Transitional Provisions

Introduction

This chapter examines various transitional situations provided in the *Immigration and Refugee Protection Act*[1] (IRPA) and the *Immigration and Refugee Protection Regulations*[2] (IRP Regulations) as specifically concerns sponsorship appeals before the Immigration Appeal Division (IAD). Since the coming into force of IRPA on June 28, 2002, the Courts have now settled many issues raised by some of the transitional provisions.

Transitional Situations

Although there are very few transitional cases left, discussed below are likely transitional situations which the IAD has had to deal with and, in some cases, may yet be faced with in the course of management of sponsorship appeal cases since the coming into force of the IRPA.

a) Appeals filed prior to the coming into force of the IRPA

Where a notice of appeal from the refusal of a sponsored application for a permanent resident visa has been filed with the IAD prior to the coming into force of the IRPA, the general transitional rule in section 192 provides that the appeal shall be continued under the *Immigration Act*[3] (old Act).

There is one exception to this general rule: section 196 of the IRPA, which provides for the discontinuance of appeals filed under the old Act where "[…] the appeal could not have been made because of section 64 of this Act". It is clear from section 64(1) that no appeal from the refusal of an application for a permanent resident visa may be made to the IAD by a sponsor where the foreign national being sponsored has been found to be inadmissible on corresponding grounds of security, violating human or international rights, serious criminality (as described in section 64(2)[4] of the IRPA) or organized criminality.

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1 S.C. 2001, c. 27.

2 SOR/2002-227.

3 R.S.C. 1985, c. I-2.

4 In *M.C.I. v. Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004, the Federal Court ruled that pre-sentence custody which is expressly factored into a person's criminal sentence forms part of the term of imprisonment under section 64(2) of the IRPA and as such, must be considered. See also *Allen, Deon Aladin v. M.C.I.* (F.C.T.D., no. IMM-2439-02), Snider, May 5, 2003; *M.C.I. v. Smith, Dwight Anthony* (F.C., no. IMM-2139-03), Campbell, January 16, 2004; 2004 FC 63; *M.C.I. v. Gomes, Ronald* (F.C. no. IMM-6689-03), O'Keefe, January 27 2006; 2005 FC 299; *Cheddesingh (Jones), Nadine Karen v. M.C.I.* (F.C. no. IMM-2453-05, Beaudry, February 3, 2006; 2006 FC 124.

Section 196 of IRPA applies to sponsorship appeals as well as to removal appeals. In a number of cases, it was argued that section 196, as a transitional provision, was limited to removal orders because it refers specifically to appellants who have not been granted a stay under the old Act. The prevailing jurisprudence of the Federal Court is to the effect that section 196 applies to sponsorship appeals and therefore, operates to discontinue removal and sponsorship appeals[5]. In interpreting this transitional provision, the Court noted that sections 196 and 197 refer in particular to section 64 and that section 64 refers specifically to sponsors. Therefore, sections 196 and 64 of IRPA were intended to affect the rights of appellants who are sponsors.

b) Appeals filed after the coming into force of the IRPA which stem from sponsorship applications refused before the IRPA came into force

As the Federal Court of Appeal said in *Medovarski*[6], section 192 creates an exception to the general rule set out in section 190 which provides that cases pending or in progress on the day of the coming into force of IRPA are governed by IRPA. Therefore, sponsorship appeals filed on or after the coming into force of the IRPA which stem from refusals made prior to June 28, 2002 are governed by the provisions of the IRPA and IRP Regulations[7]. This means that the IAD will assess the facts presented at the time of the appeal hearing against the corresponding IRPA grounds of inadmissibility set out in section 320 of the IRP Regulations. It is important to note that section 320 of the IRP Regulations does not as such set out corresponding grounds from the *Immigration Regulations, 1978* to the IRP Regulations which would lead to an inadmissibility finding under the IRPA. For example, there is no specific corresponding ground for section 4(3) of the *Immigration Regulations, 1978.* However, section 320(10) provides in particular that a person who had been determined to be inadmissible pursuant to section 19(2)(d) of the old Act becomes inadmissible under section 41(a) of the IRPA for failure to comply with the IRPA. Failure to comply with the IRPA includes the IRP Regulations by virtue of section 2(2) of the IRPA. The IAD will also decide these appeals taking into account sections 63(1), 64, 65 and 67 of the IRPA. This entails numerous consequences. Below is a discussion of particular transitional situations, jurisdictional **b) 1-** and non-jurisdictional **b) 2-**, which are likely to arise.

b) 1- Matters in which the IAD has no jurisdiction, no jurisdiction in law or no discretionary jurisdiction

