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"Qui bene interrogat bene docet" "He who questions well teaches well"

Canada's New Economic Migration Model: Whose Interests Are Being Expressed?[1]

Mario D. Bellissimo, LL.B., C.S.*

Part Two (of Two Parts)

International Cues & Clues

New Zealand

Given the questions and concerns enumerated in Part 1 of this article, and the fact that the idea for an EOI system in Canada

1 Please be advised that this is Part Two of a two-part article. The first section of this article was included in our April edition of ImmQuest and provided an overview of the changes to the *Immigration and Refugee Protection Act* created by the passage of Bill C-4, *A Second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013.* Concerns regarding these amendments were highlighted at that time. This second section of the article attempts to address the concerns raised in Part One through an analysis of similar systems in New Zealand and Australia. In addition, Mr. Bellissimo provides herein advice for advocates in navigating the EOI system.

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Refugee Appeal Division (RAD): First Steps in an Important Legal Evolution

Mario D. Bellissimo, LL.B., C.S. and Joanna Mennie, LL.B.

Part One (of Three Parts)

Introduction

The Refugee Protection Division is often referred to as the RAD. RAD is:

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Canada's New Economic Migration Model: Whose Interests Are Being Expressed?

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was largely derived from New Zealand's (NZ) model as well as from Australia, a quick review of their systems may afford us some cues and clues. The NZ system a two-stage process. In form INZ 1101 *Skilled Migrant Category, Expression of Interest Guide,* it reads:

> The Prerequisites
>
> To be considered under this category you need to be of good health, good character, have a reasonable standard of English and be under 56 years of age. You will also need to meet the threshold of 100 points for employability and capacity-building factors to have an Expression of Interest (EOI) accepted.
>
> The Points System
>
> The points system is designed to reflect which applicants have the most to offer New Zealand so that Immigration New Zealand (INZ) can extend invitations to apply for residence to them. The points you can qualify for are set out on page 6. Points are available for skilled employment in New Zealand, work experience, qualifications, age and close family in New Zealand. Bonus points are available for employment in identified areas of future growth and/or absolute skill shortage. Bonus points are also available for employment outside Auckland, studying full-time in New Zealand for at least two years towards a recognised New Zealand qualification, gaining recognised New Zealand qualification(s), and for a partner's recognised qualification or offer of employment.

Applicants can make an online EOI application in NZ at a cost of roughly $480.00 Canadian and $610.00 Canadian for a paper-based EOI application. If an Applicant has an EOI score of 100 points or more, it goes in the pool of EOIs. Every two weeks Immigration authorities automatically select EOIs with a points score of 140 or over from the pool. Then they select EOIs with a points score between 100 and 139, which include points for a skilled job or job offer. If spaces remain available, they use additional criteria to select lower scoring EOIs. EOIs are only valid for six months and the EOI fee will not be refunded. The points breakdown is as follows:[2]

- **Skilled employment**: 50-60 points for a job or a job offer in NZ that requires specialist, technical, or management expertise. Bonus points if the job/job offer is in certain industries, or if applicant's partner also has a skilled job/job offer.
- **Work experience**: Minimum two years' work experience in the same field.
- **Recognized qualification**: 40-60 points for a variety of trade certificates, diplomas, bachelor degrees and post-graduate qualifications. Bonus points for qualifications as well.
- **Age**: Minimum of 5 and a maximum of 30 points for age. Applicant must be under 55 years old to apply.
- **Close family**: 10 points for close family with New Zealand residence or citizenship.

Application Form

The NZ EOI application comprises thirty-six pages. The EOI application form is an interesting read with a number of notable inclusions worthy of comment. First, Section A **Identity,** A20, asks if the applicant has received immigration advice on the EOI application. Section B **Character**, BI, asks an applicant if they have been sentenced to a term of imprisonment for five years or more regardless of any suspended sentences or any expunged criminal records. B7 includes specific questions about drug trading and trafficking. Section C **Health** specifically asks about dialysis treatment and haemophilia. Section D **English Language Ability** allows an applicant to meet language thresholds with IELTS, but also by having a bachelor degree or a higher qualification conducted entirely in English, or current skilled employment in New Zealand for 12 months or more amongst others.

