**IMMIGRATION LAW**

Immigration & Federalism: 4

Union Colliery of BC Ltd v Brydon (1899) 4

Quong-Wing v The King (1914) 4

Canada v Singh: RE Munshi Singh (1914) 4

de Guzman v Canada (M C&I) (2005) 5

KEY ACTORS AND INSTITUTIONS 5

Government Departments: 5

Administrative Tribunals and Judicial Courts 5

JUDICIAL REVIEW: 6

Kinds of decisions that can be reviewed: 6

STANDARD OF REVIEW 6

Reasonableness 7

- 1. Reasons 7

Agraira v Canada (Public Safety and Emergency Preparedness) (2013 SCC Lebel J) 7

Komolafe v Canada (Minister of Citizenship and Immigration) (2013) 7

Pinto v Canada (Minister of Citizenship and Immigration) (2013) 7

- 2. Weight 7

- 3. Discretion and the Charter 8

Ensensoy v Canada 8

CONSTITUTIONAL & INTERNATIONAL LAW 8

CHARTER 8

S.7: LIFE, LIBERTY, AND SECURITY OF THE PERSON 8

Singh v Minister of Employment and Immigration 8

SECTION 15: EQUALITY BEFORE THE LAW 9

Lavoie v Canada (2002 SCC) 9

Toussant v Canada (AG) (2011 FCA) 9

TEMPORARY RESIDENTS 10

TO BECOME TR: 10

VISA APPLICATION: 10

CONDITIONS (IRPR s.193: a visitor is subject to conditions imposed under Part 9) 12

Khatoon v Canada (M C&I) (2008) 12

Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness) (2010 FC) 13

LENGTH OF STAY: 13

Extending Stay/Renewing: 13

LOSS OF STATUS 14

**Conditions**: 14

PERMITS 15

STUDY PERMIT 15

TEMPORARY WORKERS 17

WORK PERMITS: 17

Babu v Canada (M C&I) (2013) 22

Construction and Specialized Workers’ Union (2013) 22

Randhawa (2006) 22

Sing Grewal (2013) 22

CAREGIVER CLASS (TR) 23

PERMANENT RESIDENCY 24

FAMILY CLASS 26

Canada (AG) v Mavi (2011 SCC Binnie J) 28

SPOUSES: 31

Agha v Canada (MC&I) (2008 FC) 31

Amin v Canada (MC&I) (2008 FC) 31

Gure v Canada (MC&I) (2002 IRB) 31

Macapagal v Canada (MC&I) (2004 IADD) 32

Canada (MC&I) v Morel (2012 FC) 32

REQUIREMENT OF ALL SPOUSES: 33

Abebe v Canada (M C&I) (2011 FC) 33

MacDonald v Canada (MC&I) (2012 FC) 34

Canada (C&I) v Xie (2013 FC) 34

Herman v Canada (MC&I) (2010 FC) 34

CHILDREN 35

MAO v Canada (MC&I) (2003 FC) 35

Adopted Children 35

Kwan v Canada (MC&I) (2002 FC) 36

PARENTS AND GRANDPARENTS (IRPR s.117(1)(c) &(d)) 37

ECONOMIC CLASS 38

1. EXPRESS ENTRY 38

Liang v Canada (MC&I) (2012 FC) 38

Austria v Canada (C&I) (2014) 39

A. FEDERAL SKILLED WORKERS 39

B. FEDERAL SKILLED TRADES 41

C. CANADIAN EXPERIENCE CLASS 42

D. PROVINCIAL NOMINEE PROGRAM (prescribed class under IRPR s.87(1)) 42

2. BUSINESS CLASS IMMIGRANTS 43

**Immigrant-Investor Venture Capital Class** 43

**Start-Up Visa Program** 43

**Self Employer Persons** (prescribed class: IRPR s.100(1)) 44

HUMANITARIAN ADMISSIONS 44

Baker v Canada (MC&I) (1999 SCC L’Heureaux Dube) 46

Hinzman v Canada (MC&I) (2010 FC) 47

Kanthasamy v Canada (MC&I) (2015 SCC Abella J) 47

INADMISSIBILITY 48

Almrej (Re) (2009 FC) 48

1. SECURITY (IRPA s.34)\*\* 49

Poshteh v Canada (MC&I) (2005 FC) 49

TK v Canada (Minister of Public Safety and Emergency Preparedness) (2013 FC) 49

2. HUMAN AND INTERNATIONAL RIGHTS VIOLATIONS (IRPA s.35) 50

Mugasera v Canada (MC&I) (2005 SCC) 50

3. CRIMINALITY \*Does not apply to PR (IRPA s.36) 51

Serious Criminality (both PR and FN) 51

Ordinary Criminality (ONLY FN) 51

EXCEPTIONS: 51

EQUIVALENCY: 52

4. ORGANIZED CRIMINALITY (IRPA s.37) 52

Chiau v Canada (MC&I) (2001, FCA) 53

B010 v Canada (MC&I) (2013 FCA) 53

5. HEALTH \*Does not apply to PR (IRPA s.38) 53

Zhang v Canada (MC&I) (2012 FC) 54

Hilewitz v Canada (MC&I) (2005 SCC Abella J) 54

6. FINANCIAL \*Does not apply to PR (IRPA s.39) 54

7. MISINTERPRETATION (IRPA s.40(1)(a)-(c)) 54

8. NON-COMPLIANCE WITH ACTS (IRPA s.41) 55

9. INADMISSIBLE FAMILY MEMBER \*Does not apply to PR (IRPA s.42) 55

MINISTERIAL DECLARATION: 55

THE PROCESS OF REMOVAL 56

TWO WAYS TO BE SUBJECT TO REMOVAL ORDER: 56

Cha v Canada (MC&I) (2006 FCA) 56

Monge Monge v Canada (2009 FC) 57

Types of Removal Orders (3 types (IRPR s.223)) 58

Sahakyan v Canada (2004 FC) F: A had arrived in Canada to attend wedding, claimed refugee status within a week. Was denied, did not leave Canada (departure order became deportation order). Were allegations did not pay for ticket to leave. He has now been selected for PR pursuant to a fed-prov agreement. VO decided not to grant authorization – not in national interest to grant the return. This is JR of decision by VO. 58

REMOVAL 59

Canada (Minister of Employment and Immigration) v Chiarelli (1992) (SCC Sopinka J) 59

Suresh v Canada (M C&I) (2002) 59

Charkaoui v Canada (M C&I) (2007 SCC McLachlin CJ) 60

RECOURSE FROM REMOVAL: 61

STAYING A REMOVAL ORDER 61

OTHER APPEALS: 62

IAD: 62

Cheiu v Canada (MC&I) (2002 SCC Iacobucci) 63

FC JUDICIAL REVIEW: 63

Maklakov v Canada (M C&I) (2013) 64

H&C APPLICATIONS: s.25 65

TEMPORARY RESIDENT PERMIT 65

Betesh v Canada (MCI) (2008 FC) 65

PRE REMOVAL RISK ASSESSMENT (PRRA) 65

Varga v Canada (2007 FCA) 66

STAYS OF REMOVAL 66

STATUTORY STAYS: 66

JUDICIAL STAYS: 66

Omar v Canada (2009 FC) 66

Mauricette v Canada (2008 FC) 66

DETENTION AND SECURITY CERTIFICATES 67

Harkat v Canada (2014 SCC) 68

DETENTION 69

ORGANIZED CRIME, HUMAN TRAFFICKING, AND PEOPLE SMUGGLING 71

TRAFFICKING: 71

SMUGGLING: 72

B010 v Canada (C&I) (2015 SCC) 73

CITIZENSHIP 73

ACQUIRING CITIZENSHIP: 73

Budalakoti 73

Kandola v Canada (MC&I) (2014 FCA) 73

McAteer et al v AG Canada (2013 ONSC) 75

Ishaq v Canada (2015 FC) 75

BARS TO CITIZENSHIP 75

PROCESS OF ACQUIRING CITIZENSHIP 76

REVOKING CITIZENSHIP 76

The Passport 77

Abdelrazik v Canada (2009 FC) 77

Kamel v Canada (AG) (2014 FCA) 77

Immigration & Federalism:

|  |
| --- |
| Union Colliery of BC Ltd v Brydon (1899)  F: Mine employs Chinese immigrants; *Coal Mines Regulation Act* prohibits Chinese people from being employed in a mine where the Act applies. Brydon wants declaration that they have no right to employ Chinese people + injunction. Company argues legislation is ultra vires the legislature of BC, and that Chinese workers are not dangers to others  I: Ultra vires?  D: Partially ultra-vires the province of BC  R: s.91 gives federal govt power to legislate with regard to naturalization and aliens 🡪 can be construed to give power to legislate naturalized aliens *after* naturalization (**broad construction of ‘naturalization’**). Distinction between ‘alien’ and  ‘naturalized citizen’.  🡪 Falls under federal authority because s.4 of the CMRA establishes a statutory prohibition which affects naturalized subjects/aliens.  Parliament has the right to legislate re: **naturalization**, including the **rights and privileges pertaining to *after* naturalization** |

