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ImmQuest

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

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Employment Requirements of the NOC

Cobus (Jacobus) Kriek, RCIC[1]

1. The National Occupational Classification (NOC) is a federal classification system of all occupations. In most instances, each NOC aligns with one occupation. For example, NOC 3112 is a family doctor. In some cases, a single NOC can represent a multitude of closely related occupations. For example, NOC 3219 includes medical technologists and technicians not elsewhere classified, such as dietary technicians, pharmacy technicians, ocularists, prosthetists, orthotists, prosthetic technicians, and orthotic technicians. This NOC system is also used to classify all occupations for immigration purposes.[2]

2. Currently. Immigration, Refugees and Citizenship Canada (IRCC) and Employment and Social Development Canada (ESDC) have conflicting policies surrounding the interpretation of the Employment Requirements of the National Occupational Classification (ER-NOC). This has resulted in incongruent decisions being made on immigration applications, some of which, in my opinion, raise questions of constitutionality. IRCC refuses to answer or consider constitutional questions related to the ER-NOC. ESDC lacks a clear and comprehensive written policy to provide

1 This is Part One of a two-part article. Part Two will appear in the May 2016 edition of *ImmQuest*.

2 Citizenship and Immigration Canada. "Unit Group 3219: Other Medical Technologists and Technicians (except dental health)." Available online: http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/QuickSearch.aspx?val65=3219.

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Employment Requirements of the NOC

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guidance to officers in making Labour Market Impact Assessment (LMIA) decisions. In turn, IRCC Officers are disregarding the employer's own employment requirements (as dictated by their business needs). The result is a policy lacuna within ESDC and IRCC in which the actual needs of employers are not being met, and the varying interpretations of the ER-NOC's are resulting in refusals of LMIAs, thereby preventing immigrants from entering Canada.

3. An analysis of the existing situation with regard to the interpretations of the ER-NOC by both IRCC and ESDC follows, with practical examples to demonstrate the current state of affairs, and concluding with advice to practitioners.

IRCC's Situation

4. At the present time, officers at IRCC are making decisions on work permits based on an incorrect understanding of the role of employers (and their rights) in terms of the ER-NOC. Some visa/immigration officers refuse work permit applications by claiming that the ER-NOCs are not being met by applicants even if:

   a. Employers determine the foreign national suitable for the vacancy;[3]

   b. Employers do not require the Employment Requirements to be met (in the specific job offer); and,

   c. Employers do not require that the NOC requirements be included in approved LMIAs.

This approach can be demonstrated through an example. An application for a work permit was submitted to a visa office,[4] where an error was made by Service Canada in the choice of NOC. The Applicant had applied for a work permit as an Underground Production & Development Miner (NOC 8231). The approved LMIA indicated that only *some High School* was required. Service Canada changed the NOC code to Supervisor, Mining & Quarrying (NOC 8221). The visa officer refused the case on the basis that the new NOC 8221 required ***completion of High School***. Service Canada corrected their error on the information system being shared between the two departments. The visa office subsequently refused to review the decision (albeit being informed of an administrative error by another federal department). Respectfully, this hard-line approach is procedurally unfair. This is a good example of how visa officers are using the ER-NOC to refuse work permit applications while ignoring requirements of an approved LMIA, as well as the requirements of employers.

5. *Immigration and Refugee Protection Regulations* (IRPR) 80(3) (Federal Skilled Worker Class) stipulates the following:

> (3) For the purposes of subsection (1), a skilled worker is considered to have experience in an occupation, regardless of whether they meet the employment requirements of the occupation as set out in the occupational descriptions of the National Occupational Classification, if they performed
>
> (a) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and
>
> (b) at least a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all the essential duties.

Therefore, IRPR 80(3) does not require that Employment Requirements be met in an application for immigration in the Federal Skilled Worker Class.

6. IRPR 87.2(3) (Federal Skilled Trades Class) stipulates:

> "(3) A foreign national is a member of the federal skilled trades class if
>
> […]
>
> (c) they have met the relevant employment requirements of the skilled trade occupation specified in the application as set out in the National Occupational Classification, except for the requirement to obtain a

3 See *Portillo v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 3476, 2014 FC 866.
4 File number W300399794 refused in May 2013.

certificate of qualification issued by a competent provincial authority; and

Given that IRPR 87.2(3) specifically requires the ER-NOC be met in an application pursuant to the Federal Skills Trades Class, one can conclude these specific ER-NOC requirements are therefore not requirements that need to be met under both the Federal Skilled Worker Program and the Canadian Experience Class. There is no rhyme or reason for this difference in policy.

