Chapter Nine

Non-compliance with the Act or the Regulations

Introduction

Under IRPA a sponsored member of the family class may be refused a permanent resident visa if that person does not meet the requirements of the Act or the Regulations (IRPR). Generally speaking a person must be eligible to be sponsored and they must be admissible to Canada.

As well, the Act and Regulations prescribe many additional requirements those persons seeking to become permanent residents through sponsorship must meet. Section 41 of IRPA establishes a general inadmissibility provision to cover these requirements:

> s. 41 A person is inadmissible for failing to comply with this Act
> (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act;

Note as well that s. 2(2) of IRPA states that unless otherwise indicated, references in this Act to "this Act" include Regulations made under it.

A refusal letter[1] must set out with sufficient detail the basis of the refusal. It is necessary therefore that s. 41(a) is also accompanied by a statutory reference to the specific requirement which it is alleged the applicant cannot meet.

Some requirements that are commonly not met and are likely to lead to a refusal under subsection 41(a) will be discussed below but this list is not exhaustive.

Not an Immigrant

In the case of parents who are sponsored to Canada for the purpose of settling their dependent children in Canada and who do not intend to remain permanently in Canada, so called "courier parents", the applicable requirement is set out in s. 20(1)(a) of the Act, reproduced below:

> s. 20(1) Every foreign national, … who seeks to enter or remain in Canada must establish,

[1] S. 21(1) IRPA.

> (a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence;…[emphasis added]

It should be noted that although the scheme of the Act suggests that this provision may properly ground a refusal for such an applicant, IRPA no longer contains the words "immigrant" and "landing" which figured heavily in the reasoning in cases under the former Act.

Does the language of s. 20(1)(a) give rise to a requirement on the part of applicants to intend to reside in Canada permanently? The IAD has held that the concept of “courier parent” survives in IRPA in s. 20(1)(a). The panel distinguished between the obligation to maintain permanent residence in Canada under s. 28 from the requirement of an intent to establish permanent residence in Canada under s. 20(1)(a)[2].

The balance of this subtopic is based on cases decided under the Immigration Act as they may provide useful guidance for members.

Intention

An applicant for permanent residence must have the requisite intention to reside permanently in Canada. The visa officer will undertake an examination of all of the surrounding circumstances to determine whether or not such intention exists.

Intention can be demonstrated in one of two ways. “It [intention] can be revealed by speech or conduct.”[3] Generally, the intention of the applicant will become evident during the visa officer's interview with the applicant in the statements made by the applicant in answer to the visa officer's questioning. Other times, the finding of no intention will be based on the applicant's failure to pursue all of the steps involved in the application process.[4] The visa officer's decision may also be founded on evidence of the applicant's past behaviour when he or she had previously been granted permanent resident status, but subsequently lost it.[5]

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[2] *Daliri, Farshid Hafezi v. M.C.I.*, (IAD TA3-01591), MacDonald, May 6, 2004; [2004] I.A.D.D. No. 210 (QL).

[3] *Kan, Chak Pan v. M.E.I.* (F.C.T.D., no. T-2977-91), Muldoon, March 19, 1992. Reported: *Kan v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 206 (F.C.T.D.).

[4] See *Villanueva, Antonio Ordonez v. M.E.I.* (I.A.B. 85-9741), Benedetti, Weisdorf, Bell, November 12, 1986, where the applicant's failure to respond to the visa officer's request for documentation regarding his separation from his wife led the Immigration Appeal Board to conclude that he was not an immigrant. In *Saroya, Kuljeet Kaur v. M.E.I.* (IAD V92-01880), Verma, September 21, 1993, one of the bases for the refusal was that the applicant disregarded instructions given to her during the processing of the application, as she did not show up for three scheduled interviews and did not respond to some communications. See also *Goindi, Surendra Singh v. M.C.I.* (IAD T93-10856), Aterman, December 13, 1994, where the applicants had ignored requests for them to undergo medical examinations as was required.

