

LAW 588
IMMIGRATION
CARVER

Sources of Immigration Law

1. The Constitution

Constitution Act, 1867, Section 95: creates concurrent authority in both levels of government, but with federal paramountcy.

IRPA ss.8-10: Federal-provincial agreements in the immigration area

Constitution Act, 1867, Section 91(25): “Naturalization and aliens” is an exclusive federal jurisdiction. Its role in Canadian constitutional history challenging discrimination in provincial legislation. **Therefore ss.95 and 91(25) above set out the authority to set laws in the area of immigration and naturalization.**

2. Legislation

1. *Immigration and Refugee Protection Act (IRPA)*, SC 2001, c. 27

2. Regulations to *IRPA*: Subordinate legislation: has the force of law. Regulations must be authorized by statute. Regulations must be consistent with that authority. If not, a regulation is *ultra vires* (invalid, and of no force or effect).

3. International Agreements

Treaty: treaty making power in the constitution. They don't come automatically into Canadian law; **they need to be implemented.** The authority depends on the division of powers in the constitution.

Agreements of significance to immigration law: *UN Convention Relating to the Status of Refugees*, *Convention Against Torture* (IRPA, s. 2(1)), *Convention on the Rights of the Child* [*Baker* (SCC, 1999) case]

Ratified international agreements can influence Canadian law by being implemented in Canadian law (ex. UN convention relating to status of refugees; Convention against torture) or as an aid to the interpretation of domestic law (ex. *Convention on the Rights of the Child* in *Baker* (SCC, 1999))

4. Administrative Law

Statutes accomplish two main tasks:

- 1) They set out rules binding on the conduct of person in society; and
- 2) They grant or delegate the authority to make binding decisions concerning rights and interests of persons to government officials and agencies [this is what IRPA does largely]

Delegated decision making under IRPA:

- The Minister and immigration officers- section 6
- Citizenship and Immigration Canada (CIC)
- Canadian Border Services Agency (CBSA)
- Immigration and Refugee board –IRPA sections

Administrative law is concerned with ensuring that governmental actors (i.e., statutorily delegated decision-makers) act within their statutory authority, including acting in a procedurally fair or just manner.

Theoretical Perspectives on Immigration

Michael Trebilcock

- Open policy will maximize the national profit
- Utilitarian view (law and economics point of view)
- View of outsiders Impact on global economic welfare
- View of insiders and this is usually the nature of discussion of immigration law
- Whether immigration is beneficial and of economic good for insiders (ie, Canada)
- Open boarder for labor perhaps due to certain exclusions [criminals and health problems]
- Worse offenders against the concept of immigration → illegal immigrants → cheap labor and economic contribution without the attendant cost that legal immigrants impose
- He is attacking the argument of the people that argue that the immigrants take away jobs that are available to Canadians
- Decentralized to the market the immigration to employers and combine it with bringing family members in
- What is the answer to the family
- Put the costs on Immigrants in case they have problems that lead to imposing
- Sponsorship and that there should be mandatory insurance
- Page 51 first full paragraph: how economic benefit undermines the common sense (illegal immigrants and their benefit)
- Issue of “brain drain”

Joseph H. Carens

- Can be seen as responding to Trebilcock
 - Immigration law is unjustifiable in legal theory
 - If everybody has the equal moral worth then there does not need to be selective to allow certain people enter countries or not
 - Everyone should have equal liberty, autonomy and freedom to make choices for themselves
 - Inequality would be allowed to the extent that it contributed to most disadvantage people be better off by that inequality
 - Page 56: third paragraph: Citizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely.
 - He compares the sovereign state to neighborhoods, families etc.
 - What is his position with regards to open and closed borders?
 - Culture depends on a degree of closure of community
 - 58-59
 - the idea of who gets to be a member it is not just about
 - what are the justification for exclusion vs. what outsiders see as justification to enter
- The other two authors say that they disagree with the open border are

Michael Walzer
Joseph Carens

CITIZENSHIP

How to Acquire Status

Citizenship is a statutory right – it cannot be acquired via common law.

Citizenship Act, Section 3(1): Three principal means of acquisition:

- a. Born in Canada [exception: children of diplomats born in Canada (s. 3(2))].
- b. Born outside of Canada of Canadian citizen parent(s).
- c. By "Grant of Citizenship" (i.e. Naturalization pursuant to s. 5).

Method b) Amendments in 2008 done to fix certain problems and make certain alterations to acquisition rules: Lost Canadians Problem. Various transitional and technical issues had resulted in circumstances in which certain groups of people who had citizenship at one time had lost it, often without even being aware of this loss. Groups included "war brides" and children of Canadian parents who failed to apply for citizenship before turning 28. Conservatives were concerned with the potential that children born abroad to Canadian citizens could inherit citizenship. Conservatives feel this is too tenuous a connection. Section 3(3)(a): Limits "inherited citizenship" to persons born outside Canada to two generations.

Method C) "By Grant of Citizenship" (IE. Naturalization)

Citizenship Act, Section 5: Applicant must be:

- a. At least 18 years of age.
- b. 3 years residence as a permanent resident in Canada out of the 1 immediately preceding the application of citizenship.
- c. "adequate knowledge" of English or French.
- d. "adequate knowledge" of Canada.
- e. Or a minor child who is a permanent resident, the child of a citizen and for whom application is made s. 5(2).
- f. If over the age of 14, must take the oath of citizenship (s. 12).
- g. Not subject to removal (deportation) proceedings, a security report (ss. 19-20), or a criminal prohibition (s. 22).
- h. Ministerial Discretion: Section 5(3) - Minister may exempt an individual from residence or knowledge requirements on "humanitarian grounds" and from taking the oath in the case of mental disability.

Decision Making Process for Naturalization

Citizenship Judges: Federal cabinet may appoint "any citizen" to be a Citizenship Judge. They need not be a lawyer. They review and decide on applications for naturalization. Decisions of a Citizenship Judge can be **appealed** by

either the applicant or the Minister to the FCC.

What does "Residence" mean for citizenship purposes?

2 Approaches in the case law:

Chen v. Canada (2001, FCC - Justice Nadon): **Quantitative Question:** Best understood as simply meaning, being able to count up the physical days you have been in Canada.

Xia v. Canada (2002, FCC - Justice Gibson): **Qualitative Question:** people can be considered as residing in Canada even if outside the country for a short period of time (vacation or work related travel). Look more flexibly at the residency criteria.

- In the end, it all comes down to which judge you get. A higher court must clear up this inconsistency. Problem → *Citizenship Act* Section 14(6): No appeal to the Federal Court of Appeal. Perhaps an amendment to the legislation is necessary.

How can Status be Lost?

Only Naturalized citizens are liable to the possibility of having their citizenship **revoked**. Canadians by birth are not at risk of **involuntarily** having their citizenship being taken away from them.

2 Ways to Lose Citizenship:

- 1) **Renunciation:** *Hamdi case*: 6 years ago, he was one of the American citizens who was caught in terrorism activities abroad and was held on a naval base of the coast of Virginia. He was naturalized as a child. He was charged with terrorism related offences; the case went up to the Supreme Court and became resolved by a plea bargain – he would renounce his USA citizenship and be allowed to flee to Saudi Arabia.
 - Why would someone seek renunciation?
 - Could be a matter of principle, but more commonly it is **due to dual or multiple nationals**. Canada allows dual or multiple citizenships, but other countries might not. In order to maintain citizenship in another state, renunciation may be necessary.
- 2) **Revocation for Fraud:** The Minister serves notice to person of his intention to file a report with federal Cabinet recommending revocation on basis of fraud. Person has 30 days to have matter referred to the Federal Court for a hearing on merits. Justice of the Federal Court decides if the allegation is well-founded. No appeal from Court. If Cabinet declares itself “satisfied” on the matter, the person ceases to be a citizen. Judicial review is available and can be sought with respect to that final decision made by Cabinet. Done by alleging procedural unfairness or attacking that decision as failing the appropriate standard of review. Ex. WWII war criminals have been sought to be deported from Canada for this other method.

Rights Conferred By Citizenship

Mobility rights: *Charter*, s. 6(1): *citizens have a constitutional right to remain in Canada and to come and go when he so chooses. Cannot be deported (or removed) from Canada.*

Charter, Section 3: They have the right to vote and be candidates in an election. Not a bar to permanent residents, but not guaranteed PR’s.

Charter, Section 23: Minority language education for one’s children, *where numbers warrant*.

EQUALITY AND CITIZENSHIP

Can distinctions in law between citizens and non-citizens that are based on the distinctions in sections 3, 6(1) or 23 of the Charter be challenged via s. 15(1)?

- We have seen that citizens under s. 6(1) have a guaranteed right to enter and remain in Canada. Permanent residents do not. This is Discriminatory, but probably saved under s. 1. This requires combating s. 15(1) against s. 6(1). There is no hierarchy between *Charter* provisions. One part of the constitution cannot be used to attack another part of the constitution. That distinction around removal from the country is in the Constitution. It is not subject to constitutional attack and therefore not a breach of s. 15(1).

But what about legal distinctions in statute between citizens and non-citizens (*Lavoie*)?

- Generally, the phrase “every individual” means everyone in Canada is entitled to equal benefit under the law. Distinctions in law drawn between citizens and non-citizens, not including constitutional distinctions, are *prima facie* breaches of s. 15(1) of the Charter.

Andrews v. Law Society of BC (1989) SCC: The SCC found that citizenship is an analogous ground under s. 15(1). Non citizens are a vulnerable group because they don’t have the voice in political Canada to argue their concerns.

But Contrast Andrews with Lavoie.

Lavoie v. Canada [2002] SCC: *Lavoie* demonstrates that discrimination against non-citizens has been tolerated by being found justifiable under s. 1 of the *Charter*.

The federal *Public Service Employment Act* gives preference in hiring to citizens (and war veterans and widows of veterans). The State, through legislation, made a distinction based on status. If it is rooted in the Constitution itself, it is not disputable. But if, as in this case, it is statute, then it is subject to scrutiny. Court finds that this is a breach of the claimant's equality rights. But, is it justifiable? Move to section 1 (Oakes test). Majority finds that it is justified discrimination. Minority disagrees, believing that discriminating on the basis of citizenship runs counter to the inclusiveness and nature of Canadian citizenship. Providing meager advantages like public service employment cheapens the status of citizenship. Citizenship should be sought for the greater goals of societal inclusiveness and acceptance.

DUTY TO PROTECT CASES

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| <p><i>Khadr v. Canada</i> [2009] FCA</p> | <p><u>Breaches of section 7 of the Charter identified by the majority at the FCA</u></p> <ol style="list-style-type: none"> a. Breach #1: In 2003/04, Canadian officials interviewed him at the prison at Guantanamo Bay in the course of which they should have known that he was the victim of sleep deprivation. They shared all of this information with the Americans. He was a child and had no access to legal aid. At the trial of the Khadr 2008 case, it was provided that the Charter remedy is to seek repatriation of Khadr. b. Breach #2: In 2008, Crown's refusal to request Khadr's repatriation is a breach of Khadr's rights under s. 7. In this 2009 case, there was a breach of rights in 2003/04 with respect to the interviews, but there is still another breach from 2008 with respect to the refusal to utilize the Charter remedy? Is this refusal a basis for a Charter breach? If not, is it a breach of administrative law? <p><u>Did this case concern a "duty to protect" Canadian citizens from harms or improper treatment emanating from foreign states?</u></p> <p><i>The FCA does not discuss a general duty to protect that exists in the Charter or International law incorporated in Canadian law. What we are dealing with here is a Charter remedy for this breach of someone's Charter rights is that a duty to protect is engaged. This is fact specific to this case.</i></p> <ul style="list-style-type: none"> - Suppose the Canadian officials had done everything right. Where would we be headed? On the analysis of this case, is there still a duty to protect? <p>Majority of the Federal Court of Appeal believes that this case is an issue with a Charter remedy. Justice Nadon (minority) doesn't know if there is a duty to protect in Canadian or International law. If there is though, look at all of the things the Government have done – Practically everything but ask for repatriation. This is enough to satisfy their obligations to 'protect'.</p> |
| <p><i>Abdelrazik v. Canada</i> (Minister of Foreign Affairs & International Trade) [2009] FC</p> | <p>Abdelrazik claims that his citizenship rights under s. 6 of the Charter have been breached. He wants the court to direct Canada to repatriate him to Canada "by any safe means at its disposal."</p> <p>HELD: Abdelrazik's Charter rights have been breached and the Government has failed to justify them. The Government must take immediate action to return Abdelrazik to Canada.</p> <p>While passport control is a matter of royal prerogative and solely the responsibility of the executive, once this prerogative interferes with Charter rights or the rule of law, it becomes a justiciable matter.</p> |
| <p><i>Smith v. Canada</i> (Attorney General) [2009] FC</p> | <p>Ronald Smith, convicted murderer held on death row for over 25 years and all that time, the Canadian Government had been providing consular service for Smith. Clemency had been routinely sought for Canadians up until 2007 – when Stockwell Day, as Solicitor General, changed government policy with Canadians convicted of murder in other countries.</p> <p>Issue: <i>Whether Canada should make a request of clemency to prevent Smith from being dealt the death penalty.</i></p> <p>FCC: Since his life is at stake, Smith's s. 7 interest is at stake; this gives rise to a duty to protect - a duty to intervene as best they can to prevent a death sentence against a Canadian.</p> <p>Court focuses on the Charter issue. All Canada can do is intervene to make a request for clemency for Mr. Smith.</p> <p>HELD: Government is ordered to continue to apply the former policy of supporting clemency on behalf of Canadians facing death penalties in any foreign state to Mr. Smith. While the Government is exclusively in charge of developing foreign policy, when it affects individuals directly, it is a justiciable matter to rule upon. The government did not issue a formal policy change and Smith should not be required to piece together various media reports (no notice).</p> <p><u>Suggestion of Duty to Protect:</u> Doesn't just quash the decision; FCC orders the government to request clemency (Similar to in <i>Khadr</i>).</p> |

PERMANENT RESIDENTS

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| <p><u>How to Acquire Status?</u></p> | <p><u>SUBSTANTIVE LEGAL REQUIREMENTS</u></p> <p>1. <u>Eligibility Requirement:</u> <i>IRPA Section 12:</i> Satisfying the selection criteria for the class (family, economic, refugee)</p> |
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under which one is applying. *Section 12(1) = Family Class, Section 12(2) = Economic Class, Section 12(3) = Refugee Class.*

2. Intention Requirement: *IRPA* Section 20(1) (a): must possess visa/other document required under the regulations **and have come to Canada to establish a permanent residence.** Ex. Satellite Kids and their parents not actually living in Canada, thus parents should not be given PR status.

3. Not Inadmissible Requirement: *IRPA*, Sections 34-42: not coming within grounds of inadmissibility.

4. Officer's Approval: *IRPA*, Section 21(1): An immigration officer must be satisfied as to the above.

PROCEDURAL LEGAL REQUIREMENTS: 2 Stages

1. *IRPA*, Section 11(1): Obtaining a "Permanent Resident Visa" BEFORE appearing at port of entry: Conducted by officers posted abroad.
2. *IRPA*, Section 18(1): Examination by Immigration Officer at port of entry: Conducted at port of entry by officers.

OFFICER EXAMINATION, IRPA, Section 15

IRPA, Section 16(1): Duty to Tell the Truth and produce any documents that are requested. Counsel not allowed at these examinations.

IRPA, Section 41: Inadmissibility for failure to comply with the *Act*. Any misrepresentations at this examination can be relied upon for future grounds for inadmissibility.

IRPA, Section 31: Status document: a document to be held by permanent residents confirming their status (the 'Maple Leaf card').

ACCOMPANYING FAMILY MEMBERS

Regulation 10(3): In applying for PR status, one can include any of your family members. The application will be considered to be made for the principal applicant and their accompanying family members. Accompanying family members = the dependents of the applicant. No need to fill out a separate application on their own.

Important distinction: "Family member" is different from "member of the family class", which relates to sponsorship.

Regulation 1(3): "Family member" relates to 'spouse', 'common-law partner' and 'dependent child'.

Regulation 2: 'dependent child' = less than 22 years of age and unmarried/common law, or enrolled in post-secondary education.

IRPA, section 42: An applicant is inadmissible if an accompanying or prescribed non-accompanying family member is inadmissible.

Regulation 23: Prescribes as non-accompanying family members: A common-law partner, dependent child over whom applicant has custody or guardianship, or a spouse, unless relationship has "broken down".

Regulation 117(9)(d): implications for later sponsorship: non- accompanying family member may not be eligible to be sponsored at a later date. Prevents applicants from engaging in a scam or conveniently forgetting to include someone in their application who is inadmissible. (See *De Guzman* case)

Classes that can apply for permanent resident status within Canada: Live in caregiver, Spouse of common law partner in Canada, Permit holder, Protected persons, on humanitarian and compassionate grounds per s. 25 of *IRPA*.

ECONOMIC CLASS → SKILLED WORKERS

IRPA, Section 12(2): Provides for the selection of immigrants as members of an economic class based on their ability to become successfully established in Canada. The economic class consists of: **Skilled Workers & Business Immigrants (Entrepreneurs, investors, and self-employed).**

Policy objectives: s. 3(1) of the *IRPA*: (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration; (c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada; (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society.