|  |
| --- |
| Quong-Wing v The King (1914)  F: Sask passed *An Act to Prevent the Employment of Female Labour in Certain Capacities* which disallowed any business that is owned or managed by Asian person from employing a white woman/girl or permit a white woman/girl to reside or lodge or work there.   * A was convicted of this offence; appealed 🡪 argued that it affects the civil rights of Chinese people whether naturalized or aliens   I: Ultra vires?  D: Not ultra vires, appeal dismissed.  R: Pith and substance is entirely different 🡪 protecting white women & girls. Distinguishes case from Union Colliery because it was aimed specifically at depriving Chinese people the ordinary rights of BC citizens, and prohibiting continued residence in BC. [distinguishes from Union Colliery]  \*Charter and HR Legislation would obviously prevent this distinction now  Dissent: Aim is to restrict rights of Chinese people 🡪 Naturalization Act affords any naturalized citizen all political and rights that natural born citizens are entitled to (so would have held that the Act *only* applies to non-naturalized Chinese); naturalization is a process that certifies good character (once process of naturalization 🡪 equal treatment) [applies Union Colliery] |

|  |
| --- |
| Canada v Singh: RE Munshi Singh (1914)  F: Boat arrived in Vancouver, kept in harbour for almost 2 months. A challenged a refusal of the writ of habeus corpus. Argued IA provisions were ultra vires and trenched on civil rights, which constitutionally belonged to prov. Challenged continuous journey requirement in arguing that as a British subject, it was a continuous journey because he left from a British territory (Hong Kong).  D: Upheald denial of habeus corpus  R: Canada’s authority to admit/deny immigrants of any race or nationality is **plenary and ample authority** (British subject has no higher right than any other alien). The only privileged persons are Canadian citizens 🡪 permitted to land in Canada as a matter of right. **Power of preservation of the nation**. |

|  |
| --- |
| ***Watt v Liebelt*** *(1999)* F: Watt was not Canadian citizen, not registered under the Indian Act. Convicted of growing cannabis and ordered deported to the US. Argued he could not be deported from sovereign territory & engaged in protecting burial grounds (AR)  R: Very little evidence, cannot determine if there is a AR. If there was, the tribunal would have to determine if it was infringed by s.4 and 5 of the IA and whether it was justified. |

**Objectives of the IRPA**:

* So plentiful that can effectively support any discretionary implementation choice **s.3(1)**

|  |
| --- |
| de Guzman v Canada (M C&I) (2005)  F: A did not declare existence of 2/3 children when she applied for PR visa. The omission meant she was barred from sponsoring them at a later date. Challenged the legislation: contravenes the Convention on the Rights of the Child, which according to s.3(3)(f) must be applied.  D: Not noncompliant with the Convention  R: International instruments do not override domestic legislation (would mean that II that didn’t exist when IRPA was enacted would override it). If inconsistent with IL, statute prevails. Does not require that each provision apply with international instruments, but just that the Act as a whole be compliant with international HR instruments to which Canada is signatory. Right to family life (Convention) is about deportation, not about admission.   * Legally binding instruments = determinative for interpretation, unless clear intent to the contrary * Non-binding international instruments = persuasive and contextual factors. |

KEY ACTORS AND INSTITUTIONS

Government Departments:

**Immigration, Refugees and Citizenship Canada** (formerly Citizenship and Immigration Canada)

* Executive branch - Legislation sets few limits on scope of activities
* Develops immigration law & policy
* Drafts immigration law, publishes guidelines that instruct IOs, issues visas & passports, responsible for IRB
* Decide who comes to Canada:
  + Select PR and temp residents
  + Issue visitor, worker and student visa, passports

**Canada Border Services Agency**

* Began in 2003, with security turn
* Manage, control, secure Canada’s borders – policing, security screening
* Arresting, enforcement/removals, detainment

**Minister of Public Safety and Emergency Preparedness Canada**

* Policy development and administrative responsibilities with regard to people who are inadmissible to Canada because of security, organized crime and breaches of international human rights

**Minister of Citizenship and Immigration**

* Has primary responsibility for administering the IRPA

Administrative Tribunals and Judicial Courts

**Immigration and Refugee Board of Canada**

* Makes decisions about refugee status, hears refugee and sponsorship appeals and has limited jurisdiction to hear removal orders; Monitors immigration detention; hearings for whether individuals are inadmissible
* Four divisions:
  + 1. Immigration Division \*not lawyers
    - Detention review, admissibility hearings
  + 2. Immigration Appeal Division
    - (1) sponsorship appeals (2) appeals by permanent residents who are faced with losing that status because of inadmissibility or failure to meet the residency requirement (3) appeals by the minister where the immigration division did not issue a removal order (4) removal orders against PRs, refugees, protected persons and FNs with PR visas
    - Can grant appeals on humanitarian or compassionate grounds (discretion)
  + 3. Refugee Protection Division
  + 4. Refugee Appeal Division

JUDICIAL REVIEW:

* **Federal Court of Canada**
  + Proceeds on basis of “leave”
  + Decision on leave is not reviewable and no reasons are given for granting or denying leave
  + Grounds of judicial review are set out in s.18.1(4) of the Federal Courts Act
* **Federal Court of Appeal**
  + Only possible when judge of first instance (at FC) has certified a question as required by s.74(d) of the IRPA
* **SCC**
  + May proceed with leave of the SC, like other civil matters

Kinds of decisions that can be reviewed:

* 1. Decisions of visa officers and immigration officers (accept/reject visa applications; admit/exclude people @ border)
* 2. Decisions of the IRB
  + Immigration division: detention or release of individuals
  + Immigration appeal division: allows or dismisses appeals for refusals of admission, PR orders, etc.
* 3. Decisions of Ministers
* Must exhaust all internal resources (incl. administrative appeals) (IRPA s.72(2)(a))
* Judicial review v Appeal
  + Appeal: on the merits
    - Was the decision correct?
    - can overturn and substitute proper result
  + Judicial Review: supervisor role
    - Was the decision maker in breach of procedural fairness in process? Or substance? (see below)
    - Cannot substitute proper result
    - If decision maker acted lawfully 🡪 application dismissed
* In almost all other areas of admin law, person has a CL right to seek judicial review of a decision by an administrative decision maker that engages rights/interests governed by statute. Not under the IRPR.

STANDARD OF REVIEW

|  |  |
| --- | --- |
| Reasonableness (lower) | Correctness (higher) |
| Is the outcome *permitted* by the terms of the statute? | Is the decision *correct*? |
| Questions of fact, discretion (*Baker*), credibility, questions of law w/i the expertise of the tribunal | Matters of procedural fairness, certain legal questions of general importance of constitutional questions |
| Requires: **justification, transparency and intelligibility** |  |

To determine standard of review: (*Dunsmuir*)

1. Ascertain whether jurisprudence has already determined the standard
2. Proceed to an analysis of factors:

Reasonableness default position for virtually all substantive issues of fact, discretion, and non-constitutional questions of law

1. Presence of absence of a privative clause or right or appeal
2. Expertise of the tribunal relative to reviewing court
3. The purposes of the provisions
4. The nature of the question (law, fact, or mixed fact and law)

