TAB 2

Practice Tips in the Federal Court

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Practice Tips in the Federal Court

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Below is an outline of points of practice which may assist counsel[1] who are bringing applications before the Federal Court to challenge decisions made or matters arising under the *Immigration & Refugee Protection Act (IRPA).* [2]

The process of having such decisions or matters reviewed is in two stages: the first is a written application for leave to commence judicial review[3] and if leave is granted, the second stage is the judicial review application itself, with an oral hearing before a judge of the Federal Court.

Notice of Application:[4]

- The notice provides the opportunity to outline grounds on which the application is

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[1] It is always easier to tell others how to do things, than to consistently follow one's own instructions. This paper is meant to assist counsel, not harangue them: the haranguing I leave for government officials who cause us to bring the court applications in the first place.

[2] S. 72. (1) , IRPA: "Judicial review by the Federal Court with respect to any matter - a decision, determination or order made, a measure taken or a question raised - under this Act is commenced by making an application for leave to the Court."

[3] The leave requirement was introduced in 1989 covering all but visa officer decisions. Amendments in June, 2002 made visa officer decisions subject to the leave requirement, but on a 60 day, instead of 15 day, time limit for commencing the proceeding from the date of receipt of the decision.

[4] S. 5, *FCIRP Rules*, provides that an application to challenge a decision or matter under the *IRPA* is to be commenced by notice (in the format set out in Form IR-1 to the Rules) and shall include: full names of the parties; date and the details of the matter — decision, determination or order made, measure taken or question raised — in respect of which relief is sought and date when the person was notified or otherwise became aware of the matter; name of the tribunal and, if it had more than one member, the name of each tribunal member; tribunal file number; the precise relief sought on the application for judicial review; the grounds on which relief is sought, including a reference to any statutory provision or Rule to be relied on; the proposed place and language of the hearing of the judicial review; whether or not the applicant has received the tribunal's written reasons; and the signature, name, address and telephone number of the individual solicitor filing the application for leave, or where the applicant acts in person, his or her signature, name, address for service in Canada, and telephone number. Further, unless the responsible Minister is the applicant, that Minister shall be the respondent in an application for leave.

to be based. It is a good idea to leave it open in the notice to argue further grounds, in the event that other issues are developed once one turns one's mind more fully to analysing the problems with the decision which is being challenged. Often the reasons are not even available before the time for filing the notice comes due, so that the issues cannot be fully identified in the notice.

> Eg. In the event that leave is granted, the application for judicial review is to be based on the following grounds:
> (1) the tribunal erred in law in ignoring evidence;
> (2) the tribunal erred in law in failing to take into account relevant considerations and in failing to address the issues raised;
> (3) *and, such further and other grounds as Applicant may advise and this Honourable Court permit.*

- Even so, it is still good practice to list in the notice any issue which may potentially arise in the case. Section 5(1) of the *Federal Courts Immigration & Refugee Protection Rules (FCIRP Rules)* requires that the grounds be set out in the notice and it is simple to drop grounds if they are not to be pursued. Even if the notice advises that further grounds may be raised, at times it may be problematic to do so. Sometimes, raising a significant ground in written argument, which was not included in the notice, may irritate some justices of the court or even cause the Court to excise that ground and prohibit argument on it.[5]

- Where it is indicated in the notice of application that reasons have not been received, the time for filing the application record does not begin to run until they are received.[6] Often individuals will receive a letter refusing his or her application with brief reasons - these are not necessarily the full reasons and it is better to give notice that reasons have not been received so that the full set of reasons is available before arguments are set out in the memorandum of argument. For example, a removals officer may send a notice indicating that removal will not be

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[5] See for eg. *Canadian Council of Churches v Canada,* [2009] 3 F.C.R. 136; [2008] F.C.J. No. 1002; 2008 FCA 229, at para. 85-86

[6] S. 9(1), *Federal Courts Immigration & Refugee Protection Rules (FCIRP Rules)*, provides that where the notice sets out that the applicant has not received the written reasons of the tribunal, the Registry will send a request to the tribunal to provide them. S. 9(4) and 10(1) provide that the 30 days for filing the application record does not start to run until the reasons are received or notice is given that there are no reasons. This is calculated as the tenth day after the tribunal mails the reasons or notice to the Registry.