7. A policy inquiry was sent to IRCC and the following questions were presented, utilizing the example of a Landscaping Supervisor:

a. Scenario given to IRCC

An employer located in Alberta intends to apply for a LMIA in NOC 8255 (Landscape Supervisor) at Service Canada at the New Brunswick office. The intent is to use the LMIA for an application in the Federal Skilled Worker Class and for a Work Permit. The foreign worker will work in Alberta if the visa or work permit is issued.

NOC 8255 (Landscaping Supervisor) indicates the following under the heading Employment Requirements:

Experience as a Landscape Supervisor is required

Experience in the type of work supervised is required

If a person must be licensed to perform work such as a doctor or other regulated trade, then obviously it is a requirement of the province that must be met. In the case of the Landscape Supervisor, there are no provincial rules in any province that regulate this occupation.

In the LMIA application, the section where the required experience is indicated (questions or Block 11 on page 4 of Form EMP5593) it is not mentioned that experience in the type of work being supervised (operating a lawnmower) is required, but only experience as a landscape supervisor (supervising lawnmower operators) is required.

b. First Question to IRCC

According to IRPR 80(3), the ER-NOC does not apply once the request is made for permanent residence in the Federal Skilled Worker Class.

Therefore the request for ***permanent residence*** can be submitted without demonstrating that the ER-NOC (experience in operating a lawnmower) can be met.

When a ***work permit*** is being requested for a skilled occupation (not a trade) with the same LMIA that will be used to apply for permanent residence in the Federal Skilled Worker Class, must the foreign national be able to demonstrate that s/he meets the ER-NOC, even when it is not mentioned in the LMIA?

My understanding is that if the ER-NOC's are not applicable in the application for permanent residence (based on a positive LMIA) then the employment requirements should also not be applicable when the same LMIA is used to apply for a work permit.

c. Answer by IRCC on the First Question[5]

Yes. The work permit application assessment is always a separate assessment from the PR application assessment. Therefore, the assessment must be in accordance with R 200(1).

d. Interpretation of the First Answer

IRPR 200(1) referred to by the officer indicates the following must be established for a work permit to be issued:

- The Minister may provide instructions with respect to all conditions that apply to applications;
- The foreign national will leave at the period of their authorized stay;
- The job offer is valid;
- The employer has not been barred due to not employing the foreign national in the incorrect occupation or the incorrect wage;
- A positive LMIA has been issued;
- The foreign national is not medically inadmissible.

IRCC did not answer the question as IRPR 200(1) does not make any reference to ER-NOC. Thus, the Regulations and the answer by IRCC are silent on whether the ER-NOC must be met during a work permit application.

5 Response by IRCC provided on 24 December 2014, Reference number REP-2014-1315.

Given the above, we can try to answer the question by analyzing the actions of IRCC officers, which leads to the following observations:

- When a foreign national applies for permanent residence in the Federal Skilled Worker Class, the foreign national is not required to provide evidence that the ER-NOC can be complied with (i.e., from the landscape supervisor example above, provide evidence that he or she can operate a lawnmower).
- When the foreign national applies for a work permit based on the same LMIA that was used for the permanent residence application in the Federal Skilled Worker Class application, the ER-NOC must be met (i.e., the foreign national must provide evidence that he or she can operate a lawnmower).

e. Second Question to IRCC

In the matter of *R. v. Eastern Terminal Elevator Co.*,[6] Duff J. clarified s. 91(2) of the *Constitution Act 1867*, stating that Provinces regulate their trade and commerce. This includes the regulation of occupations. ***It is the provincial governments that have jurisdiction over occupations; the ER-NOC does not take precedence to dictate the amount or type of experience needed.*** My understanding is that, if the provincial laws do not require experience in the work being supervised (operating a lawnmower), that ***provincial*** policy would take precedence over the ER-NOC (which is a ***federal*** classification system).

According to the guidelines given to visa officers, if a visa officer is provided with evidence that the ER-NOC exceeds provincial requirements and practices for the given occupation, should officers recognize the constitutional right of the employer (in terms of the rules of a specific province) to regulate its own trades, or refuse work permits based on non-compliance of specific ER-NOC?

f. Answer by IRCC for the Second Question

We have reviewed your question, and have concluded that Policy officials at Employment and Skills Development Canada (ESDC) for the Temporary Foreign Worker Program would be better positioned to provide you with the information you are seeking. ESDC is better able to provide subject matter expertise for matters concerning the National Occupation List.

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g. Interpretation of the Second Answer

IRCC is supposed to provide guidance to officers, but could not answer this question. This is a concern, given that officers are allowed to continue refusing work permit requests despite a possible constitutional issue.

