Family Class Advocacy before the Immigration Appeal Division and the Federal Court – Marriages of Convenience, Misrepresentation, and Excluded Relationships

Prepared by Andrew Z. Wlodyka

Vancouver, B.C.

For Ashton College

Content to be Covered

- Description of the IAD
- What the IAD can do
- Common Grounds of Refusal
- Relationships of Convenience under subsection 4(1)
- Misrepresentation
- Limitation of IAD's jurisdiction under IRPA in sponsorship cases
- Grounds of appeal
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Content to be Covered

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Description of the IAD's Mandate

- Immigration Appeal Division
- Immigration Appeal Division(IAD) one of four Divisions under the Immigration and Refugee Protection Act
- Hears appeals from refusals by visa officers under subsection 63(1) of the IRPA, Permanent resident visa holders appeals under subsection 63(2), Removal order appeals by permanent residents under subsection 63(3) appeals by permanent residents from negative residency obligation decisions by visa officers under subsection 63(4), and Minister's appeal against decision of the Immigration Division at an admissibility hearing under subsection 63(5)
- See Information Guide produced by IAD

What the IAD can do

- The IAD has sole and exclusive jurisdiction to hear and determine all questions of “law and fact” in proceedings before it (See section 162 of IRPA
- It may base its decision on the evidence before it that is adduced in the proceeding (See paragraph 175(1)(c)
- It is not bound by Rules of evidence (See paragraph 175(1)(c)
- Grant a remedy if the IAD determines that the lower decision is wrong in law, in fact or mixed law and fact (See paragraph 67(1)(a)
- The IAD can set aside the lower decision and substitute its own determination (See subsection 67(2))
- The IAD does not have to hold a full hearing in every circumstance (See paragraph 175(1))(a)

Grounds of refusal relating to the sponsor

- Whether sponsor described in section 130; (no access to H&C power where there is breach of section 130)
- The words “resides in Canada” in paragraph 130(1)(b) do not refer to the residency obligation set out in section 28 of the IRPA
- Whether the sponsor is habitually present in Canada and intends to fulfill his obligations in the sponsorship undertaking;
- Whether the sponsor is in default of undertaking or support payments under Court order;
- Whether the sponsor has an income that is at least equal to the sponsor’s minimum necessary income as defined in section 126 of the Regs

Grounds of Refusal relating to the Applicant

- S. 36(1)-Serious Criminality

- Permanent Resident or Foreign National:
- Conviction in Canada for offence under Act of Parliament is punishable by at least 10 years or term of imprisonment of more than 6 months imposed;
- Conviction outside of Canada that if committed in Canada is punishable by at least 10 years; or
- Committing an act outside of Canada that is an offence in the place where committed and that if committed in Canada would be an offence punishable by at least 10 years
- In Canada offences require an application to National Parole Board for record suspension pursuant to Criminal Records Act or if offences are outside of Canada then need to apply for rehabilitation under paragraph 36(3)(c) of the IRPA

S. 36(2)-Criminality

- Foreign National
- A) convicted in Canada under Act of Parliament punishable by indictment or of two or more offences under any Act of Parliament not arising from same occurrence;
- B) convicted outside Canada of offence that if committed in Canada would be (a);
- C) committing an act outside Canada that is an offence in that place and that if committed in Canada would be an indictable offence; or
- D) committing on entering Canada, a prescribed offence under any Act of Parliament (See Chapter 2.10 (a) to (g) of Canada/U.S. Relocation Manual)

S. 38-Health Grounds

- Foreign National:
- A) danger to public health;
- B) danger to public safety;
- C) excessive demands on health or social services (defined s.1(1)of the Regs; See also Hilewitz v. Canada (Minister of Citizenship and Immigration) [2005] 2 S.C.R. 706

Financial Grounds

- Foreign National:
- Unable or unwilling to support themselves or any person dependent on them and having not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made. (Section 39 of IRPA)
- In case of sponsorship of parents, inability of the sponsor to meet LICO (Paragraph 133(1)(j) of IRPR)

s.40 Misrepresentation Ground

- Permanent resident or foreign national misrepresentation or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of justice;
- 5 year duration of inadmissibility (Can cover both sponsor and applicant)
- Applicant cannot apply for permanent residence for 5 years under subsection 40(3)

Relationship of Convenience: Bad Faith Relationships

- S. 4(1) For the purposes of these **Regulations**, no foreign national shall be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership, conjugal partnership
  - (a)was entered into primarily for the purpose of acquiring any status or privilege under the Act; or
  - (b) is not genuine
- (2) A foreign national shall not be considered an adopted child of a person if the adoption
  - (a)was entered into primarily for the purpose of acquiring any status or privilege under the Act; or
  - (b) did not create a genuine parent-child relationship.