Certain questions are not to be answered by yes/no. In particular, under Section E **Skilled Employment in New Zealand**, applicants are asked to give a detailed reason in support of claims for point allocations (E1-E9). Pursuant to section F **Recognized Qualifications** applicants are asked if one's qualification has been assessed by the New Zealand Qualifications Authority (NZQA), the government agency responsible for quality assurance of qualifications. The applicant must provide an NZQA assessment of qualification unless one of the following applies:[3]

- your qualification is on our List of Qualifications Exempt from Assessment, or

2 See online: www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply.

3 See online: http://www.dol.govt.nz/immigration/knowledgebase/item/1199.

- your qualification is on our List of Qualifications Recognised as an Exception or
- you have full or provisional registration and your qualification has been assessed by a New Zealand organisation as being comparable to a New Zealand qualification on the List of Qualifications Exempt from Assessment

Interestingly, there are a number of exempt educational qualifications and institutions categorized by country including Canada. For Canada many of the qualification exemptions include Bachelor Degrees, Doctorates, and Masters from various Canadian universities.[4] Section N, **Other Family** at N2 explicitly recognizes that the presence of close family members enhances long-term prospects for employability and settlement. Close family members under New Zealand immigration law include adult siblings, adult children and/or parents.

An important section for immigration lawyers is Section Q **Immigration Advisor's Details** which sets out the exemptions under the *New Zealand Immigration Adviser's Licensing Act, 2007*, while Section R **Declaration by Person Assisting the Applicant** asks a series of questions to confirm the nature of the service provided to the applicant. An important clarification regarding the information collected in the EOI application form reads:

> The information about you and your family in this form is being collected to determine whether we will invite you to apply for residence in New Zealand and may also be used to contact you for research or marketing purposes or to advise you on immigration matters. This information may also be used to determine your entitlement to board a flight to come to or return to New Zealand. Your personal information will not be shared with airline check in agents, however a boarding message will be returned to the airline check in agent based on information you have supplied on this form.
>
> The main recipient of the information is Immigration New Zealand (INZ), a service of the Ministry of Business, Innovation and Employment, but it may also be shared with other Government agencies that are entitled to this information under applicable legislation. In particular, the Ministry of Social Development (Work and Income) may be given information about your personal resources. The collection of the information is authorised by the Immigration Act 2009 and the Immigration Regulations made under that Act. The supply of the information is voluntary, but if you do not supply the mandatory information required by the Expression of Interest form, then your Expression of Interest cannot be accepted.

4 See online: http://www.immigration.govt.nz/opsmanual/47085.html.

If selected, an 'Invitation to Apply' for residence under the Skilled Migrant Category is sent. Applicants must provide evidence to support the points claimed and proof that all dependents meet all health, character and English language requirements including the form and fee.[5] Fees are based on geographic region. By way of example, Canadian applicants are required to pay a permanent resident fee totaling approximately $2250.00 CDN. Applications must be submitted within four months of being invited to apply for residence. Any applications received after four months will not be accepted. If filed within time, there exist three possible outcomes:

- Approval and grant of residence.
- Deferral of application and a granting of a Skilled Migrant Category job search visa. This is a temporary visa that will allow the applicant to enter New Zealand to search for skilled employment. It will be valid for a stay of nine months and is an open work visa.
- Refusal of application.

Australia

As noted above, in July 2012 Australia introduced an EOI two-step system similar in some respects to the New Zealand EOI immigration system reviewed above.[6] SkillSelect is the name of the Australian online service that enables skilled workers and business people to file a skilled visa application through an EOI. Intending migrants can then be found and nominated for skilled visas by Australian employers or state and territory governments, or they may be invited by the Australian Government to lodge a visa application. All EOIs must be completed online using SkillSelect. There is no fee to submit an EOI in SkillSelect and at the conclusion of the online process a points score will be provided. The result and points score generated after applying for an EOI, along with the time and date of filing becomes the applicants ranking for some visas. Rankings are processed automatically by SkillSelect with no involvement of the department's staff.

The EOI system extends to points-based temporary and permanent migration, business investment and innovation visa programs. Any false information on EOI applications results in a

5 See online: http://www.immigration.govt.nz/NR/rdonlyres/00B58004-04AB-46C6-B32B-5CE91FBA979A/0/INZ1028.pdf.
6 See online: http://www.immi.gov.au/skilled/general-skilled-migration/skilled-occupations/skills-assessed.htm.

three-year ban. A range of information in the EOI application form is required depending on the visa, such as:

- Basic personal information
- Nominated occupation
- Work experience
- Study and education
- Level of English skills
- Details of a Skills Assessment, related to the nominated occupation
- Business and investment experience.

Applicants are ranked according to the appropriate points test. Applicants are able to submit an EOI even if they do not meet the pass mark; however, they will not be invited to apply for a visa. Point calculations are specific to the visa class. Nominated occupations or priority occupations are on the Skilled Occupation Lists. Like the New Zealand model, the applicant must provide details of a Skills Assessment relating to the nominated occupation. While applicants are not required to submit documents supporting point claims, they must still provide certain information like a completed skills assessment referred to above and/or a job-ready program, and have taken an English-language test as proof the English language requirement has been met.