From analysis of officers' decisions, it appears that if a specific occupation is not a regulated occupation (such as a medical doctor in any province, or certain regulated trades) and the employer decides to determine the actual employment requirements that should be met, officers enforce the ER-NOC and do not appear to consult provincial statutes.

The limit of an officer's discretion to determine a foreign national's suitability for a position was questioned in *Portillo*[7]. Citing *Randhawa*,[8] *Gao*,[9] and *Chen*,[10] the Honourable Mr. Justice Russell of the Federal Court reasoned, "[T]he Officer in this case was not in a position to assess [the foreign national's] suitability and experience, or unreasonably imported suitability requirements that the employers did not consider necessary […]."[11] It was further said that, without a reason for the officer's decision to take precedence over the employer's satisfaction of the applicant's suitability, a decision to the contrary (on this issue) would be unreasonable.[12]

6 1925 CarswellNat 33; [1925] 3 D.L.R. 1 [1925] S.C.R. 434

7 *Supra*, note 3.
8 *Randhawa v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1294, 2006 CarswellNat 6368, 57 Imm. L.R. (3d) 99.
9 *Gao v. Canada (Minister of Citizenship & Immigration)*, 2000 CarswellNat 432, 184 F.T.R. 300.
10 *Chen v. Canada (Minister of Citizenship & Immigration)*, 2000 CarswellNat 825, 7 Imm. L.R. (3d) 206, 190 F.T.R. 260 — considered.
11 *Supra*, note 3, para. 56.
12 *Ibid.*

Quick Bites

Canadian Employer Compliance Regime: Ten Important Questions

Mario D. Bellissimo, C.S.

Since 2011, the Canadian Temporary Foreign Worker Program (TFWP)/International Mobility Program (IMP) has undergone a significant evolution to a program of last resort, which has been heavy on enforcement or, more specifically, Canadian employer compliance. At the Ontario Bar Association Institute on 2 February 2016, I presented a paper on *Canadian Employer Compliance Regime, Ten Important Questions!* The questions included:

1. Compliance Regime 2011-2015 – What are the Changes?
2. What are the Legal Means to Review Employer Compliance?
3. What are the Enhanced Enforcement Measures as of December 1st, 2015?
4. What Legal Authority does ESDC have to Conduct an ECR?
5. What Will Become of Ministerial Revocations, Suspensions and Refusals?
6. Why are Key Terms in the TFWP Undefined?
7. Are ESDC Officers Constrained by Policy?
8. Are Administrative Monetary Penalties Capable of Attracting Charter Scrutiny?
9. Are the Enforcement Measures Too Legally Broad?
10. Should Employers Be CoEmplncerned About Collateral Provincial Proceedings?

These are all important questions. Given the breadth of these changes, I have dedicated a new chapter in the next update of *Canadian Citizenship and Immigration Inadmissibility Law, 2nd Edition* on the Employer Compliance Regime. One example of the myriad of issues these questions raise is under s. 209.6 of the *Immigration and Refugee Protection Regulations*, where an Officer or the Minister may compel an "employer to report at any specified time and place to answer questions and provide documents that relate to compliance with those conditions." [Emphasis added]

There is nothing in the *Regulations* which speaks to the reasonability of the reporting requirement, nor are there any limits placed on the documents that are to be produced, nor the questions that may be asked—except that they are to relate to compliance with the conditions set forth in ss. 209.2 and 209.3 of the *Regulations*. The difficulty with this limitation is two-fold. First, the conditions are undefined, making it difficult to ascertain where the limits are on the examination. Second, the conditions address whether "**substantially the same but not less favourable** [...] **wages and working conditions**" are being provided, but what is meant by this requirement is not publicly available or defined in law.

This is a fascinating area of evolving law and policy and it is an almost certain that Federal and Provincial courts will be called upon to weigh in on defining the scope and legal authority of this new regime. Our firm remains heavily involved in a number of cases involving the compliance regime and each experience informs our understanding of the process because it is still so new.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

Case: *Guo v. Canada (Minister of Citizenship and Immigration)*
Deciders: George R. Locke J.
Court: Federal Court
Citation: 2015 CarswellNat 1354, 2015 CarswellNat 2137, 2015 FC 533
Judgment: 24 April 2015
Docket: IMM-1251-14

13 I cannot conclude this decision without expressing my surprise that the respondent chose to oppose the present application. The evidence is perfectly clear, in my view, that it was

unreasonable to expect the applicant to appear on the day of the original hearing. The applicant's medical letter appears to be as clear as a doctor could be at that time. To deprive a person of a potentially life-saving refugee claim by quibbling over whether prescribing a week at home constitutes providing "the date on which the claimant is expected to be able to pursue their claim" smacks of trying to save RPD resources on the backs of the very people the RPD exists to protect, diligent refugee claimants.

