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"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]

Service Canada's Situation

8. When an employer submits a request for a Labour Market Impact Assessment (LMIA), an Officer of Service Canada has a statutory obligation to assess seven factors, as identified in the *Immigration and Refugee Protection Regulations* ("IRPR") 203(3). One of these seven requirements is "whether the employer will hire or train Canadian citizens or permanent residents, or has made, or has agreed to make, reasonable efforts to do so". In terms of the advertising rules (that employers must comply with to demonstrate their "reasonable efforts" to attempt to find a Canadian), employers must list the educational requirements, knowledge requirements, and experience requirements of the job vacancy. However, if an employer lists experience requirements, knowledge requirements, or education/training requirements that exceed the ER-NOC, based on our experience, Service Canada would make a negative LMIA decision (i.e., a refusal) for advertising "excessive" requirements for the position. These refusals are *inter alia* the result of a lack of guidance and clear, well-written LMIA rules regarding the role of the ER-NOC. This specific issue is not addressed in Service Canada's existing Temporary Foreign Worker Manual (which is only accessible with an

1 This is Part Two of a two-part article. Part one appeared in the April 2016 edition of *ImmQuest*.

Full Story on page 2

INSIDE

Focus—Challenges in Assessment of LMIAs

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Employment Requirements of the NOC

continued from page 2

Access to Information Request). In these LMIA refusal letters, an explanation of what is meant by "excessive" is not provided. In requiring employers to strictly comply with the ER-NOC when hiring foreign workers, Service Canada in effect pushes employers to not abide by provincial legislation.

9. IRPR 200(5)(d) indicates that the following must be assessed in considering the genuineness of a job offer :

> (d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

Employers must comply with all statutes regulating employment. If an employer is forced to follow the ER-NOC which implies a contravention of a provincial statute regulating employment, it will result in non-compliance by the employer. This means that if an employer employs a foreign worker and contravenes any relevant legislation regulating trades, it could result in the revocation or suspension of LMIAs. As a result, many officers of Service Canada demand advertising requirements that effectively force the employer to contravene provincial laws and federal immigration regulations.

10. This can best be demonstrated by the following practical applications:

a. Electricians, Welders and Auto Service Technicians are compulsory regulated trades in Alberta (AB).[2] Foreign workers and Canadians that work in these trades must have their experience assessed by Alberta Apprenticeship and Industry Training and be found eligible to challenge the examination within 12 months after starting employment in Alberta. Failure to follow these laws will result in the contravention of IRPR 200(5)(d), with serious consequences for the employer.

b. Employers in Alberta may follow three different sets of rules in terms of ER-NOC:

- Provincial Statutes (see below): In the case of compulsory regulated trades such as electricians, service auto technicians, and welders.
- Collective Bargaining Agreements (CBAs): Certain CBAs require that only Red Seal trades be allowed on the jobs site or that they must pass the exam within a certain number of weeks (even though it is not required by provincial law). This implies that an applicant must have the minimum hours needed and then take the examination with the deadline given by the Alberta Government.
- Company Policy: Applicants may be required to have or be eligible to obtain the Red Seal Endorsement (or Provincial Certificate of Qualification).

Even though employers must comply with two of the three situations mentioned above (Provincial statutes and CBA), some Service Canada officers demand that employment requirements listed in advertisements only be taken from the ER-NOC. The challenge is employers may provincially have to meet more stringent employment requirements, such as collective bargaining agreements and provincial regulations, which exceed the ER-NOC. If these requirements are advertised, in practice, they may be deemed excessive by Service Canada officers, resulting in LMIA refusals.

The thorny issue is company policies wherein employers may choose their own ER-NOC in cases where they are not required to follow provincial statutes or CBAs.

c. The disconnect, between the actions of Service Canada officers (when employers advertise experience requirements in excess of the ER-NOC) and the requirements of provincial laws, can best be demonstrated with two practical examples from AB.

2 Alberta Advanced Education| Apprenticeship and Industry Training. "Tradesecrets–What's a Trade?" Available online: http://tradesecrets.alberta.ca/trades-occupations/what%E2%80%99s-a-designated-trade/.

d. The ER-NOC for a Heavy-duty Equipment Mechanic (NOC 7312)[3] are as follows:

Completion of a three- to five-year apprenticeship program

or

A combination of over four years of work experience in the trade and some high school, college or industry courses in heavy equipment repair is usually required to be eligible for trade certification.