Once completed, the EOI is stored in SkillSelect and is valid for two years. If an applicant does not complete the EOI it will be stored for two years, but the applicant will not be eligible to receive an invitation. It is the applicant's responsibility to access the EOI and update the details if circumstances change. An EOI is not considered a visa application and applicants will not be granted a Bridging visa or be able to appeal any decision on EOI applications.

Caps, or what the Australians refer to as an "occupation ceiling", may be applied to invitations issued under the points-based skilled migration program. This ensures that the skilled migration program is not dominated by a small number of occupations. When this limit is reached, no further invitations for that particular occupation group will be issued for that program year. Invitations would then be issued to other EOIs who have nominated available occupations even if they are lower ranking. For the state and territory nominated visas, a state or territory will not be able to nominate an applicant if the nominated occupation has reached its occupation ceiling.

So invitations will be issued automatically to people with the highest ranking EOIs, subject to occupation ceilings and to those whose point score exceeds the current pass mark, although not all EOIs that meet the point test pass mark will receive an invitation. State or territory governments will locate and select skilled business people that they want to nominate. State and territory governments may assess people before they nominate. On a limited basis, nominating state or territory governments may award additional points towards the innovation points' test where they have determined that the proposed business is of exceptional economic benefit to that state or territory.

The Skilled Occupation List (SOL) is available to applicants in various streams including: independent points-based skilled migration where applicants are not nominated by a state or territory government agency, a Family Sponsored Points Tested visa and a Temporary Graduate visa (subclass 485)–Graduate Work stream. The Consolidated Sponsored Occupation List (CSOL) applies to points-based skilled migration where applicants are nominated by a state or territory government agency under a State Migration Plan, the Employer Nomination Scheme (ENS), where applicants must have been nominated by an Australian employer to fill a position in an occupation that appears in the CSOL, the Temporary Work (Skilled) visa (subclass 457) and the Training and Research visa (subclass 402).

Most recently, based on feedback received as part of an evaluation, the following changes are in place as of 1 March 2014:[7]

- State and territory nominated visas will no longer be subject to occupational ceiling limitations
- The minimum ceiling for each occupational group will be 1000 invitations.
- As there are still high levels of interest from prospective skilled migrants in the following six occupations, pro rata arrangements for these occupational groups will continue:
    1. Chemical and Materials Engineers
    2. Electronics Engineers
    3. Other Engineering Professionals
    4. ICT Business and Systems Analysts

7 See online: http://www.immi.gov.au/skills/skillselect/.

5. Software and Applications Programmers
6. Telecommunications Engineering Professionals.

- Details of the cut-offs for these occupations will continue to be included in the regular invitation round reports.

So are these programs working in NZ and Australia? The Australian SkillSelect system has been in operation for less than two years so it is difficult to make comparisons at this time. As for the NZ system, even though it has been in existence for eleven years, comparison is difficult as noted in a research brief by the *Alberta Association of Immigrant Servicing Agencies* released in December 2013:[8]

> There are key differences between the model in New Zealand's application and how Canada's model will be implemented, making direct comparison between the two countries problematic, which will be discussed in this article.
>
> A key reason why comparison between countries is challenging with regards to this immigration model is that most of the applicants are people who are already "on-shore" – what Canada terms Temporary Foreign Workers (TFWs). Canada has not stated that TFWs will easily be able to apply for this immigration stream. New Zealand's current success in integrating immigrants who already live in the country diverges from the information provided by the Canadian government thus far, which appears to focus on processing applications while applicants are overseas. In the Australian EOI system, prospective immigrants can be found and be nominated by either an Australian employer or a state/territory government, often done remotely while the applicant is overseas. It is likely that Canada will follow a similar route , and as the EOI system in Australia is barely a year old it is too early to draw meaningful conclusions from immigration statistics.

The research brief goes on to note that 87% of applicants approved within the NZ EOI program are onshore while only 13% are offshore.[9] Therefore, although the program is working well in NZ, a comparison to Canada's proposed system would be limited given this key distinction. However, a number of cues and clues can still be discussed as it relates to what Canada may implement in their EOI system. Moreover, looking at certain features of both the NZ and Australian systems respectively (both programs from which Canada has already borrowed heavily) may inform our discussion and raise a number of key considerations.