[5] In *Shergill, Sohan Singh v. M.E.I.* (IAD T92-05406), Weisdorf, Chu, Ahara, February 8, 1993, the applicant was landed in 1981, but returned to India shortly thereafter, leaving the sponsor and a daughter behind. In her present application, statements had been made to the visa officer that she wished to remain in Canada for only six or seven months, for the purpose of bringing her alleged adopted son to Canada. The applicant's declared

Meaning of "permanently"

The ordinary definition of "permanently" connotes something lasting indefinitely. However, this ordinary definition is not applicable within the context of permanent residence. "Permanently" does not mean immutably or forever, or for the applicant's lifetime or anyone else's. An intention to leave Canada at some time in the immediate future is not inconsistent with an intention to reside permanently in Canada until then.[6] Nevertheless, "permanently" has the opposite meaning of "temporarily", and an applicant must not be seeking admission to Canada for a short, fixed period of time for a temporary purpose.[7]

There are several examples in the case-law of what have come to be known as "courier parents". In such cases, the panel finds that the purpose of the applicant's immigration to Canada is to facilitate the immigration to Canada of the applicant's accompanying dependent son or

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intentions were "strikingly similar" to her behaviour in 1981, and therefore it was reasonable to conclude that she had no intention to reside permanently in Canada. See also: *Patel, Mohamed v. M.E.I.* (IAD T91-03124), Weisdorf, Ahara, Fatsis, April 15, 1993, where the panel considered the applicants' past actions as one of the factors in assessing their intentions in the current applications; *Saroya, supra*, footnote 4; and *Sidhu, Gurdev Singh v. M.E.I.* (IAD V92-01678), Singh, November 17, 1993. In *Gill, Jagjit Singh v. M.C.I.* (IAD V95-00365), McIsaac, May 8, 1997, the applicant lost his permanent residence status after residing in Canada for only seven months in a 12-year period. For each request for a returning resident permit he gave a different reason, none of which appeared to be the real reason for his extended stay in India. It was not established on a balance of probabilities that he intended to reside permanently in Canada.

[6] *Toor, Joginder Singh v. M.E.I.* (F.C.A., no. A-310-82), Thurlow, Heald, Verchere, February 15, 1983. Reported: *Re Toor and Canada (Minister of Employment and Immigration)* (1983), 144 D.L.R. (3d) 554, QL [1983] F.C.J. 114 (F.C.A.). In *Dhaul, Paramjit Kaur v. M.E.I.* (I.A.B. 86-6004), Chambers, March 5, 1987, the Immigration Appeal Board held that a person may still be an "immigrant" for the purposes of the *Immigration Act* even though the person is undecided as to whether or not he or she will wish to remain in Canada after admission. In *Sarwar, Abida Shaheen v. M.C.I.* (IAD T93-11195), Ariemma, Leousis, Muzzi, April 24, 1995, the panel agreed that establishing permanent residence in Canada does not imply that the applicant is barred from returning to his or her homeland. In this case, if the appellant had established that the applicant genuinely required to return to Pakistan to attend to personal or family matters, the panel would have had no difficulty in finding that he was a genuine immigrant, "irrespective of how many times or when he intended to travel to his country". In *Sanghera, Rajwinder Kular v. M.C.I.* (IAD V96-01527), Clark, February 17, 1998, the panel accepted the applicants' testimony at the hearing that they always intended to reside permanently in Canada but did plan to visit India sometimes. In response to the visa officer's question about when he would return to India, the principal applicant said a year or two. He was asked whether he intended to be a permanent resident of Canada, to which he replied in the negative. The CAIPS notes revealed that the officer did not explain what it meant to be a "permanent resident". The answers given to the officer's questions were consistent with the applicants not knowing whether or not permanent residents are allowed to leave Canada for any reason.

[7] In *Mirza, Shahid Parvez v. M.E.I.* (I.A.B. 86-9081), Teitelbaum, Weisdorf, Townshend, December 1, 1986, the Immigration Appeal Board held that an applicant who intended to come to Canada for only a temporary period of time was not an immigrant. In *Gill, Shivinder Kaur v. M.C.I.* (IAD T94-06519), Wright, May 16, 1995, the panel held that the applicant's statement that he would return to India if he did not like Canada was not unreasonable and did not negate his intention to establish permanent residence in Canada. In *Wiredu, Alex v. M.C.I.* (IAD T97-00727), Muzzi, December 8, 1997, the panel found that the family members desired a reunion, but for a fixed period of time on the part of the principal applicant. The immigration officer's handwritten notes revealed that the applicant's intention was to visit her sons in Canada. As such, she was not making an applicant for permanent residence.