In contrast, s. 5(1) of *Alberta Apprenticeship and Industry Training Act* (AIT) (Certification and Certificate Recognition Order 2/2009)[4] indicates the following:

Requirements to be certified

5(1) A person may be granted a trade certificate in a designated trade if,

(a) that person has

(i) worked in that trade for 1.5 times the total amount of time prescribed by the applicable trade regulation to complete the term of apprenticeship

(ii) completed 1.5 times the total number of hours of on the job training prescribed by the applicable trade regulation to complete the term of apprenticeship

Section 8 of the Alberta Heavy Duty Equipment Regulation (Regulation 282/2000)[5] requires a heavy duty technician apprentice to complete an apprenticeship in AB of 6000 hours over 4 years.

Section 5(1) of the AIT (Order 2/2009) requires that these hours and years mentioned in the Alberta Heavy Duty Equipment Regulation be multiplied by 1.5, or 150%, resulting in 9000 hours and 6 years.

Therefore, if a Service Canada officer takes a strict reading of the ER-NOC for this occupation, an employer may only request three to five years of apprenticeship experience for a heavy duty mechanic in AB; this requirement by the officer is *ultra vires* the provincial legislation.

According to the Canadian Constitution, Alberta statutes in the regulation of occupations should take precedence over the NOC.

e. Similar is the example of a millwright (NOC 7311).[6] The ER-NOC of NOC 7311 are as follows:

Completion of a three- to four-year apprenticeship program

or

A combination of over five years of work experience in the trade and some high school, college or industry courses in industrial machinery repair or millwrighting is usually required to be eligible for trade certification.

However, as previously stated, s-s. 5(1) of the AIT (Order 2/2009) indicates the following:

Requirements to be certified

5(1) A person may be granted a trade certificate in a designated trade if,

(a) that person has

(i) worked in that trade for 1.5 times the total amount of time prescribed by the applicable trade regulation to complete the term of apprenticeship

(ii) completed 1.5 times the total number of hours of on the job training prescribed by the applicable trade regulation to complete the term of apprenticeship.

In order for a foreign trained millwright to be eligible to obtain the provincial Qualification Certificate, the foreign

3 Government of Canada, Employment and Social Development Canada. National Occupational Classification Nation, "Unit Group 7312: Heavy-duty equipment mechanics." Available online: http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/ProfileQuickSearch.aspx?val=7&val1=7312&val65=*.

4 Alberta Apprenticeship and Industry Training. "Apprenticeship and Industry Act, Certification and Certificate Recognition Order." Available online: http://tradesecrets.alberta.ca/SOURCES/PDFS/legislation/appr_cert_recog_order.pdf.

5 Province of Alberta, Apprenticeship and Industry Training Act. "Heavy Equipment Technician Trade Regulation." Available online: http://www.qp.alberta.ca/documents/Regs/2000_282.pdf.

6 Government of Canada, Employment and Social Development Canada. National Occupational Classification Nation, "Unit Group 7311: Construction millwrights and industrial mechanics." Available online: http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/ProfileQuickSearch.aspx?val=7&val1=7311&val65=*.

national must have 6 years or 72 months of working experience (as supported by s. 5(1) of the AIT).[7]

For individuals in Canada, s. 4 of the Alberta Millwright Trade Regulation[8] requires an apprentice to complete a 4-year apprenticeship as a millwright with each year consisting of 1560 hours, resulting in a total of 6240 hours. This number (6240 hours), multiplied by 150% equals 9360 hours of work experience for uncertified applicants within or outside Canada.

In these two examples, provincial legislative requirements exceed the requirements of the NOC.

f. Interestingly, Service Canada officers seem to accept the requirement of CBAs in LMIA requests. For example, in British Columbia (BC), all trades certifications are voluntary. Therefore, if an employer demands a Red Seal in a LMIA application some officers would refuse the LMIA, as Red Seals are not compulsory in the ER-NOC and BC law also does not require Red Seals for journeymen. Such an employment requirement is deemed to be excessive in some cases. However, if a Red Seal is required in the terms of a CBA, officers tend to shy away from refusals based on "excessive employment requirements", respecting the CBA requirements.