1. Multiple Point Systems and Visas: In the NZ model we note certain occupations are more heavily point weighted and the Australian model offers visa-specific point allocations and varied visas (graduate, research and training, Family Sponsored Points Tested visas, etc.). Will we see Canada move away from a "one size fits all" point system and cater to more nuanced needs, and by extension visas? The NZ allows for a nine-month open Skilled Migrant Category job search visa for applicants to enter the domestic work force to secure employment. This visa must in part contribute to a high number of onshore applicants in NZ. It is a creative option that affords skilled workers a probationary period to economically integrate. These types of innovations do run the risk of complicating the system but also may result in a more flexible and responsive program overall.
2. Minimum Work Experience**:** In the NZ model, two years of work experience is a minimum requirement for eligibility–will we see an increase in the Canadian system with respect to this requirement, from one to two years? It may be more stringent but could also result in stronger applications.
3. Streamlined Processing**:** The NZ system asks upfront medical questions regarding certain medical conditions like dialysis treatment and haemophilia, and front-line criminality questions regarding, for example, drug trafficking. The NZ system, unlike the Australian model and the current Canadian requirements for IELTS, allows for reasonable exceptions such as having a bachelor degree or a higher qualification conducted entirely in English, or having current skilled employment in New Zealand for 12 months or more. As highlighted above, the NZ EOI system also allows for a number of country specific educational qualification exemptions. It also mandates a four-month filing deadline once an applicant has been selected for an invitation. If the focus in Canada is a "just in time" immigration system, we may also see some upfront screening and reasonable exemptions to speed up the system.
4. Will Family Remain a Priority?: The NZ model awards ten points to applicants who have close family in NZ, and Australia offers a Family Sponsored Points Tested visa, both being examples of a fusion of economic and family class processing. Will family processing remain a priority in the EOI system in Canada?
5. Scope of EOI Program**:** In Australia, state sponsored programs equivalent to Canada's PNP program operate within the EOI system as do certain work visas. In NZ, there is a notable fee to make an EOI application while in Australia there are no fees. Also, the NZ fee for permanent residency applications is in excess of $2000.00 CDN. Will Canada adopt and/or increase fees? How many of Canada's immigration programs will fall under the EOI umbrella (FSW, FSTD, CEC, business streams, work permits, etc.)?

8 See online: http://aaisa.ca/wp-content/uploads/2013/02/EOI-BRIEF-DRAFT.pdf at page 1.
9 See online: http://aaisa.ca/wp-content/uploads/2013/02/EOI-BRIEF-DRAFT.pdf at page 3.

Furthermore, will the information collected under the EOI program be shared with other agencies as we see in the NZ model? Will specific questions be put to immigration lawyers regarding the scope of their representation, similar to the NZ EOI forms? In Australia, no appeal flows from a decision on an EOI. Canada seems to be following suit. Therefore, important questions regarding the scope of the program can be gleaned by looking at our international counterparts.

Role of Lawyers in the New System (Ethical & Professional Considerations)

Following our international cues and clues discussion and from what has already been revealed about the proposed Canadian EOI system, it is safe to say that the role of immigration lawyers' pre-application filing will expand in this new system. If Canada adopts a similar application form to NZ, submissions are requested to support applicant's point claims. Will this be a role Canadian immigration lawyers will be sought out for in the new system? Further, key questions regarding potential encroachment on the solicitor client confidential relationship, privacy concerns and possible strict timelines to respond to EOI invitations will arise.

As immigration lawyers, it is important to be alive to potential issues facing clients amidst the changes to the FSWP, the jurisprudence and other upcoming initiatives in Canadian immigration. For instance, it is important to consider the following:

1. As noted, immigration lawyers' roles on a client matter relating to EOIs will involve work that may not necessarily result in an immigration application going forward with CIC. Thus, the employment of "limited scope retainers" may become commonplace for immigration lawyers and intending EOI applicants.
2. In particular, pursuant to the Law Society of Upper Canada's *Rules of Professional Conduct*, Rule 1.03 Citation and Interpretation,[10] "limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client [New September 2011].
3. The use of this type of retainer is consistent with Rule 2.01 (h) Relationship to Clients, Competence "*recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served*".
4. Legal Services Under a Limited Scope Retainer, Rule 2.02 reads *"Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client."* [New September 2011]. Clients' expectations and the myriad of steps that may or may not result in an immigration application will have to be carefully managed by immigration lawyers.
5. Rule 6.01 discusses how, when providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so. [New September 2011] Specifically, the commentary section notes: "*Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.*"
6. Lawyers will also have to be mindful if lodging an EOI application on clients' behalf until the use of client information is clarified so that confidential and privacy concerns are properly considered and communicated to the client. As set out in the NZ system, information provided under the EOI system is shared with other agencies including the entitlement to board a flight to come to or return to NZ. Rule (1) 2.03 Confidentiality applies. Specifically, "*A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.*"
7. Credentialing agencies are here to stay. To date, they include: (1) World Education Services; (2) Comparative Education Service; (3) International Credential Assessment Service of Canada; (4) Medical Council of Canada (professional body); and, most recently, (5) Pharmacy Examining Board of Canada (professional body). Lawyers need to develop an understanding of these credential assessment agencies, how they differ from one another, their advantages and disadvantages, etc. In the context of the particular circumstances of your client, which one will best meet their needs?
8. Be mindful as to whether your client intends to work in a regulated profession, and advise the client to call the relevant regulatory body to determine how early they can start the licensing process.
9. Know the relevant case law in your client's case. Refrain from over-reliance on the Operational Manuals – although they sometimes reference important jurisprudence, the manuals themselves are not law (Rule 2 Relationship to Clients, Rule 2.01 Competence).
10. Continue to monitor and/or take the lead in legal efforts to ensure these decisions are not beyond recourse before the