Concerns that recent economic class immigrants have not been as "successful" as their predecessors in terms of labour market participation and earnings. **Christopher Worswick** recommends postponing any increase in the total level of annual immigration until an improvement occurs in the performance of new immigrants in the labour market.

SKILLED WORKERS

- Selected based upon a "point system" designed to predict their potential economic contribution to the country.
- According to **Citizenship and Immigration Canada (CIC)** "skilled workers are people whose education and work experience will help them find work and make a home for themselves as permanent residents in Canada."
- These newcomers are selected as permanent residents on the basis of their ability to become economically established in Canada.

THREE REQUIREMENTS:

1. Out of 100 points, you need to score 67.
 2. 1 year of employment experience
 3. Available funds (1/2 LICO) or arranged employment. Regulation 76(1)(b): LICO is low income figure for a family that outlines the necessary funding a family of varying size needs to have in liquid funds.
- b. Pass Mark: The minimum number of points required of a skilled worker, or the "pass mark," is set by the Minister of Citizenship and Immigration.
- c. Selection Criteria: According to **Regulation 76**, an applicant under the skilled worker class is assessed on six selection criteria:
- **Education, Proficiency of the Official Languages of Canada, Age, Experience, Arranged Employment, Adaptability**
1. Education (Regulation 78(2)): A max. of 25 points are awarded for education. Awarded based on the level of the degree and the number of degrees or diplomas obtained by an individual. Problem: Assessing the educational qualifications of foreign nationals is not always straightforward. The IRPA Regulations do not provide for a comparison of the applicant's educational credentials to Canadian educational standards.
 2. Language (Regulation 79): A max. of 24 points are awarded for language. Awarded based on his or her ability to speak, listen, read and write in his or her first and second official language. Immigration officers are instructed not to use the interview to assess language proficiency. Officers must either (1) rely on the results of a test done by an approved testing organization as conclusive evidence of an applicant's level of language proficiency or (2) evaluate written evidence of proficiency submitted by the applicant against the *Canadian Language Benchmarks 2000*.
 3. Employment Experience (Regulation 80): A max. of 21 points shall be awarded to a skilled worker for full-time work experience, or the full-time equivalent for part-time work experience, within the 10 years preceding the date of their application. Awarded based on the number of years of experience completed by the applicant. Pursuant to Regulation 75(2), a skilled worker **must have at least one year of continuous full-time experience or the equivalent in part-time employment in one or more occupations**, other than a restricted occupation, that are **listed in the Skill Type O (management occupations) or Skill Level A (professional occupations) or Skill Level B (technical, skilled trades, and paraprofessional occupations) of the National Occupational Classification (NOC)**. Ineligible Applicant's for FSW Class: Occupations corresponding to Skill Level C (intermediate level clerical or supportive functions) or Skill Level D (elemental sales or service and primary labourer occupations).
In order to qualify on the occupational criteria, the applicant must have performed: (1) all of the "actions" described in the NOC lead statement for the occupation, (2) a substantial number of the "main duties" for the occupation, and finally, (3) all of the "essential duties" of the occupation. Problems with Employment are the same found in the assessment of foreign education and credentials.
 4. Age (Regulation 81): A max. of 10 points shall be awarded for age. Awarded based on whether between the ages of 21 and 49. 2 points are deducted for every year above 49 or below 21.
 5. Arranged Employment (Regulation 82): A max. of 10 points shall be awarded for arranged employment. Awarded based on if Human Resources and Skills Development Canada provides a permanent confirmation, in the form of a labour market opinion, that there is a shortage in Canada of the skills required to fill the position.
 6. Adaptability (Regulation 83): A max. of 10 points are awarded for adaptability. Awarded on the basis of the educational credentials of his or her spouse or common-law partner.
 - In addition, points will be awarded if the skilled worker or his or her accompanying spouse or common law partner has previously studied for at least 2 years at a post-secondary institution in Canada.
 - Also, points will be awarded if the skilled worker or his or her accompanying spouse or common-law partner previously engaged in at least one year of full-time work in Canada under a work permit.
 - Furthermore, points will be awarded if the skilled worker or his or her accompanying spouse or common-law partner has a relative residing in Canada who is a Canadian citizen or permanent resident of Canada.

Settlement Funds (Regulation 76(1)(b)): The applicant is required to demonstrate that he/she has the "minimum necessary income" to support himself/herself and his/her family members for six months.

- c. Lock-in Date: The "lock-in date" is a reference point used to freeze certain factors for the purpose of processing an individual's

application for permanent residence. The lock-in date has frequently been an issue in relation to the applicant's age. As long as they are the right age on the lock-in date, they can surpass it before admission.

- d. **Discretion:** *IRPA* grants very broad powers to immigration officers. Regulations 76(3): "An immigration officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada." This permits an immigration officer to "override" the selection system where he or she believes that the point total is not a sufficient indicator of whether or not the applicant may become economically established in Canada. An immigration officer must obtain the concurrence of a second officer prior to exercising his or her discretion.

Chen v. Canada (FCA, 1994): Applicant successfully completes interview, but he and his family must complete medical and security checks. Applicant sends a Christmas card with \$500 in it to the immigration officer. Explained it as an oriental custom but later apologizes. The immigration officer utilized his discretion to refuse the applicant's permanent residency application.

PROCEDURAL HISTORY: Challenged via judicial review.

SCC: ROBERTSON JA dissenting was affirmed. "I am of the view that when deciding a person's ability to successfully establish themselves in Canada, the determination criteria must be restricted to matters relating to their ability to make a living. That determination cannot and should not be influenced by conduct which suggests moral turpitude."

Provincial and Territorial Nominee Class: Most provinces in Canada have entered into an agreement with the government of Canada that enables them to assume a direct role in selecting immigrants that wish to settle in their province. **Although provincial nominees must meet federal health and security admissions criteria, they are not assessed on the six selection factors of the Federal Skilled Workers Program.** After an individual has been nominated by a province, he or she must submit a separate application to CIC for permanent residence. The Alberta Provincial Nominee Program is an employer-driven immigration program operated by the Province in association with CIC. Employers must establish, *inter alia*, that the employee position cannot be filled by a Canadian resident, is for permanent full-time employment in Alberta, meets provincial, employment and wage standards, and is offered to an individual who meets the required criteria.

Quebec-Selected Immigration: Quebec was the first province to establish its own agreement on immigration with the government of Canada.

ECONOMIC CLASS → BUSINESS IMMIGRANTS

BUSINESS IMMIGRANTS = **Entrepreneurs, Investors or Self-Employed.**

Governed by **Regulations 88-109**

Business immigrants are selected on the basis of their ability to: a. Create jobs for themselves and other Canadian residents, b. Contribute capital to the Canadian economy through investment, and c. Stimulate the Canadian economy. The Business Immigration Program is relatively small (just 7.3% of overall economic class.)

Applicants can rely upon this immigration class if they can satisfy either **the Points OR Officer's discretion PLUS Meet the mandatory definition.**

Points: The points total is currently 35 points and is assessed upon 5 categories: 1. Age, 2. Education, 3. Language proficiency, #4. Business experience and #5. Adaptability are scored differently for business class immigrants than economic class.

Discretion: Regulation 109: officer discretion is available to assess likelihood of person establishing themselves economically if the officer does not feel that the points system has accurately reflected the individual application. Can be exercised in accepting or declining entrance into Canada.

Definitions: Must also meet the definitions of the class that they are applying for under Regulation 88(1).

1. Entrepreneurs

- **Definition:** A foreign national who: 1.) Has "business experience", 2.) A legally obtained *minimum net worth* (\$300,000), and 3.) Provides a written statement to an officer that they intend and will be able [upon settling in Canada] to meet the conditions set out in ss. 98(1) to 98(5) of the Regulations [these Regs require an entrepreneur, who becomes a permanent resident, to meet the following conditions:
 - a. *Control a percentage of equity of a qualifying Canadian business (QCB) equal to or greater than 33.3%;*
 - b. *Actively manage the QCB;*
 - c. *Their QCB provides at least one full-time job for Canadian citizens or permanent residents not family members*

The third criterion makes entrepreneurs the only immigration class that's permanent residency is **conditional**.

Time Limit: Regulation 98(3): an entrepreneur must meet the conditions for a period of at least one year within the period of three years after the day on which the entrepreneur becomes a permanent resident.

2. Investors

- **Definition:** To qualify as an “Investor” a foreign national must: 1.) Demonstrate “business experience”, 2.) Demonstrate a minimum net worth of \$800,000, and 3.) Be willing to commit an investment of \$400,000 (non-refundable and untouchable for 5 year period). "Business experience" is defined in Regulation 88(1): “minimum 2 years managerial experience in business activity.”

3. Self-Employed Persons

- **Definition:** To qualify as a “self-employed person” a foreign national must have: 1.) “Relevant experience” and 2.) The intention and ability to be self-employed in Canada and to make a significant contribution to “specified economic activities” in Canada such as cultural activities, athletics and farm management. According to the *Overseas Processing* manual, an immigration officer must consider the following factors: Self-employed experience in cultural activities or athletics, Management experience in the world of arts and culture, a person's financial assets may also be a measure of intent and ability to establish economically in Canada, participation at a world-class level in cultural activities or athletics, and when determining an applicant's intent and ability to purchase and manage a farm, to be aware that farming is a highly skilled and capital-intensive industry.

Regulation 103: An **investor** or **entrepreneur** may be awarded up to a maximum of 35 points for *business experience* in the period beginning five years prior to the date of his or her application for a permanent resident visa and ending on the day that a determination is made in respect of the application. A **self-employed person** may be awarded up to a maximum of 35 points for *relevant experience* during the period beginning five years before the date of their application for a permanent resident visa. **Self employed persons** will be awarded up to 6 points for *adaptability* on the basis of any combination of the following elements:

1. The educational credentials of the individual's accompanying spouse or common-law partner;
2. Any previous period of study in Canada by the individual or his or her spouse or common-law partner;
3. Any previous period of work in Canada by the individual; and
4. Being related to a person who is a Canadian citizen or a permanent resident.

Regulation 89: The Safety Valve: “Business immigrants will not meet requirements for permanent resident visa if they tried to do so on the basis of a transaction *the purpose of which was to circumvent, directly or indirectly, the requirements.* The business class area is a significant immigration area for legal practice. **THESE PEOPLE CAN AFFORD TO RETAIN LAWYERS.**”

David Ley, “Seeking Homo Economicus”: Based on a study of business class immigrants in the Vancouver area in the late 1990s. The study is of interest because the usual story is one of people moving to Canada and becoming successful businesses. Through this study, he was surprised to find that the story doesn’t seem to be this way at all. It is a lot tougher to make it in Canada, than immigrants from Hong Kong anticipated. These immigrants did not have an overwhelmingly successful time. Also, the conditional status of these individuals is not always enforced. Should we rethink the criteria for business immigrants?

JUDICIAL REVIEW OF ECONOMIC CLASS

Economic class applicants have no statutory right of appeal, including no right of appeal to the Immigration Appeal Division of the IRB.

IRPA, Section 72: **Judicial review** to the FCC is available for any decision or order made under the Act, by leave of an FCC judge. Gate-keeping function for FCC workload. Leave Applications are notoriously unpredictable.

IRPA Section 74(d): An **appeal of a decision in judicial review** to the FCA is available only if the reviewing judge “certifies that a serious question of general importance is involved.” This is another gate-keeping measure to prevent judicial review decisions from being appealed.

| Economic Class | Family Class | H & C (s.25) |
|--------------------------------|--|--------------------------------|
| ↓ | ↓ | ↓ |
| Judicial Review to FCC (s. 72) | Appeal to IAD (s. 63(1)) | Judicial Review to FCC (s. 72) |
| | ↓ | |
| | Judicial Review from IAD to FCC (s.72) | |

Dogra v. Canada (FCC 1999)

Visa officer scored applicant’s experience in Pakistan as school counselor as worth 0 points, because he viewed needs of Canadian students as being different. **Decision quashed on judicial review.** Officer should not have looked behind the NCO occupational descriptions.

Sheikh v. Canada (FCC, 2003)

Judicial review upheld the visa officer’s findings because, under the appropriate standard of review, they were reasonable. In most instances, it will be a standard of deference given to the immigration tribunal. If they quashed the decision, the court will not substitute a decision for the one that had been set aside; it goes back to the statutory

decision maker. In these instances, it will go back to a different visa officer.

FAMILY CLASS – IRPA, s.13(1)

IRPA lists family reunification in Canada as one of the statute's objectives (s. 3.1 (d)).

NO POINTS SYSTEM. The requirements to meet this permanent residence class are:

1. **IRPA, Section 13(1): The Sponsor must be eligible to be a Sponsor, and satisfy other application requirements.**
2. **IRPA, Section 12(1): The Applicant must meet the definition of “Member of the family class”**

Sponsor’s Eligibility

- **Regulation 130:** “SPONSOR” – a citizen or permanent resident, 18 or over, residing in Canada, who files an undertaking to sponsor a “member of the family class”. If the Sponsor does not currently reside in Canada, then they must reside in Canada at the time the applicant would become a PR.

Sponsor’s “Other Application Requirements”:

- **Regulation 133:** Sponsor is not subject of removal order, in jail, or convicted of sexual offence against a relative, in default on a previous sponsorship undertaking, or receiving social assistance.
- **Reg 133(1)(j)(i):** sponsor (and his/her co-signer) has a “total income” at least equal to “minimum necessary income”
- **Reg., 133(4):** Financial requirements do not need to be met for sponsorship of a spouse/partner or dependent child.
- “Total income” is defined in Regulation 134: Income stated on most recent “notice of assessment” (income tax), or if no notice, then total earned income - social benefits payments = total income.
- “Minimum necessary income” – defined in Regulation 2(1): LICO for urban areas over 500,000 in size, for a family composed of: Sponsor + “family members”, Sponsored MFC + his/her “family members”. Everyone else still under an undertaking given by sponsor or co-signer, + their “family members”

Enforcement of Financial Undertakings

- **IRPA, Section 13(3):** "An undertaking relating to sponsorship is binding on the person who gives it."
- **Regulation 132:** The undertaking obliges the sponsor to reimburse the Minister for every "social assistance" (welfare) benefit received by the MFC and his/her family members during the period following becoming a PR of:
 - 3 years, if a spouse
 - If a dependent child, the earlier of the child's reaching 25 years of age, or 10 years from their becoming a PR.
 - If anyone else, 10 years from their becoming a PR. (Ex. Parents of a sponsor).
- **IRPA, section 145(2):** A debt is payable on demand to the Crown.

Member of the Family Class’ Eligibility

IRPA, Section 12(1): “A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common law partner, child, parent or other prescribed family member of the Sponsor.”

Regulation 117: “MEMBER OF THE FAMILY CLASS” – Applicant for permanent residence (whose application may include his/her accompanying family members).

Regulation 117 provide that the following persons may be sponsored as family class members:

- Spouses or common-law or conjugal partners 16 years of age or older;
- Parents and grandparents;
- Dependent children, including adopted children;
- Children under 18 years of age whom the sponsor intends to adopt;
- Children under guardianship;
- Brothers, sisters, nephews, nieces, or grandchildren who are orphans, under the age of 18, and not married or in a common-law relationship;
- One relative of any age if there is no aunt, uncle, or family member from the list above who could be sponsored or who is already a Canadian citizen, Indian, or permanent resident.

Notable omission: *SIBLINGS*. Solution: Canadians or permanent residents can sponsor parents, and parents can bring dependent children as accompanying family members.

Sponsors must undertake to support the relative or family member and their accompanying family members for a period of 3 to 10 years, depending on the relationship between sponsor and family class member.

A family class member who is a spouse, common-law partner, or child of a sponsor (unlike other applicants for permanent residence) is still admissible even if he or she has a medical condition that might reasonably be expected to result in excessive demand on Canada's health care system and social services.

A) Spousal Relationships: Spouses, Common-Law Partners, and Conjugal Partners

Spouse:

- Although the word "spouse" is not defined in the IRPA or the Regulations, it would appear that it was intended to refer to a man and a woman who are married.
- Regulation 2(1): "marriage" outside Canada means a marriage valid both under laws of a foreign country and of Canada.
- Regulation 5(a): Spousal relationships cannot exist with a foreign national under the age of 16.
- Regulation 5(b): One cannot be a spouse if → a) polygamous or b) separated for over a year and in a common-law relationship w/ another person.
- The categories of **conjugal partner** and **common-law partner** are defined in gender neutral terms to include either same-sex or heterosexual relationships.

Common Law Partner:

- **Regulation 1(1)**: A **common-law partner**, in relation to the sponsor, must be an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.
- Foreign national **spouses** or **common-law partners** of Canadians or permanent residents who live in Canada with their spouses or partners can be sponsored from within Canada.