Reasonableness

* 1. Reasons
  + Vehicles for demonstrating justification, transparency, and intelligibility
  + *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador* (SCC) 🡪 where a duty to give reasons exists and some type of reasons are provided, cannot be challenged as a breach of procedural fairness (under a correctness standard), but should instead be assessed under reasonableness
    - Reasons can also be inferred (reviewing court may look outside the reasons themselves) (*Agraira*)
    - **If reasons allow reviewing court to determine whether the conclusion was in the range of possible outcomes 🡪 standard met**

|  |
| --- |
| Agraira v Canada (Public Safety and Emergency Preparedness) (2013 SCC Lebel J)  F: A had been residing in Canada since 1997 despite having been found inadmissible on security grounds in 2002 based on membership to an organization considered terrorist to CIC. Applied for ministerial relief under s.34(2) [national interest grounds] IRPA but was denied despite recommendations that he be granted relief. Minister determined it was not in the national interest. Application for PR denied.   * FC: found standard was reasonableness; granted application for judicial review w/ question: must Minister consider specific factors whether presence would be contrary to the national interest? * FCA: dismissed application for JR * Argues that Minister took overly narrow view of term ‘national interest’, also that failed to meet legitimate expectations that certain procedures would be followed and certain factors taken into account in determining his application for relief   D: Decision was reasonable, application for JR dismissed  R: **Standard of review: reasonableness**. Can consider the reasons that could have been offered. Reviewing court cannot engage in a new weighing process (Minister said he had “reviewed and considered” ie. weighed all factors)   * Minister emphasized national security and public safety, was afforded deference. Because the decision is reasonable 🡪 it is valid. * Procedural fairness (legitimate expectations): implied interpretation encompasses the factors in the Guidelines and therefore **no failure to discharge the procedural fairness owed to him** * **Now look at s.42.1** 🡪 The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest [MINISTERIAL RELIEF for organized criminality, human or international rights violations, security grounds] |

|  |
| --- |
| Komolafe v Canada (Minister of Citizenship and Immigration) (2013)  R: Decisions provided no insight into the agent’s reasoning process – merely stated conclusion w/o explanation. |

|  |
| --- |
| Pinto v Canada (Minister of Citizenship and Immigration) (2013)  F: Addressed similar situation as *Komolafe*  R: The greater context (reviewing large amount of applications), allowed the officer to be brief. |

* 2. Weight
  + *Suresh* 🡪 weighing of factors is not the function of a court reviewing the exercise of discretion
  + *Khosa* 🡪 SSC affirmed *Dunsmuir*: certain questions that come before a tribunal do not lend themselves to 1 conclusion; tribunals have a margin of appreciation within the range of acceptable solutions
    - **Not for reviewing court to second-guess weight**
  + BUT *Baker* 🡪 could argue that the SCC faulted the IO for not giving sufficient weight to best interests of the child
* 3. Discretion and the Charter
  + *Baker* 🡪 discretion must be exercised in accordance with principles of the Charter
  + **Not always obvious when the Charter is engaged**
    - *Multani* 🡪 full Charter analysis
    - *Dore* 🡪 proper approach is conduct an administrative review under appropriate SOR (usually reasonableness)
      * The decision-maker should conduct an informal proportionality analysis aimed at balancing the Charter right against the statutory objectives
      * **How do you reconcile a proportionality analysis without reweighing discretionary factors?**

Ensensoy v Canada

F: Minister suspended parental sponsorship, A argued that it essentially nullified right to sponsor granted by Parliament

R: Discretionary powers are robust s.87.3(1) of the IRPA; can reduce number of applications processed to 0

CONSTITUTIONAL & INTERNATIONAL LAW

* Pre-Charter, defining a matter as within exclusive fed jurisdiction over s.91(25) Naturalization and Aliens, operated to invalidate prov leg targeting immigrants – but racist fed leg (such as the Chinese Immigration Acts) was never subject to constitutional challenge
* *Mangat* 🡪 found double aspect, applied paramountcy (prov: only members of law soc could practice law; fed: allowed immigration consultants)

CHARTER

* Charter protections are available to everyone in Canada regardless of citizenship/immigration status (**s.7** 🡪*Singh;* s.15 Everyone has the right not to be arbitrarily detained or imprisoned)
* Canadian officials must comply with the Charter in their actions outside Canada in circumstances where their actions are not governed by international or foreign law (*Hape*, applied in *Khadr*)
  + *Khadr* 🡪 Canadian officials acting outside Canada are not generally bound by the Charter but the Charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligation
    - **This would be a hard argument to make in an immigration context**
* **s.6** Every citizen has the right to enter, remain in and leave Canada

S.7: LIFE, LIBERTY, AND SECURITY OF THE PERSON

* Requirements vary according to context (different than in criminal context)
* The two-part structure of s 7 also means that courts need only make a determination in regard to one part of the section in order to meet the argument raised (ex. court may find that principles of fundamental justice were adhered to, thus bypassing the need to rule on whether a matter of life, liberty, or security of the person was engaged)

|  |
| --- |
| Singh v Minister of Employment and Immigration  F: A asserted claim to Convention refugee status, were denied. Made an application for redetermination of that claim by IAB, refused to allow application proceed (did not believe that there were “reasonable grounds to believe that a claim could, upon the hearing of the application, be established.”). A argues that the procedural mechanisms set out in the IA deprived them of their rights under the Charter (not *application* of procedure, but the procedure itself) – challenging the fact that there was **no oral hearing,**  I: Does IPA deny claimants rights they were entitled to under the Charter? What procedures does the Act set out for adjudicating claims for refugee status?  D: Breach of fundamental justice.  R: Act does not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath, nor is the refugee claimant’s being given an opportunity to comment; decision making body is isolated from persons whose status it is adjudicating.   * **To deprive a refugee claimant of the avenues, open to him under the Act to escape from that fear of persecution must, at the least, impair his right to life, liberty and security of the person** (the rights that the appellants are seeking to assert are those which entitle them to protections under s.7) * Entitled to fundamental justice in the determination of whether they are a Convention refugee * What procedures are necessary to ensure fundamental justice?   + **At a minimum: procedural fairness**     - Where a serious issue of credibility is involved, FJ requires credibility be determined on the basis of *an oral hearing*     - Highly adversarial process 🡪 application will usually be rejected before the refugee claimant has had an opportunity to discover the Minister’s case against him in the context of a hearing * Not saved under s.1 🡪 administrative convenience does not override the need to adhere to fundamental justice   R: **(1) Determines that s 7 rights protect every person physically present in Canada, regardless of their immigration status**. **(2) That a substantive decision about refugee protection engages the core s 7 interests**. **(3) because of these interests, a refugee determination may not proceed without allowing the person concerned the opportunity for a hearing** |

SECTION 15: EQUALITY BEFORE THE LAW

*Charkaoui* 🡪 s.6 allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada

* A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15
* S.6 and s.15 are therefore read together for immigration matters

|  |
| --- |
| Lavoie v Canada (2002 SCC)  F: Canadian citizens receive preferential treatment in federal Public Service employment. A, FNs who sought employment in the PS without obtaining citizenship, challenge the provision of a violation of s.15(1)  D: violates s.15, justified under s.1  R: If it makes immigrants feel less deserving of concern, respect and consideration, it runs afoul of s. 15(1).   * Oakes:   + Objectives: first, to enhance the meaning of citizenship as a unifying symbol for Canadians; and second, to encourage permanent residents to naturalize.   + Rational connection: common sense, widespread international practice   + Minimal impairment: allows dual citizenship, preference not absolute bar   + Balancing: inconvenience they suffered is not too high a price to pay for the government’s right to define the rights and privileges of its citizens |

|  |
| --- |
| Toussant v Canada (AG) (2011 FCA)  F: A citizen of Grenada, entered Canada as a visitor and never left. Health has deteriorated, received some without paying. Tried to regularize status in Canada; applied for PR, then applied for temporary residence permit, asked for waiver of fees which were denied, never paid so applications were never processed. Applied for the Interim health program (embodied in imm law)- denied. Asking for judicial review. Claims her exclusion from med covered infringed her s. 7 and s. 15 rights  D:  R: Assessing s.15(1) claim, apply two-part test:   * (1) whether the law creates a distinction that is based on an enumerated or analogous ground and * (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping * Focus is not differential treatment, but discrimination (which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society) * **Immigration status is no an analogous ground under s.15**   + Further, the Order in Council, with its eligibility criteria, denies medical coverage to the vast majority of us, and not just the appellant and others like her   + No obligation to create a particular benefit, it is free to target social programs |

*Withler* 🡪 s.15 inquiry must be contextual rather than formalistic and should focus on the potential of a provision to exacerbate situations of historic disadvantage. This emphasis may help non-citizens in the future, so Toussaint shouldn’t be seen as final word.