14 The respondent's continued insistence that the applicant did not clearly state, at his abandonment hearing, that he was ready to proceed, is even more difficult to understand. Though counsel did not press the point in oral submissions, the respondent's written argument does so, relying on the incorrect and misleading statement by the RPD that, with respect to whether the applicant was ready to proceed with his claim, he said "only he thought so, as he had not been feeling well earlier."

Case: *Basharat v. Canada (Minister of Citizenship and Immigration)*
Deciders: Alan Diner J.
Court: Federal Court
Citation: 2015 CarswellNat 1565, 2015 FC 559
Judgment: 29 April 2015
Docket: IMM-1611-14

21 Given the Member's position on the requirement that the Applicant submit a complaint to the ICCRC, she did not address the merits of whether the Applicant's former counsel had acted negligently. Consequently, and for the reasons above, I find the Member's Decision to be unreasonable, and allow the judicial review. The issue of whether the claim should be re-opened will be sent back to the RPD for redetermination by a different decision maker. There was no question for certification proposed by the parties.

Refugee Cessation/Vacation

Case: *Yuan v. Canada (Minister of Citizenship and Immigration)*
Deciders: Keith M. Boswell J.
Court: Federal Court
Citation: 2015 CarswellNat 3263, 2015 FC 923
Judgment: 28 July 2015
Docket: IMM-5365-14

15 This Court has reviewed cessation decisions on the reasonableness standard, not only with respect to the RPD's interpretation of paragraph 108(1)(a), but also its application of such paragraph to the facts (Canada (Public Safety and Emergency Preparedness) v Bashir, 2015 FC 51 at paragraphs 24-25 [Bashir]; Nsende at paragraph 9; Cadena at paragraph 12). Accordingly, the RPD's decision should not be set aside so long as "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). The Court can neither reweigh the evidence nor substitute its own view of a preferable outcome (Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339).

25 In conclusion with respect to this issue, therefore, any concerns about non-refoulement do not affect the criteria for ceasing refugee protection. Prospective risk does not prevent refugee protection from ceasing under paragraph 108(1)(a) of the Act (Balouch v Canada (Public Safety and Emergency Preparedness), 2015 FC 765 at paragraphs 19-20).

36 In these circumstances, a finding of actual re-availment cannot be justified and is unreasonable. How could the Applicant intentionally and actually re-avail himself of China's protection while actively avoiding — and fearing — the entities charged with that responsibility? How could someone who fears that the state of China will persecute him be "implicitly expressing confidence in the state of China to protect him" from its own officials and laws? The RPD's findings on these points were contradictory and, hence, unreasonable. The RPD's decision should therefore be set aside on this basis and the matter returned to the RPD for redetermination.

43 Admittedly, the RPD has previously considered the same issues and declined jurisdiction, essentially accepting the arguments made by the Respondent in this case (see: Re X, 2014 CanLII 66637 at paragraphs 19-25). It may seem excessively formalistic to insist that a litigant must first raise a constitutional issue at the RPD even when there is prior authority to suggest that jurisdiction may be declined. However, in the absence of any

decision by the RPD in this case as to such issues, they form no part of the decision under review.

Case: *Canada (Minister of Public Safety and Emergency Preparedness) v. Zaric*
Deciders: Simon Fothergill J.
Court: Federal Court
Citation: 2015 CarswellNat 2874, 2015 FC 837
Judgment: 14 July 2015
Docket: IMM-3126-14

30 While the Convention does not prescribe a particular mechanism to cancel a grant of refugee protection, the IRPA does precisely this in s 109(1). This provision states that upon application by the Minister, the Board may vacate a successful claim for refugee protection where the decision "was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter". There is nothing in the language of s 109 to suggest that an application by the Minister to vacate refugee protection cannot be made if the claimant has subsequently become a citizen of Canada.

32 It follows that the Board was wrong to conclude that its determination of the Minister's Application to Vacate would have no practical effect on the Minister's rights. While the Minister could also apply to revoke Mr. Zaric's status as a Canadian citizen without first seeking to vacate his status as a protected person under the IRPA, there may be reasons why the Minister would prefer to challenge Mr. Zaric's status as a protected person first. The Board has a specific expertise in matters of refugee determination. Its procedures, in particular its rules of evidence, are flexible. Mr. Zaric suggests that this potentially gives rise to an abuse of process, but this question is not before the Court in the present proceeding. I note that a motion respecting abuse of process was brought before the Board but was not decided, presumably because of the Board's determination that the Minister's Application to Vacate was moot.

34 Although it is not strictly necessary to do so, I also find that the Board's reliance on the decision of the Ontario Court of Appeal in *Villanueva-Vera* was misplaced. *Villanueva-Vera* was concerned only with the cessation (not cancellation) of refugee protection where a person has become a citizen and is subsequently the subject of extradition proceedings.