Conjugal Partner:

- **Regulation 2(1)**: A **conjugal partner** is a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

Macapagal v. Canada [2004] IADD No. 21

FACTS: Refused on the basis that the applicant is not a member of the family class. Immigration officer found that applicant was not a spouse, common law partner or conjugal partner in relation to the sponsor. Sponsor was a Filipino citizen when he obtained his divorce in Canada, and he was still a Filipino citizen when he subsequently married the applicant. According to Filipino law, a citizen is governed by their law wherever they travel. Since the Philippines do not recognize divorce, even conducted in Canada, the sponsor was not free to marry. Therefore, the family relationship of spouse is inapplicable. The immigration officer then tried to fit the applicant into the Common law partner and conjugal partner classification. This was unsuccessful. The applicant appeals the decision of the immigration officer.

ANALYSIS: Conjugal Partners ≠ Common law partners OR Spouse, because conjugal partners are eligible for permanent residence only in the context of a family-class sponsorship. Conjugal is defined in case law as being "marriage-like".

In *M. v. H.* [1999], the SCC adopted 7 characteristics of a conjugal relationship.

1. **Shelter** - whether the partners live together in the same home as a couple;
2. **Sexual and personal behaviour** - whether the partners' relationship is exclusive, committed, and evidenced by emotional, intellectual, and physical interaction;
3. **Services** - whether household and other family type responsibilities are shared and whether there is evidence of mutual assistance especially in time of need;
4. **Social Activities** - whether the partners share time together or participate in leisure activity together - whether they have relationships or interaction with each other's respective family;
5. **Economic support** - whether the partners are financially interdependent or dependent. Whether the partners have joined, to some extent, their financial affairs for example, naming the other partner beneficiary in an insurance policy or will;
6. **Children** - the Partners' attitude and conduct towards children in the context of their relationship; and
7. **Special perception** - Whether the partners are treated or perceived by the community as a couple.

The case law does not single out one or more factors as determinative of the existence of a conjugal relationship. Furthermore, in order for a foreign national to be considered a member of the family class as a conjugal partner, the evidence must establish that the conjugal relationship is not a **bad-faith relationship**.

- According Regulation 4, a bad faith relationship is one that either is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the IRPA.

- Two Step Process:

1. **A determination must be made as to whether or not a partnership has the characteristics of a conjugal relationship.**
2. **If the evidence does show that a partnership is bona fide for purposes of immigration to Canada.**

Applied to the Facts of this case:

The applicant applied as a spouse. That was not possible. The immigration officer proceeded to also consider whether the person could be a common law partner or conjugal partner. Failed on the 7 indicia. Met the sexual and personal behaviour, but this is only one indicia. Not a conjugal or common law partnership.

HELD: Appeal dismissed.

Same-Sex Relationships

Under the IRPA, Canadians and permanent residents can sponsor their same-sex partners if they meet the criteria of conjugal or common-law partners and otherwise fulfill sponsorship prerequisites. In 2004, the SCC ruled that it is unconstitutional to deny homosexual couples the right to marry. There would appear to be no obstacle to recognizing the validity of same-sex civil marriages performed in Canada for immigration purposes.

Polygamous Relationships

Polygamy is a criminal offence in Canada. The IRPA prohibits the sponsorship of more than one intimate partner (spouse, common-law, or conjugal).

Relationships of Convenience

Regulation 4: *For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common law partner, a conjugal partner, or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is **not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.***

The case law indicates that various criteria have been applied in making the determination. Factors that have been considered indicators of the existence (or otherwise) of genuine marriage and/or intention to reside with the sponsor:

- Inconsistent or contradictory statements regarding matters such as the origin and development of the relationship between the parties;
- The applicant's history of previous attempts to gain entry into Canada;
- Evidence of a previous marriage for immigration purposes;
- The parties' knowledge about each other,
- Contact between the parties;
- Family ties;
- Exchange of gifts; and
- Financial support.
- Circumstantial evidence of love and affection
- Photographs of the wedding
- If a common law/conjugal relationship, other types of photographs...
- **Evidence of continued communication:** Phone records, calling cards, emails, love letters.

Arranged marriages are not inherently less credible than so called love matches characteristic of Western culture. However, the lack of prior acquaintance of the parties poses evidence challenges, and decision makers often attempt to assess the relationship against customary practices and norms regarding arranged marriages in the community of origin.

Salh v. Canada (IAD, 1988)

FACTS: Deals with the refusal of the application to sponsor her husband. In the opinion of the immigration officer, Salh entered into marriage with his sponsor primarily for the purpose of gaining admission into Canada as a member of the family class and not with the intention of residing permanently with his spouse. The applicant initially applied to Canada as a member of the refugee class. In his interview, he admitted that he was not a refugee, but applied for this status for the sole purpose of remaining in Canada. Failed to get in, after appealing to Federal Court and Supreme Court. Applicant filed another application which made no mention of a wife. The result was also negative. Applicant then quickly got married and applied again.

MacLEOD: Finds that the immigration officer got the facts wrong. The marriage appears to have created an enduring relationship and their desire to live together in Canada is genuine. Marriage was not entered into primarily for the purpose of gaining admission into Canada; the applicant has the intention of residing permanently with the appellant.

TOWNSHEND (dissenting): What is relevant is the state of mind of the applicant, not the appellant. This is a ruse.

HELD: Appeal allowed.

Sanichara v. Canada (FCC, 2005)

FACTS: This is an application by the purported sponsor for judicial review of a decision by the Immigration Appeal Division that dismissed an appeal from the decision dismissing the application for permanent residence in Canada of applicant's spouse as member of family class. The sponsor is a 22 year old male citizen of Canada. His wife is a 22 year old female citizen of India. They got married in May 2002 and applied for family sponsorship in June 2002. Immigration officer refused sponsorship because of a suspicion that the marriage was not genuine.

ISSUES: Did the IAD apply the proper test in determining whether the Applicant's wife was a member of the family class? Did the IAD err in concluding that the Applicant was not a member of the family class?

BEAUDRY J.: Marriage was arranged by family members, and close trusted friends. Elements which caused the Designated Immigration Officer to doubt the real purpose of the marriage:

- The applicant and his wife did not meet prior to the marriage, despite the fact that the Applicant was in India in advance of the wedding day;
- The applicant speaks little Punjabi and his wife speaks little English;
- The applicant was not present at the engagement ceremony;
- Neither the applicant's parents nor his siblings attended the wedding;
- The applicant only spent less than one week in India after the wedding and his wife could not give reasonable explanation as to why he would spend such a short period of time there;
- While the applicant and his wife were in touch, the contact was minimal. The applicant's wife has not demonstrated any evidence that her husband called her and only presented seven phone bills indicating calls from her of very short duration.
- The written correspondence the Applicant's wife provides was in English. The applicant's wife was unable to read what was written in the letters. Moreover, she did not provide any envelopes to prove that any of the correspondence was mailed to her.
- Moreover, many contradictions in the testimonies of husband and wife were found by the IAD.

Two stage test for disqualifying a spouse as a member of the family from *Horbas v. Canada*:

- ...The spouse is disqualified under Regulation 4(3) only if the marriage is entered into primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with the other spouse.
- **To disqualify a spouse, it must be established that:**
 1. **The marriage is not genuine; and**
 2. **The marriage was entered into primarily for the purpose of acquiring any status under the Act.**

HELD: IAD properly applied this test. Appeal dismissed.

B) Children

Dependent children, biological or adopted, may be sponsored for permanent resident status by parents who are Canadians or permanent residents.

Children under the age of 18 may not sponsor parents.

The term "dependent child" excludes children who are married or in a marriage-like relationship with another person.

Regulation 2(1): A "**dependent child**" is a biological or adopted child who is not a spouse or common law partner and is in one of the following situations of dependency:

1. Is less than 22 years of age; or
2. Has depended substantially on the parent since before the age of 22 and is a full-time student in an accredited post secondary institution; or
3. Has depended substantially on the parent since before the age of 22 and is unable to be financially self-supporting because of a physical or mental condition.

The relevant date for determining the age of a child for sponsorship purposes is the age of the child at the time that the application was received (**Lock in Date**).

The relevant date for determining the age of a child in relation to the right to appeal is the age at the time the visa was denied.

Josephine Soliven De Guzman v. Canada 2005 FCA 436

FACTS: Ms. de Guzman, a citizen of the Philippines, was admitted her permanent resident visa in Canada in 1993. She told immigration officials that she was single and had no dependants, other than her daughter. This was not true, as she also had 2 sons, Jay and Jayson, whom she left in the Philippines with their father. Eight years later, Ms. De Guzman, now a Canadian citizen, applied to sponsor the admission to Canada of Jay and Jayson as members of the family class. They were 17 and 16 respectively. However, Canada refused visas under Regulation 117(9)(d) on the ground that they were not members of the family class because they had not been examined for immigration purposes when Ms. De Guzman came to Canada.

ISSUE: *Is Regulation 117(9)(d) valid?*

EVANS J.A. (Desjardins J.A. concurring): Ms de Guzman claims that Regulation 117(9)(d) is invalid on three grounds:

1. It is not authorized by the relevant enabling statute (IRPA) [**Admin argument**]
2. By preventing the reunification in Canada of parent and child, the regulation violates the parent's rights under section 7 of the *Charter*. [**Constitutional argument**]
3. The regulation is inconsistent with international human rights instruments to which Canada is a signatory [**International law argument**]

Is Regulation 117(9)(d) authorized by IRPA?

Administrative Law Rule: if there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Counsel for Ms. de Guzman argue that Regulation 117(9)(d) was invalid because the Governor in Council had taken irrelevant considerations into account when enacting it. Despite counsel's ingenuity, FCS is unable to agree.

Does Regulation 117(9)(d) violate the parent's rights under section 7 of the Charter?

Court says that there is an insufficient nexus between state action and the deprivation: De Guzman herself chose to separate herself from her children.

How does Regulation 117(9)(d) affect international human rights instruments to which Canada is a signatory?

IRPA, Section 3(3)(f) says that this act is to be construed and applied in a manner that is consistent with the international instruments to which Canada is a signatory.

A hierarchy of importance develops with the degree of integrality of International Human Rights Instruments:

- At the low end, there is being a signatory of the document, followed by ratification, and then implementing into Canadian law.
- Because 'Signatory' is the lowest level of Canadian confirmation of international agreements, this language is somewhat ambiguous, and the courts must now figure out how to deal with this.
- 2 positions that should be **rejected**:
 - 1) Provisions of non-implemented international human rights treaties prevail over express provisions in IRPA.
 - 2) Provisions of signed IHRI constitute merely 'persuasive and contextual' aids to the interpretation of IRPA.
- The Court finds that the 2 IHRI's relied upon by Ms. de Guzman are not intended to deal with how different countries regulate admission into their country. Furthermore, because there are still options available for Ms. de Guzman's children to come to Canada, this is not an unreasonable refusal. They cite IRPA Section 25 [power to deal with an application to immigrate on H & C grounds] as an option. Additionally, they can apply later as economic immigrants.

HELD: Appeal Dismissed

C. Adoption: Non Biological Parents and Children

At present a child who has been adopted by permanent residents or Canadians, as well as a child whom a sponsor intends to adopt, must be sponsored as a member of the family class. The child may be adopted in Canada or in a foreign country.

If adopted **within Canada**, the child must be:

- Under 19 years of age at the time of the sponsorship application
 - PLUS
- Be an orphan;
- An abandoned child whose parents cannot be identified;
- A child born outside of marriage who has been placed with a child welfare authority for adoption;
- A child whose parents are separated and who has been placed with a child welfare authority for adoption; or
- A child, one of whose parents is deceased, who has been placed with a child welfare authority for adoption.

If adopted **outside Canada**, the sponsored child must be:

- Under 19 years of age at the time of the sponsorship application
 - PLUS
- Must be adopted according to the laws of the country of origin.
- The adoption must be in compliance with the country's domestic laws and international laws.
- Canada ratified the Hague convention with respect to adoption immigration laws.
 - The purpose of the Convention is to prevent abuses such as the abduction or sale of, or the trafficking in, children or any other improper financial gains.

For adoption sponsorship cases in the immigration context to succeed, three conditions must be satisfied:

- 1)** The adoption must be legal under the laws of the jurisdiction where it was performed;
- 2)** The adoption must be genuine;
- 3)** The person must not have been adopted primarily for the purpose of gaining admission to Canada or gaining the admission to Canada of persons who are related to him or her.

Regulation 2(2): "Adoption" creates a legal parent-child relationship and severs pre-existing Parent-Child relationship.

Regulation 117(2) – Child shall not be considered an MFC unless the adoption was in best interests of child as set out in *Hague Convention*.

- 117(3) – Considerations going to "best interests"
- 117 (c) the adoption created a "genuine parent-child relationship"

Factors to help prove that an adoption is ***genuine***:

- Motivation of adoptive parents to adopt. *Why are the biological parents giving up their relationship with the child? Are they doing it for reasons that make sense and they understand? Is this child really moving from one family to another?*
- Active role of adoptive parents in making decisions concerning child.
- Degree of contact between child and adoptive parents. Sending letters, gifts, etc. Problem with this kind of documentary evidence is that it is pretty self-serving; a non-genuine relationship can appear to be real through this mode of evidence.

FAMILY SPONSORSHIP APPEAL RIGHTS & OTHER RECOURSES

IRPA, Sections 62-71

Section 62: IAD is the competent jurisdiction of the board for appeals.

Section 63: Sets out various appeal rights for people in different situations, with the appeals all going to the IAD tribunal.

Section 63(1): A person who has filed in the prescribed manner **an application to sponsor a foreign national** as a member of the family class **may appeal** to the IAD against a decision not to issue the foreign national a permanent resident visa.

Section 63(2): A right of appeal to the IAD for a **PR returning to Canada** and at the examination by an immigration officer, being refused. PR can remain in Canada until appeal is dealt with.

Section 63(3): A PR or a protected person may appeal to the IAD against a decision at an examination or admissibility hearing to make a **removal order** against them.

| | |
|--|--|
| IMMIGRATION APPEAL DIVISION Appeals of Removal Orders Appeals of Refused Family Class Sponsorships due to inadmissibility, not eligibility (from Imm. Div & Officers) | REFUGEE APPEAL DIVISION Not Proclaimed Yet Intended to Hear Appeals from RPD |
| ↑ | ↑ |
| IMMIGRATION DIVISION Conducts Admissibility Hearings and Issues Removal Orders | REFUGEE PROTECTION DIVISION Determines 'Refugee' and 'Person in Need of Protection' Claims |

Grounds for an appeal to the IAD:

- IRPA, Section 67(1) sets out 3 grounds for appeal:

(a) **The decision appealed is wrong in law or fact or mixed law and fact (colloquially, this is the legal grounds of appeal).**

(b) **A principle of natural justice has been breached; or**

(c) **Discretionary/Equitable Grounds**

- Ex. Taking into account the best interests of a child directly affected by the decision, sufficient H& C considerations warrant special relief.
- Discretionary/Equitable Appeals are considered *de novo* appeals. This is unlike a judicial review, where there is deference granted on the findings of fact made by the initial decision maker. You get evidence that goes to the time since the decision was made.

IRPA, Section 65 limits the appeal jurisdiction with respect to H&C in the family class: The IAD may not consider H&C factors unless "it has decided that the foreign national is a member of the family class" and the sponsor "is a sponsor within the meaning of the regulations." Therefore, where the IAD concludes that an applicant is not a member of the family class (e.g., not a dependent child, or a spouse, or an adopted child, as those terms are defined), then it can only consider the legal grounds, or any breach of procedural justice in the appeal, not H&C grounds. Regulations 130 & 133: Define requirements of a sponsor.

If a visa officer concludes that someone listed as an accompanying dependant [now, "family member"] of the principal applicant is not, in fact, a "family member", then the officer has no basis for refusing visas to the principal applicant and other family members. A visa officer is instructed to strike the non-eligible family member from the application and allow the principal applicants in. In this circumstance, there is likely no appeal to the IAD under s. 63(1), because there has not been "a decision not to issue the [sponsored applicant] a permanent resident visa." There is no refusal of the principal applicants and the sponsor cannot appeal the refusal of the dependant. The recourse?

- **Judicial review – the dependant would initiate a judicial review to the Federal Court.**

Fortaleza v. Canada (IAD 2005)

FACTS: A permanent resident initiated a sponsored application for her nephew from the Philippines. This sponsorship application relied upon the residual relative category (Regulation 117(1)(h)) [*a person in Canada can sponsor one relative, of any relationship, if they have no other relative or sponsor in Canada*]. **The refusal of the application is based on financial grounds** as the visa officer determined the sponsor lacked the requisite Minimum Necessary Income (MNI). The appellant does not challenge the legal grounds of the refusal and brings her appeal in relation to her nephew on the grounds that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, pursuant to s. 67(1)(c) of IRPA. [H & C considerations]

ANALYSIS: Considerations for affording discretionary relief need not be extraordinary and can be as ordinary as the love of a husband and wife and a natural desire to be together. The absence of any family member of the appellant in Canada is a salient factor in affording discretionary relief. This is inherently a strong case on H & C grounds.

Another matter dealt with in this case is that **the IAD and the FCC in reviewing their decisions have acknowledged that the degree of**

inadmissibility is a factor in the H & C as well. In this case, since the application was filed, she has recovered financially.
HELD: The IAD finds the refusal valid in law; however, the IAD allows the appeal pursuant to s. 67(1)(c) [H & C].