**To determine procedural fairness, look to Baker, Chiau factors. Assess. Is the decision unreasonable? What is considered ‘fair’ is within the discretion of the VO**

* **Nature and significance of the decision, the nature of the statutory scheme, the significance or impact of the decision on the applicant, the absence of a legal right to obtain a visa, the burden of establishing eligibility, the fact that the Officer may be better placed to address the issue raised, and administrative efficiencies (citing *Baker* in *Da Silva*)**

**ENTRY**

**Scope of s.6**

* *Abdelrazik* 🡪 Federal Court ruled that the refusal of the Canadian government to issue an emergency passport to violated his s.6(1) right to enter Canada (otherwise impossible for him to travel from Sudan to Canada)
* *Divito* 🡪SCC held that refusal of the minister to consent to a transfer of a Canadian citizen from a US to a Canadian prison did not breach his s 6 right to enter, even though the United States consented to transfer him and the only obstacle to his entry was the minister’s withholding of consent

**s.19(1) IRPA** – Every Canadian citizen and every Aboriginal person (registered under Indian Act) has the right to enter and remain in Canada– allows non-citizens status Aboriginal person have same rights to enter/remain

**s.35** – *Watt v Liebelt*: FCA held that sovereign nation of Canada is not a legal barrier to the existence of Aboriginal rights (non-citizens then have a right to enter Canada – but would have to be based on AR)

|  |
| --- |
| TEMPORARY RESIDENTS  IRPR s.191: visitor class is prescribed as a class of persons who may become temporary residents  IRPR s.192: FN is a member of the visitor class if the FN has been authorized to enter and remain in Canada.  Objective IRPA: s.3(1)(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities |

TO BECOME TR:

* **IRPA s.20(1)(b)**to become a temporary resident:
  + (i) Hold the visa or other document required under the regulations (types permitted: IRPR s.52(1))
    - Does not have to hold document if citizen of U.S. etc. (s.52(2)(a))
    - Unless visa exempt: IRPR s.190 (see next page)
  + (ii) Will leave Canada by the end of the period authorized for their stay
    - Look into: family ties to COR, financial stability in Canada, immigration status in COR, economic & political conditions in COR, obligations & responsibilities in COR
    - BUT IRPA s.22(2) allows **dual intent** (*Rebmann*)
      * Obligated to consider it, but difficult to assess

VISA APPLICATION:

**Step 1: Application from OUTSIDE of Canada** (**IRPA s.11(1)**; IRPR s.11(2) 🡪(a) in country where A present and has been lawfully admitted; (b) A’s country of nationality or habitual residence if stateless)

* (i) Not inadmissible(IRPA s.11(1))
* (ii) Meet requirements of IRPA (IRPA s.11(1))
  + **Visa** (IRPR s.20(1)(b))
    - UNLESS visa exempt 🡪 IRPA s.7(2) (b) holds TRP issued under s.24(1); (c) authorized to re-enter or remain in Canada
      * IRPR s.190: by **(1) nationality, by (2) documents, or by (3) purpose of entry**
      * Can apply for IRPR s.25 H&C exemption from visa requirement, or from holding a TRV, but generally only permitted for PR

**Step 2: Obtain Visa**

* Issued by visa officer outside of Canada
* **Status is not determined by a visa 🡪 can still be refused status if present at port of entry with visa**
* IRPR s.179 – an officer *shall* issue a TRV where
  + (a) has applied as a visitor, worker, or student;
  + **(b) will leave Canada by the end of the authorized period** \*primary consideration
  + (c) holds a valid passport or similar document;
  + (d) meets the requirements for admission as a visitor, worker, or student;
  + (e) is not inadmissible; and
  + (f) meets the requirements of subsections 30(2) [need medical exam] and (3) [medical certificate], if they must submit to a medical examination under paragraph 16(2)(b) [staying longer than 6 months or have close contact in public health setting, resided in area with high communicable disease] of the Act
  + (g) is not subject of a declaration made under s. 21.1(1) [ministerial discretion]

\***applicants bear onus that these criteria are or will be met**

\*Must meet requirements at time visa issued (IRPR s.180(a)) and continue to meet the requirements when appear at port of entry (IRPR s.180(b))

* Factors:
  + Positive:
    - A is citizen in COR
    - COR is politically stable
      * Those from impoverished, unstable countries may face increased scrutiny
    - A has stable, well paid employment (w/ evidence 🡪 letter stating salary, position dates)
    - Spouse/children not accompanying
    - Owner of substantial business (w/ evidence 🡪 registration of business & financial statements)
    - Good financial situation (w/ evidence 🡪 bank statements)
    - Previous trips to Canada
    - Previous trips to countries as attractive to illegals as Canada
    - Property in COR
    - Host with legal status in Canada (citizen, PR, student etc.)
  + Negative:
    - Host remained in Canada w/ TRV, student application, or entered illegally (idea that if host abused system, so will A)
    - Unmarried (particularly if young and chances of successful establishment in COR are poor)
    - Poor financial situation
    - Poorly paid employment or unemployment
    - Host is friend or distant family member (little previous contact)
    - No previous travel abroad
    - Has previously been denied visa

**Single entry visa** (SEV) – can go back and forth to U.S.

**Multiple entry visa** (MEV) – can be as long as passport (1 years minus 1 month)

\*Automatically assessed for MEV

**Super visa** –MEV for parents/grandparents of Canadian nationals or PRs; can’t access healthcare but must purchase health insurance (min 1 year), renewable for up to 10 years, must meet financial criteria.

* + - Has been denied visa by another country
    - Owns no property
    - Wants to visit fiancé/spouse who is residing in Canada
    - Listed in FOSS (national immigrant database for those who have violated the Act or a report has been written)

**Step 3: Port of Entry** [get status]

* IRPA s.18(1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada
* IRPA s.22(1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has **applied for that status**, has **met the obligations set out in paragraph** 20(1)(b), is **not inadmissible** and is not the subject of a declaration made under subsection 22.1(1)
  + IRPA s.22.1(1) gives the Minister the power to declare that a FN is not a TR if it just **justified by public policy concerns** (IRPA s.22.1(2) maximum 3 year declaration, s.22.1(3) may shorten or revoke declaration)
    - Notice requirements 🡪 IRPR s.182.1
    - IRPR s.182.2(1) FN who is subject to a declaration can make written submissions to why declaration should be revoked or effective period shortened (2) within 60 days of notice of declaration
* TR is authorized to enter and remain in Canada on a temporary basis as a visitor or as holder of TRP (IRPA s.29(1))
* IRPA s.11(1.3) If sponsored, sponsor must meet requirements
* IRPA s.23 – officer can authorize entrance for the purpose of further examination or for an inadmissibility hearing
* **If denied at port of entry** 🡪 **can be challenged before the FC with leave**

**Step 4: Permits?** (depending on purpose of visa) 🡪 Move onto page 15

CONDITIONS (IRPR s.193: a visitor is subject to conditions imposed under Part 9)

* IRPA s.29(2) 🡪 must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by end of the period authorized for their stay and may re-enter Canada only if authorization provides for re-entry.
* IRPA s.30(1) FN may not work or study unless authorized to do so under this Act (also IRPR ss. 196 & 212)

**IF INADMISSIBLE AS A TR** 🡪 **Discretionary Temporary Resident Permit**

**Procedure:**

* Can share info w/ U.S.
* No formal appeal process if application is refused – can reapply though
* May challenge an approval by seeking judicial review (with leave) – practically difficult from abroad
* **Only entitled to a minimal degree of procedural fairness** (*Chhetri*)
  + No obligation of visa officer to advise the applicant of concerns or deficiencies in their application
  + No obligation to offer an interview
  + No onus for VO to address/satisfy additional concerns
  + Often difficult to set aside VO decisions

Khatoon v Canada (M C&I) (2008)

F: A applied to attend wedding. Refused. VO checked two boxes: (1) not satisfied she would leave (considering ties to COR and factors that motivate staying) (2) not provided sufficient documentation re: hosts income/assets

* Has 4 children in Pakistan, son and grandson in Canada
* Canadian relatives have decent income, no proof of employment or savings
* Notes show that VO was concerned that since her son had stayed in Canada without status, she may as well. Know that elderly women normally live with sons not daughters in Pakistan – only son lives in Canada
* Application pursuant to s.72(1) of IRPA for judicial review

D: Application for judicial review granted – decision of officer quashed, remitted back for re-determination.

R: **Officer’s findings remain undisturbed unless they are ‘clearly irrational’ or ‘evidently not in accordance with reason’**

* Objectives suggest family reunification is an important consideration
* Officer’s findings unreasonable:
  + (1) Won’t leave Canada
    - 1. the fact that her son was in Canada out of status cannot be used to impute similar conduct to the applicant, **people are to be judged on their own behaviour**
    - 2. the mere fact that elderly widowed women normally, in the view of the officer, live with sons and not daughters, cannot be used to attack the bona fides of the applicant’s application (gross generalization patently unreasonable)
    - 3. Officer disregarded the applicant’s previous trip to Saudi Arabia as not international – not true.
  + (2) Unsatisfied with income
    - Was satisfied host’s income was decent - patently unreasonable to require that the applicant, a woman in her 80s, produce evidence of her personal funds as well

Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness) (2010 FC)

F: A was scheduled to speak relating to wars in Middle East – argues that he was inadmissible because of the Minister’s opposition to his political views (argues bad faith and abuse of executive power)

* Minister argues that his politics are not legally relevant because his inadmissibility was legitimately evaluated w/ legislation and that no legally reviewable decision was made to exclude him because he never appeared at a POE.
* Application for judicial review pursuant to IRPA s.72

D: Matter of law 🡪 application must be dismissed (preliminary decision did not constitute a reviewable decision)

R: Violate 2(b)? It is a form of expression but there is no obligation to provide a platform by which the applicants may exercise FOE. The preliminary assessment **is not reasonable 🡪 had more to do with antipathy to his political views** (unreasonable to rely on grounds that he was a terrorist).