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5 *Touita, Wafa El Jaji v. M.C.I.* (F.C., No. IMM-6351-04), De Montigny, April 21, 2005; 2005 FC 543; *Alleg, Sahila v. M.C.I.* (F.C., No. IMM- 6278-04), Martineau, March 11, 2005; 2005 FC 348; *Kang, Sarabjeet Kaur v. M.C.I.* (F.C., No. IMM-2445-04), Mactavish, February 25, 2005; 2005 FC 297; *M.C.I. v. Bhalrhu, Mandeep Kaur* (F.C., No. IMM-2228-03), Gauthier, September 9, 2004; 2004 FC 1236; *Williams, Sophia Laverne v. M.C.I.* (F.C. No. IMM-6479-02), Phelan, May 6 2004; 2004 FC 662; see also, *M.C.I. v. Seydoun, Saber Hussain* (F.C., No. IMM-8407-04), Lutfy, February 2, 2006; 2006 FC 121; *M.C.I. v. Sohal, Manjit Kaur* (F.C., No. IMM-6292-02), Lutfy, May 6 2004; 2004 FC 660, where, on the contrary, the Federal Court decided that section 196 did not apply to sponsorship appeals. The fact that a stay was never contemplated for a sponsor is indicative of Parliament's intent to remove the right of appeal for removal order appellants only.

6 *Medovarski: M.C.I. v. Medovarski, Olga* (F.C.A., No. A-249-03), Evans, Rothstein, Pelletier (dissenting), March 3, 2004, par. 50; 2004 FCA 85 (upheld by the SCC, [2005] 2 S.C.R. 539

7 Section 2(2) of IRPA provides that references to "this Act" include regulations made under it.

- Inland applications and sponsorship refusals

  Section 63(1) of the IRPA provides for an appeal from a decision not to issue a foreign national a permanent resident visa. Inland applicants are never issued or refused visas. Rather, they are given or refused permanent resident status. Thus, it may be seen that appeals from inland sponsorship refusals should be dismissed for lack of jurisdiction because they were not contemplated by section 63(1) of the IRPA and as such, there appears to be no right of appeal to the IAD[8].

- Sponsorship refusals based on corresponding grounds of security, violating human or international rights, serious criminality or organized criminality

  The consequence of section 320 of the IRP Regulations will be that an appellant will have no right to appeal from the refusal of a sponsored application for a permanent resident visa if the foreign national was determined to be inadmissible on grounds which correspond to section 64(1) of the IRPA. As such, foreign nationals who had been determined to be inadmissible under sections 19(l)(e), (f), (g) or (k) of the old Act are inadmissible under the IRPA on security grounds (section 320(l) of the IRP Regulations). There will be no appeal for foreign nationals determined to be inadmissible under sections l9(1)(j) or (l) of the old Act because they are inadmissible on grounds of violating human or international rights under the IRPA (section 320(2) of the IRP Regulations). The same consequence will follow for foreign nationals determined to be inadmissible under sections 19(1)(c.2) or 19(1)(d)(ii) of the old Act as they are inadmissible on grounds of organized criminality under the IRPA (section 320(6) of the IRP Regulations).

  Sections 320(3) and 320(5)(a) of the IRP Regulations indicate which inadmissible classes under the old Act correspond to the inadmissible class of serious criminality under the IRPA. However, appellants in those cases will not be deprived of a right of appeal unless the foreign national comes within the specific criteria of serious criminality provided for in section 64(2) of the IRPA, which indicates that serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years[9].

  Section 326(2) of the IRP Regulations also stipulates that persons in respect of whom section 77(3.01)(b) of the old Act applied on the coming into force of the IRPA are subject to section 64(1) of the IRPA.

- Sponsorship application not filed in the *prescribed manner*

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8 *Dargan v. M.C.I.* (IAD TA4-09872), Boire, November 18, 2004; *Marish v. M.C.I.* (IAD TA4-03526), Boire, January 28, 2005.

9 On the interpretation of *term of imprisonment*, see *supra*, footnote 4.

Refusals based on the sponsor's failure to fulfill basic requirements in the filing of a sponsorship application were generally uncommon before the IAD under the old Act. It should be noted that section 10(6) of the IRP Regulations now specifically provides that a sponsorship application which does not meet the requirements of section 10(1) is not an application filed in a *prescribed manner* for the purpose of section 63(1) of the IRPA. Hence, in such cases, there may be no right of appeal if the sponsor's application is refused on the ground that it was not filed in a *prescribed manner*. The IAD would likely dismiss the appeal for lack of jurisdiction if it so concludes. It appears that in such cases the IAD would not be in a position to allow the sponsor to remedy any non-compliance with section 10(1) of the IRP Regulations.