HOW CAN PERMANENT RESIDENCY STATUS BE LOST?

Determinations of Inadmissibility.

- Committing criminal offences of the requisite seriousness;
- Failing to fulfill conditions of landing;
- Making a misrepresentation at the time of being granted PR status.
 - Each of these can lead to a **removal order**. If appealed, a removal order is frozen until after the appeal finds it valid or after the appeal expiration period.

Abandonment:

- *IRPA* Section 28: A permanent resident cannot live outside Canada for more than 3 years in a 5 year period.

Upon Becoming a Citizen
 Under s. 46 of *IRPA*, a person loses permanent resident status on becoming a citizen.

RIGHTS CONFERRED BY PERMANENT RESIDENCY

Charter s. 6(2): the right to move to and reside in any province and to pursue the gaining of a livelihood in any province.
 The rights of permanent residents to enter and remain in Canada are determined solely by the *IRPA* and its regulations.

IRPA, s. 19(2): *An officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status.*

- **Unlike Citizens, can be deported on grounds of inadmissibility.**
-

FOREIGN NATIONAL

IRPA, section 2(1)

A person who is neither a permanent resident nor citizen of Canada.
 Foreign Nationals include: Refugees (Protected Persons), Temporary Residents, and No Status (rest of world).

TEMPORARY RESIDENTS

HOW TO ACQUIRE TEMPORARY RESIDENT STATUS?

For a person to enter Canada to work on a temporary basis, they generally need two documents prior to entry:

1. **A temporary resident visa**
2. **A work permit**

The requirements are partly set out in *IRPA*, but primarily in the Regulations.

IRPA, Section 3(1)(g): objective of facilitating entry of visitors, students and workers
IRPA, Section 22: Every foreign national must satisfy an officer upon entry that they are:

- (a) Not inadmissible.
- (b) Meet conditions set out in s. 20 (1)(b).

IRPA, Section 20(1)(b): foreign national

- (a) holds a temporary resident visa
- (b) will leave at the time of expiry of the visa [Not leaving upon expiration is a basis for refusal of permanent residency].

IRPA, Section 24(1): “temporary resident permit” (**TRP**). This is a document given to some inadmissible person to allow them brief entry in Canada. (Ex. U.S. truck drivers with criminal records).
IRPA, Section 32: Power to enact regulations including creating classes of temporary residents, like students and workers. This is also a source of authority for setting the conditions of work and study in Canada.

Temporary Resident Visa (TRV) Provisions
Regulation 10(3): An application for a Temporary Resident Visa (TRV) is made on behalf of themselves and their accompanying family.
Regulation 179: TRVs may be issued to visitors, students or workers, on conditions that: they will leave Canada upon expiration, are not inadmissible, and have received a medical examination if required.

- Officers are hesitant to issue visas of this nature if the applicant will soon file a refugee claim after arriving in Canada.

- Officers can deny visas if they believe there is a likelihood of the person not leaving after the expiration date.
- Regulation 183(2): Visas are issued for a 6 month period, unless otherwise decided.
- Regulation 190: Countries for which TRVs are not required
- Mexico requires TRVs: see www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13.asp
 - *De la Cruz* (1989) – TRV decisions are given considerable deference by the court
 - TRV decisions are subject to judicial review.

Work Permit (WP) Provisions:

- Regulation 186: Persons who can work in Canada without a work permit. Includes “business visitors”.
- Regulation 196: Otherwise, foreign nationals may not work in Canada without a WP
- Regulation 197: WPs must be applied for before entering Canada, with exceptions in Regulations 198 and 199
- Regulation 199: Exceptions for students, and family members of a person with a WP

Trade Agreements (Pages 239-242 in Casebook)

NAFTA and GATT provide for facilitated entry for work purposes of business travelers and professionals. The principal benefit appears to be that the HRSD process is unnecessary, and work permits may be issued at the port of entry if documentation is adequate. Not clear where the provisions of these agreements have been incorporated into the IRPA Regulations– possibly 186(a), 198(2), and certainly 199(h).

How to Lose Temporary Resident Status?

- IRPA, Section 47: Temporary Resident status is lost by:
- 1) Expiry of status,
 - 2) Determination of breach of the conditions under s. 32, or
 - 3) On cancellation of a Temporary Resident Permit.

Rights Conferred to Temporary Residents

- IRPA, Section 29(1): A temporary resident is authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.
- IRPA, Section 29(2): A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period of their stay and may re-enter Canada only if their authorization provides for re-entry.
- IRPA, Section 30(1): A foreign national may not work or study in Canada unless authorized to do so under this Act.

Temporary Live-In Caregivers

The Live-In Caregiver is a route to permanent resident status for domestic workers (nannies, care aids, etc). In the first several years, they appear on a temporary work permit, but they can apply for permanent residence after a probation period. This is predominantly an avenue for women of moderate skills who likely would not be in a position to otherwise immigrate under the point system. The largest category in this route is nannies.

Requirements of the program (see Regulations 110-115):

- Secondary school diploma;
- Training and experience in caregiver role;
- A contract with an employer (approved through HRDC);
- Within three years of coming to Canada, two years of employment must be completed.
- The individual and their family members may then obtain permanent residence.

A complaint in **Audrey Macklin**’s article with regard to the system of the early 1990’s, was that married individuals could not apply. Then there were issues as to whether they could apply and later bring spouse with them. Today, this is resolved and they can bring their dependants. Audrey Macklin’s Article also discusses the vulnerabilities of the Live-in Caregiver during the probationary period: Failure of employment relationship and contract, Harassment by employers; improper demands to do menial or household related tasks, Breach of employment standards, and difficulty in seeking enforcement. A reform that Macklin applauded was allowing live-in caregivers the flexibility to switch employers. Macklin’s feminist analysis of foreign domestic workers: “The role of the FDW (foreign domestic worker) is not merely anomalous; it is anachronistic.” Anachronistic in the sense that the FDW as “surrogate housewife” is coming into greater demand as women move increasingly into the workforce. Discussion of whether the FDW program perpetuates a patriarchal society structure (and discourages the creation of a daycare program), or whether its abolition would not advance greater gender equality. **(Page 274)** What would happen if FDWs were prohibited tomorrow? She would like to see pay increase for the house spouses. Or maybe, there would be a breakthrough in which men would take a bigger share in household work. Or neither of the above materializes, the wife returns to the home. Does this critique lead one to the view that the Live-in caregiver program should be eliminated? Or is this going too far and limiting a viable source of immigration for foreigners? Balance the need for a viable revenue stream for foreign workers versus reinforcing patriarchal system.

Public Policy of Temporary Foreign Workers

Walzer Article, pp. 243 – 249

- “Why are they [permanent aliens] admitted? To free the citizens from hard and unpleasant work. Then the state is like a family with live-in servants.” (244)
- “Political justice is a bar to permanent alienage— either for particular individuals or for a class of changing individuals.” (248)
- “Democratic citizens, then, have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership” (248)

What is Walzer’s position on ‘membership’ in a community, in terms of whether a theory of justice allows communities to control immigration?

- He sees two leaps in admission: 1. foreign national to temporary foreign worker to permanent resident and 2. Permanent resident to Citizen.
- He discusses the first arrival of becoming physically present in the country he analogizes as coming to the neighbourhood.
- By going from a permanent resident to a full citizen, he analogizes it to being akin to joining a family.
- He defends immigration law, whereas people like Joseph Carens and Michael Trebilcock argue for open borders and the dismantling of immigration systems.
- Walzer says that it is the basic principle of communities that allows them to dictate who can join and who cannot. For community to exist, we have to close the borders somewhere and allow the members of the community to determine who gets in and who doesn’t. Without this, there is no concept of community.
- What does Walzer say about the second admission (permanent residency to citizenship and the temporary foreign worker)?
- Temporary foreign worker programs are an answer for labour market issues (especially for low skilled workers). This is about foreigners doing work that locals are not willing to do at lower wages. This is an economic benefit to Canada. The dilemma is if you put them on the track to full political citizenship, then you start to undermine the benefits to economy in Canada.
- **His theory of political justice says that you cannot be just without having political rights. Foreign workers need the ability to acquire political rights. That is why the Canadian immigration system is ok.**
- What countries does he think demonstrate a poorly organized immigration system (one he calls tyranny)?
- Germany and Switzerland; they had people coming in on a temporary worker status, but would never be allowed to get on to a track for permanent residence and eventually citizenship.
- Are there other societies that he is sending a warning to?
- Where people are residing in a country and serving its economy without gaining political rights.
 - South Africa.
 - Israel.

Martin Ruhs Article, pp. 250-259

Critics of TFW programs tend to undervalue their worth to the workers themselves and their home countries

- The very temporary nature of these programs helps spread opportunities out among more foreign workers, and may limit the downside of “permanent alienage”
- Three correctives to ‘bad’ TFW programs:
 - (1) Grant temporary workers a degree of mobility and freedom from their single arranged employer
 - (2) Impose a reasonable fee on employers of TFWs
 - (3) provide transparent, but not automatic routes from temporary to permanent and citizen status

Martin Ruhs responds to Walzer:

What is Martin Ruhs position with respect to temporary foreign worker programs?

- If a country that is desirable to work in doesn’t allow some legal way to work, then you will drive up illegal immigration.

What is his further response to Walzer’s theory of justice?

- He disagrees with Walzer on whether or not there is an appropriate tradeoff between the needs and desires of foreign workers wanting to improve their lives and the benefits received by the recipient country.
- **Ruhs feels the work is traded in exchange for not acquiring full political rights and Ruhs argues that this is not a fair deal.**

Ruhs feels that TFW programs should be designed carefully because they can go awry. He thinks an improvement would be for TFW to be able to switch employers in their limited stay in Canada, so that they are not at the mercy of their employers. He thinks that a fee should be imposed on the employers to recognize the value of the foreign worker that can pay for protective programs and enforcement aspects of it. Without good enforcement (against the employer and the TFW), the program is useless. Carver feels that this argument is most germane to the USA.

Law and Public Policy

Many of the arguments we see on this issue, and on economic class immigration and immigration policy generally, go to ethical and economic arguments. What is the role of law?

1. Law as an instrument of carrying out public policy goals. Law requires operable criteria— how well do these fit policy goals? E.g., the

points system.

2. Law implies certain values of process and substantive rights that dictate facets of how policy is implemented. Many of these deal with how individuals experience policy. See Ruhs, p. 255 bottom.
3. Law and unintended consequences. Vulnerability of temporary workers; incentives for illegal conduct. Real-world and real-law issues around enforcement. See Ruhs at 256 bottom.

Humanitarian & Compassionate Applications to the Minister

IRPA, Section 25(1): *The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.*

Ministerial Policy on H & C Applications:

“Delegated persons have full authority to make this decision. At the same time, to be fair to clients and to avoid just criticism, there must be as much consistency as possible in the use of this discretion.” (Manual--Internal Processing 5, 2.1)

“Standard”: The hardship caused by deportation should be “unusual and undeserved”, or “disproportionate.” (IP 5, 5.1)

Baker v. Canada (1999 SCC)

FACTS: She came on a visitor visa to Canada. She did not leave after its expiration. She had four children while in Canada. CIC get a deportation order against her. She also has children back in Jamaica that she left. She had psychiatric issues while in Canada. She applies for relief under the predecessor to s. 25.

ANALYSIS: Two Administrative Law grounds brought against Officer’s decision

Procedural fairness: the file notes made by one of the immigration officers created a reasonable apprehension of bias with respect to the decision-making process.

Substantive justice: The decision was unreasonable because officers failed to (sufficiently) take into account the best interests of Ms. Baker’s Canadian-born children.

Discussion of H&C: Historically, Immigration law was built on the sovereign authority of the Crown. Section 25 doesn’t really change that dynamic, it is like an equitable remedy for the Crown to relieve people in dire circumstances. SCC characterized H&C decisions as having **fundamental importance for the applicant.**

Implications for Immigration Law from this case:

1. **An oral hearing (interview) for H&C applications is not necessary.**
2. **Reasons must be given for H&C decisions.** Due to the seriousness of these decisions, reasons must be given.
3. **Immigration decisions require a significant degree of cultural sensitivity.**
4. **The role of international agreements, and in particular the *Convention on the Rights of the Child***
5. **Minister’s policy guidelines “are a great assistance to the Court” in deciding whether an officer’s decision was reasonable.**
6. **Conclusion on the role of children’s best interests in H&C decisions.** The Immigration officer did not take sufficient consideration of Ms. Baker’s Canadian born children. The Canadian born children are under a different status than the mother.
7. **On appeals to the FCA and the SCC, those courts are not limited to addressing only the question “certified” by the FCC.**

Legault v. Canada (Minister of Citizenship and Immigration) (2002 FCA): Like *Baker*, this case stands for the proposition that the “best interests of the child” is an important factor that must be given substantial weight. However, *Legault* stands for the further proposition that the best interests of the child is not determinative of the issue of removal to be decided by the Minister.

Hawthorne v. Canada (Minister of Citizenship and Immigration) (2003 FCA): The best interests of the child are determined by considering the benefit to the child of the parent’s non-removal from Canada as well as the hardship the child would suffer from either her parent’s removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. (Weigh the pro’s and con’s of parent’s departure upon the child). As a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. For all practical purposes, the officer’s task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations that militate in favour of or against the removal of the parent. *Baker* should not be interpreted to mean that Canadian-born children are a trump card to an individual being deported.

Section 25 Applications versus Section 63 Appeals

Remember what was said by the IAD in *Fortaleza*: mere love of one spouse for another may be enough to overcome inadmissibility.

D’Espino – FCC decision in January 2007: it makes sense that section 25 applications may require more, because the context is different.

- Section 63 appeals are available to permanent residents (as sponsors, or when subject to removal)
- Section 25 is available to foreign nationals.
- SCC in *Chieu* says that IAD appeals must and do meet the requirements of natural justice (fairness), while section 25 H&C decisions have not always done so.

INADMISSIBILITY AND REMOVAL

“Inadmissibility” is a basis for:

- refusing applications** for permanent residence (and temporary status);
- “**excluding**” persons who appear at ports of entry with permanent resident visas (**accompaniers**);
- removing** (deporting) **permanent residents**.

Both (b) and (c) fall under the term “removal”, and are accomplished by “removal orders”.

Appeals to the IAD exist for (a), if the refused application is a family class sponsorship [*IRPA*, s. 63(1)];

Appeals exist also for both scenarios (b) and (c) [*IRPA*, s. 63(3)].

Eligibility of immigrant classes are found in the Regulations.

Issues of **inadmissibility and removal** are found in the statute *IRPA*, Sections 33-43.

Grounds of Inadmissibility

- “Heavy Duty” or “Serious” grounds (applicable both to **permanent residents** and **foreign nationals**)
 - Sections 34-37 → (but **not** s. 36(2)).
 - Grounds applicable **only to foreign nationals**.
 - Sections 36(2), 38, 39, 42).
 - ‘Non-serious’ grounds (applicable both to **permanent residents** and **foreign nationals**)
 - Sections 40, 41.
- A. Heavy Duty or Serious Grounds of inadmissibility**

Security grounds, including terrorism → **Section 34** → Ex. *Suresh*

Crimes against humanity and war crimes → **Section 35** → Ex. *Mugesera* (717)

Serious Criminality → **Section 36(1)** → Ex. *Li* (688)

Organized crime → **Section 37**

Commonalities of the various ‘Serious’ or ‘Heavy-Duty’ Grounds of Inadmissibility

IRPA, Section 33: These can all be established on the basis of there being **reasonable grounds to believe** that the stated acts are occurring, have occurred or will occur in the future. **Standard of proof = reasonable grounds to believe**. Reasonable grounds will exist where there is an objective basis for the belief based on credible information. The standard of proof it must meet is less than 50%. More than a suspicion, less than a probability.

IRPA, Section 64: There is an **express denial of an appeal right** for a person of the serious and heavy duty grounds of inadmissibility. It pretty much means no recourse (aside from a judicial review).

Section 34: Security Grounds

Section 34: Permanent resident or a foreign national is inadmissible on security grounds for:

- engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
- engaging in or instigating the subversion by force of any government;
- engaging in terrorism;
- being a danger to the security of Canada;
- engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

34(f): **Membership** is indeed a source of liability for someone in this area. Ex. *Suresh* – he was removed for alleged involvement with the Tamil Tigers, the rebel group involved in the civil war of Sri Lanka. Ultimately, the court relied on the definition of terrorism under s. 34.

- Defining terrorism is tough. How do we come to a satisfactory legal definition. Page 710.

“Terrorism includes any act intended to cause serious bodily injury to an innocent person when the purpose of such act by its nature or context is to intimidate a population or influence a government to do or abstain from any act.”

What does membership mean? Nefarious groups don’t issue membership card. It means something looser than that: meetings, supporting, donating money. Can be unclear. **Sharryn Aitken** criticizes or suggests that the risks successful claimants. Many refugees are refugees because they engaged in political oppositional activities and exposed themselves through their associations to the possibility of being labeled in groups. **Suresh** alleviates this definition a bit. If someone innocently becomes a member of a group without their knowledge engaged in terrorism, there is an out. That is, if they satisfy the Minister that their admittance is not harmful to Canada [**Section 34(2)**]. Thus, Section 34(f) does not capture innocent membership (lack of awareness of nefarious activities).

