section 133(1)(j) of the Regulations

- ***Begum*, 2018 FCA 181:** Section 133(1)(j) of the Regulations does not violate ss.7 or 15 of the *Charter*. The application for leave to appeal to the SCC was dismissed.

SPONSORSHIP

Interpretation of s.117(1)(h) of the Regulations

- ***Bousaleh*, 2018 FCA 143:** In order to determine if an applicant is a member of the family class pursuant to paragraph 117(1)(h) of the Regulations, does the Minister have to consider the likelihood of success of a hypothetical application for permanent residence that could be made by a relative listed in that provision in light of an alleged health condition that could render that person inadmissible? **No**

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father

(i) who is a Canadian citizen, Indian or permanent resident, or
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

SPONSORSHIP

Interpretation of s.117(1)(h) of the Regulations

❖***Sendwa*, 2018 FC 1091:** There is a "split" in the case law concerning s.117(1)(h) of the *Immigration and Refugee Protection Regulations*. The court certified 2 questions:

➢In determining an application for permanent residence under section 117(1)(h) of the *Immigration and Refugee Protection Regulations* (IRPR) is consideration of the financial eligibility criteria in section 133(1)(j)(i)(B) of the IRPR required by subparagraph 117(1)(h) of the IRPR?

➢If so, does the existence of a right of appeal to the Immigration Appeal Division require a sponsor to appeal the denial of an application to sponsor such a relative because of the financial ineligibility of the sponsor in order to establish that there are no relatives whom the sponsor may otherwise sponsor?

CITIZENSHIP

Section 13.1 of the *Citizenship Act*

- ***GPP*, 2019 CAF 71:** Does s.13.1 of the *Citizenship Act* permit the Minister to suspend a citizenship application made prior to August 1, 2014, if that application was not finally disposed of before that day? **Yes**

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive

(a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies with respect to the applicant; and

(b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the determination as to whether a removal order is to be made against the applicant.

CITIZENSHIP

Appeal in the absence of a certified question; declaratory relief

- ***Tennant*, 2018 FCA 132:** The Federal Court declared the applicant a citizen of Canada, and did not certify a question (2018 FC 151). The Minister appealed this decision. Despite the lack of certified question, the Federal Court of Appeal concluded that it had jurisdiction, and dismissed the respondent's motion to remove the notice of appeal from the court file, and to close the court file. An application for leave to appeal has been submitted to the SCC.

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