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

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The Use of the Term "Significant Economic Benefit" in Immigration Law

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(Part One)[1]

1. Application and Objective

In cases where *significant economic benefit* can be demonstrated, certain foreign nationals may immigrate to Canada with permanent residence visas in the following two types of cases:

- permanent entry in the federal self-employed class; and
- permanent residence visa in certain provincial nominee class programs (British Columbia and Saskatchewan)

When *significant economic benefit* can be demonstrated, a foreign national might also be allowed to work in Canada temporarily under the authority of a temporary work permit in the following cases:

- intra-company transferees;
- emergency repairs; and
- entrepreneurs/self-employed class

1 Please note that this article consists of several parts and this release contains Part 1 of this article only – the second portion of this article will resume in the October issue of ImmQuest (8-10).

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The Use of the Term "Significant Economic Benefit" in Immigration Law

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The objective of this article is to analyze the use and possible definitions of the term "significant economic benefit" within existing sources of authority as well as other secondary sources with persuasive value. Shortcomings in the use of significant benefit in policy will also be discussed. Finally, advice will be provided to policy makers on how to improve the existing policy of significant economic benefit as well as advice to immigration law practitioners on how to use the term "significant economic benefit" in submissions (both for permanent residence visas and temporary work permits).

2. The Existing Use and Definition of the Term "Significant Economic Benefit"

The term "significant economic benefit" is not clearly defined in any one particular source of authority. There are, however, seven different sources that may be referred to in order to establish the wider understanding thereof:

1. *Immigration and Refugee Protection Regulation* (IRPR) 205 and IRPR 88;
2. The Immigration Manual Chapters FW 1;
3. The Immigration Manual Chapter OP 8;
4. Decisions and comments from eleven court cases (only 2 cases are post-*Immigration and Refugee Protection Act* (IRPA) Provincial-Federal agreements such as the Agreement for Canada-British Columbia;
5. Cooperation on Immigration, that forms the foundation of the Provincial Nominee Class;
6. Lexbase Volume 19, Issue 7/8; and
7. The article, *Challenges to Intercompany Transfer Policy* (Immquest Vol. 4, Issue 11, November 2008).

The first five sources are within the realm of government policy and the last two are secondary sources that hold only persuasive value.

2.1. Regulations

The analyses of case law should be done within the context of regulations that were valid at the time. Until July 2002, Immigration Regulation 2(1)[2] was the guiding regulation and offered the following:

a. "entrepreneur means an immigrant who intends and has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a ***significant contribution to the economy***". [Emphasis added]

b. "self-employed person means an immigrant who intends and has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself ***and*** will make a ***significant contribution to the economy***". [Emphasis added]

On 24 June 2002, the *Immigration and Refugee Protection Regulation* 88(1) came into effect and provides the following reference[3] to the term "significant economic benefit" (for permanent entry): "Self-employed person means a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a ***significant contribution*** to ***specified economic activities*** in Canada" [emphasis added] and "*(a)* A self-employed person, other than a self-employed person selected by a province, means cultural activities, athletics or the purchase and management of a farm. (*b*) a self-employed person selected by a province, has the meaning provided by the laws of the province." *Comments:*

- It is interesting to note that the use of the term "significant economic contribution" disappeared from the definition of "federal entrepreneur" and was replaced by a specific definition, requiring experience, specific minimum net worth and an agreement to meet certain objectives in the future. Searching for the possible meaning of "significant economic benefit" from case law of federal entrepreneurs after 2002 would, therefore, not yield any insight, unless it

2 Immigration Regulation 2 (1) of 1978.
3 Canada Gazette, Part II, Volume 136, Number 9, SOR 2002-227, 14 June 2002, page 62.

is in reference to a work permit for an entrepreneur as the Immigration Manual still requires "significant economic benefit" if a work permit is to be issued before the permanent residence visa is issued.

- The term "contribution" is still being used in IRPR 88 (definition of "self-employed") but in IRPR 205(a), reference is made to significant economic "benefit", although in the case of *Momin*[4] (see further down) the Federal Court viewed these two terms to be synonymous.

In the IRPR 205(a), the term "significant economic benefit" is used within the area of temporary work permits: "A work permit may be issued under section 205 to a foreign national who intends to perform work that (*a*) would create or maintain ***significant social, cultural or economic benefits*** or opportunities for Canadian citizens or permanent residents;" among other things. [Emphasis added]

Therefore, the use of "significant" in an economic sense is used in IRPR 88 in cases where a permanent residence visas are to be issued and IRPR 205 (c) refer where temporary visas and work permits are to be issued.

