Introduction

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This paper deals with the sponsorship provisions of the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRP Regulations) as they pertain to the Immigration Appeal Division.

The paper, within the sponsorship context, outlines the legislative purpose of the IRPA and discusses how the IRPA has been interpreted by the courts.

This paper does not constitute legal opinion and should not be taken to represent the views of the Immigration and Refugee Board and its members.

General

A sponsorship appeal to the Immigration Appeal Division is a hearing *de novo* in a broad sense.[1] It is open to the Immigration Appeal Division to consider issues which were not before the visa officer.[2] The Immigration Appeal Division is not bound by legal or technical rules of evidence and it may receive and base its decision on any evidence considered necessary and credible or trustworthy.[3]

The Immigration Appeal Division is bound by the common law duty of fairness. A participant at a hearing must have sufficient knowledge of what is at issue to afford her an opportunity to participate in the hearing in a meaningful way.[4]

The Immigration Appeal Division may allow or dismiss a sponsorship appeal. It may allow in law or by granting special relief, or both. The Immigration Appeal Division must give

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1 *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.). The Immigration Appeal Division may make use of newly created evidence in sponsorship cases: *Valdez, Enrico Villanueva v. M.C.I.* (F.C.T.D., no. IMM-5430-97), Reed, March 12, 1999; *Nadon, Claude v. M.C.I.* (F.C., no. IMM-2932-06), Beaudry, January 22, 2007; 2007 FC 59; *Khera, Amarjit v. M.C.I.* (F.C., no. IMM-6375-06), Martineau, June 13, 2007; 2007 FC 632.

2 *Pabla, Dial v. M.C.I.* (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000.

3 See section 175(1) of the IRPA.

4 *David, Solomon v. M.C.I.* (F.C., no. IMM-5599-06), Martineau, May 24, 2007; 2007 FC 546; *M.C.I. v. Dang, Thi Kim Anh* (F.C.T.D., no. IMM-3113-99), Dawson, July 20, 2000. [Judicial review of IAD T98-03773, MacAdam, June 4, 1999]. Thus where the sponsor indicated she was not putting into issue the correctness of the visa officer's decision, the Appeal Division came under an obligation to clearly advise the Minister of its decision to nevertheless inquire into the adequacy of that decision.

reasons for its decision.[5] If the Immigration Appeal Division allows an appeal by a sponsor, the matter goes back for further processing and an assessment of whether the requirements of the IRPA and the IRP Regulations, other than those requirements upon which the decision of the Immigration Appeal Division has been given, are met.[6]

If the Immigration Appeal Division dismisses an appeal and a new application for a permanent resident visa is filed, refused on the same ground and appealed again, and if no new evidence is adduced at the second appeal, the appeal may be dismissed as an abuse of process;[7] if new evidence is adduced, the second appeal may be dismissed using the doctrine of *res judicata* unless special circumstances apply.[8] A decision allowing the appeal on compassionate or humanitarian grounds has the effect of blanketing the ground of refusal that was appealed and that particular refusal ground cannot be used again[9] unless new material facts come to the attention of the visa officer.[10]

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[5] See section 54 of the *Immigration Appeal Division Rules*, and section 169(b) of the IRPA.

[6] See section 70 of the IRPA. However, a visa officer is not precluded from refusing a sponsored application on the same statutory basis as was relieved against by the Appeal Division when new material facts arising after the Appeal Division hearing or discovered after the Appeal Division hearing and not before the Appeal Division, come to the attention of the visa officer: *Au, Shu Foo v. M.C.I.* [2002] F.C. 257 (C.A.).

[7] *Kaloti, Yaspal Singh v. M.C.I.* (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000. *Li, Wei Min v. M.C.I.* (F.C., no. IMM-5040-05), Lemieux, June 14, 2006; 2006 FC 757. See too *Dhaliwal, Baljit Kaur v. M.C.I.* (F.C.T.D., no. IMM-1760-01), Campbell, December 21, 2001 where the Court found that evidence of continuing commitment was new and relevant evidence with respect to the parties' intention at the time of marriage and thus the Immigration Appeal Division erred in finding abuse of process. See *Rahman, Azizur v. M.C.I.* (F.C., no. IMM-1642-06), Noël, November 2, 2006; 2006 FC 1321 where *Dhaliwal* was distinguished.

[8] *Danyluk v. Ainsworth Technologies Inc*. [2001] 2 S.C.R. 460; 2001 SCC 44. See *Kaloti, Yaspal Singh v. M.C.I.* (F.C.T.D., no. IMM-4932-97), Dubé, September 8, 1998; *Bath, Ragbir Singh v. M.C.I.* (IAD V95-01993), Lam, December 8, 1997 (appeal dismissed on grounds of *res judicata* where ground of refusal, parties, law and factual matter to be determined were the same as on the first appeal); and *Singh, Ahmar v. The Queen* (F.C.T.D., no. T-1495-95), Muldoon, December 2, 1996; affirmed in *Singh, Ahmar v. The Queen* (F.C.A., no. A-1014-96), Strayer, Isaac, Linden, November 5, 1998. (*res judicata* applied regarding a challenge to the validity of regulations). For a contrary position, see *Jhammat, Harjinder Kaur v. M.E.I.* (F.C.T.D., no. T-1669-88), Muldoon, October 13, 1988, where *res judicata* was held to be inapplicable in public law, allowing the Minister to question the validity of a marriage on appeal from a second refusal despite having conceded the validity of the marriage in the appeal from the first refusal. A court order quashing a refusal on a limited basis does not have the effect of rendering the whole ground of refusal *res judicata*: *Wong, Chun Fai v. M.E.I.* (F.C.T.D., no. T-2871-90), Jerome, February 26, 1991. See also the in-depth discussion of *res judicata* and abuse of process at chapter 6, section 6.7 "Repeat Appeals".

The Immigration Appeal Division must allow the sponsor to present the alleged new evidence before deciding the abuse of process/*res judicata* issues: *Kular, Jasmail v. M.C. I.* (F.C.T.D., no., IMM-4990-99), Nadon, August 30, 2000. [Judicial review of IAD T98-00523, Maziarz, September 20, 1999.] But the Appeal Division is under no obligation to grant a full oral hearing, new evidence by way of affidavit is acceptable: *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.

[9] *Mangat, Parminder Singh v. M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985. However, if a new ground of refusal is subsequently discovered, nothing would preclude a second refusal/appeal.

[10] *Au, supra*, footnote 6.

A decision of the Immigration Appeal Division may be challenged by way of judicial review to the Federal Court with leave of the Court.[11]

Sponsor

Whether or not one qualifies as a "sponsor" is covered in Chapter 1.

Member of the Family Class

The issue of who is a "member of the family class" and thus can be sponsored is covered in Chapter 7. Topics that are discussed in greater detail within this issue include: adoptions (see Chapter 4), foreign marriages, common-law partners and conjugal partners (see Chapter 5), and bad faith family relationships (see Chapter 6).

Grounds of Refusal

A permanent resident visa may be refused for various reasons including: financial (see Chapter 1), criminality (see Chapter 2), health grounds (see Chapter 3), misrepresentations (see Chapter 8), and non-compliance with the Act including not an immigrant (see Chapter 9).

Discretionary Relief (special relief)

The Immigration Appeal Division has the power to allow an appeal using its discretionary jurisdiction (s. 67(1)(c) of the IRPA). This issue is discussed in detail in Chapter 10.

Transitional Provisions

The transitional provisions of IRPA and IRP Regulations that govern sponsorship appeals pending before the IAD are covered in Tab “T”.

[11] See section 72(1) of the IRPA.

CASES