* A FC may, under paragraph 18.1(3)(b), can review decisions 🡪 but this isn’t a decision.

\*Now s.22.1(1) IRPA gives the Minister discretion to deny admission to FN as TR on public policy grounds

LENGTH OF STAY:

* Authorized period of stay: IRPR s.183(2) 6 months or any other period fixed by an officer on basis of: (a) means of support; (b) period TR applied to stay; (c) expiry of passport or travel document
  + Begins: date entered Canada (s.183(3) IRPR))
  + Ends: earliest of: IRPR s.183(4)(a) TR leaves w/o prior authorization; (b) permit becomes invalid (in case of work or study permit); (b.1) day second permit becomes invalid; (c) TR ***permit*** is no longer valid under s.63 (cancelled, leaves Canada, expires, 3 years elapses); (d) authorized period ends

**Classes of people**:

* If entered as member of a crew – must leave within 72 hours (IRPR s.184(1))

Extending Stay/Renewing:

* IRPR s.181(1) FN may apply for an extension of their authorization to remain in Canada as a TR if (a) the application is made by the end of the period authorized for their stay; **and** (b)) they have complied with all conditions imposed on their entry into Canada
* IRPR s.181(2) An officer ***shall*** extend authorization to remain in Canada as a TR if it is established FN continues to meet criteria in s.179 [TRV requirements]
* IRPR s.183(5) If applied for extension of period authorizing stay and decision is not yet made by the time the period ends, the period is extended until (a) the day the decision is made if refused; (b) end of new period authorized for stay
  + Does not apply to FN subject to declaration under 22.1(1)
  + Retains status during this period (IRPR s.183(6))

**Already Expired? Cannot apply for extension any more BUT can get it restored.**

* If your visa expires, it can be restored if done **within 90 days of expiry**
  + IRPR s.182(1) 🡪 officer ***shall*** restore if applicant continues to meet original requirements and is otherwise compliant with the statute, if failing to comply with:
    - IRPR s.185(a) [stay longer than authorized], (b)(i)-(iii) [type of work, employer, location of work], or (c) [studies they are permitted to engage in or are prohibited from engaging in]
      * **NOT** (d) [area permitted to travel] or (e) [times and places must report for medical or surveillance etc.] or IRPR s.182(2): Officer ***shall*** not restore status of a student who is not in compliance of 220.1(1) [study permit conditions: shall enroll at designated learning institution and remain until complete studies & actively pursue course or program]
    - And did not fail to comply with any other conditions or subject to declaration under s.22.1
  + **Restoration cures any breach of length of stay requirement** (*Ozawa*)

LOSS OF STATUS

* **IRPA** s. 47 A foreign national **loses temporary resident status**
  + **(a)** at the end of the period for which they are authorized to remain in Canada;
  + **(b)** on a determination by an officer or the Immigration Division that they have failed to comply with any other requirement of this Act; or
  + **(c)** on cancellation of their temporary resident permit

**Conditions**:

* Cannot work or study without appropriate permit (IRPA s.30(1); IRPR s.183(1)(b) [work] or (c) [study])
* Failure to leave before expiry of TRV (IRPR s.183(1)(a))
* Work for employer who offers striptease, erotic dance, escort services or erotic massages (s.182(1)(b.1)) or extending employment agreement with employer who does such (b.2)
* Visa officer may impose, vary or cancel following conditions on a TR: (IRPR s.185)
  + (a) Period authorized for their stay
  + (b) work they are permitted to engage in, or prohibited from engaging in:
    - (i) type of work (ii) employer (iii) location of work (iv) times and periods of work
  + (c) studies they are permitted to engage in, or are prohibited from engaging in:
    - (i) type of studies (ii) educational institute (iii) location of studies (iv) times and periods of studies
  + (d) area which they are permitted to travel or prohibited from travelling
  + (e) times and places they must report for (i) medical examination, surveillance or treatment; or (ii) presentation of evidence of compliance with conditions

PERMITS

STUDY PERMIT

IRPR s.210: The student class is prescribed as a class of persons who *may* become temporary residents

IRPR s.211: member of the student class if has been authorized to enter and remain in Canada as a student

**Who needs to apply?**

* Anyone who wants to enroll in a program longer than 6 months (IRPR s.188(1)(c))
* **Who doesn’t need a study permit?**
  + IRPR s.188(1) FN may study w/o a study permit if (a) family member of member of private staff of foreign representative (b) member of armed forces that is a designated state (c) duration of course or program less than 6 months [BUT *can* apply before entering in sub(2)] (d) they are an Indigenous person
  + IRPR s.189 FN who has made an application to renew study permit until a decision is made on that application if have remained in Canada since expiry and continue to comply with the conditions other than the expiry date

**Where to apply?**

* Generally**, apply abroad** (IRPR s.213)
* BUT can apply when entering if (IRPR s.214)
  + (a) a national or a permanent resident of the United States;
  + (b) a person who has been lawfully admitted to the United States for permanent residence;
  + (c) a resident of Greenland; or
  + (d) a resident of St. Pierre and Miquelon
* Can apply if already in Canada, if:
  + IRPR s.215(1) FN can apply for study permit if they:
    - (a) hold a study permit;
    - (b) apply within the period beginning 90 days before the expiry of their authorization to engage in studies in Canada under subsection 30(2) IRPA [minor child], or IRPR 188(1)(a) [family member of diplomat etc.], and ending 90 days after that expiry;
    - (c) hold a work permit;
    - (d) are subject to an unenforceable removal order;
      * But do not become temporary residents (IRPR s.218)
      * Do not need to have sufficient financial resources (IRPR s.220)
    - (e) hold a **temporary resident permit** issued under subsection 24(1) of the Act that is valid for at least six months;
    - (f) are a temporary resident who
      * (i) is studying at the preschool, primary or secondary level,
      * (ii) is a visiting or exchange student who is studying at a designated learning institution, or
      * (iii) has completed a course or program of study that is a prerequisite to their enrolling at a designated learning institution; or
    - (g) are in a situation described in s.207 [live-in caregiver class, spouse or CL partner class, protected person, has applied to become PR and has been granted exemption under IRPA ss. 25(1), 25.1(1) or 25.2(1) [H&C or Pub Pol], or is family member of a person described previously)
  + OR (2) **family member of a foreign national** may apply for a study permit after entering Canada if the foreign national resides in Canada and the foreign national
    - (a) holds a study permit;
    - (b) holds a work permit;
    - (c) holds a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months;
    - (d) is subject to an unenforceable removal order;
    - (e) is a member of the armed forces of a country that is a designated state described in paragraph 186(d);
    - (f) is an officer of a foreign government described in paragraph 186(e);
    - (g) is a participant in sports activities or events, as described in paragraph 186(h);
    - (h) is an employee of a foreign news company as described in paragraph 186(i); or
    - (i) is a person responsible for assisting a congregation or group, as described in paragraph 186(l).

**Requirements:**

* TR can be authorized to study if FN meets conditions in regulations (IRPA s.30(1.1))
* IRPR s.216 (1): Subject to subsections (2) and (3), an officer ***shall*** issue a study permit to a foreign national if, following an examination, it is established that the foreign national
  + (a) applied for it in accordance with this Part;
  + (b) will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;
    - Does not apply to those described in 206 and 207(c) and (d)
  + (c) meets the requirements of this Part;
  + (d) meets the requirements of subsections 30(2) and (3), if they must submit to a medical examination under paragraph 16(2)(b) of the Act; and
  + (e) has been accepted to undertake a program of study at a **designated learning institution** (=defined in IRPR s.211.1(a))
* IRPR s.219(1): must have written acceptance letter from designated learning institution
  + Does not apply to a family member of a FN whose application for a work or study permit is approved in writing before the FN enters Canada (IRPR s.219(2))
* IRPR s.220: must have sufficient financial resources (without obtaining employment in Canada) to (a) pay tuition, (b) maintain themselves and accompanying family members and (c) pay transportation costs
* **Conditions:** IRPR s.220.1(1): must enroll at designated institution and remain enrolled until they complete their studies and actively pursue their course or program of study
  + BUT can transfer between institutions, programs and levels without applying to change conditions (UNLESS officer imposed conditions under IRPR s.18)
  + If DLI loses status after the permit is issued because of the termination of an agreement between province & Minister or the coming into force of an agreement or revocation of the designation by the province sub (1) still applies as if it had not been un-designated (IRPR s.220.1(2))
  + (1) DOES not apply to those in s.300(2)(a)-(i) or a family member of a FN who resides in Canada and is described in s.215(2)(a)-(i) (IRPR s.220.1(3))
  + **Evidence of compliance**: must provide evidence if (a) O requests it because has reason to believe the permit holder is not complying/has not complied (b) O requests as part of a random assessment
* IRPR s.221: must not have previously engaged in unauthorized work or study or failed to comply with a condition of a permit
  + DOES NOT APPLY if:
    - (a) more than 6 months have elapsed (get pardon)
    - (b) unauthorized activity consisted of failing to abide by conditions related to period of authorized stay, engaging in prohibited work, working with prohibited employer, or working in prohibited location (can be cured)
    - (c) was subsequently issued TRP
* IRPR s.185(c) the studies that they are permitted to engage in, or are prohibited from engaging in, in Canada, including
  + (i) the type of studies or course,
  + (ii) the educational institution,
  + (iii) the location of the studies, and
  + (iv) the times and periods of the studies;
* Note: every minor child (other than a child of a TR who is not authorized to work or study) can attend preschool primary or secondary school (IRPA s.30(2))