Section 35: Crimes Against Humanity

Inadmissible for a violation of human or international rights outside of Canada, including actions that would violate the Canadian **Crimes Against Humanity and War Crimes Act**. This gives Canada extrajudicial authority to prosecute war crimes committed elsewhere if they are established on reasonable grounds to believe that they were committed.

Mugesera v. Canada (SCC, 2006)

This case arose from the genocide in Rwanda. Mugesera had affiliation with the Rwanda government. Prior to the genocide, Leon Mugesera made speeches broadcasted in Rwanda in which he made statements regarding the Tutsi minority that were alleged to be incitements of hatred. Mugesera then fled after making those speeches and became a Canadian citizen. In 1994, the genocide occurred. The Hutu majority engaged in the genocide against the Tutsi minority. He **had engaged in war crimes by inciting it earlier**. The argument was that the speeches he gave constituted crimes under the Canadian Statute.

| <u>4 Elements of a Crime Against Humanity</u> | <u>Test Applied in Mugesera</u> |
|---|--|
| (1) Actus reus and mens rea for a listed crime | <u>The speech</u> as hatred constituted the crime against humanity of “persecution.” Persecution must be understood in terms of an act of real gravity. The <i>mens rea</i> component for persecution is having a <u>discriminatory intent</u> . |
| (2) The crime was part of a systematic attack | A “widespread or systematic attack” need not be led or conducted by a country’s government. (724) |
| (3) Directed against a civilian population | A civilian population or identifiable group must be the ‘primary target’ of the attack, not a collateral target. (725) |
| (4) The person knew of the systematic attack. | The individual must have knowledge that his act is part of the systematic attack, irrespective of what his/her particular motivations were. (727) |

All of the foregoing was established with respect to the allegation against Mugesera, and he was found inadmissible pursuant to s. 35.

Section 37: Organized Crime

Includes being a member of a criminal organization, or engaging in people smuggling. 37(2)(b) –the ‘smuggl-ee’ is excluded.

Sections 34, 35 and 37, in subsections (2), allow for applicants to satisfy the Minister their ‘presence in Canada would not be detrimental to the national interest’.

- As applied to refugees, the Minister’s discretion exercised “constitutionally” would result in ‘innocent’ members of organizations engaged in these activities not being found inadmissible (*Suresh*, 709-10)

Section 36(1): Serious Criminality

- Three conditions of “serious criminality”
 - (a) Conviction **in Canada** for a criminal offence punishable by 10 years or more, or for which a sentence of over 6 months was received.
 - (b) Conviction **outside Canada** for offence that, had it occurred in Canada, would be punishable by 10 years or more.
 - (c) Committing an act **outside Canada that, if committed in Canada**, would be punishable by 10 years or more.

The Issue of Equivalency of Foreign Convictions

Li v. Canada (FCA, 1996) (p. 688)

FACTS: Li had been convicted of the Hong Kong offence of bribery, defined in Hong Kong as occurring when an agent “without lawful authority or reasonable excuse” accepts a payment from a third party when acting for a principal. The alleged equivalent Canadian offence refers to an agent’s “corruptly receiving a benefit.”

ISSUES: (i) Does “equivalencing” require taking into account defenses available to accused?

- Notice and disclosure was a defence to this charge in Canada but not in Hong Kong.

(ii) Does “equivalencing” require taking evidentiary and procedural rules into account, including *Charter* principles?

(iii) Even if offences are not equivalent, is there another way of establishing a person’s inadmissibility?

FCA:

- (i) Defenses that are specific to the charge form part of the essential elements of the defence. Such a defence should be brought in to the exercise. The Hong Kong defence should be read broader.
- (ii) Equivalencing only goes to the substantive elements of the charge, not the procedural or evidentiary issues. The Hong Kong offence put a reverse onus on the defendant; that issue should not be made a matter of equivalency. It doesn’t go to the likelihood of conviction in Canada as opposed to that of Hong Kong, but to the substantive elements.
- (iii) Does the Minister of Immigration have an alternative way to pursue inadmissibility against Li, given that the court was able to find an equivalent defence?

IRPA, Section 36(1)(c) – commission of an unlawful act outside of Canada.

- Instead of alleging the mere fact of conviction, you can allege the criminal act as well.
- The onus for serious criminality of an act committed outside of Canada is bumped up to the balance of probabilities.

B. Grounds applicable only to foreign nationals.

- ***This is not a basis for the removal of permanent residents (deportation).***
Section 36(2): “criminality” (i.e., non-serious criminality)
Section 38: medical grounds
Section 39: financial (inability to support oneself)
Section 42: inadmissibility of a “family member”

Section 36(2) – Non-serious criminality

- (a) One indictable conviction (or hybrid), or two summary convictions.
- (b) & (c) : a conviction outside Canada, or an act committed outside Canada, that would be an indictable offence if it had occurred in Canada.
- “indictable” includes hybrid offences
- Issue: proof of criminal acts (for which no conviction entered) committed outside Canada?
- **Standard of Proof = Balance of probabilities required for 36(1)(c)**

Rehabilitation: Both the serious criminality and non-serious criminality provisions (Section 36(1) & (2)) allow for a finding that the individual is rehabilitated and not inadmissible. IRPA, Section 36(3)(c): With respect to criminal acts or convictions **outside Canada**, a person will **not** be inadmissible if:

- Regulation 17 – with respect to foreign convictions or commissions, five years have passed since completion of any sentence (convictions), or since commission of the offence (acts), without any further conviction, and person satisfies the Minister that they are rehabilitated.
- Regulation 18 – or ten years have passed without further convictions.

Medical Grounds

Section 38(1): Foreign resident shall be inadmissible

- (a) for reason of **danger to public health or safety**; or
- (b) “expected to cause **excessive demand on health or social services**”

Definitions of “excessive demand”, and “health services” and “social services” in Regulation 1.

Excessive demand: Refers to costs, waiting lists [increase the rate of mortality (by pushing them down waiting lists)]

- **Health services:** Majority of funds are contributed by government.
- **Social services:** Homecare, specialized residence, rehab services, personal support, etc.

Section 38(2)(a): persons being **sponsored** as partners or children are exempted from the “excessive demand” ground. Reunification of families as more important than excessive demand.

Deol v. Canada (FCA 2003)

FACTS: Permanent resident sought to sponsor parent coming to Canada. Sponsor’s father was diagnosed as needing \$40,000 of orthopedic surgery within 5 years of immigrating. He was assessed by the medical officers as needing expensive surgery that needed imminent treatment.

ANALYSIS: FCA ruled that it is relevant that the family commits not to seek medical treatment in Canada or at least promise to cover the cost. However, while it is relevant, it is not determinative. It is really not that influential in considering a matter that is subject to Public Health Care. It is a concern to admit people that, once in Canada, they are like 2nd class citizens unable to utilize public health care when everyone else is allowed.

Difficulty to enforce: Such an intention is not enforceable, and circumstances might well cause an individual to change their mind.

Hilewitz v. Canada (SCC 2005)

FACTS: Economic class/ investor immigrant from South Africa ruled inadmissible on the basis that his 17 year-old mentally handicapped son would place “excessive demand” on social services in Canada.

ISSUE: In determining inadmissibility on these grounds, should officers take into **consideration the financial resources of the family?**

ABELLA J.: She reviews the history of medical inadmissibility in Canada and concludes that the movement has been toward individualized assessment. Section 38 of *IRPA* calls for such an assessment, and that **should include a family’s financial ability to cover extra costs.** Canada is constitutionally allowed to limit its admission criteria. The problem is applying a cookie cutter interpretation to s. 38 for administrative expediency without contemplating the individual assessment focus of the Act.

HELD: The majority of the court in *Hilewitz* utilizes the standard of correctness. The decision is quashed.

What are the *public policy* implications of *Hilewitz*?

Inadmissibility due to chronic disability. What about our movement towards integration into society, yet the statement the legislation is making discriminates. This case allows an out for families to avoid this. Another way that this type of problem can be dealt with is the H & C considerations.

Is there anything about *Hilewitz* that is unsettling?

This is a way out for entrepreneurs. Not a context for the average skilled workers. Helps the presently wealthy.

Is there a relevant distinction between health services and social services that explains the different outcomes in Hilewitz and Deol? Social services are not covered by 100% government funding. Government subsidizes or contributes to those programs, but if you have resources, you have to contribute (means test). Or there may be ready alternatives like private education. The court uses the fact that the social services that the son in *Hilewitz* will have his family help with while health care services in *Deol* are purely funded by the government.

Is there a section 15(1) challenge with regard to Section 38?

There has not been a challenge or decision on that. Lower court decision found that this was not an unjustifiable limit on equality rights. The article from Montreal on child’s cerebral palsy has to do with health care services. We will see how this turns out.

Section 39: Financial Grounds

Deals with the financial inability to support oneself. This is different from sponsor’s financial ineligibility. It is used against **foreign nationals** who give rise to a reasonable suspicion that they will not be self-sufficient in Canada. It can be used with respect to sponsored persons. Even if the sponsor says that they will help sponsor, this section can override if it appears that the person will NEVER be able to support themselves.

Section 42: Inadmissibility of a Family Member: See *Abbas*.

C. Non-Heavy Duty Grounds of Inadmissibility

Applicable to Foreign Nationals & Permanent Residents!

Section 40: Misrepresentation

Direct and Indirect Misrepresentation of material facts relating to a relevant matter that induces or could induce error in applying *IRPA*. Two year period of barring to apply to immigrate again. If you have allowed a misrepresentation to be made about you by someone else = indirectly.

Ex. Chieu

Section 41: Failure to comply with the IRPA

This can mean failure to comply with conditions imposed at time they were granted this status (e.g. entrepreneurs). **Abandonment:** physical residence in Canada for 730 days out of 5 year period. **Section 28(2)(c):** Makes determination of failure to abide by residency obligation subject to an H&C assessment by officer.

ADMISSIBILITY APPEALS

If a permanent resident breaches immigration law in certain specified fashions, they are then exposed to the possibility of losing their status and being deported.

What are possible reasons and justifications for deportation?

1. Criminal Sanction/Deterrence

- It serves as a deterrent service by those exposed to it, so it is an anti-crime measure, and keeps society safer.
- Problem: Courts have said that immigration sanctions in this area are not criminal sanctions; the criminal law issues penalties for criminal conduct and this is a civil sanction intended to address particular matters in relation to immigration law. See *Chiarelli*.
- Informally, perhaps, it serves a deterrent function for immigrants who ought to know the consequences of criminal conduct.

2. Public Safety

- This is indeed the main justification for laws that provide for deportation; remove people from Canada who pose a threat to public safety. This speaks to one of the objectives of the Immigration Act s. 3.
- Problematic Issue: When we think of public safety, we are thinking of it in national terms. Does the concept of Deportation enhance the safety of human beings worldwide? No. Deportation means that Canada gets rid of the risk, but saddles some other country with assuming the risk of their misconduct.

3. To Protect the Integrity of the Immigration Laws

- If there is a misrepresentation on behalf of the immigrant.

4. Financial Burden

- This may be a concern for taxpayers.
- This is **not**, however, a basis on which we remove people from this country. Not because of medical issues that arise after they immigrate and not because they fall on hard times. We generally are not willing to deport for non-risk conduct. Thus, minor matters that do not go to security and risk.

Does any of this, particularly public safety, look different if we consider what stage of life a person was at when they immigrated to the country? What does that do to our consideration of the public safety factor? Permanent residents involve a broad swath of individuals: the economic class, children (dependents).

Appeal Process for Permanent Residents

1. The first step is that the person is served with the removal order. They are told of the ground that they are being removed upon.
2. **IRPA, Section 63(3)** gives a permanent resident (or a protected person) a statutory right of appeal to the IAD.
3. The outcomes of the immigration appeal are **three possibilities: 66(a)** the appeal can be allowed and the removal order quashed, **s. 66(c)** the appeal can be dismissed and person may be removed from Canada, or **66(b)** where the person may stay for a period of time on certain conditions. **Section 68(3)** states the basis on which a stay may be granted. This is the H & C jurisdiction of removal appeals. This is what people who are subject to a removal order want to be able to invoke, especially if the reason for removal is criminality; They likely have no other argument. (the case will have been determined to be guilty in Canadian Courts, there is no arguing their wrongful culpability). The argument would be “despite what I have done, I throw myself on the mercy of the appeal division and on H & C compassionate grounds, please don’t remove me from this country.” Regulation 251 prescribe conditions upon a stay that is issued.
4. Whatever the IAD decides is subject to a judicial review by the FCC. (not in the diagram – would follow the appeal result).

How does the IAD exercise its discretion or power?

The case of *Ribic* (1985) derived the “Ribic factors”. These Factors were applied in *Tolonen*.

Tolonen (IAD, 1990)

FACTS: Tolonen had a serious criminal record. An elaborate prison escape. He was in jail for beating an elderly man to death in a drug robbery (aka murder). Very serious conduct. He is issued a removal order. He was criminally sentenced, thus he was to serve the sentence in Canada (subject to another countries requests). After serving his time, removal orders are likely to be issued against you upon his release. Tolonen appeals to be allowed to stay in Canada. When did he arrive? He came at the age of **1** from Finland. He never took steps to gain citizenship. Since he was never a citizen, he became liable to deportation.

| RIBIC Factors | Applied in Tolonen |
|---|---|
| 1. Seriousness of offence leading to removal order; | Can't get more serious; |
| 2. Possibility of rehabilitation and risk of re-offence; | HE is in LOVE with a GOOD PERSON (maintain correspondence with a person outside of jail); THIS SAVES TOLONEN. They get married & he is rehabilitated |
| 3. Length of time, and degree of establishment, in Canada; | He has been in Canada his entire life (except his 1 st year). This is very important to the IAD and should be. The prototypical person that they envision being subject to deportation laws is someone who arrived as adults and were always criminally minded. Tolonen was not a citizen, but for was practically Canadian. |
| 4. Family in Canada, and dislocation to them of person's removal; | His wife is his family in Canada. If he is deported to Finland, his wife would be dislocated from him. |
| 5. Support available from family, and in the community; | Wife is a strong influence in his life and will help him stay on the right path. |
| 6. Degree of hardship to person caused by return to country of origin. | The degree of hardship: He doesn't speak Finnish, knows of no relatives to him in Finland. It is as foreign a country to him as any other in the world. |

The IAD's Dilemma in this case: they are dealing with someone who engaged in the most serious criminal conduct which would normally lead to deportation and would lead Canadians to be concerned for their safety. However, a stay is entered in this case of 5 years on terms and conditions of reporting regularly.

Chieu v. Canada (SCC, 2002) → IAD's H & C Jurisdiction

FACTS: Removal order that reached the SCC. This was a removal order on a misrepresentation. He had arrived in Vietnam after fleeing from Cambodia (born there). From there, they escaped on boats to Canada in 1992. He is a young man, but immigrated as the dependent son of his parents. However, he was married and had a child and didn't disclose that at the immigration process. This is discovered by him applying to sponsor his wife and child. CIC pursue a misrepresentation removal against him. It is appealed to the discretionary jurisdiction of the IAD.

ISSUE: Whether the sixth factor of the Ribic test should be a part of the IAD's jurisdiction.

ANALYSIS: The Minister, after the appeal is dealt with at the IAD level, traditionally has the final say on which country the person would be removed to. In this case, there is uncertainty with Cambodia and Vietnam. The sixth Ribic Factor invites the IAD to inquire into country situations (what is the place like). They are not supposed to be inquiring into this.

The SCC easily found in favour of maintaining the IAD's jurisdiction. They talk about interpreting the statute liberally. The argument of the IAD's jurisdiction speaks to any sufficient H & C considerations that exist *in all the circumstances of the case*. The SCC liberally interprets the word "all" – it means the whole thing; it doesn't mean everything but not this. The SCC explains why the IAD deserves this broad discretion. Immigration officer's under the Department of Immigration should be removed from this process to promote greater independence. Also, in 1977, Canada dispensed with the concept of 'domicile'. It stated that once you immigrated to Canada, and had been here for more than 5 years, you could be protected from being deported. It was a mechanism of protection. The IAD's enhanced jurisdiction grew from this. The SCC describes the operational capabilities of the IAD: natural justice, receiving evidence from both sides, giving written reasons for its decisions --- the SCC compares that to how the Minister operates in s. 25 applications (citing *Baker* as indicative of the less than acceptable standards of fairness of the Department. The SCC rejected the idea that the IAD cannot consider foreign jurisdictions. Its concerns of foreign hardship are more individual concerns (does the deportee speak the language, do they have family there, is there a civil war in the country). The restriction was that the IAD could determine what the likely country of receipt would be.

HELD: The 6th Ribic factor remains a part of the IAD's jurisdiction.

Khosa v. Canada (SCC, 2009)

FACTS: A high-profile case in the Vancouver area, in which a permanent resident was responsible for killing a young mother pushing a baby carriage in a street-racing incident. He was convicted of criminal negligence, and sentenced to less than 2 years. The IAD dismissed his appeal, largely because of his failure to acknowledge that he had been racing at the time of the incident.