   This is problematic because some employers require a Red Seal in such an environment (in BC where no trade is compulsory or in a province where a specific trade is not compulsory) due to company policy, or an employer's need for an employee to demonstrate competence. In these cases, some Service Canada Officers easily refuse applications, claiming that the employment requirements exceed the ER-NOC.

   Therefore, when the Employment Requirements, in advertisements for the purpose of a LMIA application, exceed the ER-NOC, based on a collective bargaining agreement with a union, the situation is acceptable to Service Canada. However, when the Employment Requirements of a LMIA application exceed the ER-NOC based on a company policy, employers face a LMIA refusal because the Employment Requirements in the advertisements are excessive. There is no logic in allowing Employment Requirements to be ignored in cases involving company policy but not in cases involving a collective bargaining agreement with a union.

g. Certain other requirements exist where the provincially required wage exceeds the median wage (according to the definition of median wage by Service Canada, which is to follow the wage on www.jobbank.gc.ca). It is possible that a minimum provincial wage for a specific NOC code (in skill level B) is higher than the median wage provided on www.jobbank.gc.ca. For example, according to www.jobbank.gc.ca, the median wage for an electrician for the northern part of Manitoba is CAD $25.64. However, Manitoba's *The Construction Industry Wages Act* and *The Employment Standards Code* require that a construction electrician be paid CAD $33.90 after 1 January 2013. This is just one example of the unique circumstances that require an employer to pay more than the median wage. In this case, provincial law trumps federal rules. Service Canada seems to have a double standard in applying the law when decisions are made:

   - When the Employment Requirements of the employer as mentioned in advertisements exceed the ER-NOC based on a company policy (a provincial legislative requirement or other employment instrument) a refusal may be issued.
   - When the actual wage, as required by provincial statutes, in an advertisement exceeds the prevailing wage (as mentioned on www.jobbank.gc.ca), then an employer would not face a refusal.

Therefore, sometimes the validity and the authority of provincial statutes is not recognized and in other cases it is recognized by Service Canada. This is the result of a policy lacuna and lack of direction given to officers.

7 See Alberta Government Apprenticeship and Industry Training, Qualification Certificate – Work Experience Application Guide, "Work Experience Requirements – Hours and Months." Available online: http://tradesecrets.alberta.ca/experiencedworkers/qualification-certificate/.

8 Province of Alberta, Apprenticeship and Industry Training Act. "Millwright Trade Regulation". Available online: http://www.qp.alberta.ca/documents/Regs/2000_290.pdf.

h. In the case of bookkeepers (NOC 1311),[9] the ER-NOC does not indicate any work experience and only requires a College Diploma. If an employer requires a degree and 5 years of experience, Service Canada could refuse the LMIA; the claim being that such requirements are excessive (compared with the NOC). Once again, employers should have the right to set their own employment requirements.

The ER-NOC of NOC 1311 indicates the following:

> Completion of secondary school is required.
>
> Completion of a college program in accounting, bookkeeping or a related field
>
> or
>
> Completion of two years (first level) of a recognized professional accounting program (e.g., Chartered Accounting, Certified General Accounting)
>
> or
>
> Courses in accounting or bookkeeping combined with several years of experience as a financial or accounting clerk are required.

In contrast, the Alberta government's website ALIS[10] indicates the following:

> Personal Characteristics
>
> Accounting technicians must be able to:
>
> - communicate effectively in person and on paper
> - work with numbers quickly and accurately
> - concentrate for extended periods of time and pay close attention to detail but also switch back and forth between tasks
> - follow verbal and written instructions
> - analyze and proofread data
> - keep employer information confidential
> - work independently on routine tasks.
> - they should enjoy having clear rules and organized methods for their work, balancing financial records and business transactions, and operating computerized systems and office equipment.
>
> Educational Requirements
>
> Accounting technicians need an understanding of business documents such as receipts, till tapes, purchase orders, credit slips, sales slips, banking statements, financial statements and invoices.
>
> Educational requirements for accounting and bookkeeping positions vary greatly from one employer to another depending on the scope and responsibility of the position.
>
> Most companies use electronic bookkeeping operations and require their employees to have related training or experience.
>
> Up to two years of on-the-job training or a related post-secondary certificate or diploma may be required.
>
> Employers may prefer to hire job candidates who are working toward a professional accounting designation (see the Accountant occupational profile).
>
> Most employers prefer to hire job candidates who have taken related courses and programs from colleges, technical institutes or private vocational schools.