deferred because under IRPA a removal order must be enforced as soon as is reasonably practicable. Or a visa officer may send a letter indicating that a landing application is refused and set out summary reasons for this. In both instances, there are likely much more detailed reasons which have not been included with the rejection letter. The removals officer will have written an entire report and the visa officer will set out concerns in the computer CAIPS notes. By indicating in the notice of application that reasons have not been provided, the more detailed reasons will be provided when the officers respond to the Court Registry's request for the reasons to be provided.[7]

Application Record:[8]

- Providing a detailed index of the documents contained in the application record is generally helpful to the Court. Further, it simplifies preparation of the written argument and the preparation for oral argument, if leave is granted, because it is easy both to locate documents in the record and to ensure that significant ones have not been overlooked.

- It is very important to ensure that all relevant information is provided in the application record. For example, the Court will want to know a person's past immigration history even if the person is seeking only to review a refusal to approve an application for landing made on humanitarian and compassionate grounds. If the person is a refused refugee claimant and/or has had a negative pre-removal risk assessment, this information should be included. It is better to deal up front with information that is unhelpful, than have the Minister bring it to the Court's attention. When the Minister presents it, the impression is given that the person had been trying to hide unhelpful facts. If it is not possible to include

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[7] S. 9, *FCIRP Rules*

[8] S. 10(2) *FCIRP Rules*, requires that an application record be filed, containing, on consecutively numbered pages, and in the following order (*a*) the application for leave, (*b*) the decision or order, if any, in respect of which the application is made, (*c*) the written reasons given by the tribunal, or the notice under paragraph 9(2)(*b*), as the case may be, (*d*) one or more supporting affidavits verifying the facts relied on by the applicant in support of the application, and (*e*) a memorandum of argument which shall set out concise written submissions of the facts and law relied upon by the applicant for the relief proposed should leave be granted.

the decisions made on the person's previous applications, this can be explained in the person's supporting affidavit. The person may have misplaced the documents or, as is more often the case, previous counsel kept the documents and has not returned them.

- The affidavit in support of the application should be from the person concerned.[9] If this is not possible, the person who provides the affidavit in support of the application should explain why the person, with first hand knowledge of the facts, has not provided it. With non-contentious records, an affidavit from a clerk or another lawyer[10] in counsel's office is sometimes acceptable, notwithstanding the direct knowledge rule, although the reason why the person with direct knowledge is not providing the affidavit should be explained by the person who is swearing the supporting affidavit. Nevertheless it is still better practice to have the applicant swear his or her own supporting affidavit.

- The supporting affidavit ought to indicate that it is being provided in support of the leave application, and if leave is granted, in support of the judicial review application.[11]

- It is important to remember that the affidavit(s) provided should not contain legal argument. They are meant to provide the Court with the facts of the case. The

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[9] The general *Federal Courts Rules (FC Rules)* apply to immigration and refugee proceedings by virtue of s. 4 of the *FCIRP Rules*. It provides that, but for the rule about service on the Crown, "except to the extent that they are inconsistent with the Act or these Rules, Parts 1 to 3, 6, 7, 10 and 11and rules 383 to 385 of the *Federal Courts Rules* apply to applications for leave, applications for judicial review and appeals. S. 81, in Part 3 of the *FCR*, specifically addresses affidavits, requiring that they be "confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included". It further provides that an "adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts."

[10] S. 82, *FC Rules* provides that a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

[11] Similarly with affidavits filed in support of stay motions, they may be used in the leave application if they are sworn in support of both the motion and the application. To address this the last paragraph of the affidavit could read: "I make this affidavit in support of my motion for a stay of the execution of the removal order issued against me, in support of my application for leave, and if leave is granted, in support of my application for judicial review before this Court and for no other or improper purpose."

legal arguments are meant to be developed in the memorandum of fact and law.