**Opportunities once a student**:

* If hold a valid study permit, studied continuously full time in Canada and completed a program at least 8 months in duration, obtained a degree/diploma/certificate can apply within 90 days of receiving written confirmation of completion can apply for a **post-graduate work program**
  + Work permit is valid for as long as the program (8 months – 3 years)
  + Help graduates qualify for PR under the CEC

**Expiration**:

* IRPR s. 222 (1) A study permit becomes invalid upon the first of:
  + (a) 90 days after permit holder completes studies
    - Does not apply to persons described in 300(2)(a)-(i) or or a family member of a FN who resides in Canada and is described in s.215(2)(a)-(i) (IRPR s.222(2))
  + (b) the day that a removal order becomes enforceable
  + (c) the day the permit expires

**Renewal**:

* IRPR s. 217 (1) A foreign national may apply for the renewal of their study permit if
  + (a) the application is made before the expiry of their study permit; and
  + (b) they have complied with all conditions imposed on their entry into Canada.
* (2) An officer ***shall*** renew the foreign national's study permit if, following an examination, it is established that the foreign national continues to meet the requirements of s. 216.

**Revocation:**

* If A does not remain enrolled or does not ‘actively pursue their course or program of study’ (IRPR s.220.1(1))
  + BUT can transfer between institutions, programs and levels without applying to change conditions

TEMPORARY WORKERS

IRPA s.14(1) Regulations provide for any matter relating to the application of this Division and may define for the purpose of this Act, the terms used in this Division

4 Kinds:

* (1) Temporary foreign workers
  + Need work permit and LMIA (IRPR s.200, 203)
* (2) Workers in ss.204-208 [international mobility program]
  + Need work permit, ~~LMIA~~
* (3) Business visitors
  + ~~Work permit~~, ~~LMIA~~
  + IRPR s.186(a)-(w) [where no work permit required, see page XX above]
  + IRPR s.187(1) described in (2) or who seeks to engage in international business activities in Canada w/o directly entering the labour market = IRPR s.187(3)(a) if primary source of remuneration for business activities is outside Canada; and (b) principal place of business and actual place of profits remain predominantly outside Canada
    - (2) Following FN are business visitors:
      * (a) FN purchasing Canadian goods or services for a foreign business or govt, or receiving training or familiarization in respect of goods/services
      * (b) FN receiving or giving training with in a Canadian parent or subsidiary of the corporation that employs them outside Canada, if any production of goods/services that results from training is incidental
      * (c) FN representing a foreign business or govt for the purpose of selling goods for that business or govt, if FN is not engaged in making sales to general public in Canada
* (4) FN who work in Canada but not authorized under IRPA or IRPR

WORK PERMITS:

IRPR s.194: the worker class is prescribed as a class of persons who may become temporary residents

IRPR s.195: FN is part of worker class if has been authorized to enter and remain in Canada as a worker

**Who needs to apply?**

* **Must not work unless authorized to do so by work permit or under IRPR** (IRPR s.196)
* Any FN who wants to work in Canada under temporary visa (IRPA s.30 (1) A foreign national may not work or study in Canada unless authorized to do so under this Act; (1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.)
* **Can apply:**
  + IRPR s.208: if temporarily destitute
* **DOES NOT need a work permit:** (IRPR s.186)
  + (a) as a business visitor within meaning of s.187 (not directly entering labour market)
  + (b) as a foreign representative (accredited) or (c) family member of the foreign representative
  + (d) member of armed forces with designated status
  + (e) officer of foreign government to take up duties (e.1) cross-border maritime law enforcement officer
  + (f) **full-time international students w/ study permit may work on-campus without a work permit**
  + (g) performing artist appearing in a performance for film, television or radio broadcast, or a staff member of such if (i) part of foreign production or group etc. (ii) not in an employment relationship with organization
  + (h) participant in sports activities or events as individual or group
  + (i) employee of a foreign news company for reporting in Canada
  + (j) as a guest speaker for sole purpose of an event that lasts not longer than 5 days
  + (k) member of the executive of a committee that is organizing a convention or meeting in Canada or as a member of the administrative support staff of such
  + (l) person who is responsible for assisting a congregation or group in the achievement of its spiritual goals and whose main duties are to preach doctrine, perform functions related to gatherings of the congregation or group or provide spiritual counselling
  + (m) judge, refer or similar official at amateur sports competition, international cultural or artistic event or animal/agriculture competition
  + (n) examiner or evaluator of research proposals or university projects, programs or theses
  + (p) as a student in a health field, including as a medical elective or clinical clerk at a medical teaching institution in Canada, for the primary purpose of acquiring training, if they have written approval from the body that regulates that field
  + (q) civil aviation inspector (r) representative or advisor for aviation
  + (s) member of a crew foreign owned and engaged in international transportation
  + (t) provider of emergency services…
  + (u) **until a decision is made on an application made by them under subsection 201(1), if they have remained in Canada after the expiry of their work permit and they have continued to comply with the conditions set out on the expired work permit, other than the expiry date**
  + (v) (i)-(iii) **full time international students w/ study permit, in a post-secondary vocational or professional training program of at least 6 months that leads to a diploma, diploma or certificate may work off campus without a work but** (iii) **only for 20 hours/week during regular academic session, full time in breaks**
  + (w) if they were or are holder of a study permit who has completed their program of study and (i) meet requirements set out in (v) and (iii) applied for a work permit before the expiry of the study permit and a decision has not been made in respect to their application

**Where to apply?**

* Generally, before entering Canada (IRPR s.197; IRPA s.11(1))
  + BUT can apply upon entry if visa-exempt under Division 5 of Part 9 (IRPR s.198(1))
    - CANNOT apply while entering [determination under 203 required, does not hold medical certificate required under 30(4), participant in international youth exchange program unless US] (IRPR s.198(2))
  + BUT can apply within Canada (after entering) if:
    - IRPR s.199 if (a) already hold a work permit, (c) study permit or (d) temporary resident permit under s.24(1) that is valid for at least 6 months, or (b) work under s.186 authority without a work permit, or (e) are a family member of the previous categories (f) have no other means under s.206 or 207 [live in caregiver class, spouse or CL partner class, protected person, exemption under 25(1), 25.1(1) or 25.2(1), or is a family member of previous categories] (g) applied for work permit before entering and application was approved in writing but have not issued permit (h) applying as trader or investor (i) hold written statement from Department of Foreign Affairs

**Requirements:**

* TR *can* be authorized to study if FN meets conditions in regulations (IRPA s.30(1.1))

\*if issued permit under 206 or 207(c) or (d) 🡪 DO NOT BECOME TEMPORARY RESIDENT (IRPR s.202)

* IRPR s.200(1) VO ***shall*** issue a work permit to FN who applies before entering if:
  + (a) Properly applied for;
  + (b) will leave Canada at the end of the period of authorized stay;
  + (c) FN:
    - (i) is described in 206\* [no other means] or 208 [humanitarian reasons]
    - (ii) intends to perform work in 204 or 205 but does not have an offer to perform that work or is described in 207\* [live in caregiver, spouse or CL partner class, protected person, exemption under 25(1), 25.1(1) or 25.2(1), or is a family member of previous categories] and has an offer of employment and VO is satisfied that:
      * (A) offer is genuine
      * (B) employer: (I) for 6 years before met wages and working conditions
    - (**iii) has been offered employment and O has made a positive determination under 203(1)(a)-(e) 🡪 see LMIA conditions below**.
  + (e) submits a medical certificate when this is required under 30(2) [new medical exam if >6 months in area of communicable disease] and (3) [medical certificate not danger to public health or safety] under s.16(2)(b) of Act