2.2. Immigration Manual Chapter FW1[5] (and IRPR 205)

Paragraph 5.28 of Chapter FW1

Here, an overview is provided of three specific examples when "of significant benefit" could exist: Entrepreneurs/Self Employed, Intra company transferees and emergency repairs.

Paragraph 5.29 of Chapter FW1: General Cases

Under the authority of IRPR 205(c), paragraph 5.29 general guidelines are provided to officers when assessing significant economic benefit which would allow a work permit to be issued without a Labour Market Opinion (LMO) (LMO exemption code, C10). The broader scope of Paragraph 5.29 is a reiteration to the officers that "***Authorizing a foreign national to work in Canada has an impact on the Canadian labour market and economy***". [Emphasis added] Officers are advised to be reluctant to issue a work permit without the assurance from Human Resources and Skills Development Canada (HRSDC) that the impact on Canada's labour market is likely to be neutral or positive." It allows for the officers to disregard an opinion from HRSDC in "...those situations where the social, cultural or ***economic benefits*** [emphasis added] to Canada of issuing the work permit are so clear and compelling that the importance of the LMO can be overcome."

In the context of allowing this "economic benefit" to override the existing process, the rules importantly refer to the "balance of practical considerations" in the "issuance of a work permit in a time frame shorter than would be necessary to obtain the HRSDC opinion". Out of the types of benefits allowing exemption, it is specifically said that cases where "significant economic benefit" are employed for the application of C10, "all practical efforts to obtain HRSDC's opinion should be made" and in the alternative that a C10 exemption is being requested, "documentation supporting their claim of providing an ***important or notable contribution to the Canadian economy***" should be provided. [Emphasis added] Although technically and theoretically possible, general cases of significant benefit where officers issued a work permit based on the limited guidelines provided are not known as the hypotheses is that officers rarely issue a work permit based on significant economic benefit (i.e. general exemption of C10) as it is unheard that this exemption is ever used.

Very specific examples are provided to guide officers about significant social and cultural benefit, but the only guideline provided to officers about the meaning of "significant economic benefit" is the term "***notable contribution to the Canadian economy***." [Emphasis added]

Paragraph 5.30 of Chapter FW1; Entrepreneurs and the Self Employed[6]

In para. 5.30, the discussion of subject matter and guidance to officers can be classified in the following five groups:

a. a discussion about three types of applicants that are affected by this authority;

b. a brief definition of significant benefit (it is spread throughout para. 5.30);

c. other factors that could be present when an applicant argues that significant benefit will be achieved in the future;

4 *Momin v. Canada (Minister of Citizenship & Immigration)* (March 23, 1999), Doc. IMM-2904-98 (Fed. T.D.).

5 CIC, Immigration Manual, Chapter FW1, Updated on 11 January 2012.

6 CIC, Immigration Manual, Chapter FW1, Updated on 11 January 2012, para. 5.30, page 57-59.

d. a discussion of two pre-requisites that must be present when significant economic benefit arguments are used in the case of entrepreneur and self-employed applicants;

e. sources of information about significant benefit which should be relied upon by officers.

First, Paragraph 5.30 of Chapter FW1 provides a specialized case where significant economic benefit may be used before a work permit is issued (The LMO exempt code is C11):

- Applicants that were selected in the Federal Entrepreneur Class or Self-Employed Class in terms of IRPR 97 or IRPR 101 may be issued work permits pursuant to Regulation 205 (a). In terms of this rule, these permanent resident applicants that are classified as 'entrepreneurs' or 'self-employed' may be issued work permits without LMOs. Entrepreneurs in the Provincial Nominee Class are not included in this group, but the authority is IRPR 204 (c).
- Entrepreneurs being *considered* by a province or territory prior to them being actually *nominated* by the province or territory: Once they are nominated, IRPR 204(c) and Immigration Manual Chapter FW1, para. 5.27 become the authority; LMO exempt code T12). *Comment:* Care should be taken where the foreign national is in the nomination process as it could have an effect on the decision whether to use significant economic benefit or not as a motivation for a work permit. Once T12 becomes the applicable exempt code, there is no need to demonstrate significant economic benefit.
- Temporary residents entering Canada that have not applied for permanent residence are also discussed. Officers are advised that profits and other spin-offs should remain in Canada when IRRP 205(a) is used as a motivation. However, there might be situations in which profits will not remain in Canada, but significant economic benefits are still possible. An example is provided of a foreign national that might start a business and then leave Canada after appointing a local to manage/operate the business or close the business because it is seasonal. Specific reference is also made to Fishing and Hunting Outfitters and Racing Jockeys (western provinces only). Readers are directed to Para. 13.4 (page 103) and 13.9 (page 108 of Chapter FW1), where these two special cases of significant economic benefit are discussed. Racing Jockeys may be issued with a work permit that is LMO exempt if they have a license to race and a job offer to work in MB, SK, AB or BC. Although reference is not made to significant economic benefit in Para. 13.9 (jockeys) at the top of page 58, it is clearly mentioned that significant benefit must be demonstrated in the case of self-employed applicants.