It is interesting to note that the requirements in Alberta for accountants include the following and therefore are different from the federal NOC system:

- Personal characteristics are mentioned in the Alberta requirements.
- Employment requirements might vary greatly between different employers.
- There is no legislation in Alberta that prevents an employer from requiring an accounting degree instead of a college diploma.

9 Government of Canada, Employment and Social Development Canada. National Occupational Classification Nation, "Unit Group 1311: Accounting technicians and bookkeepers." Available online: http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/ProfileQuickSearch.aspx?val=0&val1=1311&val65=*.

10 Alberta Government Alberta Learning Information Service. ALIS OCCinfo: Occupations and Educational Programs, "Occupational Profile -Accounting Technician." Available online: http://occinfo.alis.alberta.ca/occinfopreview/info/browse-occupations/occupation-profile.html?id=71003141.

i. The Temporary Foreign Worker Program Manual (Version 2011-04-14) stipulates:

> Section 3.2.6.5.1 – Determination of Occupation
>
> In assessing the job requirements, TFWP Officers must contact employers to understand their needs. In addition to assisting in identifying the appropriate NOC code, this information will serve CIC in assessing the foreign national's ability to perform the job. The employer has a right to provide services that respond to the expectations of his/her target clientele.
>
> For example:
>
> Although the NOC description may cite a Bachelor's degree as the usual requirement for a management position, the duties of a particular organization may require someone with a doctorate in a scientific discipline in order to effectively deal with matters of scientific policy.

This manual is meant to provide some guidance on the issue of ER-NOC; it however, fails to provide clear rules on this issue as this is the only sentence regarding the interpretation of the ER-NOC. The manual of Service Canada is not available to Service Canada officers and it is difficult to find information in the manual. It is also not available to the public unless an Access to Information and Privacy request is submitted. Moreover, the public is not informed if updates are made. During 2015, ESDC awarded CAD $80,000 to a private contractor for "re-writing and reformatting" the existing manual. This new manual was never released to the public. The new manual seems to suffer from the same problems as the older version: there are no numbered pages, no index, important policy issues not addressed, etc.

The Canadian Chamber of Independent Business (CCIB) wrote the following in its publication, *Immigration for a Competitive Canada: Why Highly Skilled International Talent is at Risk*:

> The government should develop a fully transparent set of guidelines and criteria regarding the LMIA and the TFWP so that everyone is following the same playbook.[11]

The CCIB has now joined the chorus of employers and representatives requesting that the LMIA rules be made public. The chaos surrounding ER-NOC is just a symptom of much larger issues: lack of clarity, secrecy, hidden rules, refusal to answer policy questions, procedural unfairness, and lack of political oversight around rules that give some Service Canada officers the ability to refuse LMIAs based on their own ad hoc rules.

j. In the "HD Mining" case, section 124, the following is mentioned:

> Moreover, this is consistent with his evidence on cross-examination where he states that the NOC requirements are used by program officers as a guide and they do not require that an applicant provides a mirror image of the NOC classification: See Cross-examination of Officer MacLean, March 25, 2013, pages 26-27.[12]

The Officer that was cross-examined, Officer Maclean, therefore, indicated that the ER-NOC does not have to be followed dogmatically. Due to the lack of clear rules and the fact that officers do not have the Service Canada manual, many officers follow the NOC strictly and refuse LMIAs if the ER-NOC is exceeded.

Conclusion

11. In certain regulated occupations, for example medical doctors, officers at IRCC follow ER-NOC as indicated in provincial statutes that regulate these occupations.

12. However, in situations where the occupations are not regulated or governed by a CBA, certain officers demand the ER-NOC be followed strictly. In these cases, the Federal Government (ESDC and IRCC) seemingly ignores the requirements, as mentioned in LMIAs, and also ignores the rights of employers to determine their own specific employment requirements for their vacancies (based on their business needs and company policy).