39 Neither *Villanueva-Vera* nor *Németh* was concerned with the technical interpretation and application of s 108(1) of the IRPA, and it was unreasonable for the Board to rely upon those decisions in support of its conclusion that an individual's refugee status under Canadian domestic law ceases automatically under s 108(1) of the IRPA upon a grant of Canadian citizenship. The application for judicial review must therefore be allowed.

Case: *Bermudez v. Canada (Minister of Citizenship and Immigration)*
Deciders: Richard G Moseley J.
Court: Federal Court
Citation: 2015 CarswellNat 1753, 2015 FC 639
Judgment: 15 May 2015
Docket: IMM-5825-14

26 It is clear that the recourses available to a protected person after a finding of cessation are extremely limited. In the circumstances, I am not prepared to find that this application is premature. I note that Justice Strickland, in Olvera Romero, chose to deal with the matter on the merits despite a prematurity argument by the respondent. I will do so as well.

38 The manual contemplates that a cessation application need not be pursued if the individual in question is a permanent resident. Even where the individual is not a permanent resident, the Officer is directed to consider factors of an H&C nature such as establishment. Evidence from the Olvera Romero case introduced in these proceedings indicates that the manual was a still valid direction and was still found on the CBSA website at the relevant time. There is no indication that these factors were taken into consideration by the Hearings Officer in making the decision to apply for cessation in the present matter. In particular, the applicant's submissions with respect to the presence of a spouse and children who benefit from status in Canada and the evidence of his settlement in Canada were highly relevant to the question of whether he had voluntarily reavailed himself of the protection of his former country under paragraph 108(1)(a).

40 In Olvera Romero, Justice Strickland certified three questions. The first two dealt with whether a CBSA officer was obliged to provide notice of the purpose of an interview and an opportunity to make submissions when a cessation application was being considered. Neither, in my view, would be dispositive of an appeal in this case. The third question, slightly modified

to limit its scope to permanent residents, is a serious question of general importance arising from the facts of this case and would be dispositive of an appeal in this matter.

> Does the CBSA hearings officer, or the hearings officer as the Minister's delegate, have the discretion to consider factors other than those set out in s. 108(1), including H&C considerations and the best interests of a child, when deciding whether to make a cessation application pursuant to s. 108(2) in respect of a permanent reside

Refugee Exclusion

Case: *Tabagua v. Canada (Minister of Citizenship and Immigration)*
Deciders: Mary J.L. Gleason J
Court: Federal Court
Citation: 2015 CarswellNat 1885, 2015 FC 709
Judgment: 04 June 2015
Docket: IMM-2549-14

21 As the RPD failed to undertake the type of analysis that the Supreme Court mandated is required in Hernandez Febles and failed to assess the seriousness of the applicant's conduct in light of the range of sentences available, the Board's decision must be set aside and the matter remitted for reconsideration as occurred in Jung. Contrary to what the respondent argues, the need for the type of analysis mandated by Hernandez Febles is not lessened by the fact that the applicant was not charged and therefore was not sentenced. If anything, these facts would tend to show that the applicant's actions fall at the less serious end of the spectrum and therefore that a sentence well below the maximum would likely have been imposed had the applicant committed the offences and been charged in Canada.

22 The foregoing points should have been considered by the Board and its failure to do so renders its decision unreasonable. As in Jung, for much the same reasons, the Board's decision in this case must be set aside.

Sentencing

Case: *R. v. Nassri*
Deciders: Robert Sharpe J.A., E.A. Cronk J.A., Grant Huscroft J.A.
Court: Ontario Court of Appeal
Citation: 2015 CarswellOnt 6562, 2015 ONCA 316
Judgment: 07 May 2015
Docket: CA C57461

19 Affidavits from an experienced immigration lawyer state that as a result of his robbery conviction it is "almost a certainty" that the appellant will be referred to an admissibility hearing, and that will lead to a non-discretionary removal order. If the sentence including pre-trial custody were less than six months, the appellant would have "a strong case" before the IAD to appeal his removal on humanitarian and compassionate grounds. The affiant deposes that under current legislation, regulation and practice, other means of avoiding deportation such as a Ministerial stay, Humanitarian and Compassionate application, judicial review, or Pre-removal Risk Assessment would be futile.

20 The Crown did not cross-examine the immigration counsel lead any evidence or make any argument to contradict her opinion. The only response offered by the Crown is a motion to admit the affidavit of a Justice Liaison Officer with the Canada Border Services Agency, stating that the appellant's "pre-removal risk assessment has not been completed as he is not yet removal ready", and that the appellant has been allowed to "file submissions as to why he should not be reported and referred to [an] admissibility hearing."