- While it is important to set out the history of the case, the supporting affidavit and materials should be focussed in relation to the issues raised. For example, if the leave application is a challenge to a PRRA decision, it may not always be necessary to include all the background reports and articles on country conditions. The Court does not need to, nor does it have the time to, read numerous articles which are dated and not relevant to the arguments, or which are excessively repetitive. Merely because the PRRA officer had the materials does not mean that the Court needs them all on the leave application. Inundating the Court with paper does not strengthen the case. It is better to choose those which are relevant to the issues raised.

- The memorandum of fact and law is in five parts: a concise statement of fact; a statement of the points in issue; a concise statement of submissions; a concise statement of the order sought, including any order concerning costs; and a list of the authorities relied upon. [12] Counsel have different ways of structuring arguments, but no matter how it is done, it should be succinct, focussed, and organized. Arguments should be prioritized; the weakest ones do not need to be made. It is often helpful to the Court and the opposing party if the written memorandum opens with overview as to why the person is before the Court and the moves on to a summary of the relevant facts, issues, and then argument.

- After the facts have been summarized and the issues listed, the first matter often addressed is what standard of review applies. One way of structuring argument which often works well is to first identify the statement which is at issue in the

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[12] S. 70, *FC Rules* provides that a memorandum of fact and law shall contain, in consecutively numbered paragraphs, (*a*) a concise statement of fact, as Part I; (*b*) a statement of the points in issue, as Part II; (*c*) a concise statement of submissions, as Part III; (*d*) a concise statement of the order sought, including any order concerning costs, as Part IV ; (*e*) a list of the authorities to be referred to, as Part V; (*f*) in a proceeding other than an appeal, the provisions of any statutes or regulations cited or relied on that have not been reproduced in another party's memorandum, as Appendix A; and (*g*) in a proceeding other than an appeal, a book of the authorities to be referred to that have not been included in another party's book of authorities, as Appendix B. Statutes extracts provided in Appendix A are to be reproduced in both official languages. Appendices to a memorandum of fact and law may be bound separately. And, unless otherwise ordered by the Court, the memorandum, exclusive of Part V and appendices, shall not exceed 30 pages in length.

reasons, then what the error is said to be, and finally identify the evidence in the record that supports this submission.

> Eg. **Corroborating Evidence Ignored:** The panel concluded that the Applicant failed to establish that he was not a member of the rebel group. It did this by purporting to assess his statements and specific supporting evidence he provided. However, it erred in law in failing to consider relevant documentary evidence which supported the Applicant's assertions.
> *Tribunal Record,* Reasons, p. 9-14; *Application Record,* p.100-234[13]
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> The evidence indicated the rebel group operated in another region only and that it was illegal, while the group to which the Applicant belonged was legal and permitted to operate at the university. The applicant was either working or studying at the university in his city and was not in the region where the rebel group operated. Further, the documentary evidence indicated that there was more than one group with the same or similar names who were not connected to each other. The panel makes no mention of this crucial evidence in its reasons when making a determination that the applicant was a member of the rebel group based in the other region.
> *Application Record,* Applicant's Affidavit, p. 24, para. 2k; *Tribunal Record,* Hearing Transcript, p. 28-31
> *Yener v. Canada (M.C.I.),* 2008 FC 372, at para 41, 46, 54, 63; Toro v M.E.I., [1981] 1 F.C. 652 (C.A.), at p. 652; *Kassa v M.E.I.,* [1989] F.C.J. No. 801 (C.A.), at p. 1

Judicial Review Application:

- If leave is granted the Court will schedule a hearing date and fix a schedule for perfecting the judicial review application. The Court schedules hearings for 1 ½ to 2 hours only. If the case is a complex one, it is preferable for counsel to bring a motion, well ahead of the hearing date, requesting a longer time for argument. Most judges of the Court are not likely to be pleased if argument is not completed in the time fixed by the court.

- It is not always necessary to prepare a supplementary memorandum of argument, if the tribunal record does not disclose new issues to be argued. One reason for preparing a supplementary memorandum is to relate the legal issues

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[13] There does not appear to be a set practice of footnoting cites or references or having them follow each paragraph. The advantage of footnotes is that they can be related to a specific fact or legal issue, whereas when the cites and references follow a full paragraph they cover the whole paragraph.

to the evidence (i.e. page references) in the tribunal record, as it is the official record. This is preferable to using the application record.