10 See online: http://www.lsuc.on.ca/with.aspx?id=671.

Courts. As per Rule 4 Relationship to the Administration of Justice, Rule 4.01, The Lawyer as Advocate: (1) "*When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.*"

Whose Interests Are Being Expressed?

Clearly one of Canada's main goals, like all countries, is to increase global competitiveness surrounding immigration and a continued steady increase in immigrants who will contribute to our overall *social* as well as economic wellbeing is crucial to that objective. Former Immigration Minister Jason Kenney has argued that the purpose of eliminating the backlog was to ensure that newcomers meet Canada's current labour market needs and shortages, and for the country to move toward a "just in time" immigration system.

CIC hopes to overcome previous backlog issues by processing only those permanent residency applications responding to Invitations to Apply (ITA); however, this does not overcome the possibility for a backlog to occur in the front-end of the system and, specifically, at the EOI stage where applicants, as described by CIC, need only fill out an online form. Should there be an influx of these pre-screening applications, which officers must assess, processing times for a suitable candidate to receive an ITA could lengthen. On the other hand, like Australia, will the Department not be involved in the initial stage of processing EOI applications?

Leaving incredible scope and implementation to Ministerial instructions opens the initiative, regardless of political party, to serious criticisms and concerns regarding transparency, lack of Parliamentary oversight and potential politicalization of the program. Provisions like s.10.3(5) – whereby the Minister can, by instruction, provide for criteria that are more stringent than current criteria or requirements under any other division of the Act, will be challenged as *ultra vires* the legislation. Legal battles will ultimately defeat the very purpose and appeal of creating an immigration scheme for fast and efficient economic immigration to meet Canada's current labour market needs.

EOI does offer exciting possibilities and can be transformative, but not if it is undermined by a lack of transparency, perpetuation of historically poor relations with authorized representatives, privacy concerns, and traditional processing challenges. How can this change? In my opinion, to ensure buy in and proper expression of all stakeholder interests, the details of the program should be fully rolled out and subjected to Parliamentary oversight and approval. Pilot projects for certain visa classes should be explored for limited periods to collect empirical data especially as it relates to employers' role in the system. We should also look to, once again, borrow from our international counterparts for innovative processing ideas (front end screening, reasonable qualification and language exemptions, multiple visa and point allocation streams, and a fusion of economic and family processing in certain visa classes, as some examples) to test and deliver an immigration program that has been carefully defined and debated. Only then can the question of whose interests are being expressed be answered, and that answer should be–Canada's best interests.

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Refugee Appeal Division (RAD): First Steps in an Important Legal Evolution

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An abbreviation of 'radical'—a term made popular by the Teenage Mutant Ninja Turtles. Still primarily used by people on the West Coast who find words like 'cool', 'awesome', and 'tight' to be tired and overused; 'rad' is generally considered to be a much higher praise than the aforementioned superlatives. Also used as a general expression of awe. "Those are some rad shoes." "Oh, RAD."[1]

As the RAD begins to define its jurisdiction and establish its role in the Canadian refugee legal landscape, its goal is not to obtain praise or be considered cool but perhaps an "awesome" evolution

1 See online: http://www.urbandictionary.com/define.php?term=rad.

towards a robust tribunal that effectively and consistently discharges an important legal function within the larger refugee legal structure. Its transformation from first steps to a mature tribunal will take several years and will in part be defined by the Federal Courts and potentially beyond. The core of any debate surrounds understanding the role of the RAD and its appellate jurisdiction. Citing the remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada:

> I believe that we have reached a new stage in the saga of courts, administrative tribunals and the rule of law. We have not resolved all the problems. But we understand better how to go about resolving them. We understand better than we once did that what matters is fundamental fairness, and that what is fundamentally fair depends profoundly on the particular mandate and context of the tribunal in question. We understand better than the rule of law does always not call for one right answer in every case, but rather that for many decisions there are a range of reasonable alternatives. And most importantly, we understand that both tribunals and courts are essential to maintaining the rule of law in our complex, rapidly changing world.
>
> [our emphasis]

So the RAD, the courts and the parties that appear before it will define its mandate and what constitutes fundamental fairness in the context in which it functions.