21 In my view, the Crown's proposed fresh evidence merely explains the stage the immigration proceedings have reached and does nothing to cast doubt on the evidence that, given the "virtually certain" removal order, the appellant's "only viable option" to avoid deportation to Syria is an IAD appeal, which will not be available if his sentence is not reduced to less than six months.

30 The appellant is a relatively youthful first offender and the Crown concedes that the principle articulated in R. v. Priest (1996), 30 O.R. (3d) 538 (Ont. C.A.), at pp. 543 -44, applies, namely that the primary objectives in sentencing a youthful first offender are specific deterrence and rehabilitation. The trial judge found that specific deterrence was not necessary. In any event, the interest of specific deterrence has been fully met. The appellant has served his sentence and experienced a significant period of incarceration. The trial judge was clearly focused on crafting a sentence that would promote rehabilitation. And, as the trial judge noted, by the date of sentencing, the appellant was

well along that path. She found that his prospects for rehabilitation were strong.

Case: *R. v. Ren*
Deciders: MacDonnell J.
Court: Ontario Superior Court of Justice
Citation: 2015 CarswellOnt 7830, 2015 ONSC 3397
Judgment: 28 May 2015
Docket: None given

37 This is a close case. Given the importance of public confidence in the integrity of Canada's immigration processes, the paramount objectives of sentencing must be denunciation and deterrence. For the reasons I have stated, a sentence of imprisonment of two years less one day is required to achieve those goals. I am concerned that ordering the sentence to be served in the community could dilute its denunciatory and deterrent impact. After anxious consideration, however, I am satisfied that with the imposition of punitive conditions Ms Ren's liberty can be restricted in a fashion that will make it clear both to her and to the community that she is truly serving a significant sentence of imprisonment. Accordingly, I will order that her term of imprisonment be served in accordance with the terms of a conditional sentence order.

38 I will hear from counsel in relation to the specific terms of the order, but, to be clear, I am of the view that for a substantial portion of her sentence, Ms Ren should be under complete house arrest, with only those exceptions that are necessary to ensure her health and that of her parents and to enable the supervisor to administer the order. Apart from that, she should be subject to the same kind of restrictions on her liberty that she would be if serving the sentence in a custodial facility.

Case: *R. v. Alli*
Deciders: Rick Leroy J.
Court: Ontario Superior Court of Justice
Citation: 2015 CarswellOnt 9446, 2015 ONSC 3961
Judgment: 22 June 2015
Docket: CR-13-119

28 The offender in Esmail was involved in a large sophisticated and ongoing scheme and the motivation was financial gain. The offender was involved in planning arrangements to smuggle the aliens for dispersal to Texas. He was more than a courier. He did not have a prior criminal record. Esmail was sentenced to six months real jail. Judge Andre rejected the merit of a conditional sentence, having regard to the planning involved and concern for general deterrence. Mr. Esmail's co-accused received six month conditional sentences. Each provided an individual for transportation, not for financial gain. Neither were involved in any actual transportation of persons across the border and both gave inculpatory statements.

29 In Wasiluk the offender's role was limited to transporting immigrants across the river by boat. He was not involved in planning and administration and Judge Andre levied a conditional sentence.

30 In R. v. Hallal, [2006] O.J. No. 2026 (Ont. C.J.) the offender failed to establish an evidentiary basis for conditional sentence. The Court did not know if he held employment, he had not volunteered anywhere, he had not up-graded and was mired in hopeless debt without any plan for recovery. Mr. Hallal neglected to advance any indicators of pro-social lifestyle the Court could work with in fashioning a worthy conditional sentence. Accordingly the Court could not craft a sentence consistent with the fundamental purpose and principals of sentencing set out in s. 718–718.2 of the Criminal Code

31 The Supreme Court of Canada in Proulx emphasized that a conditional sentence does not denude the principals of denunciation and deterrence.

32 Although to me it is a close call, this is a case for conditional sentence. Mr. Alli was not involved in planning. The piece with his brother is double-edged. Action speaks loudly. Yavar trusted Nizar implicitly. That trust was brokered over a lifetime of good deeds and support and that as much as anything says that this is a man who accepts responsibility for his actions, recognizes the harm to his Canadian community and is committed to reparation. Nizar broke that trust and has to live with it.

33 The evidence is that these men have family and community support and are valiant breadwinners. The Crown submission to the point that Mr. Alli opted for the easy money is valid; however, such is often the case. The financial advantage to Mr. Alli in these ventures was small relative to the risk and bespoke desperation.