- The case authorities should be prepared and provided to the Court and opposing counsel at least several days before the hearing. If counsel for both sides have relied on the same cases or the application is a complex one with extensive authorities, it will be of assistance to the Court if the parties collaborate on preparing the case authorities. This avoids duplicating cases and using different cites. As well, if counsel has discovered other relevant cases, not cited in the written memorandum, it is clearly preferable to give opposing counsel and the Court advance notice of this so that there is time to review them before oral argument.

- Within three weeks of the hearing date, the Registry will let counsel know, if asked, which Judge of the Court will be preside at the hearing. This is helpful because counsel can check the judgements of that particular judge before the hearing to see if he or she has decided similar cases before. If the judge has decided similar issues in a manner favourable to the client, this, of course, is useful. If the judgements are not favourable, at least counsel can prepare to distinguish them in oral argument.

- As a matter of best practice, there are a number of points to keep in mind when making oral submissions before the court:
  - It is important for counsel to know where to find the evidence in the record which relates to the issues raised. Judges often raise questions about the evidence and a counsel who is not familiar with the record will not be able to address the Court's concerns.
  - The same holds true with the law: counsel should be familiar with the jurisprudence relating to the issues raised in the memorandum and be able to apply the principles to the facts. Put cases which are relevant to the arguments into the case authorities book. If counsel has cited many, many cases in the written memorandum, they do not all need to be included in the case book. Include the ones which are clearly on point. It is useful to draw the Court's attention to a relevant case, but not all the relevant cases. The Court can read the written submissions.

- The Judge hearing the case has normally has had the time to review the record before the hearing. As such it is acceptable to ask the Court if it wants counsel to review the facts or just move right into identification of the issues and argument. If the Court wishes to hear counsel review the facts, it will say so.
- There is nothing wrong with identifying which issues counsel believes are the strongest ones.
- Time is limited so it is not always necessary to argue all of the issues orally, particularly if there are many issues which have been identified in the written memorandum and where some are fairly straightforward and well articulated in the written argument. Further, there is nothing wrong with counsel focusing on the strongest arguments, advising the court that he or she relies on written argument for the other points, unless the court has any questions about them.
- To the extent possible counsel should present oral submissions in the same order as the arguments are set out in the written memorandum. Some judges use the factum to follow argument, which is hard to do if counsel does not follow the written outline.

- It is trite to note that in Court and out of it, counsel must be respectful and courteous to all involved in the process. This is not always easy, particularly for counsel who are before the Court representing non-citizens for whom the stakes are very high and often heart-wrenching, but it is a necessary part of practice. Being polite does not mean that one should cave on arguments. Counsel is obligated to press arguments before the Court with vigour. But there comes a point, when it becomes apparent that the argument is becoming repetitive and the Court not convinced. At this point move on to another issue: the Court will not be won over by repeating what has already been said.

- It is important to consider in advance whether a question should be certified for appeal in respect of any of the issues raised. There are different considerations at play. For example, divergent trends in decision making may form the basis for certification of a question to have the Court of Appeal 'settle' the law. But when preparing for argument, one is not normally looking for cases which do not help advance the position taken by the client. Nevertheless it is better to be aware of

these differences, because the Court should be made aware of them in any event when called upon to make a decision on the same issue[14] and, in the long term, it is more helpful to have the differences resolved on appeal then to have them fester unresolved.

- It is not always possible to frame a question before oral argument takes place because cases can sometimes take on a different focus entirely when the arguments are presented before a judge. There is nothing wrong with asking the Court to permit counsel to suggest questions and forward them to the Court within a few days after argument, or in complex cases, to request the Court to issue reasons and give the parties time to pose questions for certification before the final order issues.

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[14] The judges of the Federal Court are normally fully aware of differences in the Court's decision making on particular issues, though not all are prepared to certify a question for appeal.