Relationships of Convenience under subsection 4(1) of the Regulations

- Grewal v. Canada (Minister of Citizenship and Immigration) 2020 FC 1186

- IAD refused to accept the joint recommendation of the parties and refused the appeal because it was convinced that the Applicant was willing to marry the Sponsor who had an intellectual disability in return for permanent residence. IAD applied the western standard to evaluate the marriage of culturally Indian applicants.

- Federal Court overturned decision because the IAD had failed to justify why it departed from the joint recommendation of the parties and also it did not show how it was relying on any institutional expertise about what was acceptable in an arranged marriage

Primary Purpose of Marriage

- Waqas v. Canada (Minister of Citizenship and Immigration) 2020 FC 152
- Example of a case where the two prong test set out in subsection 4(1) is demonstrated
- The IAD found that the marriage was genuine looking at the evidence up to the time of the hearing but also that the marriage had been entered into primarily for an immigration purpose
- Factors included the Applicant's immigration history, timing and initiation of the relationship, his expressed interest in coming to Canada, the couple's communication prior to the marriage and the factors fulling the Applicant to Canada
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- Finally, negative inference drawn from the Appellant's failure to produce evidence from a family member who had introduced them even though it flagged the relevance of such evidence
- Federal Court upheld the IAD decision

Misrepresentation

- Misrepresentation includes lies, omissions and false documents but the information must be material to the point where it can induce an error in the administration of the Act. It can be direct or indirect (misrepresentation by third party such as legal representative or sponsor)
- No mens rea component to this ground so if someone unknowingly misrepresents or omits a fact that is still a misrepresentation
- An exception to the rule is where the person honestly and reasonably believed that they were not withholding material information (See **Nwaubani v. Canada (Minister of Citizenship and Immigration)**, 2019 FC 1192.
- Serious consequences for misrepresentation

Limitation of IAD's jurisdiction under IRPA in sponsorship cases

- Limited right of appeal to the IAD where the sponsored applicant is not a member of the family class under paragraph 117(9)(d) of the Regs. IAD can only examine if the refusal is well grounded.

- No H&C jurisdiction to overcome refusal under paragraph 117(9)(d) of the Regs

- There is public policy that allows sponsorship of close family members even if fall within paragraph 117(9)(d). Does not apply to economic class immigrants who failed to declare dependants

Limitation on Right of Appeal by Sponsor

- No right of appeal by a sponsor where the refusal of the Applicant where he or she has been found inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality (see subsection 64(1) of IRPA)
- Serious criminality is defined under subsection 64(2) of IRPA namely (a) crime punished in Canada for term of imprisonment of at least 6 months or described in paragraph 36(1)(b) or (c)
- A Conditional Sentence in Canada is not a term of imprisonment (See Tran v. Canada (Minister of Citizenship and Immigration) 2017 SCC 50

Limitation on Right of Appeal by Sponsor

- No right of appeal under subsection 63(1) of IRPA where there is a finding by a visa officer of inadmissibility for misrepresentation in a sponsored application for permanent residence unless the Applicant in question is the Sponsor's spouse, common-law partner or child (see subsection 64(3) of IRPA
- For example there is no right of appeal where the Applicant is a conjugal partner or parent or grandparent

Appeal on Humanitarian and Compassionate Grounds

- To qualify for H&C relief before the IAD, the sponsor and the sponsored family member must fit in the IRPA definition of "sponsor" and "member of the family class". This determination must be made first by the Visa Officer and the IAD can review this aspect of the decision in law or mixed fact and law See **Minister of PSEP v. Gebrezgabher Hagos** [2012] F.C.J. No. 1721

Appeal on Humanitarian and Compassionate Grounds

- Single common test to determine humanitarian and compassionate considerations, where the IAD has jurisdiction to allow an appeal on humanitarian and compassionate considerations;

- It involves a balancing of the weight of the ground of inadmissibility and the humanitarian and compassionate considerations that exist in a case.

What Happens if You Appeal a Sponsorship Refusal

- The Sponsor has 30 days after the receipt of the refusal to apply for an appeal to the IAD.
- Do not have to wait until Sponsor receives refusal letter so long as the Applicant has received it.

After Notice of Appeal is Filed

- Minister has to prepare Appeal Record within 120 days Rule 4(4)

- IAD can issue show cause if Minister does not comply Rule 4(5) or schedule the hearing without appeal record or only part of record

- Contents of the Appeal Record include:
- A table of contents
- Application for a permanent resident visa that was refused
- The application for sponsorship and the sponsor's undertaking
- Any relevant document to the application
- Written reasons for refusal (See Rule 4(1))
- Access request is necessary as Appeal Record may not contain all relevant documents

Powers of the IAD

- The IAD has pursuant to section 174 of IRPA, the powers of a superior court of record. It has the power to swear and examine witnesses and to order the production and inspection of documents.
- It has the power to enforce its own orders. Under section 175 of IRPA, the IAD is not bound by strict rules of evidence and can accept evidence if it is credible and trustworthy in the circumstances s.175.