daughter and that the applicant does not have the requisite intention to reside permanently in Canada as the applicant intends to return to his or her homeland after spending a period of time in Canada.[8] The possibility that the applicant might have the requisite intention to reside permanently in Canada at a later time is not sufficient as "[t]his form of deferred intent […] is not contemplated in the Immigration Act."[9]

Other factors which have been considered by panels in the determination of whether or not an intention to reside permanently in Canada exists include the preservation of a family base in the homeland[10] and the retention of assets abroad.[11]

Motivation

The relevant issue is whether or not the applicant has the requisite intention to reside permanently in Canada. The motivation behind the applicant's intention is not of itself relevant.[12] For example, the Immigration Appeal Division held that an applicant's desire to facilitate the entry into Canada of her two unmarried sons did not, in that case, preclude a finding of an intention on the part of the applicant to reside permanently in Canada; therefore, the applicant was found not to be a "courier parent."[13]

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[8] See for example: *Shergill, supra,* footnote 7; *Patel, Mohamed, supra,* footnote 15; *Kala, Bhupinder Kaur v. M.E.I.* (IAD T92-09579), Arpin, Townshend, Fatsis, May 18, 1993; *Mahil, Tarlochan v. M.E.I.* (IAD T92-08178), Weisdorf, Townshend, Ahara, May 18, 1993; *Kamara, Abass Bai Mohamed v. M.E.I.* (IAD W91-00092), Arpin, February 24, 1994; *Brown, Earlyn v. M.C.I.* (IAD T93-09712), Ramnarine, August 17, 1994; *Gill, Harbans Kaur v. M.C.I.* (IAD V92-00694), Lam, March 27, 1996; and *Dhandwar, Jatinder Kaur v. M.C.I.* (IAD T96-01977), Bartley, June 6, 1997. In *Molice, Antoine Anel v. M.E.I.* (IAD M93-07976), Durand, March 22, 1994, one of the factors which the panel considered was the sponsor's statement that he did not sponsor his parents in the early 1980s when he could have, as he was waiting until the law would allow him to also sponsor his siblings, his parents' accompanying dependants. The panel held that if the applicants were not "courier parents", there would have been no reason for the sponsor to have waited for the law to change before sponsoring them; as well, the sponsor could not have known or predicted that the law would be changed in the future. *Cherfaoui, Azzedine Dino v. M.C.I.*, (IAD MA1-01747), Beauchemin, February 11, 2002 (reasons signed February 13, 2002).

[9] *Sarwar, supra,* footnote 6. *Ha, Byung Joon v. M.C.I.* (IAD TA0-04969), Sangmuah, October 3, 2001 (reasons signed January 8, 2002).

[10] *Deol, Dilbag Singh v. M.E.I.* (I.A.B. 80-6012), Campbell, Hlady, Howard, February 11, 1981.

[11] *Pacampara, Enrique Pandong v. M.E.I.* (I.A.B. 85-9684), Ariemma, Arkin, De Morais, April 10, 1987; *Ruhani, Zahida v. M.C.I.* (IAD T92-07177), Teitelbaum, Muzzi, Band, March 8, 1995; and *Lalli, Kulwinder v. M.C.I.* (IAD V94-01439), Lam, November 20, 1995. See however *Gill, Shivinder Kaur, supra,* footnote 7, where there was evidence that the retention of the family home was a cultural norm and that in any event, the applicant offered a plausible explanation when he said that he didn't want to sell the home so that the family could have accommodation when they returned to India to visit relatives. In *Dhiman, Jasvir Kaur v. M.C.I.* (IAD V95-00675), McIsaac, May 27, 1996, one basis for the refusal was that the applicants' societal traditions were such that parents lived with their sons (married or not), and not with their married daughters; the applicants applied to go and live with their married daughter in Canada, while their eldest son remained in India. This basis was not accepted, however, and the refusal was found to be invalid in law.

[12] *Aquino, Edmar v. M.E.I.* (I.A.B. 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986.

[13] *Ruhani, supra,* footnote 11.