LMIA

* *May* be issued a work permit under s.200 but **DO NOT NEED LMIA**: [International Mobility Program]
  + Intnl agreement (IRPR s.204**\*\***) agricultural work, by provinces or Minister-provinces

**\*\*HOWEVER**, if work permit is sought for job offer that has been extended by an employer (although no LMIA required) must **assess whether offer is genuine**

* + Work of significant social, cultural, economic benefit to Canadians or work of religious or charitable nature (IRPR s.205**\*\***)
    - (a) create or maintain significant social, cultural, or economic benefits or opportunities for Canadians or PRs
      * Proposed benefit must be significant, meaning it must be important or notable 🡪 suggested indicia: evidence of recognition for achievements and significant contributions to the field; evidence of scientific or scholarly contributions to the field; and publications authored by the foreign national in academic or industry publications
      * *Da Silva* 🡪 officer did not breach applicant’s right to procedural fairness in letter that stated exemption in s.205(a) was not warranted
        + This is **not considered a final decision** (just an eligibility decision)
    - (b) create or maintain reciprocal employment of Can citizens or PRs in other countries
    - (c) designated by Minister as being work that can be performed by FN on basis of these criteria:
      * (i) related to research program (i.1) essential part of post-secondary academic, vocational or professional raining program offered by designated learning institution (i.2) essential part of program at the secondary level (ii) limited access to Canadian labour market is necessary for reasons of public policy relating to competitiveness of Canadian academic institutions or economy
    - (d) religious or charitable nature
  + Refugee claim or unenforceable removal order with no other means of support IRPR s.206**\*\***
    - If (a) has made a claim for refugee protection that has not been determined or (b) subject to an unenforceable removal order
    - BUT must not be issued to claimant in s.111.1(2) unless 180 days have elapsed since claim was referred to RPD.
  + Member of live in caregiver, spouse or CL partner class, protected person, exemption under 25(1), 25.1(1) or 25.2(1), or is a family member of previous categories (IRPR s.207(a)-(e))
    - **All people waiting for PR applications to be processed**
  + IRPR s.208🡪 Student visa & temporarily destitute because of circumstances beyond their control and beyond the control of any person on whom that person is dependent for the financial support to complete terms of study OR holds a TRP under 24(1) that is valid for at least 6 months.
  + Work permits may be tied to a specific employer and offer or they may be “open”
  + Employers must (IRPR s.209.3(1))
    - remain actively engaged in the business
    - comply with federal and provincial laws regulating employment and the recruiting of employees
    - provide the foreign national with employment “in the same occupation as that set out in the foreign national’s offer of employment and with wages and working conditions that are substantially the same as—but not less favourable than—those set out in that offer”; and make reasonable efforts to provide a workplace that is free from abuse
    - Must verify that within the previous six years no foreign nationals employed by the employer have been made to work in an occupation, for wages, or under working conditions substantially inconsistent with the job offer made to them (IRPR s.200(1)(ii.1))
    - **If not compliant** 🡪 work permits may be revoked (IRPA s.30(1.41))
      * An LMIA issued to an employer may be suspended or revoked (IRPA s.30(1.43))
      * Employers will be ineligible to hire foreign nationals under a work permit for two years (IRPR s 200(3)(h))
      * Employers past non-compliance may be taken into account for up to six years in the processing of work permit applications (IRPR s 203(1)(e))
* Employer requirements for LMIA: IRPR s.203(1), O assesses:
  + (a) **the job offer is genuine**
    - IRPR s.200(5) 🡪 genuineness based on whether (a) the employer who made the offer is actively engaged in the business in respect of which the offer is made; (b) the offer is consistent with the employer’s reasonable employment needs; (c) the employer is reasonably able to fulfill the terms of the offer; and (d) the employer or recruiter has in the past complied with federal or provincial employment laws
  + (b) **the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada**; IRPR s.203(3) considers:
    - * (a) Work will result in direct job creation or retention by Canadians or PRs
      * (b) Work will result in transfer of skills and knowledge to Canadians
      * (c) Work will likely fill labour shortage
      * (d) Wages and working conditions are sufficient to attract Canadians
      * (e) Employer made reasonable efforts to hire and train Canadians
      * (f) Employment of foreign worker will affect labour dispute
    - s.203(1.01) – presumption that employment would not have positive or neutral effect on labour market *if* required the ability to communicate in language other than English or French (*Construction and Specialized Workers Union*) UNLESS:
      * (a) employer demonstrates that the ability to communicate in the other language is bona fide requirement for performing the duties associated with the employment
      * (b) offer of employment to work relates to work to be performed under an international agreement concerning seasonal agricultural workers
      * (c) relates to other work to be performed in the primary agriculture sector w/i s.315.2(4)
  + (c) **Would not be inconsistent with the terms of any federal-provincial agreement that apply to the employers of foreign nationals**; and
  + (e) in the past six years, the employer has not, without justification, breached the terms of previous offers of employment to foreign nationals admitted as temporary workers
    - IRPR s.203(1.1) sets out justification for this
* **Validity period is set out on the LMIA** (IRPR s.203(3.1))
* **Exempt from LMIA requirement:** ss.204-208 above

**Refusal**:

* IRPR s.200(3) ***shall*** not be issued if the foreign national has:
  + (a) Unable to perform work sought
  + (b) Work will adversely affect settlement of any labour dispute
  + (c) Live-in caregiver who does not meet s.112 requirements
  + (d) Has engaged in unauthorized work or study or has failed to comply with a condition of a previous permit or authorization unless:
    - (i) 6 months has elapsed
    - (ii) study or work permit was unauthorized because of type of work, employer or location of work or type of studies permitted to engage in.
    - (iii) s.206 applies to them [no other means]
    - (iv) was subsequently issued a TRP
  + (f.1) Unpaid fees
  + (g) Worked for period or periods totaling more than 4 years (unless 4 years have passed, work of social/cultural/economic benefit or int’l agreement)
    - Does NOT include periods of work where FN was authorized to study on a full-time basis (IRPR s.200(4))
  + (g.1) Employer of sexual services
  + (h) Employer is non-compliant [refer to other sections]
  + Worked in Canada for one or more periods totaling four years, with certain exceptions (IRPR s200(3)(g))
* *Shall* **deny** this if public policy considerations, given by MIs, justify it (IRPA s.30(1.2)) but it requires concurrence of a second officer (s.30(1.3))
  + Public policy considerations should be those that aim to protect FN from degrading, humiliating treatment including sexual exploitation (IRPA s.30(1.4))
* Restrictions: FN must not enter into an employment agreement or extend term of agreement with an employer that offers striptease etc. or referred to in s.200(3)(h)(i)-(iii) [failure to satisfy criteria [wages and working conditions], violations, or in default] (IRPR s.196.1)

**Revocation**:

* An officer can revoke a work permit if in their opinion, public policy considerations that are specified in MIs justify it (IRPA s.30(1.41))
  + Can revoke or suspend this opinion (IRPA s.30(1.43))

**Invalidity:**

* Work permit becomes invalid when it expires or when a removal order that is made against the permit holder becomes enforceable (IRPR s.209)

**Renewal**:

* IRPR s.201(1) FN may apply for the renewal of their work permit if (a) application is made before their work permit expires or (b) have complied with all the conditions imposed on their entry into Canada
* O ***shall*** renew if it is established that the FN continues to meet the requirements of s.200 (IRPR s.201(2))

|  |
| --- |
| Babu v Canada (M C&I) (2013)  F: Unsuccessfully applied for a study permit 3 times in 5 years. Most recent was refused because VO was not satisfied that he would leave (limited employment prospects in country of residence, current employment, and personal assets.   * A argues that his father owns property and father expected him to return to care for him; argues that he has not pursued education in Pakistan bc wants to study in Canada.   I: Did VO’s decision unreasonable bc failed to consider totality of evidence or unreasonably assessing A’s ties to Pakistan?  D: Not unreasonable.  R: VO decided he didn’t have sufficient ties, not that he had no ties. Low level of establishment in Pakistan. Decided he was not genuinely focussed on education. A argued that he could not easy obtain academic credentials in Pakistan bc he is Hindu and does not have wealth/political connections 🡪 no evidence of this, and even if so this works against him.  **This case also shows how reviewing courts put things together that weren’t present in the decision** (*Newfoundland Nurses*) |