Reasons for Decision

- Under Rule 54(1) the IAD must give reasons in the case of sponsorship appeals or where it stays a removal order Rule 54(1) and in all other cases they must be provided if the person who is the subject of the proceeding or the Minister requests them within 10 days of notification of the decision or where the Rules provide that the IAD must give reasons (See Rule 54(2))

Early Resolution

- The IAD may contact counsel before the appeal record is prepared and request written submissions where there is a question of its jurisdiction to hear the appeal such where the applicant is not a member of the family class or the sponsor does not meet the definition of sponsor in the Regulations or the matter is simple and capable of resolution by way of written submissions by the parties such as the legality of the marriage or adoption or where *res judicata* applies or where the issue concerns meeting the Minimum Income Level ("MNI").
- Once the Appeal Record is produced the IAD may designate the appeal for alternate dispute resolution (ADR). The parties may also request ADR after receipt of the appeal record.

Alternative Dispute Resolution

- Formalized alternate dispute resolution system Rule 20
- Allows for expedited process to review merits of appeal in informal setting
- Process depends on good faith by participants
- Minister's counsel is key actor
- Dispute Resolution Officer facilitates process Rule 20(2) See IAD Guides to Dispute Resolution

Alternate Dispute Resolution

- Types of cases where ADR may be appropriate are
  - (1) bad faith relationship cases not including adoptions,
  - (2) medical inadmissibility cases where the sole ground of appeal is based on humanitarian and compassionate grounds or
  - (3) sponsorship appeals such as a financial refusal where there are sufficient humanitarian and compassionate grounds to overcome the financial inadmissibility or
  - (4) where there is a default of an undertaking or
  - (5) Applicant's non compliance of a request by a visa officer for documents

ADR Process from Appellant's Perspective

- Use ADR process where issue is straightforward
- Where credibility of Applicant is a serious issue or there are multiple complex issues counsel should proceed to full hearing
- Important to manage client expectations
- Preparation is the key
- Treat ADR scheduling seriously and avoid postponements if possible
- Treat Minister's representative in a polite manner as he or she is the key actor along with the client. They should be allowed to engage each other. Counsel's role is supportive.

Finalization of ADR

- If successful, summary prepared by DRO with concurrence of parties for signature by Board Member
- Process is confidential but If not successful, Minister's counsel shall prepare notes for benefit of Minister's rep at hearing
- Shortened disclosure requirements
- Failed ADR leads to scheduling matter for hearing or withdrawal of appeal

Preparation for Hearing

- Important to meet disclosure rules for documents
- Request sufficient time for the hearing taking into account number of witnesses to be called and submissions of parties
- Hearings of the IAD are virtual with use of conference calls for out of town witnesses
- Provide expert reports with credentials within the time limit set in the rules.

Preparation for Hearing

- Develop strategy ahead of time such as whether you will challenge the ground of refusal on legal grounds or restrict the appeal on humanitarian and compassionate grounds. Burden of proof on the Appellant.
- Prepare client, applicant and witnesses in advance with the understanding that the hearing is adversarial in nature and it is a hearing de novo. However, the reasons for the refusal given by the Visa Officer cannot be ignored

Appeal Hearing

- Appellant's opening statement (Brief Statement what case is about and what witnesses will be called)
- Appellant testifies under oath or affirmation through questioning by his or her counsel (Restriction on ability to lead witness)
- Appellant is cross-examined by Minister's counsel (Can ask leading questions)
- Re-direct by Appellant to clear up answers
- Same order for witnesses
- Final submissions are done orally but can be done in writing if there is not enough time to complete case

Special Issues Res Judicata and Abuse of Process

- If Appeal is dismissed and no judicial review, new application on same facts may lead to new refusal and dismissal of case without full hearing. Even if there are new facts no guarantee that there will be a full hearing.

- Note that where evidence that would have the effect of changing a member's mind that was not obtained at the first available opportunity the appeal could still be dismissed. **Sami v. Canada (Minister of Citizenship and Immigration) 2012 FC 539**

Key Points to Remember

- IAD can provide relief from a refusal of a sponsored application for permanent residence in most cases even if there is a question of whether the Applicant is a member of the family class. (Can determine threshold question and also determine possible breach of natural justice)
- IAD has power of superior court in its area of jurisdiction
- IAD facilitate early review of cases to promote resolution of cases in timely manner.
- Hearing before IAD is adversarial and de novo. Decision can be reviewed by Federal Court
- Members are independent of the Government as they are GIC appointees

Judicial Review

- 15 days from receipt of decision, can apply to Federal Court for leave to commence judicial review s.72(1) of IRPA
- 30 days to perfect Application Record once leave application filed
- Leave must be granted for there to be a hearing
- Disposition by Federal Court is to dismiss application or else return to IAD for reconsideration by different member
- Need to determine whether to file judicial review application or file new application
- Where no right of appeal to IAD, need to apply for judicial review of Visa Officer's decision. You have 60 days from receipt of refusal letter to go to Federal Court

Questions

Ask Away!