Second, significant economic benefit is described with the following examples (this description is spread throughout the paragraph)

- "They must demonstrate that their admission to Canada to begin establishing or operating their business would generate significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents pursuant to R205(a)."
- "general economic stimulus (such as job creation, development in a regional or remote setting or expansion of export markets for Canadian products and services)."
- "advancement of Canadian Industry (such as technological development, product or service innovation or differentiation or opportunities for improving the skills of Canadians".
- "create a benefit for Canadian workers or provide an economic stimulus";

Comment: How much benefit required is not specified. The definition of "significant economic benefit" in para. 5.30 is vague and merely indicates "economic stimulus" but fails to mention *how much* stimulus is needed. As it is silent on the degree of stimulus, it implies any level of economic stimulus should be acceptable. It is obvious that reliance on this section would lead to refusals. Practitioners are advised to emphasize the *significant* nature of the economic contribution. It is also important to remember that the use of the term "significant economic benefit" disappeared from the definition of "Federal Entrepreneur" in June 2002 when the IRPA was promulgated. Under the IRPA, a foreign national can apply for permanent residence in the Foreign Entrepreneur Class (and not approved yet) if he or she reached the thresholds as set in the regulations (thresholds of sales, income, assets, number of employees, etc). Clearly there is no requirement to demonstrate "significant economic benefit." However, if the

foreign national would like to come earlier (before the permanent residence visa is issued) significant economic benefit must be demonstrated.

Third, officers are advised that the following factors could be present when an applicant claims that "significant economic benefit" could be present in the future as part of a submission for a work permit. The following factors are, therefore, indicators that significant economic benefit might be present. The analogy, "when there is smoke, there must be fire" could be used to describe its role.

- The foreign national should be expected to be a "*rare applicant*." *Comment:* Officers are therefore advised if the applicant is "rare", significant economic benefit could be present. There is no logic or causality in the rarity of an applicant and the ability of the applicants to make a significant economic contribution.
- If a self-employed applicant's clients experience "benefits….to Canadian clients", this should also be a positive factor.

Fourth, the rules in para. 5.30 advise officers that three pre-requisites must exist:

- "Compelling and urgent reasons" a work permit may be issued before their permanent residence visas are issued. Conversely the work permit based on significant benefit may not be issued if the situation is not urgent.
- Officers are also instructed that the business may not issue a work permit for significant benefit reasons if "the activity……actually impinges on Canadian service providers".
- In the case of repeat work permit applicants, an applicant would have to prove that "demonstration that the profits ….remain predominantly in Canada or proof that other significant benefits have accrued to Canada". *Comments:* Applicants therefore do not have to demonstrate that profits remain predominantly, only if other significant benefits trump the requirement of keeping the profits in Canada.

Comment: Therefore, the argument of significant economic benefit can only be used for Entrepreneurs and Self Employed (federal and provincial) when these three pre-requisites exist.

The second pre-requisite seems to be a spin-off from our mixed national economic identity and clearly against the economic ideology of building a strong competitive industry. It seems as if it is written by a labour union. By the way, are Citizenship and Immigration Canada (CIC) officers not part of a union? In a recent article in the National Post,[7] Andrew Coyne wrote about the Prime Minister's agenda for the economy:

> "The government's agenda thus has three broad objectives. One, curb (somewhat) the growth in transfers to the elderly, whether for pensions or, via federal transfers to the provinces, for health care. Two, increase the supply of labour: bring in more immigrants, encourage people to work longer, be less tolerant of idling. And three, raise productivity, mostly by putting more competitive heat on business — that is to say, by opening the borders to competition from without — but also by raising national savings, providing the wherewithal for productive investment. Hence, the cuts in taxes on savings, and hence, again, the greater openness to foreign investment."

It is obvious that this pre-requisite ("impinging on Canadian service providers") is not in line with the government's strategic objectives. It is also an indication that the author of this policy (or rule) clearly has a fundamentally different opinion than that of the leaders of the day. This statement is worrisome as one of the cornerstones of the Canadian economy is the competitive nature of industry. Without competition, for example, the Canadian Broadcasting Corporation would still be the only channel available on satellite or cable TV and it would continue to suck away 1 billion CAD per annum from tax-payer money. Without competition we would still be paying astronomically high long-distance phone charges. Without competition there would not be technology, such as Voice Over Internet Protocol. The core of human development lies within the competitive nature of our behavior and the way we live. CIC's policy implies the following logic: Less competition = more significant economic benefit; this is clearly questionable logic.

