

ASHTON COLLEGE
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**VACATION of REFUGEE STATUS under IRPA s. 109: THE BOARD GIVETH
AND THE BOARD TAKETH AWAY**

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INSTRUCTOR: DANIEL K. MCLEOD

IMMIGRATION & REFUGEE LAWYER, VANCOUVER

Topics:

- On what grounds can the Minister apply to vacate someone's refugee status under IRPA s. 109?
- Why is it important to know about IRPA s. 109 vacation?
- What happens in practice?
- Can new evidence be presented at an RPD vacation hearing?
- On what grounds can the RPD refuse the Minister's application to vacate a person's refugee status?
- What happens if the Minister's application to vacate a person's refugee status is successful?
- Should you take on a vacation case if you have no experience with IRPA s. 109?

On what grounds can the Minister apply to vacate a person's refugee status?

- IRPA s. 109 allows the Minister to apply to the RPD to vacate a person's refugee status if the decision was obtained as a result of directly or indirectly misrepresentating or withholding material facts.
- Practice Notes:
 - There is no time limit on when the Minister can apply to the RPD to vacate a person's refugee status. It could even happen 10 years or more after the person was granted refugee or protected person status or PR.
 - Vacation is completely different from s. 108 cessation. Vacation is for misrepresentation. Cessation is because the person no longer needs Canada's protection. Cessation only applies to refugees/protected persons, and refugees/protected persons with permanent residence. Cessation does not apply to persons with Canadian citizenship, but vacation does.

Why is it important to know about IRPA s. 109 vacation applications?

- In 2019 the Minister won 279 out of 295 vacation cases at the RPD. That's a success rate of 94.5%.
- At the end of December 2020 there were 543 vacation applications by the Minister pending at the RPD.
- From January to June 2021 the Minister had a 100% success rate.
- Vacation cases usually involve refugees/protected persons, or refugees/protected persons who also have permanent residence. In some cases, the Minister has applied even after the refugee/protected person obtained Canadian citizenship.

What happens in practice? Situation #1 – No RPD Hearing

- CBSA, IRCC or CSIS may contact the person and ask them to come in for an interview, before the Minister applies to the RPD for vacation.
- If a client comes to you after receiving a notice for such an interview, now is the time for counsel to get involved. It may still be possible to avoid a vacation hearing.
- For example: I was consulted on a case where CBSA notified a person to come in for an interview more than 12 years after obtaining refugee status and permanent residence.

Example #1:

- CBSA notifies a person who had refugee status and permanent residence to come in for an interview more than 12 years after obtaining refugee status and permanent residence. CBSA says that the person did not disclose that they had permanent resident status in the USA before coming to Canada to apply for refugee status.
- You interview the client. The client says it is true that he was in the USA for awhile (which he disclosed in his refugee application), but says he had only a US visitor visa.
- Contact CBSA, advise that you are an ICCRC member and that you will be attending the interview with the client. Confirm that they will provide you with a recording of the interview. Ask if they have evidence that he is a USA permanent resident and if so, will they send you copies.

Example #1 (continued):

- At the interview, a CBSA officer questions your client about his time in the USA and says your client had permanent residence there.
- Your client says he did not have permanent resident status in the USA, only a visitor visa.
- You ask the CBSA officer if they have documentation to prove your client had PR in the USA. The officer says no. You agree to sign any necessary documents to authorize CBSA to access your client's US immigration record. You give CBSA copies of your client's US documents.
- After the interview, CBSA makes inquiries with the US authorities and is not able to obtain evidence that your client had PR in the USA. No further action taken by CBSA.

What happens in practice? Situation #2 – RPD Hearing

- The Minister does not have to interview the refugee. The Minister can apply directly to the RPD for a vacation hearing (or apply after an interview). The refugee will get a notice by mail, with copies of the documents & materials the Minister is relying on in support of the application for vacation.
- IRPA s. 170: The RPD must hold a hearing and give the Minister (and the refugee) a reasonable opportunity to present evidence, question witnesses and make representations.
- Unlike a refugee hearing, in a vacation hearing the onus is on the Minister to prove their case.

What happens at the RPD vacation hearing?

- The Minister presents their case first. The Minister must present evidence that the refugee misrepresented or withheld material facts relating to a relevant matter.
- The refugee then presents their case.
- Any witness, including the refugee, is questioned first by the Minister, then by the RPD member, then by counsel. [RPD Rule 10(4)]
- Using the example, the Minister could allege that the refugee had PR in the USA. If your client has a document showing that they only had visitor status in the USA, they could submit that document to contradict the Minister's allegations. The RPD can reject the Minister's application if the refugee has produced credible evidence to show that there was no misrepresentation, or withholding of material facts (or if the Minister fails to prove their case by providing sufficient evidence that the refugee had PR in the USA).