Timing

In appeals where the issue is whether or not the applicant is an immigrant, the question of timing arises: that is, at what point in time must the applicant have had the requisite intention to reside permanently in Canada? In *Kahlon*[14], the Federal Court of Appeal held that the Immigration Appeal Board (the predecessor to the Immigration Appeal Division) had to decide the appeal on the basis of the law as it stood at the time of the hearing of the appeal because the hearing before the Board was a hearing de novo. If one applies *Kahlon*, where the refusal is based on the applicant's not being an immigrant, the panel would determine the applicant's intention as of the date of the hearing. However, there has been some conflicting case-law in this area.

In *Patel, Manjulaben*, it was held that a determination should be made of the applicant's intention at the time that the applicant made his or her application for permanent residence since it is a jurisdictional question.[15] However, more recently, Immigration Appeal Division panels have not followed Patel on the timing issue, and have instead relied on *Kahlon* and held that the applicant's intention to establish permanent residence in Canada must be determined as of the time of the hearing.[16] In *Ampoma*[17], the majority applied *Kahlon* and held that intention must be assessed at the time of the hearing. The dissenting member specifically refused to follow the decision in *Patel*.[18]

In *Quadri*, the Immigration Appeal Division stated that the burden of proof on a sponsor is to prove that either the visa officer erred in finding that there was no intention to immigrate at

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[14] *Kahlon, Darshan Singh v. M.E.I.* (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: *Kahlon v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).

[15] *Patel, Manjulaben v. M.E.I.* (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1990 (leave to appeal refused July 16, 1990); see *infra*, for a discussion on jurisdiction. *Patel* was applied by the majority in *Uddin, Mohammed Moin v. M.E.I.* (IAD T91-02394), Chu, Ahara, Fatsis (dissenting), August 28, 1992.

[16] *Gnanapragasam, Dominic Gnanase v. M.C.I.* (IAD T99-11000), Whist, December 4, 2000.

[17] *Ampoma, Eric Sackey v. M.E.I.* (IAD W91-00008), Gillanders, Verma, Wlodyka (dissenting), February 10, 1992. Reported: *Ampoma v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 219 (IAD).

[18] See also *Dhandwar, supra*, footnote 8; *Randhawa, Baljeet Singh v. M.C.I.* (IAD V95-01361), Lam, July 23, 1996; and the dissenting reasons in *Uddin, supra*, footnote 15. In *Sanghera, Charan Singh v. M.E.I.* (IAD V93-00595), Verma, December 9, 1993, the panel held that at the time of the hearing, the applicant wanted to live permanently in Canada; his contrary intention at the time of the interview was due to stress and shock on account of his mother's death and his brother's recent suicide in Canada. Similarly, in *Sidhu, supra*, footnote 5, the panel held that any statements that the father may have made about returning to India were due to his emotional stress at the time. In *Mallik, Azim v. M.C.I.* (IAD T94-04692), Aterman, September 8, 1995, the applicant's responses at the interview suggested that she did not intend to reside permanently in Canada; the Appeal Division accepted the appellant's explanation that the applicant was under stress as a result of the way in which the interview was conducted, and that she had become flustered; it also accepted the explanation that the applicant was not sophisticated. See also *Sanghera, Avtar Singh v. M.C.I.* (IAD V93-02360), Singh, July 22, 1994 and *Khanna, Sadhana Kumari v. M.C.I.* (IAD T96-01555), Wright, June 3, 1996. But see *Gill, Harbans Kaur, supra*, footnote 8, where the panel considered the applicants' statements at the time of their interview to be more credible and trustworthy than their affidavits made subsequent to the refusal, finding that the affidavits were "clearly a self-serving attempt to correct earlier statements".

the time of the interview, or alternatively, that the intention to immigrate arose after the interview and was present at the time of the hearing of the appeal.[19]

Fairness

There is a general duty of procedural fairness which governs visa officers in their processing of sponsored applications for landing. The issue has sometimes arisen with respect to an applicant's intention to reside permanently in Canada. A sponsor may challenge the validity of a refusal on the basis that there was a breach of the principles of natural justice, namely the denial of a fair hearing; such an argument is based on the decision in *Pangli*[20]. In that case, the Court held that the immigration officer had a duty to clear up conflicting statements made by the applicant on the same day. In both *Rahman* and *Dory*[21], the Immigration Appeal Division held that the applicant was never given an opportunity to answer supplementary questions allowing her to clarify contradictory statements regarding her intention to reside permanently in Canada.