Finally, officers are instructed to rely upon sources such as Canadian Chambers of Commerce and HRSDC. *Comment:* HRSDC does not have enough staff to issue a LMO in 12-14 weeks in many provinces. A request about the possible significant economic contribution of a foreign entrepreneur will probably be ignored.

7 Andrew Coyne, "Stephen Harper's Hidden Agenda is the Economy", *National Post* (26 May 2012) online: The National Post <http://fullcomment.nationalpost.com/2012/05/25/andrew-coyne-stephen-harpers-hidden-agenda-is-the-economy/>.

Paragraph 5.31 of Chapter FW1: Intercompany Transfers[8]

Para. 5.31 pertains to the second special case of significant economic benefit: intra-company transferees and exemption C12 (LMO exemption in this category). It sets out the reason for the creation and allowance of this category as a special case of significant economic benefit. The standard by which to assess such cases are for "the purpose of improving management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian entities in overseas markets"; slowly narrowing the definition of the term "significant economic benefit".

Further, specifying that qualified transferees are LMO exempt "as they provide significant economic benefit to Canada through the transfer of their expertise to Canadian businesses."

The following definition was not used to describe "significant economic benefit" but rather to define when specialized knowledge exists:

- "...the Canadian branch would experience significant disruption of business in order to train a new worker to assume those duties"
- "...the individual to contribute significantly to the employers productivity or well-being. Evidence of such knowledge must be provided."

Comment: The first bullet implies that significance can be defined in a negative manner; that in the absence of a suitable candidate a significant loss would occur. The second bullet implies a positive addition or value added from the presence of the immigrant.

CIC provided the following guidance to their officers: if a foreign national is being transferred to Canada, the foreign national must have at least 12 months of experience in a similar position outside of Canada. According to CIC, this is a pre-requisite for arguing significant economic benefit. However, this appears to be erroneous and the lack of logic will be addressed later in this article.

Paragraph 5.32 of Chapter FW1 Emergency

Emergency repair personnel are also LMO exempt by 'significant benefit' as they "carry out emergency repairs to industrial or commercial equipment ***in order to prevent disruption of employment.***" [Emphasis added] *Comments:* "Emergency" implies that significance is a by-product of preventing a loss (not a gain) and immediate remedies can only prevent this loss.

2.3. Immigration Manual Chapter OP 88 (and IRPR 88)

In IRPR 88, a self-employed person is described as a foreign national who has the relevant experience and has the intention and ability to be self–employed in Canada and to make a *significant contribution to specified economic activities.*

In para. 11.2 and 11.4 of Immigration Manual (Chapter OP 8) the specified economic activities are mentioned in para. 11.2-11.4:

a. cultural activities

b. athletics

c. purchase and management of a farm

In para. 11.3 of Chapter OP8, it is mentioned that a successful applicant "must meet a rigorous threshold: sufficient capital, appropriate experience and appropriate skills".

Part Two of this article on "Significant Economic Benefit" in Immigration Law, written by Cobus Kriek and Professor Devoretz will resume in the next issue of ImmQuest (Vol. 8, issue 10). Stay tuned!

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8 CIC, Immigration Manual, Chapter FW1, Updated on 11 January 2012, para. 5.31, page 59-71.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

Refugee (Mexico)

Case: *Aguilar Valdes v Canada (Minister of Citizenship & Immigration)*
Decider: James Russell J.
Court: Federal Court
Citation: 2011 FC 959
Judgment: July 28, 2011
Docket: IMM-6580-10

[45] Essentially, the RPD is saying that, if there was evidence of non-involvement in the crimes, the Applicants would not have pleaded guilty but would have presented that evidence to the Ohio court and pleaded not guilty. Without mentioning the explanations provided by the Applicants as to why they pleaded guilty to the charges in Ohio, the RPD simply says the "claimants did not provide a reasonable explanation for why such evidence was not presented in their defence." This misses the point because some of the reasons were not related to evidentiary issues.

[49] The RPD's approach in the present case, its reliance upon speculative and unproven assumptions and its failure to address the evidence and reasons put forward by the Applicants as to why, notwithstanding their guilty pleas, they were not guilty of serious crimes, means that an appropriate analysis with reasons that accord with *Jayasekara*, above, was not conducted. Also, it means that there was no assessing and weighing of the competing factors. See *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 (CanLII), 2005 FCA 125 at paragraph 25; and *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 (CanLII), 2004 FCA 250. This alone renders the Decision unreasonable and it should be returned for reconsideration.