Can new evidence be presented at the RPD vacation hearing?

- Note that neither the Minister nor the refugee can present new evidence, except for evidence to support or rebut the allegations of misrepresentation or withholding: Annalingam v. MCI 2002 FCA 281.
- So, for example, the refugee cannot present evidence of the current situation in their home country to show that even if they misrepresented or withheld material facts at their refugee hearing, they have a well-founded fear of persecution based on the present-day situation in their home country.

In practice, what defences are available to the refugee at an RPD vacation hearing? Defence #1

- The Minister must present evidence that the refugee misrepresented or withheld material facts relating to a relevant matter.
- As we have seen in the previous slides, the RPD can reject the Minister's application if Minister cannot prove that there was misrepresentation, or withholding of material facts by the refugee. Of course in practice, the Minister is unlikely to apply to the RPD for a vacation hearing if they do not have very strong evidence of misrepresentation or withholding of material facts. Remember the Minister's high success rate in vacation hearings at the RPD.

Defence #2

- The Minister must present evidence that the refugee misrepresented or withheld material facts relating to a relevant matter.
- In RPD case #MA6-03624, the claimant misrepresented how he got to Canada, not about his persecution in his home country. The RPD dismissed the Minister's application under s. 109(1) relevance: Canada v. X. 2007 CanLII 48211
- Similarly in Bafakih v. MCI 2020 FC 689, the Federal Court ruled that the fact that the Yemenese family did not disclose that 2 family members were born in Kenya was not relevant to their refugee claim, as their birth in Kenya did not give them status in Kenya.

What happened in the 2020 Bafakih vacation case?

The Federal Court agreed with the refugee family, and noted the wording of IRPA s. 109(1) which requires the RPD to find that the decision granting refugee status was obtained as a result of directly or indirectly misrepresenting or withholding facts relating to a relevant matter in order to grant the Minister's application for vacation of refugee status. The Court said the RPD and the Minister were confusing the test in s. 109 with s. 40(1)(a) which refers to misrepresentation relating to a relevant matter that induces or could induce an error.

What's happening now with the 2020 Bafakih vacation case?

- This case was decided by the Federal Court on 15 June 2020. At the request of the Minister, the judge agreed to certify the following question:

Before vacating a decision granting refugee protection under s 109(1) of the [IRPA](#), is the Minister required to demonstrate, and is the [RPD](#) required to find, a misrepresentation or withholding of a material fact that would have led to a different conclusion by the original [RPD](#) panel, or is it sufficient for the [RPD](#) to find a misrepresentation or withholding of a material fact that could have led to a possible line of inquiry that may, or may not, have resulted in a denial of refugee protection by the original [RPD](#) panel?

- (In order for a party to appeal a Federal Court decision to the Federal Court of Appeal, the Federal Court judge must agree to certify a question).
- On 22 September 2020, the Minister filed a Notice of Appeal of the [Bafakih](#) decision in the Federal Court of Appeal.

What is a typical RPD vacation hearing about?

- In order to get refugee status, the refugee lied or withheld information about something important to the claim.
- A typical scenario is where the refugee said they were persecuted in their home country in, for example, 2018. After the person gets refugee status, the Minister finds out that the refugee was actually working in Italy in 2018. The Minister applies successfully to the RPD to vacate the person's refugee status.
- This was the scenario in the leading case on vacation of refugee status: Annalingam v. MCI 2002 FCA 281, which dismissed the refugees' appeal of the vacation of their status by the RPD.

Defence #3 - Can the RPD decline to vacate a refugee's status even if there was misrepresentation as to a relevant matter?

- IRPA s. 109(2) – Yes, if there was other sufficient evidence at the original hearing to justify protection.
- In the Budimcic RPD case, the claimant misrepresented and withheld material facts including his military & employment history in Yugoslavia. The Board must then set aside the tainted evidence. After doing so, the Board found there was still sufficient evidence considered at the original hearing to justify refugee protection: Budimcic (Re) 2008 CanLII 76252

When the refugee loses at an RPD vacation hearing:

- What if the refugee misrepresented or withheld material facts relating to a relevant matter, and the remaining evidence from the original hearing is not sufficient to justify protection?
- The RPD will grant the Minister's application for vacation and the person loses their refugee status.

When the refugee loses at an RPD vacation hearing:

- What if the refugee has refugee status and permanent residence?
- Under IRPA s. 46(1)(d), the refugee also loses their permanent residence.