- Refusals based on the sponsor's inability to fulfill the undertaking or failure to comply with a previous undertaking as determined by the Province of Quebec

  Sponsored applications destined to the Province of Quebec may not be approved by an officer where the competent authority of the Province determines that the sponsor is unable to fulfill the undertaking as *per* section 137 of the IRP Regulations.

  As was the case under the old Act, section 9(2) of the IRPA provides that there is no appeal in law where the refusal is based on the determination of provincial officials that the sponsor either fails to meet financial criteria or does not comply with a previous undertaking. Thus, the IAD may only hear the appeal on the basis of humanitarian and compassionate grounds.

- No discretionary jurisdiction where the IAD determines that the foreign national is not a member of the family class or that the sponsor is not a sponsor within the meaning of the IRP Regulations

  Section 65 of IRPA provides that the IAD has no jurisdiction to consider humanitarian and compassionate grounds (H&C) if it has decided that the foreign national is not a member of the family class pursuant to section 117(1) of the IRP Regulations[10] or that the appellant is not a sponsor as defined in section 130 of the IRP Regulations.

  Section 117(9) of the IRP Regulations lists a number of situations where the foreign national is not considered a member of the family class. The Federal Court upheld a number of decisions where the IAD concluded that it had no jurisdiction to consider H&C because the foreign national was excluded from the family class pursuant to section 117(9)*(d)* in that the sponsor had not disclosed the existence of a dependent child. In so doing, the Federal Court confirmed that sections 352 and 355 of the IRP Regulations applied to applications made under the old Act and were meant to exclude from the application of section 117(9)*(d)* those children between the ages of 19 and 22 who were not considered a *"dependent daughter"*

[10] For spouses, common-law and conjugal partners, see more specifically sections 4, 5 and 117(9) of the IRP Regulations.

or "*dependent son*" under the old Act, but were a "*dependent child*" under IRPA and IRP Regulations[11].

b) 2- Matters in which the IAD has jurisdiction in law and discretionary jurisdiction

- Refusals based on medical grounds

Section 320(7) of the IRP Regulations provides that sponsored applicants for a permanent resident visa who were found to be inadmissible under section 19(1)(a) of the old Act are inadmissible under the IRPA on health grounds.

Danger to public health or public safety does not pose any difficulty. However, appeals from refusals based on excessive demands on health or social services has to be considered in light of section 38 of the IRPA and the definition of *excessive demand* contained in section 1(1) of the IRP Regulations.

Section 38(2)(a) of the IRPA provides that a foreign national who is expected to cause excessive demand on health or social services is not inadmissible on health grounds if it has been determined that the foreign national is a member of the family class and is the spouse, common-law partner[12] or child of a sponsor within the meaning of the regulations. This represents a substantial change from the old Act provisions which permitted such refusals. Such refusals made under the old Act and appealed on or after June 28, 2002 would appear to be invalid in law under the IRPA. To our knowledge, none of these cases have proceeded to a hearing before the IAD.

Medical refusals based on excessive demand on health or social services concerning foreign nationals other than the spouse, common-law partner, conjugal partner or child of a sponsor will have to be assessed by the IAD against the definition of *excessive demand* contained in section 1(1) of the IRP Regulations. Failure of the Minister to clearly justify the refusal against the new definition of *excessive demand* could result in the IAD allowing the appeal and referring the matter back for reconsideration based on the IRPA and IRP Regulations (section 67(2) of the IRPA).

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[11] *Dumornay, Jean-Bernard v. M.C.I.* (F.C. No. IMM-2596-05), Pinard, May 11, 2006; 2006 FC 541; *Le, Van Dung v. M.C.I.* (F.C. No. IMM-8951-04) Blanchard, May 2, 2005; 2005 FC 600; *Collier, Amelia v. M.C.I.* (F.C. No. IMM-8635-03), Snider, September 2, 2004; 2004 FC 1209.

[12] Conjugal partners are also specifically exempted, not in IRPA, but by section 24 of the IRP Regulations.

- Refusals based on financial grounds

  Section 320(8) of the IRP Regulations provides that persons who had been determined to be inadmissible pursuant to section 19(1)(b) of the old Act are inadmissible under section 39 of the IRPA. It is to be noted that the wording of both sections is similar. As a result, these transition cases do not raise any particular problem.