Refugee (Iran)

Case: *Zaree c Canada (Minister of Citizenship & Immigration)*
Decider: Luc Martineau J.
Court: Federal Court
Citation: 2011 CF 889
Judgment: July 14, 2011
Docket: IMM-6476-10

[13] The above-mentioned problems with regard to the translation at the hearing are sufficient in themselves to set aside the decision under review and to refer the matter back for rehearing by a differently constituted panel. In passing, I would also add that the panel's very cursory analysis of the refugee "sur place"issue (two short paragraphs only) demonstrates a great lack of thoroughness and depth, which goes directly against the standards of transparency and intelligibility that must be met in the panel's reasons in every refugee status determination matter where the issues affect the lives and safety of individuals.

[14] On this last point (political activities in Canada), it should be noted that the applicant's credibility was not at issue. However, according to the documentary evidence in the record, Iranians involved abroad in political activities against the Iranian regime risk being persecuted upon returning to Iran. The documentation on Iran by the Immigration and Refugee Board indicates that the families of Iranian demonstrators abroad are threatened in Iran and that no leniency is given to demonstrators and their families (Document 2.5, pages 1 and 3). Moreover, the documentation also indicates that the Iranian authorities monitor web sites like Facebook, Twitter and YouTube (Document 2.1, page 21). In this case, the panel cannot simply suggest, without going on to analyze the documentary evidence in light of the personal situation of the applicant and his family in Iran, that the applicant's political involvement in Canada is not sufficient to attract the attention of the Iranian regime, either towards him if he were to return to Iran or towards his family, while the letter by the applicant's father dated August 17, 2010, states quite the opposite.

Refugee (Nigeria)

Case: *Winifred v Canada (Minister of Citizenship & Immigration)*
Decider: Michel M.J. Shore J.
Court: Federal Court
Citation: 2011 CF 827
Judgment: July 8, 2011
Docket: IMM-6440-10

[34] The situation according to evidence remains what it is: "sources on the ground confirm that the protection is weak, but

it is progressing" [Emphasis added] (at para 16). The Board's decision omits to even consider the jurisprudential three-pronged test. The Board's decision demonstrates the opposite that Nigeria is undergoing changes (when it, itself, speaks of changes) in respect of protection of women facing female mutilation; however, the decision does not demonstrate, in fact, that the changes in the country conditions are either substantial or truly effective, nor are they durable. The Board erred in its reading, or lack thereof, by which the Court could state that the Board's decision is reasonable. It is unreasonable, as clearly, the evidence has not been adequately taken into account.

[37] The Board did not take the Gender-related Guidelines into consideration at all; and, if it had, it should have mentioned which parts of the Applicant's narrative it did not deem credible in its consideration of the religious, economic and cultural factors of the Applicants so as to set aside the application of Gender-related Guidelines in this case. The conclusions reached by the Board do not take into account each aspect of the Applicant's story, nor a composite whole of its entirety. The narrative of the principal Applicant is neglected, as is the country condition documentation.

[38] The Applicant submitted a Psychological Report, dated June 11, 2010 (TR at p 489). Dr. Sylvie Laurion, Psychologist, examined and treated Ms. Agimelen and specified that she had been diagnosed with post-traumatic stress disorder and was given prescribed medication for the condition (TR, Psychological follow-up of Ms. Winnifred Agimelen, born 17 July 1978 and her son, Aaron Afuah, born 2 February, 2003 at p 489). In addition, Dr. Harry Kadoch certified that Ms. Agimelen was indeed diagnosed with a post-traumatic stress disorder and that she had undergone female circumcision (TR at p 480). The Board mentioned these reports and concluded that erroneously that, "[t]hough she suffered from a mental health condition at the outset of her ordeal, these appear to have largely been addressed according to the evidence" (at para 22).

Refugee (Cuba)

Case: *Alfaro v Canada (Minister of Citizenship & Immigration)*
Decider: Donald J. Rennie J.
Court: Federal Court
Citation: 2011 CF 912
Judgment: July 22, 2011
Docket: IMM-7390-10

[20] The contrast between *Perez* and the case before this Court is marked. The evidentiary foundation referred to by both Justices Dawson and Snider existed in this case. The evidence before the Board included the following facts:

i. The applicant and Balan were friends.

ii. That subsequent to Balan's defection the applicant received a letter dated September 2, 2007 from the Cuban Ministry of Basic Industry which provided,