Furthermore, the immigration officer who interviewed the applicant should have been the one who actually refused the application;[22] this principle was satisfied where one immigration officer interviewed and made a recommendation to refuse the application, and another officer countersigned the recommendation and signed the refusal letter.

Pangli has also been applied to support the principle that a visa officer has the duty to explain to the applicant the difference between permanent resident and visitor status, and to explain the possible negative impact of any statutory declaration signed by the applicant which attests to the applicant's intention not to reside permanently in Canada.[23]

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[19] *Quadri, Fatai Abiodun v. S.S.C.* (IAD T93-12576), Hopkins, September 30, 1994.

[20] *Pangi v. Canada (Minister of Employment and Immigration)* [1987] F.C.J. No. 1022. For a fuller discussion of fairness, see Chapter 11, "Fairness and Natural Justice under IRPA".

[21] *Rahman, Mohibur v. M.C.I.* (IAD M94-05434), Angé, March 3, 1995; *Dory, Roosevelt v. M.C.I.* (IAD M94-03745), Angé, December 19, 1995. In *Sian, Malkit Kaur v. M.C.I.* (IAD V95-00955), McIsaac, January 20, 1997, the panel stated that the visa officer had a duty to clear up the conflict between her conclusion that the applicants did not intend to reside permanently in Canada and their contrary intention inherent in their application for permanent residence. The visa officer had arrived at her conclusion based on the applicant's responses at the interview; what was needed was "a further questioning…thereby affording him the opportunity to state finally, and unequivocally, what his intention was insofar as coming to Canada was concerned".

[22] This principle was applied in *Gill, Rajwinder Kaur v. M.E.I.* (IAD V91-00898), Arpin, July 26, 1993.

[23] See, for example, *Rodriguez, Meliton v. M.E.I.* (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991, where the panel applied *Pangli* and held that if at the interview the applicant indicated a desire to come to Canada as a visitor, the choice of a visitor visa rather than a permanent resident visa should have been put to her; there was no evidence that such a choice had been given to the applicant; *Merius, Ronald v. M.E.I.* (IAD M93-05810), Angé, June 13, 1994; and *Quadri, supra,* footnote 19 and *M.C.I. v. Gough, Glen Patrick* (IAD TA0-1561), MacAdam, March 26, 2001 where the respondent had signed a voluntary declaration of abandonment of Canadian permanent resident status and handed over his Canadian record of landing in unexpected circumstances and at a moment of intense sleep deprivation. The panel held that he could not be faulted for having singed it without an actual intention to abandon Canada as his place of permanent residence.

Failure to answer truthfully or provide documents

Under the Regulations to the Immigration Act, s. 9(3) provided a basis for a visa officer to refuse a visa for failure to provide information needed to assess both eligibility and admissibility of an applicant. At a de novo Immigration Appeal Division hearing the applicant may have provided a reasonable explanation or lawful excuse for the default and the refusal would no longer be lawful. If an appeal was allowed in law or on a discretionary basis, care was to be taken that the visa officer had the information needed to determine eligibility and admissibility when processing of the application re-commenced after the appeal. A similar scheme has been enacted in IRPA.

Where an applicant has answered questions in the application or at an interview which answers have turned out to be false, a refusal has been tied to the duty to answer questions truthfully. In IRPA this requirement is set out in those provisions that govern the making an application of any kind:

> s. 16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

An applicant for permanent residence would seem to be covered by the duty in this provision. They must provide adequate proof of both eligibility (e.g. relationship to sponsor) and admissibility

The failure to answer questions truthfully may also give rise to a separate inadmissibility finding under s. 40(1)(a) of IRPA, i.e. misrepresentation, which may have the effect of barring the foreign national from Canada for two years. This is dealt with in more detail in Chapter 8.

Failure to undergo a medical examination

This has been dealt with in Chapter 3 on medical inadmissibility. See comments above as to continuing obligation to provide proof of admissibility.

Discretionary Jurisdiction

The general category of inadmissibility described in s. 41(a) is designed to ensure all applicants undergo a thorough and detailed process of examination to ensure they meet the requirements of the Act and regulations. A refusal may be challenged as unlawful or a sponsor may seek special relief from the requirement and produce a sufficient evidentiary basis for the applicant to be relieved of the challenged requirement. The integrity of the immigration system must be examined against the particular circumstances supporting the request for special relief.

CASES