34 Mr. Alli spent seven days in prison and has been subject to interim release terms for three years without offending. This

criminal conviction and my disposition will result in another three years of direct institutional intrusion and a lifetime of indirect intrusion in his life. Any rational person faced with assessing the cost and benefit of such activity should be deterred.

35 Anyone who reads these reasons should get the point that this Court strongly denounces human smuggling, takes it very seriously and imposes meaningful consequences in the measure of proportionality crafted by Mr. Justice LeBel.

36 Accordingly, the sentence is fifteen months imprisonment to be served conditionally in the community, subject to mandatory terms. The first ten months include full house arrest, save for demands of employment, medical treatment and three hours weekly for household necessaries, all to be approved by his supervisor in writing beforehand. For the remaining five months, there will be a curfew hours to be settled — Door knock throughout.

37 That is to be followed by probation for two years, to include statutory terms, report as directed subject to supervision, attend and participate in assessment, rehabilitation and counselling as recommended by the probation officer. If there are money management programs available, that may be of assistance in developing healthy strategies. He shall execute releases as required. Mr. Alli is ordered to perform 100 hours of community service as part of the probationary rehabilitation process.

PRRA (Pre-Removal Risk Assessment)

Case: *Marshall v. Canada (Minister of Citizenship and Immigration)*
Deciders: Sean Harrington J.
Court: Federal Court
Citation: 2015 CarswellNat 2685, 2015 FC 856
Judgment: 13 July 2015
Docket: IMM-7266-14

1 Mr. Marshall's claim for refugee status in Canada was not successful. Since then, he has had five, yes five, pre-removal risk assessments. Five times it was decided that he would not be at serious risk if returned to Trinidad and Tobago. Five times he obtained leave to have those decisions judicially reviewed. The first four times this Court granted his applications and sent the matter back for redetermination. This is the decision on the fifth judicial review. For the fifth time, the decision of a senior immigration officer is set aside and the matter referred back for redetermination by another officer.

18 Full disclosure is also to be given of the correspondence between the High Commission of Canada and the authorities in Trinidad and Tobago so that Mr. Marshall, as required by natural justice, will have an opportunity to respond thereto. An assessment of his risk will only be determined following an oral interview.

Case: *Kawa v. Canada (Minister of Citizenship and Immigration)*
Deciders: Roger T. Hughes J.
Court: Federal Court
Citation: 2015 CarswellNat 2020, 2015 FC 737
Judgment: 11 June 2015
Docket: IMM-7914-14

6 In fact, that is not quite what the Officer found. As set out in the last passage quoted above, the Officer found that "the applicant has not established through sufficient evidence that it would be unrealistic or an unattainable option for him to return to Kabul".

7 Section 97 of the Immigration and Refugee Protection Act, SC 2001, c.27 (IRPA) speaks to a person who would be subjected personally to a danger or risk to life or cruel treatment. The Officer has set the bar too high in saying that sufficient evidence must be given to persuade him or her that safety would be unrealistic or unattainable.

8 Afghanistan is a country that Canada has designated as one wherein removals are temporarily suspended. Brief mention of this was made in the decision at issue in the first passage previously quoted. It is recognized that subsection 230(3) of the Regulations under IRPA stipulates that a stay of removal order does not apply to, among other things, persons who are inadmissible on grounds of serious criminality under paragraph 36(1)(a) of IRPA. The Applicant is such a person. However, it would be unreasonable for the Officer not to inquire as to the nature of the offence committed. A person who altered a date on a prescription in order to obtain painkillers when their supply has run out is quite different from a murderer or terrorist. Similarly, the fact that a country is on a do not remove list is not to be ignored; it is to be taken into account as one of the factors under consideration. In other words, if a country is dangerous where many are killed or subjected to cruelty, a place within that country is

not "safe" simply because fewer people are shot or subjected to cruelty within some area there.

Case: *Thiruchelvam v. Canada (Minister of Citizenship and Immigration)*
Deciders: Henry S. Brown J.
Court: Federal Court
Citation: 2015 CarswellNat 1407, 2015 FC 585
Judgment: 05 May 2015
Docket: IMM-2864-14

34 Given my finding on the issue of procedural fairness, I am not required to comment on the issue of whether the Ministerial Delegate erred in her assessment of the evidence. However, I do wish to note that various decision makers have dealt with the Applicant's membership in TELO with dramatically different results. The Applicant's membership in TELO led the RPD to exclude him from refugee protection in 2006 when it held TELO was a "terrorist organization". In 2014 however, the Ministerial Delegate found that the Applicant was not at risk if he returned to Sri Lanka because TELO is apparently today considered a "non-state pro-government paramilitary group". On that basis the Minister's Delegate rejected his request to remain in Canada. I also note that the original exclusion finding by the RPD is problematic given the Supreme Court of Canada's recent decision in *Ezokola c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2013 SCC 40 (S.C.C.).