> Always it is difficult to face the betrayal from a friend and even more when that person was a member and Team Leader. It has not been easy for you neither has been for the comrades of the Ministry.
>
> There are mixed feelings of wrath and rejection. There are people who feel like wanting to use violence and it is sad for that person has been reduced to a humiliated position as a betrayer deterred neglecting all what he has prepared for and it always deserves our maximum delivery and most of the times it is not enough.
>
> However, today is a day to work, to continue, to be patience and wait and that merely pays back to the traitors, stealers and cowards.

iii. Any reasonable interpretation of that letter would include the inference that Balan would suffer severe punishment, as would any other defector.

iv. The applicant testified that he expressed his disapproval and objection to the letter to his immediate supervisor, he became angry and accused the applicant of having "ideological problems". It should be recalled that the Board found the applicant to be truthful and candid in his testimony.

v. After the applicant advised, in a very transparent and direct way of this desire to immigrate to Canada. Yet he was immediately fired and deemed a *traitor* and accused of having committed *treason*. This language is found in a letter memorandum from the applicants' Cuban superior in Canada and head of the Canadian operations.

[23] The Court in *Castaneda*, found that the Board failed to consider elements of extrajudicial punishment beyond the risk of imprisonment, and that the Board's failure to do so was an

erroneous application of *Valentin*. The critical aspect of Justice Simon Noel's reasoning in *Castaneda* is:

> However, as I read the *Valentin*decision, the isolated nature of the sentence and the lack of direct relationship between the sentence and the offender's political opinion were determinative factors in the minds of the Appeal justices. Here, the evidence of repercussions over and beyond the statutory sentence suggests an element of repetition and relentlessness in the manner in which the Cuban authorities treat the Applicant's family as well as a direct link between the Applicant's act of defiance and the treatment afforded to his family…

Refugee – PR Application

Case: *Kahin v Canada (Minister of Citizenship & Immigration)*
Decider: R.L. Barnes J.
Court: Federal Court
Citation: 2011 CF 1064
Judgment: September 9, 2011
Docket: IMM-6777-10

[16] This type of evidence falls squarely within the definition of extrinsic evidence, which must be disclosed to an interested party before it is relied upon. Having embarked upon these independent and private enquiries, the Immigration Officer had a duty to disclose the results and to invite a response. This is consistent with cases like *Zamora v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1414 (CanLII), 2004 FC 1414 at paras 17-18, 260 FTR 155, where Justice Sean Harrington noted the importance of disclosing independent research (including some forms of material obtained on the internet), particularly if the information is open to potential challenge on the basis of questionable validity or completeness: also see *Mancia* at paras 10 to 23. Although I accept the Respondent's point that Mr. Kahin could have reasonably anticipated that the Immigration Officer might seek to verify his declarations, he had no basis to anticipate what the results of that investigation might be. The information relied upon here might well be wrong, incomplete, or open to explanation. Even if it was complete and accurate, that is not the point of concern. In *D.K. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 845 (CanLII), 2011 FC 845, [2011] FCJ no 1046 (QL) (TD), Justice François Lemieux described the relevant concern in the following passage at para 30:

> The Officer may have been right in concluding that the post-hearing material was of no value and may have been fraudulent but that is not the point. The point is that the applicant and her counsel had no opportunity to comment on the evidence which the officer herself obtained and relied on to render the decision she reached.

Refugee (China)

Case: *Wang v Canada (Minister of Citizenship & Immigration)*
Decider: Mihel Beaudry J.
Court: Federal Court
Citation: 2011 CF 1030
Judgment: September 2, 2011
Docket: IMM-461-11

[13] In the present case, the Court finds that the Board erred in determining that the applicant was not a genuine Roman Catholic by holding him to an unreasonably high standard of religious knowledge. For example, the applicant was asked if the wafer distributed during Holy Communion represented the body of Jesus or if it *was* the body of Jesus. The applicant answered that it represented the body of Jesus (transcript, Certified Tribunal Record, page 469, line 25). The Board found this answer to be incorrect. The Board erroneously determined the applicant's knowledge of the Catholic faith by way of "trivia". In assessing the applicant's knowledge of Christianity, the Board "erroneously expected the answers of the applicant to questions about his religion to be equivalent to the Board's own knowledge of that religion" *Ullah v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 1918, para 11.