- Refusals based on sponsor's inability to meet the financial criteria or failure to comply with a previous undertaking

  Refusals made on the basis of the sponsor's failure to meet settlement arrangements under the old Act and section 5(2)(f) of the *Immigration Regulations, 1978* require a reassessment based on section 134 and the definition of *minimum necessary income* in section 2 of the IRP Regulations. For cases destined to the Province of Quebec, there are jurisdictional implications as discussed above.

  As for refusals to comply with a previous undertaking (section 133(1)*(g)* of IRP Regulations), it should be noted that the duration of an undertaking has been reduced under IRP Regulations. Section 132 provides an undertaking of 3 years for spouses, common law partners and conjugal partners and from 3 to 10 years for a dependent child, depending on the age of the child at the time of landing. However, section 351(3) of the IRP Regulations provides that the duration of an undertaking under the old Act is not affected by IRP Regulations. It flows that the duration of sponsorship undertakings signed prior to June 28, 2002 remain at 10 years[13].

- Misrepresentation

  Section 320(9) of the IRP Regulations provides that persons determined to be inadmissible on the basis of sections 27(1)(e) or (2)(g) or (i) of the old Act will become inadmissible for misrepresentation under section 40 of the IRPA. There is no such equivalent for foreign nationals whose application for permanent residence may have been refused on the basis of sections 9(3) and 19(2)(d) of the old Act. In these cases the foreign national becomes inadmissible for failure to comply with the IRPA, as provided by sections 320(10) of the IRP Regulations and 41 of the IRPA. This distinction is important in view of section 64(3) of the IRPA which denies a right of appeal against a refusal of a sponsored application for a permanent resident visa made by a foreign national found to be inadmissible on the ground of misrepresentation unless the foreign national is the sponsor's spouse, common-law partner or child.

[13] *M.C.I. v. Sharma, Ashok Kumar* (F.C., no. IMM-6517-03), von Finckenstein, August 18, 2004; 2004 FC 1144.

c) Appeals which stem from sponsorship applications refused after the IRPA came into force

Sponsored applications for permanent residence which had not been finalized by a visa officer prior to June 28, 2002 will continue to be processed under the IRPA and the IRP Regulations *per* section 190 of the IRPA[14]. As such, any decisions, positive or negative, will be based on the IRPA[15]. One exception to the above concerns fiancés who are no longer members of the family class under section 117(1) of the IRP Regulations. As permitted by section 201 of the IRPA, section 356 of the IRP Regulations specifically deals with fiancé applications made prior to June 28, 2002. These applications will continue to be processed as fiancé applications under the old Act and Regulations until they are finally disposed of.

d) Court ordered rehearings

In cases where the IAD is directed by the Federal Court or the Supreme Court to reconsider an appeal which had been filed prior to the coming into force of the IRPA, section 350(5) of the IRP Regulations stipulates that *the Immigration Appeal Division shall dispose of the matter in accordance with the former Act*[16]. This is consistent with section 192 of the IRPA which directs that if the filing of the notice of appeal predates the coming into force of the IRPA, the appeal shall be continued under the old Act. This represents one of the underlying consequences of a *de novo* hearing, which is to place the parties in the position they were in when the litigation began.

In the case of Court ordered rehearings, the Federal Court determined in *Denton-James*[17] that the application of sections 196 and 64 of the IRPA may not be considered. The language of section 350(5) of the IRP Regulations is unambiguous.

Conclusion

A number of problems raised by the transitional provisions have been settled by the Courts. In view of the fact that there are very few transitional cases left, the transitional provisions are not likely to generate additional litigation.

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[14] Note that sections 352 to 355 of the IRP Regulations facilitate timely processing of pending sponsored applications by not requiring applicants to update their file if they do not so desire, for instance, in the case of children who did not qualify under the former *Immigration Regulations, 1978.*

[15] *Siewattee, Door v. M.C.I.* (IAD TA2-24492), Whist, September 4, 2003; *Noun, Pho v. M.C.I.* (IAD TA3-03260), MacPherson, August 27, 2003. See also, *M.C.I. v. Fuente, Cleotilde Dela* (F.C.A., no. A-446-05), Noël, Sharlow, Malone, May 18 2006; CAF 186, where the F.C.A. answered in the negative the certified question as to whether the doctrine of legitimate expectations could be relied upon to avoid the application of section 190 of the IRPA.

[16] *Fani, Ahmad v. M.C.I.* (IAD TA0-08820), MacPherson, July 10, 2003.

[17] *Denton-James, Lucy Eastwood v. M.C.I.* (F.C., no. IMM-1819-02), Snider, June 24, 2004; 2004 FC 911.

CASES