11 "Immigration for a Competitive Canada: Why Highly Skilled International Talent is at Risk," p. 18. Report published by The Canadian Chamber of Commerce, dated January 2016.
12 *CSWU, Local 1611 v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 512, 2013 CarswellNat 1482 (CanLII, Date: 2013-05-21, Docket: IMM-11316-12).

13. To complicate matters further, ER-NOC is not a legal requirement in either the Federal Skilled Worker Class or the Canadian Experience Class, and must only be followed in the Federal Skills Trades Class. This may result in possible unconstitutional decisions being made by officers.

14. The lack of coordination between ESDC and IRCC on the issue of employment requirements is best described in the following situation in the Federal Skilled Worker Class:

    a. ***ESDC*** typically requires the ER-NOC be followed in LMIA applications for occupations in the Federal Skilled Worker Class.

    b. ***IRCC*** generally require the foreign national demonstrate that the ER-NOC is complied with at the time of a request for a *work permit.* This is not a requirement written in the Regulations or internal rules, but is, from our experience, a requirement that is enforced by certain IRCC officers in decisions made on work permit requests. Again, these decisions could be unconstitutional depending on the specific NOC.

    c. However, when an application for *permanent residence* is submitted in the Federal Skilled Worker Class, ***IRCC*** does not require the ER-NOC to be met.

Due to the lack of coordination between federal departments, foreign nationals are expected to act like chameleons and change their colour depending on where they are in the immigration process.

15. Certain officers of Service Canada have little regard for provincial statutes and effectively may require employers to contravene provincial statutes when employers advertise to find Canadians. At the same time, the rights of employers to determine their own employment requirements for their own vacancies are being infringed by many Service Canada officers when making LMIA decisions.

Advice to Practitioners

16. In the case of submissions to ESDC/Service Canada and IRCC, detailed research should be provided regarding provincial statutes that regulate a specific NOC, as well as the relevant constitutional principles.

17. Counsel should also include references to provincial job descriptions where it has relevance and where it varies from ER-NOC in the federal system. In these types of cases, motivations regarding the relevance of provincial job descriptions should be provided to decision makers.

18. Immigration practitioners should lobby for policy improvements on the issues outlined above. Specifically, it should be requested that:

    a. Chapter FW1 of the Immigration Manual should again be published after it was abolished by CIC. For many years, CIC set clear rules that contributed to transparency and predictability in immigration decisions. If Chapter FW1 is re-instated, it would be a suitable resource for providing guidance to officers on issues related to the ER-NOC.

    b. Visa officers of IRCC should be trained in the importance of the requirements of employers. IRPR 87(3) does not have to be revised, but officers should understand that employers have the right to determine their own employment requirements.

    c. Officers, team leaders, and managers at Service Canada should be reminded of the importance of provincial statutes and the right of employers to determine the actual employment requirements in cases where occupations are not regulated by provincial statutes or where CBAs are silent on employment requirements.

    d. ESDC should write a detailed manual with separate chapters similar to the Immigration Manual of IRCC. This Manual should be published on the internet and new updates should clearly be indicated.

19. Counsel should consider litigation to establish case law regarding the role of ER-NOC in the area of LMIA decisions by Service Canada and visa decisions by officers.

Quick Bites

Challenging Refused/ Negative Labour Market Impact Assessments at Federal Court

Mario D. Bellissimo, C.S.

As reported in various media, The Honourable MaryAnn Mihychuk, Minister of Employment, Workforce Development and Labour, has announced that the government is seeking to review recent reforms to the temporary foreign worker (TFW) program. The Minister of Employment, Workforce Development and Labour will ask a parliamentary committee for proposals to fix the TFW program. There is merit to flexibility in any program to allow for unexpected and unintended consequences and to, in particular, remain nimble with respect to the ever-changing needs of Canada's labour market. Therefore, the reliance on policy as opposed to law in administering a large portion of the TFW program supports that flexibility. But the difficulty remains in officers' elevation of policy to law in refusing Labour Market Impact Assessment (LMIA) applications in our experience. Some examples of the legal issues raised in recent LMIA/work permit cases on behalf of our clients include:

- The assessment of the genuineness of the job offer is enumerated pursuant to s-s. 200(5) of the *Immigration and Refugee Protection Regulations*. The Officer exceeded his or her jurisdiction, refusing the Applicant's LMIA application for reasons which do not exist in law. There is no legislative requirement that a company be in operation for one year, nor that the company be able to support the worker for an indeterminate period. The Applicant further respectfully submits that no company is able to indeterminately sustain an individual's salary as such a benchmark is undefined and results in a floating target.
- The LMIA was refused for insufficient recruitment. Employment and Social Development Canada (ESDC) has previously approved approximately 100 workers for this employer over the past ten years. Without any change to the law or a material difference in the recruitment efforts, these two new LMIA applications were refused based upon policy guidelines on ESDC's website. The Officer's adherence to the advertising guidelines, absent an individualized assessment, is incorrect in law and demonstrates a fettering of the Officer's discretion by policy directives.
- The LMIA was refused as the Officer determined that the company has "**not demonstrated sufficient efforts to hire Canadians in the occupation**". The Officer's only stated rationale for refusal was that the prevailing wage was unreasonable for the position, given the experience required and the location of the job. The Officer based his rationale on an improper inference (wage too low for experience and location), without any evidentiary basis, while ignoring the Applicant's evidence. Finally, the Officer erred in law by believing that he was *functus* and unable to consider the Applicant's request for reconsideration.
- The Officer refused to amend the trade for which the LMIA was granted. The request for an LMIA was to enable the Applicants to hire a Fitter-Fabricator on a Canadian work permit; the LMIA was issued for an ironworker. It is the Applicants' submission that by bypassing the role of authorized third-party representative that the Officer has erred.

Often officers' decisions demonstrate an understanding that departmental policy is binding and sufficient grounds for refusal. It is, in the end, an individualized assessment and this requires discretion, rather than strict compliance with policy. Respondents' policy statements on recruitment, for example, are often expressed in mandatory language. Until a proper balance is struck, it is an almost certain that the Federal Court will be called upon to weigh in on defining the scope and legal authority of this new work permit regime.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, LL.B., C.S.

PRRA (Pre-Removal Risk Assessment)

Case: *Atawnah v. Canada (Minister of Public Safety and Emergency Preparedness)*
Deciders: Anne L. Mactavish J
Court: Federal Court
Citation: 2015 CarswellNat 2412, 2015 FC 774
Judgment: 22 June 2015
Docket: IMM-343-14

85 However, individuals whose allegations of risk have never been assessed (such as the applicants in the case before me) will face a lesser burden in demonstrating that their evidence constitutes new evidence of risk. In the absence of a prior risk assessment, almost any evidence of risk adduced by such an applicant could be considered to be "new". Whether it is "sufficient" is a matter for determination by the enforcement officer.

86 An enforcement officer's assessment of a request to defer is also not the only avenue open to individuals in the position of the applicants. Regard must also be had to the oversight provided by this Court through the stay process. As Justice Annis observed in Peter, above, "[t]he oversight function of the Federal Court provides a heightened degree of reliability to the decisions of the enforcement officer": at para. 271. Justice Annis found that this oversight "mitigates to a large extent any concerns of competency or legal standards argued by the applicant": Peter, above at para. 271. As the Federal Court of Appeal observed in Shpati, above at para. 51, this Court can often consider a request for a stay more comprehensively than can an enforcement officer consider a request to defer.

98 At the end of the day, however, each of these situations ultimately raises the same question, which is whether removing an individual from Canada without first having a PRRA officer assess a new risk factor violates the individual's section 7 Charter rights. This Court has already determined in Peter that it does not, and despite the careful and capable submissions of the applicants' counsel, I have not been persuaded that I should come to a different conclusion in this case, notwithstanding the difference in the factual situation in which the Charter issue arises.

99 I do accept that the nature and importance of the rights at stake in cases such as this suggests the need for strong procedural safeguards. I further acknowledge that enforcement officers are not mandated to carry out full-blown risk assessments, that there is no provision for a hearing at the removals stage, and no right of appeal from a decision refusing to defer removal. That said, one of an enforcement officer's core responsibilities is to assess the sufficiency of new evidence and decide whether deferral to the risk assessment process is appropriate. The applicants have not provided evidence that would indicate that enforcement officers are not competent to carry out that task.

100 Moreover, one cannot look at the deferrals process in isolation in assessing whether the applicants' Charter rights were respected by the statutory scheme. Having reviewed the scheme as a whole, I am satisfied that the applicants were removed from Canada in accordance with a statutory scheme that respected their section 7 Charter rights, and that they were not constitutionally entitled to a PRRA before they could be removed from Canada.