Family Certificate

Case: *Ffrench v Williams*
Decider: Stanley B. Sherr J.
Court: Federal Court
Citation: 2011 ONCJ 406
Judgment: August 3, 2011
Docket: Toronto D51648/10A6

[134] I have seriously considered the pending deportation order in making my decision — see paragraph [24] of *Wozniak v. Brunton and Minister of Citizenship and Immigration (No. 2)*, 2004 CanLII 19764 (ON SC), 2004 CanLII 19764, 1 R.F.L. (6th) 429, [2004] O.J. No. 939, [2004] O.T.C. 240, 2004 CarswellOnt

943 (Ont. Fam. Ct.) — but this cannot be the court's dominant consideration when a child's best interests are at stake. It is in the children's best interests to have a relationship with both parents. The children's relationship with the father and extended paternal family could be seriously damaged if the mother removed the children from Ontario. It would be unconscionable and a dereliction of my responsibility to these children if the mother removed the children from Ontario and I had not made a non-removal order **only** because there is the possibility that it would interfere with the mother's deportation. Whether this order has the effect of interfering with her deportation will be up to others to decide. My focus has to be on the best interests of these children.

[135] I wish to emphasize that I am not finding that the mother is likely to remove the children from Ontario, otherwise I would not be granting her equal time with the children. I only find that it is a risk that merits the granting of a non-removal order in the best interests of the children.

[139] If the mother is deported to Jamaica the father's child support obligation shall terminate and the parties are to immediately notify the Family Responsibility Office.

[140] The mother does not have the ability to earn income at this time, whether in Canada or Jamaica. I decline to make an anticipatory child support order against her in the event that she is deported. This does not preclude the father from seeking child support from her in the future if she is able to obtain employment in Jamaica.

Constitutional – Overage of 75

Case: *Felipa v Canada (Minister of Citizenship & Immigration)*
Decider: David Stratas J.A., Eleanor R. Dawson J.A., K. Sharlow J.A.
Court: Federal Court
Citation: 2011 FCA 272
Judgment: October 3, 2011
Docket: A-37-10

[72] As explained above, part of the overall context in which a provision was enacted can be determined by inquiring into its purpose. The purpose of subsection 10(1.1) is to facilitate the administration of justice by allowing the Chief Justice to augment his or her judicial resources from time to time when an additional full-time position is not necessary or available.

[73] The Chief Justice observed at paragraph 108 of his reasons that parliamentary debates in 1920 and 1967 contemplated "congestion of business" as a rationale for the appointment of a deputy judge. As a general principle of statutory interpretation, subsection 10(1.1) should be interpreted to promote this legislative purpose. However, there is no evidence before the Court that this purpose requires that persons 75 years of age and older be permitted to act as a deputy judge. Thus, there is nothing to trump the policy considerations that led to the introduction of a mandatory retirement age for judges of all of the superior courts in Canada.

d. Conclusion as to the proper interpretation of subsection 10(1.1) of the Federal Courts Act

[74] Having reviewed the text and the legislative evolution of subsection 10(1.1) of the *Federal Courts Act*, its statutory context and its purpose, we respectfully disagree with the conclusion of the Chief Justice that a person 75 years of age or older may be requested to act as a deputy judge of the Federal Court, and find that Mr. Felipa is entitled to succeed on his motion.

[81] As we understand this argument, the focus of Mr. Felipa's concern relates to the remuneration payable to a deputy judge of the Federal Court who does not hold office as a judge of another superior court. (A deputy judge who currently holds office as a judge of a superior court is entitled only to his or her statutory salary, and cannot receive further remuneration for acting as a deputy judge: see subsection 10(4) of the *Federal Courts* Act, quoted above.) The workload of a deputy judge who has retired from office as a judge of a superior court is entirely within the gift of the Chief Justice which means that his entitlement to the statutory *per diem* remuneration is also within the gift of the Chief Justice. Mr. Felipa argues that this gives rise to a reasonable apprehension of undue influence on the part of the Chief Justice. In our view, Mr. Felipa has raised a legitimate concern, but given the basis upon which we would dispose of this appeal, we do not consider it necessary to determine whether it is sufficient to overcome the strong presumption of integrity enjoyed by the Chief Justice and the deputy judges of the Federal Court.

Costs

[82] Mr. Felipa has asked for costs on a solicitor and client basis in this Court and in the Federal Court. In our view, Mr. Felipa has not demonstrated conduct on the part of the respondent that would

warrant an award of costs on a solicitor and client basis. However, he should be awarded costs that will ensure that neither he nor his counsel is out of pocket for disbursements, and that his counsel is reasonably compensated for his services in this matter. This litigation could have been avoided by the appointment of a different judge when that was first requested in 2009. Whatever costs Mr. Felipa and his counsel have borne in this matter have more to do with the public interest in legal certainty than any benefit that could have accrued to Mr. Felipa by pursuing this issue.