IRPA, s. 36(1) applied to Mr. Khosa.

PROCEDURAL HISTORY: The Federal Court of Appeal set aside the IAD's decision.

SCC: Reaffirms the Ribic factors as appropriate for guiding the IAD's H&C discretion in removal appeals.

The Significance of Appeal Rights: In the case of criminal convictions, although the IAD has the jurisdiction to review law and fact, the IAD will not review their culpability. Instead, they will rely upon their jurisdiction in H & C considerations as to whether or not a removal order is necessary. The IAD in *Khosa* was not satisfied that the evidence showed rehabilitation. He would not acknowledge or admit that the incident occurred in a street racing context. He admitted criminal negligence, but never admitted to street racing. The authority of the IAD thought that this indicated lack of remorse on his part and was against the rehabilitation factor of Ribic.

HELD: IAD's decision to issue a removal order was reasonable.

FISH J (in dissent): All of the other 5 factors favoured Khosa. He had immigrated with family at young age, not much left in India, was married, very remorseful with respect to mother and child. Should not have been deemed a reasonable decision.

Carver: IAD knew that this was a very unpopular young man and would have been faced with howls of protest if they ruled in his favour. Contentious point, as this would be against their independence.

Statutory Denial of Appeal Rights for Serious and Heavy-Duty Grounds (ss. 34,35,36(1), and 37)

IRPA, Section 64(1): Denies the appeal right to the IAD for those who have been found inadmissible by ss. 34, 35, 36(1), or 37. Parliament legislated this to get tougher on serious non-citizen criminals.

IRPA, Section 64(2): For the purpose of denying the appeal with respect to **s. 36(1) [serious criminality]**, this applies to **only sentences of imprisonment of at least two years**. Serious criminality is liable to ten years or more OR a sentence of 6 months or more. This section bumps the latter requirement (6 months) up to 2 years. So more serious sentences are only considered.

Example Questions:

- **What are the removal implications and available recourses for Permanent Residents subject to removal for a criminal conviction in Canada?**

(a) **Punishable by a sentence of less than 10 years, and where a sentence of 3 months is given?**

(b) **Where a sentence of 14 months is given?**

(c) **Where a sentence of 3 years is given?**

- a) Subject to a removal order (s. 36(1)), but Section 64 doesn't apply, therefore Appeal right still available.
- b) Subject to a removal order (s. 36(1)), but Section 64 doesn't apply, therefore Appeal right still available.
- c) Subject to a removal order, but Section 64 applies, thus Appeal no longer available.

The Constitutionality of Denying an Appeal

Is there a constitutional issue that may be raised with respect to the denial of appeal? Section 7 of the Charter.

Chiarelli v. Canada (SCC, 1992)

FACTS: This is an early s. 7 case. He was a young man ordered removed from Canada following a murder or two. There was an allegation that he was involved in organized criminal activity. Security certificate was issued against him, which at the time allowed for the denial of an appeal on H & C application. He raised the issue that he should have the chance to make an appeal and he argued that it was a breach of his s. 7 rights. *Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

Two issues in any section 7 case:

- 1) Is there a deprivation of an interest of life liberty or security of person?
- 2) Is so, is the deprivation (limit) nevertheless consistent with "principles of fundamental justice"?

"Fundamental Justice" includes principles that may be either –

- a) Procedural – e.g. rules of fair or just process.
- b) Substantive – e.g. is the law "just" in a substantive sense?

SCC: Substantive fundamental justice does not require an H&C appeal. It's enough if there is a "true appeal" available--i.e., an appeal on law and facts of ground of alleged inadmissibility. Sopinka J.: "*The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.*" This is a pretty restrictive understanding of what immigration law is all about. Sopinka then says how people acquire the status of permanent residency by following the rules of immigration law; it is not unjust or unreasonable that no appeal right be available. Fundamental Justice does not require an H&C appeal. It's enough if there is a true appeal available – i.e. an appeal on law and facts or ground of alleged inadmissibility.

A true appeal vs. special appeal (H&C/Discretionary appeal).

Is there now a true appeal? SCC implicitly requires via Section 7 – Section 64 renders unavailable appeal (H&C). But judicial review is always available!!!!

Is judicial review a true appeal? Carver doesn't think that this is a strong argument.

Medovarski v. Canada (SCC, 2005)

SCC notes that the objectives in s. 3 of IRPA indicate a greater concern with security issues than was previously the case. **SCC recites the comment from Chiarelli:** "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" **But they follow this up with the conclusion that "Deportation in itself cannot implicate.... Liberty and security**

interests” in s. 7 (58). If the deportation involves a risk of torture or persecution in the country that they are sent, the court has recognized that this implicates s. 7 issues. But without more, there is no s. 7 interest. Refugee matters invoke s. 7.

SCC confirms that an appeal on H&C grounds is not required as a matter of fundamental justice. There are other (more limited) available recourses— e.g., s. 25 applications to the Minister and judicial review. (para. 47)

REMOVAL ORDERS AND DETENTION ORDERS

The Immigration Division of the IRB (below the IAD) deals with the majority of removal orders. There are 2 possible issuers of removal orders: **CBSA officers** or **the Immigration Division**. CBSA officers are more important for certain classes of foreign nationals.

Removal Order Process

a) **Authority of Minister and Immigration Division**

- IRPA, Section 44: Process starts with an Immigration Officer making a report to Minister on possible inadmissibility.
- IRPA, Section 44(2): Minister may refer the report to the Immigration Division of the IRB for an “admissibility hearing” or, in prescribed circumstances involving foreign nationals, the Minister may make a removal order directly. Circumstances are set out in Regulation 228.

IRPA, Section 153(1)(a) & 172: **Appointments to the Immigration Division**

Unlike the other Divisions of IRB, Immigration Division members are **public servants** and not Cabinet appointees. They used to be employees of the department of immigration. This over time, however, led to legal problems over bias and a lack of independence on the part of these people making removal orders. They are now managed by the IRB as civil servants.

IRPA, Sections 162-169: **The nature of the hearings**

The hearings are adversarial. The procedural requirements follow natural justice.

IRPA, Section 45: **Jurisdiction**

Appeals of criminal hearings have no factual content. The factual circumstances have already been determined by a Canadian Court. But other admissibility hearing matters may require fairly extensive evidence from both parties. The Immigration Division has no H & C functions; this limits the length of hearings at this stage. There is a different onus of proof on permanent residents than on foreign nationals.

b) **Types of Removal Orders**

Regulation 224: **Departure order**: Person must leave Canada within 30 days. If they do so, they need not obtain ministerial permission (s. 52) to re-enter Canada at a later date. [This is the mildest form of a removal order].

Regulation 225: **Exclusion order**: Person is refused at Points of Entry; they must seek Ministerial approval for return (s. 52) for one year.

Regulation 226: **Deportation Order**: Person must obtain ministerial authorization before seeking to return to Canada, indefinitely.

Regulation 241: The appropriate countries a person can be removed to (their birth country, the country in which they last permanently resided before coming to Canada, the country of which they are a national or citizen, or the country from which they came to Canada).

c) **Stays of Removal**

An important legal question in the days or hours after the removal order has been issued is **whether the removal order can be stayed**.

IRPA, Section 49: Where person has an appeal right to IAD, there is an automatic stay pending the appeal.

IRPA, Section 50: other stays, including (b) for duration of a prison sentence

In other circumstances, when the appeal is not available, lawyers may want to get before a federal court judge seeking a judicial stay. *Federal Courts Act*, Section 18.1: Judicial stay - power of Courts to order an interim stay.

Judicial Stays

Toth (FCTD, 1988)

3 Part test for a stay of removal pending leave and judicial review application(s)

- (1) **Serious legal issue** (not trivial or vexatious). The stay is being sought on the basis that there is some legal process still going on (ie. Judicial review or H & C application or some other application). [*Easy threshold to overcome.*]

- (2) **Irreparable harm (if stay not granted):** this has to go beyond leaving friends and minor inconveniences. Irreparable harm to a child, business opportunity going under, etc. [*Hardest threshold to overcome.*]
- (3) **Balance of convenience (between individual and government):** Could be issues around public safety that could arise under this factor. [*Easy threshold to overcome.*]

Pancharatnam (FCC, 2004)

The *Toth* test applied to a stay of removal issued against an elderly woman with health problems whose refugee application had been denied. The “serious issue” she raised was that the enforcement officer should have deferred her removal pending the outcome of her s. 25 application. Justice Harrington concludes that the officer acted properly within his discretion and there was no serious legal issue in this challenge. Further, on the irreparable harm issue, the Court says that this factor must involve something beyond the dislocation to be expected of any removal from Canada and separation from family.

Detention Order Process

IRPA, Section 58: Grounds for detention. Not unlike those that apply to criminal charges. Danger to public. Flight Risk. Alternative Ground: Minister is pursuing a “suspicion” of security or violation of human rights OR is dissatisfied with evidence of person’s identity.

IRPA, Section 58(3): Immigration Division can impose conditions on the person’s release.

IRPA, Section 60: Children to be detained only as a last resort.

Regulation 244: Considerations relevant to assessing danger or flight risk. So use this in conjunction with s. 58 of the IRPA.

REFUGEE (AKA. PROTECTED PERSON)

| | |
|---|--|
| <p><u>BACKGROUND OF REFUGEE PROTECTION</u></p> | <p>Canada is a sovereign nation and like other sovereign nations has the authority to determine who can acquire status in the country. Refugee protection, however, is operated differently. Canada has undertaken commitments under International Law to receive persons who face threats elsewhere in the world. They can claim the health and safety in the country. It signed the international treaty: <i>U.N. Convention Relating to the Status of Refugees</i> and has implemented it into Canadian law. The onus is on the refugees to choose Canada as a safe haven.</p> <p>Refugee Law is Considered the <i>humanitarian</i> area of immigration law as opposed to the non-humanitarian law. Canadians have made a choice by signing the treaty that imposes obligations on the country.</p> <p>The convention on the rights of refugees was first signed in 1951. It was very much influenced by the events surrounding the Second World War. It had a European focus. It came out of some sense of shame on countries in the Western World that had not been very open to receiving Jewish refugees fleeing Europe. Certainly also, they were motivated by the large groups of Europeans attempting to reestablish lives. Canada didn't sign the refugee act that was signed in 1967. At some point afterwards it implemented the convention into Canadian law.</p> <p>See Objective set out in <i>IRPA</i>, Section 3(2).</p> <p><u>Meaning and Purpose of Refugee Protection</u></p> <p><i>Ward</i> (SCC, 1993), per La Forest J.:</p> <ul style="list-style-type: none"> - “Refugee protection is a “surrogate” protection, available only when a state fails to provide protection for its own citizens.” <p><i>Chan</i> (SCC, 1995), per La Forest J.:</p> <ul style="list-style-type: none"> - “The “paramount concern” of refugee law is “basic human rights” on the international level. A concern about a flood of refugees is a political, not a legal, consideration. Refugee recognition is a means of applying pressure on the international community to prevent persecution.” |
|---|--|

HOW TO ACQUIRE REFUGEE STATUS?

IRPA, Section 95: This section refers to a status under Canadian law of meeting the UN Convention definition.

It refers to 2 things:

1. Persons who are determined to meet the Convention refugee definition [Section 96].
OR
2. Person in need of protection (PNP). [Section 97: "PNP" is a person whose removal to their country of nationality would subject them personally to:
(a) a substantial danger of torture; or (b), to a risk to their life or to cruel and unusual treatment and punishment.]

IRPA, Section 96: The Definition of "refugee" in the *U.N. Convention Relating to the Status of Refugees* is incorporated into IRPA in this section.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Issues to prove in a Refugee claim under Section 96

1. A well founded fear of persecution
2. The issue of state protection
3. The issue of being outside the country of their formal habitual residence.
4. Persecution must arise from the 5 explicit grounds. (the nexus issue).

1. "a well-founded fear of persecution..."

What does "persecution" constitute?

It involves **threats to people's basic human rights**. Discrimination is not per se persecution. Ex. Being denied a job offer opportunity on the basis of race may not be enough to constitute persecution under the refugee legislation. However, an accumulation of discriminatory acts may be persecution. Particularly if they are viewed as interfering with your daily life. Being subject to prosecution is not considered persecution. Therefore, fugitives, *ab initio*, are not refugees. It is difficult to prove to Canada that a law in a foreign country represents persecution as opposed to foreign prosecutorial laws. It isn't to be judged by Canadian cultural standards. However, prosecution can constitute persecution **if the law, in itself is viewed as a violation of human rights or if the penalty (sentence) imposed for breach of that law is draconian (viewed as way out of line)**.

A Refugee claimant does not need to demonstrate that they *individually* would be targeted upon returning to their home country. **They must show that the persecution is directed at a group to which they belong**. See page 572 of the casebook for more helpful information.

"Fear of Persecution" Test

Two components: *subjective* and *objective*.

- **Subjective:** the person must have a subjective fear of persecution (Personally being afraid). Thus, their credibility is very much at issue in a refugee matter.
- **Objective:** that fear must have a reasonable basis regarding events occurring in the country and/or what happened to the person's life in that country.

Standard of Proof is NOT balance of probabilities. It is **the substantial likelihood** that this definition is met. This is greater than a suspicion. Errs on the side of the claimant if they show a substantial likelihood/serious possibility that they face persecution on one of the listed grounds.

2. State Protection

Canada (Attorney General) v. Ward (SCC, 1993).

FACTS: Ward claimed refugee status from Ireland, and the UK. Ward claimed that the government is not from whom he fears persecution. It is a militant and violent faction of the INLA. After joining, he was tasked with guarding some hostages. He was instructed to participate in the execution of those hostages. Ward had a sudden change of heart, and affected their release. The gang didn't at first know, but then through various activities, they ultimately found out. The INLA captured and tortured Ward, while also threatening his family. Ward goes to the police and serves 3 years in jail. After being released, he fears the INLA's further actions & comes to Canada.

ISSUES: What is the *source* of persecution that Mr. Ward is claiming?

He argues that the government of Ireland is unable to protect him. So, not only is the state on his side, but the issue is whether they are able to protect him. The SCC says that **complicity of the state is not necessary to found a fear of persecution**. The issue is satisfied by an absence or

inability of the state to protect persons within their society. The SCC says that there is a presumption that states are capable of protecting their citizens, but this is rebuttable: "There is an **onus on refugee claimants** to present clear and compelling evidence that the state is unable to protect them from a source of persecution from private actors in society." (556). This presumption is more difficult to rebut when dealing with a fairly well-governed, Western-democratic society. In *Ward*, the country is Ireland. Ireland has had civil disturbances, but this is the Republic of Ireland and not Northern Ireland. So how does *Ward* overcome this difficult onus of proof? The Irish police agents *themselves* give evidence to show that they are unable to administer protection. SCC also says that the issue is not whether a refugee claimant can claim **better protection** than in their home country, but whether the protection in the home country is adequate. Perfect or guaranteed protection is not necessary in home country.

Internal Flight Alternative (pp. 614-616)

The idea that if a person who is subject to persecution in their home region in a country has a safe alternative in a different region of the country, they should seek protection there (not to do so may defeat the refugee claim).

Two Part Test for IFA:

- (1) **No serious possibility of being persecuted in IFA**; and
- (2) **No undue hardship to claimant in moving to IFA, including in the travel to get there.**

Where the state is the source of persecution, an IFA will rarely be viewed as being available.

3. "Being Outside the Country of Nationality"

If a person has multiple nationalities, they must establish lack of protection from each of the alternative countries. Where a person has multiple nationalities, he/she must be outside each country, and be able to show that state protection is unavailable in each country of which he/ she is a citizen.

Ward held both Irish and British citizenship, and so it was not enough that he show that the Irish state was unable to protect him. Case was remitted on issue of protection by U.K.

In the phrase "outside the country of nationality", the word "nationality" does not mean merely citizenship. The *Katova* case (FCC, 1997) demonstrates that the fact that a Russian Jew had a right of Israeli citizenship did not make Israel her country of 'nationality.' [Contrast to the use of 'nationality' in the context of the enumerated grounds of persecution = **race** or **ethnic group** or sub-nationalities in nation states.]

- Contrast *Katova* with *Williams* (FCA, 2005) (p. 570): if a claimant has it within their control to claim citizenship in a country with which they have a connection (*Fled Rwanda, but citizen of Burundi too*), they should do so rather than make a refugee claim.
- A "**sur place**" **refugee claim**: a claim that arises after the person has left her country of nationality, due to changes in conditions there, or due to her activities since leaving the country.
- Another Example of acceptable refugee source outside country: Someone leaves country and becomes involved in activities that may lead them to be persecuted back in the home country. Ex. Participating in a student group that is not approved at home.

Alternative Sources of Refugee claims: *The legal test for succeeding on a refugee claim largely means that people get to Canada and, once here, they assert a claim for refugee status. Canada also accepts refugees from overseas. This is sort of a selection process.*

People need to be outside the country and in a UN refugee camp outside the country. Many people argue that more effort should be made in the selection process outside Canada than the determination process for those lucky enough to make it to Canada. Some groups, like church groups can sponsor refugees as well from abroad.