35 In my view the issue of the Applicant's membership with TELO and the consequences of such membership on risk should be clearly analyzed and thoroughly assessed upon the re-determination ordered in this case.

Case: *Vargas Hernandez v. Canada (Minister of Citizenship and Immigration)*
Deciders: James Russell J.
Court: Federal Court
Citation: 2015 CarswellNat 2670, 2015 FC 578
Judgment: 04 May 2015
Docket: IMM-6662-13

32 I agree with the Applicant that the Officer's handling of the new evidence from the Applicant's mother, his youth pastors and his aunt is fraught with reviewable error. This evidence is given "little weight" (which appears to mean no weight at all when read in context) because it "comes from sources close to the applicant." The jurisprudence of this Court is that evidence cannot be rejected on this basis alone. See Mata Diaz, above, at para 37; Dhillon, above, at para 11. Obviously in this case, if the Maras wanted to make threatening phone calls they would not phone strangers. Threats are made to and through family members. To reject or significantly discount evidence on this basis alone would deprive applicants of their principal source of evidence and, logically, it would mean that applicants would be disbelieved when they give evidence themselves.

44 As regards the general documentation referred to by the Officer, I agree with the Applicant that, generally speaking, it is more about "efforts" than an examination of the "operational adequacy" of those efforts when it comes to the kind of threats made against the Applicant and his family and the stated risks of targeting that he says he faces if returned to El Salvador. This is not reasonable.

45 In conclusion, the Officer unreasonably discounted evidence that, if accepted, could have established the targeting that the Applicant says he faces and that removes him from the generalized risk category. The Officer's state protection analysis is also unreasonable.

46 When this matter goes back for reconsideration, the following should be borne in mind:

a) There are no credibility issues;

b) The Applicant's father has been murdered and his mother and brother have had to flee El Salvador;

c) The Applicant has been targeted by the Maras who are actively seeking him;

d) The Court has produced extensive recent case law on s 97 and the issue of generalized risk and personal targeting. This jurisprudence should be followed; and,

e) While state protection need not be perfect, its operational adequacy must be assessed.

Temporary Resident Permit

Case: *Ramnanan v. Canada (Minister of Citizenship and Immigration)*
Deciders: Peter Annis J.
Court: Federal Court
Citation: 2015 CarswellNat 1491, 2015 FC 632

Judgment: 14 May 2015
Docket: IMM-283-14

29 These comments aside, the Court's principal concern in this case relates to the Officer's failure to comment on the issues raised by the CAS letter signed by the Family Service Worker Ms. Andrea Torchia and her supervisor, Ms. Christine Reposo. That letter stressed the importance of the applicant's role in Naresh Jr.'s progress to overcome his psychological challenges, concluding that he will "most likely require ongoing supports from community services and his father, Mr. Ramnanan, throughout his teenage years and into adulthood." CAS employees are specialists in identifying children at risk and assisting them through various programs and by facilitating recourse to relevant experts. Their opinions, in the form of assessments and recommendations for interventions, are tested on a daily basis in the courts.

30 The Officer is presumed to have considered all the evidence before him and this presumption will only be rebutted where the evidence not discussed has high probative value and relates to a core issue of the claim (*Florea v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 598 (Fed. C.A.), *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 F.T.R. 35 (Fed. T.D.) at paras 16-17, (1998), 83 A.C.W.S. (3d) 264 (Fed. T.D.)).

31 Nevertheless, given the expertise of CAS employees in identifying and addressing children's needs and the independent nature of this evidence, its opinion on the best interests of a child has a presumptively high probative value. Therefore, I find that it was not reasonable for the Officer to fail to discuss this evidence, particularly the role of the applicant in the child's improving situation.

Detention Review

Case: *Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*
Deciders: Jocelyne Gagné J.
Court: Federal Court
Citation: 2015 CarswellNat 1943, 2015 FC 720
Judgment: 08 June 2015
Docket: IMM-1655-15

49 If the nature of a flight risk varies with the facts and circumstances of a case, it logically includes the type of proceeding the applicant is required to appear at. The ongoing RPD hearings were an important feature of the circumstances of the applicants in detention, including their detention history. The Member acknowledged it. It was open to her to conclude that the proceeding in this case had little weight in view of other facts and circumstances particular to the applicants in their risk assessment (e.g. their lack of respect for the law), but she was required to at least consider it in the analysis. I find that her failure to consider the RPD proceeding, jointly in assessing flight risk and in assessing alternatives to detention which can attenuate that risk, in any part of her statutory analysis whatsoever, fatal.

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