101 In coming to this conclusion, I note that the legislative regime offered the following to these applicants:

- The opportunity to make a refugee claim and to have that claim referred to the Refugee Protection Division of the Immigration and Refugee Board for an oral hearing. The Board found that the applicants had not acted with diligence in pursuing their refugee claims, and that they had not provided a reasonable explanation for their failure to appear for their refugee hearing;
- Having failed to appear for their refugee hearing, the applicants were entitled to, and had, an abandonment hearing before the Refugee Protection Division where they had the opportunity to demonstrate that they had a continuing intention to pursue their refugee claims. They were unable to do so;
- The opportunity to challenge the abandonment decision through an application for leave and for judicial review in this Court. The applicants chose not to avail themselves of this opportunity;

- The opportunity to bring a motion to re-open their refugee claim if they believed that the Board had treated them unfairly. The applicants chose not to exercise this option;
- Had their request to re-open their refugee claim been refused, the applicants would have had the right to challenge that decision through an application for leave and for judicial review in this Court;
- The right to request a deferral of their removal to allow for a full assessment of the risks faced by the applicants in Israel. This allowed the applicants to have an enforcement officer consider the sufficiency of the evidence they provided regarding the risks that had not previously been assessed in order to determine whether they exposed the applicants to a risk of death, extreme sanction or inhumane treatment in Israel. The applicants sought such a deferral, it was considered by the enforcement officer, and the applicants were provided reasons for why their request was refused;
- The right to challenge the enforcement officer's refusal to defer through an application for leave and for judicial review in this Court. Although the applicants commenced a related application, they did not complete this process;
- The right to bring a motion for a stay of their removal where they had the opportunity to raise any errors allegedly committed by the enforcement officer for consideration by a judge of this Court. The applicants availed themselves of this opportunity and made their arguments. Justice McVeigh refused to stay the applicants' removal on the basis that they had failed to demonstrate the existence of a serious issue in their application for judicial review of the officer's decision.

102 I agree with the respondent that when regard is had to the totality of the processes that were available to these applicants under the statutory scheme in IRPA, the effect of the PRRA bar created by paragraph 112(2)(b.1) of the Act on the applicants is not grossly disproportionate to the state interests that the legislation seeks to protect.

Judgment

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. The following question is certified:

1. Does the prohibition contained in section 112(2)(b.1) of the Immigration and Refugee Protection Act against bringing a Pre-Removal Risk Assessment application until 36 months have passed since the claim for refugee protection was abandoned, violate section 7 of the Charter?

Temporary Resident Permit

Case: *Zlydnev v. Canada (Minister of Citizenship and Immigration)*
Deciders: Michel M.J. Shore J.
Court: Federal Court
Citation: 2015 CarswellNat 1430, 2015 FC 604
Judgment: 07 May 2015
Docket: IMM-1209-14

19 Paragraph 12.1 of the CIC Manual, below, provides a series of non-exhaustive guidelines in the form of "needs and risks factors" to assist visa officers in assessing TRP applications. Although such guidelines promote consistency in the decision-making process, they do not have the force of law and each application must be determined on a case-by-case basis (*Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 (F.C.A.) at paras 52 and 53; *Farhat*, above at paras 22 and 28;*Shabdeen*, above at paras 15 and 16; *Afridi v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 193 (F.C.) at para 18).

12.1. Needs assessment

An inadmissible person's need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or safety risks to Canadian society. The degree of need is relative to the type of case. The following includes points and examples that are not exhaustive, but they illustrate the scope and spirit in which discretion to issue a permit is to be applied.

Officers must consider:

- the factors that make the person's presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event);
- the intention of the legislation (e.g., protecting public health or the health care system).

The assessment may involve:

- the essential purpose of the person's presence in Canada;
- the type/class of application and pertinent family composition, both in the home country and in Canada;

- if medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful), and anticipated effectiveness of treatment;
- the tangible or intangible benefits which may accrue to the person concerned and to others; and
- the identity of the sponsor (in a foreign national case) or host or employer (in a temporary resident case).