4. The Nexus Issue: Grounds of Claimed Persecution

Available Grounds: race, religion, nationality (ethnic group), membership in a particular social group or political opinion. This is an **exhaustive list**. **No analogous grounds**. Only these 5 bases. The persecution must arise from one of these grounds.

The Ground relied upon in *Ward* : 'membership in a particular social group'

Ward's claim is that he is persecuted by the Irish National Liberation Army (INLA) for being a (former) member of the INLA.

In *Ward*, the SCC **rejects** what it views as two polar positions:

- (1) That "social group" is a catch-all or safety net category, available if no other ground of persecution applies to any person on the basis of having common interests with other victims of persecution.
- (2) That the term should be read as excluding some groups, such as terrorist and criminal groups, like the INLA, on moral grounds.

The Court rejects (1) because it would essentially erase the purpose of having enumerated grounds; a well found fear would be sufficient. Position (2) is also rejected as moral grounds should not be relied upon to exclude viable groups.

Social Group

- The Supreme Court states that the “human rights” nature of refugee law provides a better position: “social groups” refers to the need to protect groups that have a social vulnerability due to their personal characteristics. The approach should be similar to the “enumerated and analogous grounds” test for s. 15 :

| TEST for SOCIAL GROUP | Applied to <i>Ward</i> |
|--|--|
| (1) Immutable characteristics; | He wasn't born a member of the INLA. |
| (2) Groups voluntarily associating for reasons going to human dignity, and from which members should not be expected to disassociate to avoid persecution; or | It is a group that held people hostage and threatened to kill them. <u>Note:</u> By saying that the INLA cannot be said to be united for reasons fundamental to their human dignity because of what they engaged in, isn't the SCC implicitly suggesting that terrorist organizations will never be able to be the group claiming persecution? True, but this branch has since been relaxed. |
| (3) Groups whose association in the past has created a near-permanent identity for members. | Is he being persecuted for his past association? Nope. |

In *Ward*, the court says that none of the above 3 branches fit *Ward*'s social group refugee claim. The SCC says *Ward* isn't being persecuted for being a former member; his persecution is based on **individualized persecution**. He is not a member of a social group, his argument must be that members of that group suffer the persecution. It has to be a communal persecution. Do all former members of the INLA fear persecution? No. Only *Ward* does.

Chan v. Canada (SCC, 1995) [The case where the relaxation of the second branch (group pursuing fundamental human dignity) occurred.]

FACTS: Claimant was claiming persecution on the basis of the “one child” policy of China. They say that they will be jailed and punished because of this policy. *Chan* claims on being a member of a social group of “parents of one or more children.”

ISSUE: Is this merely prosecution or persecution?

ANALYSIS: The offence was prosecuted differently in different regions of China. Some were much more heavy-handed than others. The argument of note here is that the court looked at whether the social group of being a “one child parent” met the second branch of the test.

- Clearly such parents do not associate with each other (formal meetings). Court recognized that this would be interpreting the test too strictly. Having children is a matter that goes to people's human dignity. That does meet the requirement.
- Voluntary association is no longer imperative to fitting under the second branch.
- The range of activities going to fundamental human rights is now more flexible.

Therefore, today, “Social Group” is certainly the broadest of the 5 enumerated grounds.

Gonzalez v. Canada (FCC, 2002)

FACTS: *Gonzalez* makes a claim of fear of persecution for being a “member of a family”. They are the child of a family member that is targeted by a criminal group; they fear persecution.

FCC: The family members to whom they are related must be being persecuted for one of the recognized grounds. You cannot bootstrap your claim if they don't fear it.

Being a member of a family will not meet the test for ‘membership in a particular social group’, where the family is not targeted for persecution because of a nexus ground. To do otherwise would make a derivative family-based claim stronger than the original non-nexus based claim.

Political Opinion

Ward: Failing on the ground of being a “member of a social group” was not the end of *Ward*'s claim. The SCC found that he could make his claim on the basis of political opinion. He had not made this argument at any lower court. But the Court said that they could look to see if any of the grounds may apply regardless of whether the grounds were argued.

The SCC developed a very broad approach to what constitutes political opinion: **Political opinion is “any matter in which the machinery of state, government or policy may be engaged”**. It is the perspective of the *persecutor* that matters – whether the claimant actually holds this opinion is not the focus. If the persecutor is persecuting them for some subjective criteria they view, it matters not whether the claimant actually believes it. For *Ward*, he believes that achieving political change via killing of innocent people is bad. Carver doesn't think this has anything to do with the political machinery of the state. This is like a statement of being persecuted for a moral belief. Maybe this should be protected by the refugee legislation. It seems appealing to allow refugee status for being persecuted for their moral beliefs, but it is a very generous reading for political beliefs. Moral ≠ Political.

So since *Ward*, the courts have narrowed the membership in a particular group (*Chan & Gonzalez*) but broadened the notion of a political identity (*Ward*).

NEW CASE: German home schoolers seek asylum in Canada

Proving that they are members of a social group is a difficult ground to make out. The possibility of jail, the apprehension of the children as a possible outcome of state law. But the German side would argue that this is prosecution and not persecution. The family would have to make an argument that this law is itself a violation of human rights. May be difficult to argue that home-schooling is a matter of human rights and any country that enforces it is draconian. It looks pretty draconian, but it may be just the worst case scenario that their children will be taken away. Germany is a democratic country with many procedural steps. They are claiming that Germany is persecuting. Court would say that they would still be able to protect you, which is prior to arguing that potential persecution exists. (*Hinzman*).

Political Opinion & Military Service

Al Maisri (FCA, 1995)

FACTS: A deserter from the Yemeni army makes a refugee claim. Yemen was allied with the Iraqi army during the Gulf War 1990-1991, which followed Iraq's illegal invasion of Kuwait.

FCA: The Court concluded that to be facing severe punishment for deserting the armed forces of one's own country because it is engaging in an illegal or unjust war can be persecution for reason of political opinion.

HELD: Al Maisri makes Nexus connection with political opinion.

Hinzman and Hughey v. Canada (FCA, 2007)

ISSUE: Is the legality of a war in international law relevant to the decision of whether a person subject to prosecution for deserting is subject to persecution?

PROCEDURAL HISTORY: The IRB and the FCC (McTavish J.) decided that the only issue of legality that is relevant is whether an ordinary soldier is given orders to contravene humanitarian law, not whether the war itself is illegal.

ANALYSIS: The FCA declines to answer that question. Instead, it rules that the petitioners' claims fail because they did not seek state protection (by seeking conscientious objector status). The U.S. is a democratic country-- it's hard to show an absence of state protection in that circumstance (para. 57). This sets the bar pretty high to claims of refugee status coming from the USA. Seems to suggest that in some countries like the USA, you can be both persecuted and protected. The court here is saying that you are not persecuted because you are protected. But this seems to be inconsistent with *Hinzman*'s scenario.

IRB Guidelines for Dealing with Refugee Protection

IRPA, Section 159(1)(h): Gives authority to the IRB Chairperson to issue guidelines for decision-making by Board members to extend the understanding of how the refugee definition is applied.

- Guidelines presently exist with respect to two substantive refugee definition issues:
 1. Claims by civilian non-combatants in civil war situations, and
 2. Gender-based persecution.

Gender Guideline: Women Refugee Claimants Fearing Gender-Related Persecution: the main concern is identifying how such claims fit within nexus grounds. (580-582) Women as victims of domestic abuse as a 'particular social group'; or Women persecuted for non-adherence to patriarchal social norms, on basis of "religion" or "political opinion".

Other than the substantive 'gender-based persecution' guidelines and 'non-combatant civilians in civil war situation' guidelines, there is the procedural guideline of the IRB outlining 'reverse-order questioning'.

The Ambiguous Force of Guidelines

The issuance of a set of guidelines will be communicated to the public. Parties and their counsel will therefore be expected to know that a set of guidelines have been issued on a particular subject. Although **not binding**, members are expected to follow guidelines, unless compelling or exceptional reasons exist to depart from them. An IRB Member must explain in his or her reasoning why he or she is not following a set of guidelines when, based on the facts or circumstances of the case, they would otherwise be expected to follow them. Thus, there exists tacit pressure on members to follow guidelines.

REFUGEE PROCESS: THE MAKING AND HEARING OF A REFUGEE CLAIM

1. Right to a Hearing of Claimants for Convention Refugee Status

Singh (SCC, 1985): The word “everyone” in section 7 includes every person in Canadian territory or “amenable to Canadian law”. In *Singh*, it was demonstrated that the pre-1985 process for adjudicating refugee claims violated the right of “fundamental justice” in s. 7 of the *Charter*. Deportation, without anything further, does not implicate s. 7 of the *Charter*. BUT in *Singh*, deportation of a REFUGEE claimant *does* engage the security of a person, if not their life. Where credibility is an issue, fundamental justice will almost always require an oral hearing. By not guaranteeing an oral hearing, nor giving claimants a full opportunity to know and answer concerns about their claims, the statutory scheme breached section 7. The statutory scheme was not justified under section 1 of the *Charter*. “Utilitarian considerations” like cost will not usually be enough for s. 1 justification.

2. Eligibility and Exclusion

Role of Immigration Officers in Assessing Eligibility to make a Refugee Claim

IRPA, Section 99(3): A claim for refugee protection made inside Canada must first be made to an officer.

IRPA, Sections 100(1) & (4): The officer must decide within 72 hours whether the person is eligible to have their claim determined by RPD; onus is on claimant to show they are eligible.

IRPA, Section 101: Grounds of ineligibility include that claimant:

- (b) Has already had a claim rejected by the RPD.
- (d) Has refugee status in another country.
- (e) Has arrived from a designated (safe third) country.
- (f) Has been found inadmissible pursuant to serious grounds of inadmissibility – i.e., ss. 34, 35, 36(1), and 37.

- If found ineligible, they can seek judicial review before a court.

Exclusion

IRPA, Section 98: A person referred to in Section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a PNP.

Article 1, Section F of the Convention:

- “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
 3. He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 4. He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 5. He has been guilty of acts contrary to the purposes of the United Nations.
- *Pushpanathan* deals with how to interpret Article 1, Section F (c).

Pushpanathan (SCC, 1998)

FACTS: Pushpanathan had been convicted of serious narcotics trafficking and smuggling

ISSUE: Is that an act contrary to U.N. principles?

ANALYSIS: Section F excludes from protection persons who are guilty of “acts contrary to the purposes and principles of the U.N.”

SCC: No. Drug trafficking is a criminal activity, but acts contrary to UN principles connotes international human rights concerns.

HELD: Pushpanathan not excluded.

3. Safe Third Country Agreement with U.S. (See Supplementary Materials for an Example)

Agreement between Canada and the USA came into effect 2004. Goes to the authority to designate countries as safe third countries, meaning that we will not receive refugee claims coming from such a country on the basis that the claim could have been made there. **This closes the possibility to shopping for a country of asylum.**

IRPA, Sections 101(1)(e) and 102: Cabinet is authorized to enact regulations naming a country a safe 3rd country, meaning a person will be ineligible to file a claim in Canada if they have arrived from that country

- Regulation 157: Exemptions to Safe Third Country (STC) agreement with U.S.:

- It applies only to those arriving via land borders (not ports or airports).
- If you have a family member already in Canada, then you will be exempted and be able to make your claim in Canada.
- If you have obtained a visa to be in Canada, you can make a refugee claim if coming from the USA.
- If you are an unaccompanied minor, the claim will be accepted as well.

Designated Safe Third Country Agreements deals with in transit refugees. This doesn't apply to Americans seeking asylum from America itself. It applies to people from other countries who prefer to declare refugee status in Canada over the USA.

Canadian Council for Refugees v. Canada (FCA, 2008)

FACTS: This case involves a **judicial review** of Regulation 159.3 (which names the U.S. as a safe third country). It is alleged that the Regulation is *ultra vires*, and is reviewable on a standard of correctness. (para 57)

PROCEDURAL HISTORY: Judge Phelan at the FCC found that the USA had problems with its refugee determination process. It was not living up to its commitments under the UN Convention. The basis of the argument was kind of an attack on the US refugee system. Justice Phelan found it to be a less fair system than Canada's and Cabinet acted outside its authority by entering into this agreement.

FCA: Justice Noel says that the FCC Justice Phelan wrongly thought that he should assess whether the U.S. was in actual or "absolute" compliance with the Refugee Convention, when *IRPA* authorized the federal Cabinet to make that decision. So long as Cabinet considered U.S. compliance in good faith, the regulation is not reviewable. The FCA is deferential to cabinet.

- Important to the FCA that the UNHCR had testified before a parliamentary committee that the U.S. was a safe third country and was fulfilling its obligations under the Convention. (79)

HELD: Regulation 159.3 is *intra vires* Cabinet.

UPDATE: Leave to appeal refused by SCC on Sept. 28, 2008.

4. The Refugee Protection Division of the IRB

There exists considerable backlog in the refugee claims system. There was a period where CIC was not renewing contracts of people with experience and faster decision makers. This resulted in a hold-up and the numbers of the board fell significantly. This backlog has been created by some extent the Conservative government. The fear is that it was done purposefully to create a backlog and create a greater sense of urgency to reform the system.

(a) Personal Information Form (PIF)

IRPA, Section 161(1): The Chair may enact rules governing procedure before all Divisions of the Board.

IRPA, Section 161(1)(c): Power of IRB Chairperson to make a rule concerning "information" from refugee claimant. Schedule 1 to the RPD Rules defines the **contents of a PIF**: Detailed background information concerning the claimant, including how he/ she came to Canada, and the grounds and facts on which the claim is based.

- Claimant must swear to truth of contents of the PIF. It forms basis of claim, and is studied by RPD prior to hearing. Problems can arise for claimant if his/ her testimony departs from information in the PIF. Questioning occurs when inconsistencies or new elements are added at the hearing.
- People can get the assistance of counsel for completing that form and help them produce a better, full PIF to avoid problems with inconsistencies.

(b) In Camera Hearings

- RPD hearings are generally to be held *in camera*, unless someone applies to open it to public, and RPD believes this poses no security risk → *IRPA*, Sections 166(c) & (d).

(c) Non-Adversarial, Inquisitorial Model

- RPD hearings are intended to be non-adversarial, and the hearing panels may, and do, conduct them in an inquisitorial or "Board of Inquiry" fashion. There is no aggressive challenging of the claimants story or credibility. Claimant is there with counsel. Minister is not there.
- Sources of model:
 - Political pressure from refugee-supporting community
 - *IRPA*, Section 162(2): mandate to proceed "informally" and "expeditiously"
 - The reason for having an inquisitorial process has to do with creating an atmosphere in which refugee claimants do not feel further aggressive cross examination. They will be recollecting painful episodes of their histories. The idea that they should be able to give their info in an informal and non-adversarial setting.
 - The "reverse order questioning" (ROQ) Guideline
 - Board member is intended to be active in the hearing, but not act as impartial impassive adjudicator. One of the features that the board introduced through a guideline went to reverse order questioning as a means of speeding up the hearings, but allowing the board member leading the questioning rather than counsel.
 - In refugee claims, credibility is central to the determination, as there will not be a lot of documentary evidence available (no government doc certifying torture, no witnesses). So their credibility is central to the claims being accepted. **And the usual tools for testing credibility, on the surface, are not available. So if credibility is at stake, you can imagine the difficulty of getting to that without a challenging adversarial manner.**
- **Article by Rousseau**- despite the fact that hearings are not meant to be adversarial, he argues that there is perhaps a culture of disbelief inherent in the system.

(d) Role of the Minister

IRPA, Section 170(e): The Minister may appear at a hearing.

(e) Taking of Judicial Notice, and Use of Country Information

IRPA, Section 170(i): Authority for RPD to take judicial notice, or notice of any “information or opinion that is within its specialized knowledge”. Board members can bring their knowledge of the background of the countries they are hearing about. Use of country information; RPD Documentation Centre. Documentation Centre: a library service that is extraordinarily good at maintaining background sources on what is going on around the world and politics. RPD Members’ training on country conditions in a busy office, like Toronto.

(f) Single Member Panels

IRPA, Section 163: This replaces the former two person panels, in which “ties” went to the claimant.

IRPA, Section 169(b): Requirement to give reasons.

(g) Selection/ Appointment of IRB Members

Cabinet appointment. Repeated mini-scandals over political appointments to the IRB.

Possible concerns: Over-representation of lawyers? Is diversity important? Does government have a legitimate interest in having decision-makers with certain backgrounds or attitudes to the issues involved?

- Auditor-General on March 31, 2009: the federal government has failed to make appointments to the IRB, creating a significant backlog in refugee claims.

Post-Determination Processes

- If Refugee Protection Claim is Successful, the applicant:
 1. Acquires refugee status;
 2. The right of non-refoulement; and
 3. The right to apply for permanent residence status (*IRPA*, s. 21(2))

Refugee’s application for permanent residence will be approved, unless inadmissible under ss. 34, 35, 36(1), 37, or 38. Judicial review is available to a decision of the RPD from both the applicant and the Minister.

Minister has 2 **Post-Determination Processes**:

1. Cessation application by Minister:

- IRPA, Section 108: The Minister may apply to RPD for a declaration that refugee protection status has ceased because of a change in circumstances, such as the refugee’s re-availing themselves of state protection or country conditions having changed (provided for in Convention).
- This cessation is only available before permanent resident status has been granted.