When the refugee loses at an RPD vacation hearing:

What if the refugee has sponsored their spouse or children, either before or after getting permanent residence?

- IRPA s. 40(1)(c): The refugee or PR is inadmissible for misrepresentation when the RPD makes a decision to vacate their refugee status.
- IRPA s. 40(1)(b): The spouse or children are inadmissible for having been sponsored by a person who is determined to be inadmissible.

When the refugee loses at a vacation hearing:

- IRPA s. 40(1)(b): The spouse or children are inadmissible for having been sponsored by a person who is determined to be inadmissible.
- IRPA s. 40(2)(b) says: 40(1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility of the sponsored persons. But as of 09/2021 there were only 4 cases in CanLII that mentioned s. 40(2)(b). None of them involve IRPA s. 109 vacation. The only 1 of the 4 cases where IRPA s. 40(2)(b) was successfully argued was an IAD case: Lin v. MPSEP 2019 CanLII 13072. The IAD upheld the ID's decision that the sponsor father was inadmissible for misrep, but overturned the ID's decision against his son. The IAD found there was no evidence that the Minister had considered IRPA s. 40(2)(b) regarding the son, who was only 14 when he arrived in Canada and who was not aware of his father's misrepresentation. The IAD also applied IRPA s. 25 H&C.

What can a refugee do if the Minister is successful on a vacation application?

- IRPA s. 101(1)(b) A person is ineligible to make another refugee claim.
- There is no access to RAD.
- Possible remedies:
 - Federal Court judicial review.
 - Can apply for PRRA. **No 1-year PRRA bar for vacation cases** (different from IRPA s. 108 cessation).
 - Can apply under IRPA s. 25 for H&C, but there is a 1-year bar.

What if the refugee loses at an RPD vacation hearing, but has Canadian citizenship?:

- **Under the Citizenship Act, s. 10.1:** The Minister can commence an action in Federal Court, seeking a declaration that the person has obtained their citizenship by false representation or fraud or by knowingly concealing material circumstances.
- A declaration made under subsection (1) has the effect of revoking a person's citizenship. The Minister can then commence removal proceedings.
- If the refugee loses their citizenship under CA s. 10 for misrepresentation, CA s. 22(1)(f) provides that they cannot apply for citizenship again for 10 years.

What does the Minister have to do if the refugee has Canadian citizenship?

- First the Minister applies to the RPD for a hearing to take away the person's refugee status.
- If successful at the RPD, the Minister can go to Federal Court to revoke the person's citizenship. See for example: MCI v. Omelebele 2015 FC 305, and MCI v. Kljajic 2020 FC 570 (refugee did not disclose complicity in war crimes as a senior official in Bosnia).
- Remember there is no time limit on when the Minister may apply to the RPD for vacation.

What can a person do if the Minister applies to take away their Canadian citizenship?

Citizenship Act s. 10:

- The Minister has to give the person written notice and advise the person of their right to make written representations within 60 days to the Minister.
- Unlike a vacation hearing at the RPD, which deals only with misrepresentation or withholding in the original refugee case, the person under CA s. 10 can make written representations that include any considerations respecting his or her personal circumstances — such as the best interests of a child directly affected — that warrant special relief in light of all the circumstances of the case.
- If the Minister is convinced by the person's written representations, the matter will be closed and will not go to Federal Court.
- If the Minister is not convinced by the person's written representations, the matter will go to Federal Court unless the person has agreed in writing to have the case decided by the Minister.
- If the person agrees to have the Minister decide the case, the Minister may hold a hearing if the Minister is of the opinion that a hearing is required.

Summary of vacation of refugee status under IRPA s. 109

- No limitation period. Minister can apply to the RPD anytime for vacation.
- At the RPD, onus of proof is on Minister.
- To vacate refugee status, RPD must find:
 - Misrepresentation or withholding of material facts
 - Relating to a relevant matter
 - After deleting evidence tainted by misrepresentation or withholding, insufficient evidence remaining to support a refugee claim.
 - New evidence is not permitted (except to prove or disprove Minister's allegation of misrepresentation or withholding).
- Effect of vacation is loss of refugee status and PR.
- Person can apply for PRRA without 1-year bar.
- If person has Canadian citizenship, Minister can apply to take it away.

Should you take on an IRPA s. 109 vacation case if you have no experience in this area?

- S. 109 vacations cases, like s. 108 cessation cases, are complex and the consequences if your client loses are awful. Best to refer the case to experienced counsel, or take on the case under the direct supervision of experienced counsel.