Focus of this Paper: New Evidence and Oral Hearings at the RAD

When dealing with issues surrounding serious threat to life any margin of error is potentially catastrophic. The starting point for any discussion is section 3(2) of the *Immigration and Refugee Protection Act* (IRPA):

> S. 3(2) The objectives of this Act with respect to refugees are
>
> - (*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

This is balanced against the reality of limited resources and the government mandate that administrative efficiency must be promoted in order to streamline the refugee determination process. With limited RAD jurisprudence to date and no Federal Court jurisprudence, RAD Members are drawing from other similar IRPA provisions for guidance in striking this balance. The key resource area is the Pre-Removal Risk Assessment ("PRRA") regime, given the parallel language found in the IRPA and *Immigration and Refugee Protection Regulations* ("IRPR") with respect to certain RAD and PRRA processes respectively.

Specifically, both the RAD and the PRRA may only consider "new evidence" and may only conduct a hearing when such "new evidence" reveals a significant credibility concern which could have altered the outcome of the original refugee hearing.[2] In fact, the legislation is abundantly clear that the RAD must proceed without a hearing unless these requirements are met.[3] The granting of oral hearings at the RAD depends upon the provision of new evidence related to a credibility finding which constitutes a discrete window for refugee claimants to benefit from this procedural accommodation. This will in turn be defined by context and interpretation. A number of questions come to mind. How will these "new evidence" requirements be defined and developed? What will constitute an oral hearing at the RAD? What will RAD Members consider, what can they consider, and in what areas will they defer to the decision of the RPD?

In examining these questions it will become apparent, that constitutional compliance will mandate oral hearings in certain circumstances. Further, although provisions surrounding new evidence and oral hearings are identical in wording to the Pre-Removal Risk Assessment (PRRA) regime, the RAD will be called upon to develop its own context and interpretation and cannot simply transplant the legal reasoning applied in the PRRA framework.

Part Two of this article will resume in the June 2014 issue of ImmQuest and will provide a discussion of the mixed powers given to the RAD. Finally, the third part will appear in the July 2014 issue of ImmQuest and will discuss the process of appealing to the RAD, decisions to date, and questions remaining on the functioning of this new system.

2 IRPA, subsections 113, 110(3), (4) & (6), and IRPR subsection 167.
3 IRPA, subsection 110(3).

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, LL.B., C.S.

FSW

Case: *Esmaili v. Canada (Minister of Citizenship and Immigration)*
Decider: Peter Annis J.
Court: Federal Court
Citation: 2013 FC 1161
Judgement: 14 November 2013
Docket: IMM-11086-12

[20] With respect to clients' responsibility for errors committed by lawyers, in this case by an immigration consultant, Justice Barnes in *Washagamis First Nation* summarized his conclusions at paragraph 33 as follows:

> 33 I am inclined to the view that where a litigant establishes that it clearly instructed its counsel to proceed on a timely basis and that the failure to do so was solely the result of an error by counsel, the litigant should not be constructively held to have been a party to the error. Such an approach is also consistent with that adopted by other courts in dealing with solicitor error and missed limitation periods: see Woudstra v. Piston, [2004] O.J. No. 594, [2004] O.T.C. 160 (S.C.J.); Dreifelds v. Burton 1998 CanLII 5013 (ON CA), (1998), 38 O.R. (3d) 393, [1998] O.J. No. 946 (C.A.) and Tait v. CNR reflex, (1984), 11 D.L.R. (4th) 460, 64 N.S.R. (2d) 187, [1984] N.S.J. No. 398 (S.C.).
>
> [Emphasis in original]

[21] I interpret the foregoing passage to indicate generally that clients should not be held responsible for their representatives' errors so long as they do not contribute to the actions causing delay.

[22] Applying these principles in this matter, I conclude that the extension should be granted. First, because I find that the applicant should succeed, he obviously has a more than an arguable case. As Justice Sharlow pointed out, this is the most salient factor in determining whether to extend time.

[23] Second, I am also satisfied that the applicant was blameless in relying on his consultant, particularly in the circumstances of someone living in a foreign country and unaware of how the Canadian legal system functions.