2. Vacate status application by Minister:

- IRPA, Section 109: The Minister may apply to RPD to nullify protection status on basis of misrepresentation by claimant. Not common.

Refugees can potentially be refugees into perpetuity if they are granted refugee status, but inadmissible for permanent residence.

6. Bill C-11: Proposed Refugee Reforms

Top Five Reform Measures:

1. Proclamation of Refugee Appeal Division.
2. Expedited hearing process: initial interview within 8 days; hearing before RPD within following 60 days.
3. RPD to be comprised of public servant employees of IRB; RAD to be comprised of Cabinet appointees.
4. Safe Country designations: persons from Safe Countries are not entitled to an appeal to the RAD.
5. Section 25 and PRAA application may not be made by failed refugee claimants for 12 months following dismissal of claim.

7. Persons in Need of Protection: IRPA Section 97

Claim can be dealt with at same hearing as section 96 claim-- “consolidated grounds”. No need for nexus grounds. The harm feared must be **personal**, and must amount to a fear of death, torture or cruel or unusual treatment or punishment. Ex. ***RPD File TA1-24761*** (p. 648): Fear of extortion by criminal/rebel gang in Colombia, combined with absence of state protection, is sufficient for PNP claim.

| | |
|--|---|
| <u>How to Lose Refugee Status?</u> | |
| <u>Rights Conferred By Refugee Status</u> | <p>A claimant for refugee protection status may remain in Canada until her or his claim is determined. A refugee or protected person may remain in Canada so long as he/she retains that status. (Indefinite) <u>IRPA, section 115</u>: A refugee is protected from being returned to the country from which he/she fled (principle of “<i>non-refoulement</i>”) Refugees may apply for permanent residence from within Canada. (move up the citizenship ladder) Refugees choose Canada as opposed to Canada choosing them (immigration).</p> <p><u>The Right of Non-Refoulement</u> The only right which signatory countries are obliged to confer on successful refugee claimants. <u>IRPA, Section 115(1)</u>: A “protected person” shall not be removed to a country where they “would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion or at risk of torture or cruel or unusual punishment.” <u>IRPA, Section 115(2)</u>: Exception to Section 115(1) for serious grounds of inadmissibility (sections 34, 35, 36(1) and 37), together with the stated opinion of the Minister that the person is a danger to the public or a danger to national security. [<i>Suresh case</i>]</p> |

NO STATUS

Foreign Nationals are very broad and includes the rest of the world and includes the rest of the world including the no status category. If you are in Canada and have no status, you are colloquially called illegal.

THE SECURITY CERTIFICATE PROCESS

A. The Security Certificate Concept

IRPA, Sections 76-85: The Security Certificate is a recourse available to Ministers with respect to "heavy duty" grounds of inadmissibility, including security grounds in section 34.

Purposes of security certificate process:

- (1) Bypasses the usual inadmissibility hearing and appeal processes
 - (2) Allows for maintaining confidentiality of intelligence information
 - **Most important**: non-disclosure to the subject of the removal proceedings. They don't get to know the case against them.
 - (3) Facilitates immediate detention of person concerned, which detention may continue through to removal.
- The Federal Court in particular is tasked with maintaining the security interests of Canada with these security certificates.

Security Certificate: Someone is named under it and the matter is referred to the particular judge of the Federal Court who has to be seized of it.

B. Charkaoui and the Constitutionality of the Certificate Process

Chiarelli v. Canada (SCC, 1992)

FACTS: This was not about terrorism, but organized crime. He alleged to be a ‘hitman’ working for the mafia. He was subject to a security certificate (old version) and information relied upon by Government investigators from informants outlining his gangland activity was not disclosed to him. He challenged this deprivation of disclosure. He argued that the procedural grounds under s. 7 coupled with the Security Certificate process was a breach of fundamental justice in terms of fair process.

SCC: What procedural “fundamental justice” requires is assessed by balancing state and individual interests.

- By being provided with a summary of the undisclosed evidence, and an opportunity to make representations at a hearing, Chiarelli received sufficient procedural rights.

HELD: No Breach of Section 7. This was procedurally fair enough when balanced against public safety.

Charkaoui v. Canada (SCC, 2007)

FACTS: The summary of non-disclosed evidence given by FCC Justice Noel includes that the informants Ressam (the convicted Los Angeles airport bomber) and Zubaida identified Adil Charkaoui as “Mr. Al- Maghrebi” who trained in Al Qaeda camps in Pakistan in 1998. In February 2005, Charkaoui was released from immigration detention on strict terms and conditions. His case ultimately challenged the constitutionality of the security certificate process.

ISSUE: Is the security certificate constitutional?

ANALYSIS: Section 7 Argument:

(1) Is there a deprivation of “life, liberty or security of person” ?

In *Medovarski* the SCC stated that deportation ‘in and of itself’ does not implicate these interests. The allegation of terrorism and exposure to risks in receiving country add to the section 7 interests at stake. (90L) Here, however, **deportation is combined with detention**, which raises issues of liberty and security of person. (p. 90R).

While the deportation may not in itself cause a deprivation of the threshold criteria, some aspects of the security certificate process can lead to a section 7 deprivation. For this case, at least, his section 7 rights are implicated.

(2) Does the security certificate process breach principles of procedural fundamental justice?

Although the national security context may impose certain limitations, section 7 requires “meaningful and substantial [procedural] protection.” The Arar Inquiry has shown the kind of problems that arise with the lack of transparency in national security activities.

Charkaoui alleges that the procedural principles violated are:

a. An impartial and independent judiciary (92-94)

- The federal judge is put in charge of the management of the hearing process and has to conduct hearings that are not adversarial in nature and in *in camera* and *ex parte* proceedings. The role of the FCC Justice in the certificate process does not violate this requirement, but there are concerns:
- SCC cites quote from Justice Hugessen: the Justice states that Federal court judges don’t like these proceedings because they place them out of their element. It makes them responsible for hearing evidence that one side doesn’t get to hear and forces them to represent the interests of the unrepresented party. This scheme places an inquisitorial burden on the Judge.
- Judicial Independence: it is a constitutional requirement in Canada. As you may recall, it is understood to be a requirement, both as an unwritten principle of the constitution and where section 7 applies, judicial independence is a principle of fundamental justice. It has been understood to mean that all judges sitting in superior or provincial courts must be both independent and viewed as independent.

b. The person must know the case to be met

- Section 7 requires full disclosure of evidence, or an “effective substitute”. The *IRPA* scheme seeks a substitute through the role of the Justice, but that is not good enough. Meaningful and substantial procedural protection requires full disclosure of evidence against a person OR an effective substitute for full disclosure. The substitute that is provided with the certificates is the Federal Court judge. He gets to hear all of the evidence in camera, question the witnesses and decide whether it is worthy of confidentiality. The court says that this substitute for disclosure is not good enough! This is too heavy a load for the judge.
 - There is a violation of POFJ and therefore an infringement of Section 7.

Justification under Section 1

- Pressing and Substantial Objective: National security. Good.
- Minimal impairment: No, there are less intrusive alternatives, one of which is the U.K. special counsel model.

HELD: The declaration of invalidity was suspended for one year, during which the existing certificates would remain in force.

AFTERMATH: The Federal Government responded by introducing a package of legislative amendments (Bill C-3) which were enacted in February 2008. New certificates to replace ones issued under the old legislation were served on the five listed individuals.

C. The Amended Certificate Process

The major change was the introduction of the UK special advocate model. Requires the signature of both of the two ministers to issue a certificate with respect to the heavy inadmissibility of an individual. It is filed with the Federal court, which then provides a summary of the info they have against the person.

IRPA, Section 77(1): Ministers of Public Safety and of Citizenship and Immigration, may sign a security certificate with respect to an alleged “heavy duty” ground of inadmissibility (ss. 34, 35, 36(1), 37), and refer it to the Federal Court.

IRPA, Section 77(2): The Ministers must file the evidence supporting the certificate with the Federal Court, and provide a summary of the information for the person concerned, maintaining confidentiality of information the Ministers believe should not be disclosed.

IRPA, Section 78: The judge shall determine if the certificate is **reasonable**. If not, then the deportation of the person in the certificate is not

allowed. The hearing before a FC judge is to determine whether it is reasonable, not true or false or made out against a BOP.
IRPA, Section 79: It is appealable to the FCA only if the Judge certifies a serious issue of general importance.

IRPA, Section 80: A reasonable certificate turns into an executable removal order.

IRPA, Section 81-82: The Minister may order detention of the subject of the certificate.

The removal order is made by the immigration division and conduct periodic detention reviews. Whereas in the security certificate scenario, this is done by the Judge.

IRPA, Section 83(1): the obligations of the parties with respect to maintaining the **confidentiality**.

(c) provides that the FCC Justice will hear confidential evidence in the absence of the individual and counsel

(e) the Justice will provide a summary of the evidence to the individual ‘throughout the proceedings’ that “enables them to be reasonably informed of the case

made by the Minister in the proceeding but that does not include anything that, in the judge’s opinion, would be injurious to national security or endanger the safety of any person if disclosed.”

(g) the Justice shall afford the individual a “reasonable opportunity to be heard”

IRPA, Section 85:

85(1): Special advocates appointed by Minister of Justice.

85.1(1): the special advocate’s role: to protect the interests of the subject of a security certificate with respect to closed hearings and confidential evidence;

85.1(4): the advocate is not counsel or solicitor for the individual, although privilege attaches to the communication.

In short, the special advocate may see all the confidential evidence, and question and challenge its reliability and the basis for it being made subject to non-disclosure, but may not disclose the evidence to the subject of the certificate or his/her counsel.

D. The Health of the Security Certificate Process– an Update on *Charkaoui* and *Almrei* Cases

Charkaoui: in June 2008, the SCC decided in *Charkaoui II* that in SCC matters, CSIS investigators have a duty to keep and disclose to the court the original notes and records of their investigations, not merely summaries. CSIS followed a policy of destroying original notes or information utilized in their investigations. This was ordered to be stopped. The Ministers subsequently withdrew evidence from consideration by the designated FCC Judge. On October 14, 2009, Justice Tremblay-Lamer declared the certificate naming Charkaoui “void”. In March 2010, Charkaoui announced he was suing the federal government for \$10 million.

***Almrei v. Canada* (FCC, Dec 2009)**

FACTS: Almrei had been under the watchful eyes of CSIS before 9/11. 9/11 happens and he is strapped with a certificate and he is placed in detention while process continues. A new certificate is re-issued against him in 2008.

ISSUE: Whether the security certificate process is or is not “reasonable”.

- IRPA, Section 79: This is the basis for the individual to be deported.
- IRPA, Section 34: Security issues inadmissibility → Security certificate is brought up by the minister.
- SIR = Security intelligence report – the summary report prepared by security officials. It is the top secret document that the government does not wish to have disclosed. A different material is distributed as a public summary.

FCC: Justice Mosley would have found the certificate reasonable in 2001, given the limited information available at the time, including Almrei’s dishonest conduct. Justice Mosley, however is dealing with the information placed before him regarding the re-issued certificate in 2008. The government’s case turns in part on finding “membership” to be established on the basis of “shared ideology”. Such a broad view is “incompatible with freedom of expression guaranteed by our Charter.” (406) **There has to be something more than “beliefs” would warrant a security certificate. Otherwise this is a bit of an infringement of the freedom of expression.** The Governments case also relied upon informants who had their own agendas, and were shown to lack credibility.

The government failed to meet the duty of candour required of it in SCC proceedings by putting only evidence before the Court that supported (‘pled’) its own position. Evidence supporting Almrei only emerged because of the special advocate and the Court. **What the Government did in this situation was just put in information that supported their case, without putting in information that they had that went counter to their case.** Justice Mosley says that they dealt with the information as if it were up to the Court and the special advocate to dig out evidence that may be helpful.

In any event, the certificate is not reasonable here.

HELD: Certificate is quashed. This could go to appeal if he accepts certified questions.

So How does the government look after several years of practice?

- Not too good. This process doesn't look like a very useful process. Carver thinks that there is in this decision, a disparagement of secret processes and allowing them to engage in ex parte proceedings. This case illustrates that there were only suspicions and not much more than that. There were suspicions that he shared beliefs with Al-Qaida, but that is it. The government was relying upon: Broad inferences, sketchy information, and a use of unreliable sources. Furthermore the government utilized a selective presentation of information in their possession. Security certificates have led to expensive litigation and lengthy jailment where the person is eventually released. Additionally, after this case, we see the type of crappy justifications that the court provides to uphold their detention.

DEPORTATION TO TORTURE: THE *SURESH* CASE

The issue in Suresh is: Deportation to a substantial risk of torture.

What is the legal bar or limit on Canada's powers with respect to deporting individuals from this country if or when there is evidence that the person would be subject to torture? There is a legal constitutional barrier (s. 7) and because of that, when combined with the security certificate process, there is the possibility of indefinite detention.

Suresh v. Canada (SCC, 2002)

FACTS: Suresh had obtained refugee status based on a fear of persecution in Sri Lanka. The Canadian government later came to believe that he was, in fact, a senior member of the Tamil Tiger rebel group that had engaged in terrorism in Sri Lanka, and that he was fundraising for that group in Canada. It sought to deport him, and issued a security certificate against him. As a refugee, Suresh had the Convention right of non-refoulement, found in *IRPA*, Section 115.

Section 115(1): Refugees cannot be deported to the place where they feel persecution

Section 115(2): Subsection (1) does not apply in the case of a person:

- (a) Who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
- (b) Who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada."

In Suresh, the Minister forms a danger opinion against Suresh and seeks to deport him to Sri Lanka. Suresh raises the defence that there is a risk of torture if he is sent there.

ANALYSIS: Suresh challenges this process via s. 7.

Part 1: The substantial risk of torture implicates the security of the person interest in s. 7.

Part 2: POFJ requires a just process.

On a substantive basis, if the refugee faces a substantial risk of torture, Canada cannot deport the refugee other than in exceptional circumstances.

Pages 166-167 of the Textbook are helpful. Unfortunately, the Court doesn't talk about what these exceptional circumstances may be.

SCC finds that the Minister failed to meet her obligations of procedural justice to Suresh by:

- Not disclosing her subordinate officer's report and recommendation (balancing the risk of torture against security)
- Not giving Suresh a chance to respond to the report
- Not giving reasons for her decision

HELD: Minister's decision set aside, and remitted for new decision.

A Factor that would likely be in play in any future case would be: **the degree to which assurances from the receiving state will be relied upon where the receiving state assures that no torture will be employed.** If the Government wants to deport, they will likely go to the foreign state and attempt to see whether there was a guarantee from the receiving country. Court feels a little iffy about this. Torture is never a condoned policy by the government. If the officials in the military or wherever are beyond the governments control, how useful does the government's assurance appear? Not too useful.

Why a Non-Categorical Ruling on Deportation to Torture in Suresh?

The SCC found that the *Convention Against Torture* prohibits deportation to torture in all circumstances (it is categorical). (See Article 3 of *CAT*) Why then does it conclude that in Canadian law, exceptional circumstances may operate to justify deportation to torture?

- a. The fact that the threat of torture is a foreign threat permits a balancing that would not be appropriate for domestic torture --i.e., in the case of a "foreign" threat, section 7's impact is indirect.
- b. If deportation to torture was categorically ruled unconstitutional, then s. 115(2) would be invalid. The SCC appears to want to deal with this case as an issue of ministerial discretion.
- c. The events of 9/11/2001.

The Problem of Indefinite Detention

IRPA contemplates detention for certain persons alleged to be inadmissible, especially those held under security certificates, pending the resolution of legal proceedings and deportation. Section 7, as interpreted in *Suresh*, prohibits the Canadian government from deporting a person to a substantial risk of torture, other than in “exceptional circumstances”. Therefore, in the case of an individual whose inadmissibility leads to detention and whose potential deportation would lead to a substantial risk of torture, indefinite detention is possible.

In *Suresh*, the appellants argued that lengthy and indefinite immigration detention violates sections 7 and 12 of the *Charter*. McLachlin CJ recognizes the indefinite detention dilemma:

- The court concludes that this situation does not violate s. 7 of the Charter so long as the statute provides for a “robust ongoing judicial review” of detention. (Continual *habeas corpus*)
- Factors for detention review are set out at *IRPA*, sections 108-128, include the length of detention (the need to detain may go down over time), the anticipated period until final decision, and alternatives to detention.
- In individual cases, a Court might find a detention to breach *Charter* sections 7 or 12. *Suresh* was a refugee. He is entitled to protection under Regulation 115. One might have asked how did the issue of whether he faced a risk of torture come up within the statutory scheme of 115? What the court is doing is just saying that there is an implicit duty in s. 115 of the Minister to look into potential torture for refugees.

What can a non-refugee can utilize in defence to torture?

- *IRPA*, Section 112: This allows people to apply for a **pre-removal risk assessment (PRRA)** by the minister. It allows them to apply at that point to say that they are asking the minister to consider whether they are a refugee or whether they come within the terms of s. 97(the person in need of protection category). This deals with threats to death, torture or threats to life.