Skilled Worker

Case: *Kumar v Canada (Minister of Citizenship & Immigration)*
Decider: D.G. Near J.
Court: Federal Court
Citation: 2011 FC 770
Judgment: June 24, 2011
Docket: IMM-4397-10

[19] It is important to recall that the PA received 0 points for arranged employment. The only explanation as to why the PA would not be able to carry out the function of the arranged employment was his IELTS score, yet ironically, the PA received 4 points for English proficiency. There is no indication in either the CAIPS notes or the decision letter as to how the PA's language ability may have precluded him from carrying out the arranged employment and indeed, no acknowledgement that the employer required not only English skills but also Hindi and Punjab language skills, both of which the PA possessed.

Cost

Case: *Ghirmatsion v Canada (Minister of Citizenship & Immigration)*
Decider: Judith A. Snider J.
Court: Federal Court
Citation: 2011 FC 773
Judgment: June 27, 2011
Docket: IMM-6000-09, IMM-6005-09, IMM-6009-09, IMM-6010-09

[6] For the four lead cases and the files no longer held in abeyance, there has been a lengthy timeline, dating back to November 4, 2009, when the Applicants, through the Executive Director of the Canadian Counsel for Refugees, brought "common issues" to the attention of senior officials at Citizenship and Immigration Canada (CIC) headquarters in Ottawa. This was several weeks before the proceedings for leave and judicial review of these files had commenced. I agree with the Applicants that, if the Minister had carefully investigated these complaints, in November 2009, this litigation may not have been necessary. This is compounded by the very nature of the Applicants' claims. The four representative Applicants and all of the remaining applicants are refugees in a dangerous foreign country without the resources to finance the judicial review of their claims in Canada. This should have been a consideration for the Minister in 2009. Obviously, the Minister does not have the obligation to investigate every issue that arrives on his desk; however, when a reputable organization brings to his attention a number of similar issues, arising from the same visa post, common sense and fairness leads me to conclude that the Minister ought to have taken the complaint more seriously. It appears that this was not done, or not done in any satisfactory manner.

Inadmissibility Hearing

Case: *Beltran v Canada (Minister of Citizenship & Immigration)*
Decider: Sean Harrington J.
Court: Federal Court
Citation: 2011 FC 606
Judgment: May 24, 2011
Docket: 2011 FC 606

[6] An analysis of the material to be presented to the Immigration Division showed that alliances within protest groups in El Salvador were constantly shifting. Mr. Beltran's involvement with LP-28 was a snapshot in time. Mr. Beltran's understanding was that LP-28 was not part of FMLN but rather was part of FDR, see paragraph 44 of the initial reasons.

[7] The delays on the part of the Minister would have made it difficult, if not impossible, for Mr. Beltran to properly defend himself.

Order

IT IS HEREBY ORDERED THAT:

1. The Court declares that the admissibility proceeding against the applicant based on the s. 44(1) report signed on February 18, 2009, constitutes an abuse of process.
2. The Minister is prohibited from issuing any further s. 44(1) reports against the applicant regarding an allegation of

inadmissibility under s. 34(1) (f) due to his membership in the Ligas Populares 28 de Febrero (the 28th of February Popular Leagues) (LP-28), unless the Minister obtains new, credible and trustworthy evidence about his membership in the LP-28 that the Minister would not otherwise have obtained prior to the date of this order through due diligence efforts.

3. The Immigration Division of the Immigration and Refugee Board of Canada is prohibited from continuing the admissibility hearing against the applicant based on the s. 44(1) report signed on February 18, 2009 and from commencing any other admissibility hearing based on a s. 44(1) report regarding an allegation of inadmissibility under s. 34(1)(f) due to his membership in the LP-28, unless the Minister obtains new credible and trustworthy evidence about his membership in the LP-28 that the Minister would not otherwise have obtained prior to the date of this order through diligence efforts.

H&C

Case: *Perez Arias v Canada (Minister of Citizenship & Immigration)*
Decider: Richard G. Mosley J.
Court: Federal Court
Citation: 2011 FC 757
Judgment: June 23, 2011
Docket: IMM-3918-10

[15] The officer erred in this case by referring to the assessments without substantively analyzing them. I appreciate that there was an enormous amount of material submitted to the officer that required his attention but given this family's long and tumultuous history, which included rape, flight and general insecurity, the officer should have examined the evidence of psychological hardship in greater detail. The question overlooked was not the availability of services in Bolivia, which the applicants concede, but whether return would affect their psychological stability.

[16] In addition, the first number of pages of the hardship analysis is identical to that of the first pages of the pre-removal risk assessment made by the same officer. This suggests that the officer was concerned more with risk for the purposes of the hardship analysis. This was too limited. The officer needed to look beyond the question of risk, which, in the related application for judicial review I have found he properly analysed, to determine whether the family would suffer hardship.

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