[27] Finally, the decision appears clearly unreasonable on its face. The applicant had a bachelors and master's degree in his field, as well as a glowing recommendation from a professor at the graduate studies level. He had risen through the ranks at his company over the course of four and a half years, performing various functions in the general area of information systems management, and had documentation showing a year and a half's experience as a full-time information systems manager directing employees and running the IT operations of the organization. In the absence of any explanation from the Officer, it is neither transparent nor intelligible why this was not thought to be sufficient, and the decision does not represent a possible, acceptable outcome.

[30] The requirement to provide sufficient reasons is not onerous. I reproduce reasons which were challenged for being inadequate, but were found by Justice Strickland at para 5 of her decision *in Khowaja v Canada (Minister of Citizenship and Immigration)*, 2013 FC 823 CanLII), 2013 823 to be sufficient for the same occupation:

> The GCMS Notes state, in part:
>
> The information submitted to support this application is insufficient to substantiate that client meets the occupational description and/or a substantial number of the main duties of NOC 0213. Client submitted a work reference letter from TRG in Pakistan. The letter describes client as a Project Manager, Data Entry and Data Processing Dept. No explanation is provided as far as the essence of the projects in which client was involved is concerned. No budgetary responsibilities or recruitment of its analysts, engineers, programmers is mentioned, only hiring of supervisors and data entry processing teams, who appear to be employees who are simply recording data in data bases. The job description provided appears to more closely resemble the one of a Data Entry Supervisor as per NOC 1211. In view of all of the concerns mentioned above, I am not satisfied that client completed a period of one year of experience in NOC 0213. Am not satisfied on basis of the information on file that client performed the duties specified in NOC 0213.

Conclusion

[31] I find that being able to "understand why his application was rejected" is precisely what was lacking in this case. The Officer's decision is unreasonable, it lacked transparency and intelligibility. For the above reasons, the application for judicial review is granted.

Citizenship

Case: *Davis v. Canada (Minister of Citizenship and Immigration)*
Decider: Douglas R. Campbell J.
Court: Federal Court
Citation: 2013 FC 1243
Judgement: 11 December 2013
Docket: T-764-13

[20] *Guideline 12.7* makes it clear that, for relative adoptions, the severance of the pre-existing legal parent-child relationship between the biological parents and the adopted child should not be considered to be a bar to the maintenance of an ongoing relationship between the two, and the relationship between the two should not have detrimental impact in reaching a conclusion on whether a genuine relationship between parent and child exists between the adoptive parent and the adopted child:

> 12.7. Relative adoptions
>
> Where the adopted child is related to the adoptive parents, the pre-existing legal parent-child relationship should be severed under the law. While the biological parents should no longer be acting as parents to the adopted child after the adoption has taken place, an ongoing relationship and contact between the adopted child and the biological parents and extended family may still occur. However, the new parent-child relationship between the adopted child and the adoptive parents should be evident and not simply exist in law. Moreover, evidence that the biological parents fully comprehend the effects of a full adoption and that they have provided their consent to the adoption should also support a determination that the requirements of subsections A5.1(1) or A5.1(2) have been met.
>
> [Emphasis added]

[21] As a result, I find that the Officer's interpretation of the *Regulations* without regard for the *Guidelines* renders the decision under review unreasonable.

[23] On a fair reading of the interview notes, it is clear that it was the father's statements of support for the adoptions, rather than Ida's motive in making the adoption proposal, which produced the reasons relied upon by the Officer. On the evidence, the father's opinion was elicited after Ida made the decision to adopt Lancia and Terika. I find that the Officer's failure to accurately analyse the evidence in reaching the "purpose" conclusion renders the Officer's decision under review unreasonable.

[24] In addition, in my opinion, the evidence and conclusions with respect to the nature of the relationship between Ida and Lancia and Terika, is inextricably linked to the making of a finding with respect to the purpose for which the citizenship applications were filed. Therefore, unreasonable decision-making on the relationship issue will cause unreasonable decision-making on the purpose issue. This is so because a relative adoption based on the existence of a parent-child relationship implicates practical family unification issues. In my opinion, these issues must be addressed in reaching a conclusion on the purpose of the adoption. A practical family unification issue in the present case was the evidence that Ida was determined to do the very best she could to protect the safety and welfare of her grandchildren for whom she had great love. I find that the Officer's failure to address the purpose of the adoptions with this very important consideration in mind renders the decision under review unreasonable.