20 The Court considers that the Applicant's particular circumstances and the compelling reasons put forward by the Applicant have not been given a fulsome assessment. The evidentiary record demonstrates that this is a case which turns on its facts (*cas d'espèce*) and that a more in-depth consideration of the evidence on file is required.

21 The Applicant offered submissions and evidence addressing the relevant "needs and risks" factors and compelling reasons which favour the granting of a TRP, such as his daughter's pending appeal of a sponsorship application in respect of the Applicant; the Applicant's recognition and explanations for his initial incompliance, which is attributed to his sponsor's mistaken belief that the Applicant's visa expired in May 2013, and the Applicant's attempt to rectify the error in order to comply with the requirements of the IRPA; the Applicant's need for support from his family in Canada, and his family's willingness and ability to provide such financial and emotional support; the Applicant's degree of establishment in Canada within his family and his community; the disproportionate hardship the Applicant would face upon return to Ukraine, considering his advanced age and the country conditions evidence demonstrating a lack of resources or support available to him; the physical and psychological consequences related to potential resettlement in Ukraine and the risk of homelessness faced by the Applicant; the best interests of the Applicant's grandchildren and great-grandchildren, to whom he is the only representative of the older generation, and the impact the separation would have on their wellbeing and education — this includes the Applicant's relationship with his great-granddaughter, to whom he teaches the Russian language and traditions.

Detention Review

Case: *Ahmed v. Canada (Minister of Citizenship and Immigration)*
Deciders: René LeBlanc J.
Court: Federal Court
Citation: 2015 CarswellNat 2452, 2015 CarswellNat 2564, 2015 FC 792
Judgment: 24 June 2015
Docket: IMM-2572-15

28 In my view, the discussion at paras 17-24 of Justice Rennie's decision, in B147, above, is of great assistance here. In that case, the Member had found the Minister's silence on the delay and his failure to provide a timeframe for the processing of a Pre-Removal Risk Assessment (PRRA) an indicator of uncertainty, which led to a finding of indefinite detention. Justice Rennie thus concluded that, in the absence of any reasonable certainty as to when a process might conclude or an event may occur, the existence of 30-day detention reviews could not save the detention from being characterized as indefinite.

29 This, according to me, is consistent with the Federal Court of Appeal's decision in Canada (Minister of Citizenship & Immigration) v. Li, 2009 FCA 85, [2010] 2 F.C.R. 433 (F.C.A.), where the issue of the appropriateness of making estimates of anticipated future length of detention on a mere anticipation of available processes under the Act and the Regulations, was at stake. The Federal Court of Appeal concluded that "the basis of the estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not on an anticipation of available processes but not yet underway" (at para 81).

30 When reading the decision in the case at bar, it is clear that no estimation of the length of detention was made. I believe that if the Member would have embarked on such analysis, she would have soon realized that it qualified as a mere "anticipation of available processes not yet underway". The thrust of the Member's finding in this regard reads as follows:

> (...) The federal court (sic) also wrote in Sahin, "when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say

> that a lengthy detention at least for practical purposes approaches what might be reasonably termed indefinite.
>
> In order to characterize detention as indefinite, I must be satisfied that removal cannot be arranged based on all the evidence in the record and taking into account all relevant factors.
>
> (...)
>
> The inability at the present time to use the airports in Yemen is a recent development. I have no reason to conclude that this situation will continue indefinitely or that removal to Yemen cannot occur through other means.

32 In Charkaoui, at para 113, the Supreme Court held that the lengthier the detention, the heavier the onus is on the government to show that detention is still required. I agree with the Applicant that even if airports were to re-open, there would be no reason to think that the Respondent would be able to find a stable and safe route to deport him to Yemen as there is evidence on record of security factors, beyond the airport closures that have inhibited–and that are likely continue to inhibit–the removal.

33 There is no real discussion in the Member's decision on the realistic prospects for the Applicant to be removed to Yemen and the time this would require, given the situation prevailing in that country at the moment. In my view, this undermined her analysis of the section 248 factors regarding the length of time in detention, past and future. Her decision on these important factors reveals an absence of any reasonable certainty as to when removal may occur, and, more importantly, when the Applicant may be released from detention. In a context where significant liberty interests are at stake and Charter considerations are integral to the detention review analysis, this error, in my view, is fatal to the Member's decision as it brings it outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (Dunsmuir, above at para 47).

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