Inadmissibility

Case: *Goburdhun v. Canada (Minister of Citizenship and Immigration)*
Decider: Cecily. Strickland J.
Court: Federal Court
Citation: 2013 FC 971
Judgement: 23 September 2013
Docket: IMM-674-13

[42] The Officer does not specify what investigation and verification process potentially could have been bypassed as a result of the misrepresentation. However, section 9.5 of ENF 2 states that officers are required to be satisfied that a person meets the requirements of the IRPA and is not inadmissible. To make these determinations officers decide what procedures, including investigations, interviews and verifications are required. Some procedures are required by law, others are administrative. Given this discretion, and although it would have been preferable for the Officer to have been more specific, the failure to do so is not fatal. In any event, had he relied solely on the application which did not disclose the prior visa refusal, this could have induced an error in the administration of the IRPA as he could have erroneously issued a visa to the Applicant.

[43] I also cannot accept the Applicant's submission made when appearing before me that, because CIC has access to the whole of

his immigration history, an incorrect answer in his application is not material. His submission was that the incorrect answer did not affect the process because it was caught by CIC before a decision was rendered. This reasoning is contrary to the object, intent and provisions of the IRPA which require applicants for temporary residency visas to answer all questions truthfully. The penalty for failing to do so is that an applicant may be found to be inadmissible to Canada if the misrepresentation induces or could induce an error in the administration of the Act. It matters not that CIC may have the ability to catch, or catches, the misrepresentation. What matters is whether the misrepresentation induced or could have induced such an error. Accordingly, applicants who take the risk of making a misrepresentation in their application in the hope that they will not be caught but, if they are, that they can escape penalty on the premise of materiality, do so at their peril.

[47] It should be noted, however, that the Officer's assertion in the fairness letter that the Applicant was requested to surrender his OCWP but failed to comply and that this was the primary reason for the refusal of his Los Angeles application, is not supported by the CTR.

[48] The Respondent filed an affidavit of Ms. Leah Gabretensae, Admissions Unit Supervisor at CIC in response to the subject application. It attaches as an exhibit an email dated July 12, 2013 from Ms. Gabretensae to counsel for the Respondent stating that she had spoken to Rachel, no last name, at Norquest who confirmed that the Applicant was enrolled there from 2007 to April 24, 2009 taking upgrading courses with the intent of then entering the practical nursing program. He did not continue there beyond April 2009. The affidavit also attaches as an exhibit an email dated July 13, 2013 from Ms. Kathy Galloway to Ms. Gabretensae and counsel for the Respondent stating that NAIT had checked its records and advised her that the Applicant began his studies there in January 2010 and completed the one year Water and Waste Management Technician program in December 2010 with honours. The affidavit goes on to state that the designated institutional representative (DIR) "at the post-secondary educational institution where the Applicant was enrolled at that time [when the April 24, 2009 OCWP was issued] would have informed the Applicant that the Applicant was required to surrender the Work Permit to the nearest CIC office once he no longer met the eligibility criteria". The affidavit states that it (the affidavit) was made for the purpose of opposing the Applicant's application for judicial review.

[49] It appears that the purpose of the affidavit was to bolster the CTR which contains no record supporting the finding by the Officer that the Applicant was actually asked, but refused, to surrender his OCWP nor explaining why he was not in compliance with the OCWP at some time before a February 1, 2012 GMCS entry which stated this to be the case but at which time the Applicant was enrolled full time at NAIT. The affidavit evidence as to the general responsibilities of DIR's in administering OCWP's, including informing students of the surrender requirements, is not evidence that the Applicant was requested to and refused to surrender same. Moreover, it is trite law that new evidence is only admissible on judicial review to resolve issues of procedural fairness or jurisdiction which exceptions have no application in this case (*Oloumi*, above, at para 10; *Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716 (CanLII), 2006 FC 716 at para 6; *Albajjali v Canada (Minister of Citizenship and Immigration)*, 2013 FC 660 (CanLII), 2013 660 at para 12).

[50] However, even in the absence of an evidentiary basis for the assertion that the Applicant was requested to and refused to surrender the OCWP and that this was the primary reason for the Los Angeles refusal, there was, as set out above, a sufficient evidentiary basis in the record before the Officer to support the fact that the Applicant worked full time while holding only a OCWP, after graduation from NAIT, from December 20, 2010 to June 1, 2012.

[51] The Applicant contravened the conditions of his admission to Canada on a prior occasion by working full time when not authorized to do so and he misrepresented this in his statutory declaration. He also misrepresented his prior temporary resident visa refusal. In my view, both misrepresentations were material. Accordingly, the Officer's finding that he was not satisfied that the Applicant would leave Canada at the end of his stay as a temporary resident and that he had made material misrepresentations pursuant to subsection 40(1)(a) of the IRPA was reasonable and defensible in respect to the facts and the law.

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