|  |
| --- |
| Construction and Specialized Workers’ Union (2013)  F: Challenge decision to issue positive labour market opinion under IRPR s.203 for Temporary Foreign Worker Program   * O expressed concerns of non-English speaking TFW would have a negative impact on transfer of skills and knowledge to Canadians but accepted there would be some skill transfer   R: **Not unreasonable** 🡪 falls within the range of possibilities (despite concerns, to make a positive discrimination)   * LMO decisions are administrative decisions and the duty to give reasons is at the low end of the scale. Accordingly, his failure to state the source, given the evidence before the Court, is not a reason to set aside his decision |

|  |
| --- |
| Randhawa (2006)  F: VO questioned A about food hygiene & decided he was not qualified to perform the cook’s job he was offered. Hygene and sanitation did not come from NOC but job offer duties. VO kept file open for 30 days while A completed course. After 2nd interview, concluded he was unable to perform duties.  R: Unreasonable. Reasonable to expect applicant to satisfy job requirements but unreasonable not to take into account some measure of job orientation that would inevitably be provided. Application for JR allowed. |

|  |
| --- |
| Sing Grewal (2013)  F: 3 applications: caregiver, truck driver, long-haul truck driver. VO rejected application because she was concerned about command of English and concern he would overstay. Unlike the *Randhawa*, VO lists several duties in the NoC as the basis for his position (were not required *per* employment contract)   * Application for JR that he did not meet requirements of TFW class.   R: Reasonable to expect that more English was required (transparent, intelligible conclusion which fell within the range of possible outcomes). Should not have been given the opportunity to respond because no additional information would have altered findings. |

CAREGIVER CLASS (TR)

IRPR s.110: Live-in caregiver class is prescribed as a class of FN who may become PRs on the basis of the requirements of this division

* Do not need to live in a private residence
* Just need to apply for an ordinary work permit

\*\*must be met when application for work permit or TRV is made, when permit/visa is issued and when FN becomes PR

**Requirements:**

* IRPR s.111: FN must make:
  + (a) application for a work permit
    - IRPR s.112\*\* permit ***shall*** **not** be issued unless:
      * (a) applied **before entering Canada**
      * (b) have successfully completed a course of study that is equivalent to secondary school in Canada
      * (c) have training or experience in a field or occupation related to the employment for which permit is sought:
        + (i) completion of 6 months of full time training in a classroom setting OR
        + (ii) completion of 1 year full time paid employment, including 6 months of continuous employment with 1 employer in a field within three years before application
      * (d) have ability to speak, read and listen to En or Fr at a level sufficient to communicate in unsupervised setting
      * (e) have employment contract with future employer
  + (b) application for (i) TRV, if required (ii) electronic travel authorization
* **Need an LMIA**

“Caring for children” class

Requirements:

* (1) experience for 2/5 previous years in child-care provider (set out in the NOC)
* (2) meet all employment requirements
* (3) must have benchmark 5 for 1 official language for all skill areas
* (4) Canadian education credential for at least 1 year of post-secondary studies, or an equivalent foreign credential

“Caring for people with medical needs” class

Requirements: similar, but 4 occupations can be the basis for the application

**Opportunity for PR**

* IRPR s.113(1)\*\* a FN becomes a member of the live-in caregiver class if:
  + (a) have submitted application to remain in Canada as a PR
  + (b) are a temporary resident
  + (c) hold a work-permit as a live-in-caregiver
  + (d) entered Canada as a LIC and for 2/4 years immediately following entry, or for at least 3900 hours during not less than 22 months (can be more than 1 household, cannot include more than 390 hours of overtime) in those 4 years:
    - (i) resided in a private household
    - (ii) provided childcare, senior home support care or care of a disabled person without supervision
  + (e) are not (and none of family members) are subject to an enforceable removal order or an admissibility hearing, or an appeal or application for JR arising from a hearing
  + (f) did not enter Canada as a live-in caregiver as a result of misrepresentation concerned education, training or experience
  + (g) intended to reside in Quebec 🡪 have to meet criteria
* If FN wants to bring family members, they must be included in the application when it was made (IRPR s.114\*\*)
  + Family member ***shall***become a PR if (a) LIC has become PR and (b) not inadmissible (IRPR s.114.1)

PERMANENT RESIDENCY

**STEP 1: MEET REQUIREMENTS OF CLASS**

**STEP 2: APPLY FOR VISA**

**Where to apply:**

* A foreign national must, **before entering** Canada, apply to an officer for a visa or for any other document required by the regulations(**IRPA s.11(1)**)
  + **IRPR s. 6** A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa
  + **IRPR s. 11** – to immigration office that serves:
    - (a) **the country where the applicant is residing**, if the applicant has been lawfully admitted to that country for a period of at least one year; or
    - (b) the **applicant's country of nationality** or, if the applicant is stateless, their country of habitual residence other than a country in which they are residing without having been lawfully admitted.
* IRPR s.72(2) **CAN apply in Canada** 🡪 if they are (a) live-in caregiver class, (b) spouse or CL partner in Canada class and the (c) protected temporary residents class [refugee] AND meet requirements in IRPR s.72(1)
  + **Where? 🡪 must be made to the Department’s Case Processing Centre in Canada that serves the applicant’s place of habitual residence** (IRPR s.11(3))

**Requirements:**

* + **IRPR s.72(1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that**
    - (a) they have applied to **remain in Canada** as a permanent resident as a member of a class in (2);
    - (b) in Canada to establish permanent residence;
    - (c) **member of that class**;
    - (d) meet the **selection criteria and other requirements** applicable to that class;
    - (e) except in the case of FN under 178(2) or of a member of the protected temporary residents class,
      * (i)**they and their family members, whether accompanying or not, are not inadmissible**,
      * (ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and
      * (iii) they hold a medical certificate — based on the most recent medical examination to which they were required to submit under paragraph 16(2)(b) of the Act and which took place within the previous 12 months — that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

**REQUIREMENTS:**

* **IRPR s.** **70** (1) An officer ***shall*** issue a permanent resident visa to a FN if, following an examination, it is established that
  + (a) has applied in accordance with these Regulations for a permanent resident visa as a member of a class referred to in subsection (2);
  + (b) coming to Canada to establish permanent residence;
  + (c) is a **member of that class**;
  + (d) **meets the selection criteria and other requirements** applicable *to that class*; and
  + (e) FN and family members, whether accompanying or not, are not inadmissible
* (2) The classes are
  + (a) the **family class**;
  + (b) the **economic** class, (FSW class, the transitional FSW class, the Quebec skilled worker class, the provincial nominee class, the Canadian experience class, federal skilled trades class, the investor class, the entrepreneur class, the self-employed persons class, the transitional federal investor class, the transitional federal entrepreneur class and the transitional federal self-employed persons class
* **Residency Requirements:**
  + IRPA s.28(1) A permanent resident must comply with a residency obligation with respect to every five-year period.
  + (2) The following provisions govern the residency obligation under subsection (1):
    - (a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of **at least 730 days in that five-year period**, they are
      * (i) physically present in Canada,
      * (ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,
      * (iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,
        + Canadian business defined in IRPR s.61
      * (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
      * (v) referred to in regulations providing for other means of compliance.
      * **Must prove this through banking activity, leases etc.**
* **CANNOT APPLY**: if less than 5 years since determination of refugee protection; less than 5 years since becoming designated FN (IRPA s.20.2)

\*\* **Any any point if an issue comes up, the applicant is sent a letter (referred to as a fairness letter) disclosing the new issue and requiring a response within a specified time**. (*Austria*)

**STEP 3: EXAMINATION AT POE**

* IRPA s.18(1) Every person seeking to enter Canada must **appear for examination to determine whether they have right to enter/remain in Canada**
* **IRPA s.20(1)(a)** Every FN who seeks to enter/remain in Canada must establish to become a PR **they hold the visa or other document required and have come to Canada in order to establish PR**
  + **FOR PNP, must also hold provincial certificate** (IRPA s.20(2))
* **IRPA s.21(1) – FN becomes PR if O is satisfied that they have applied, met obligations from 20(1)(a) and 20(2) and is not inadmissible.**
* IRPA s.19(2) O shall allow PR to enter Canada if satisfied they have status; IRPA s.27(1) PR has right to enter/remain, subject to provisions in IRPA
* IRPA s.27(2) **must comply with any CONDITIONS imposed under IRPR or MIs**

🡪 **Granted PR status the date you *enter* Canada, given PR Card (renew every 5 years)**

**LOSS OF STATUS**

* IRPA s.46 (1) A person loses permanent resident status
  + (a) when they become a Canadian citizen;
  + (b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;
  + (c) when a removal order made against them comes into force;
  + (c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);
  + (d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination to vacate a decision to allow their application for protection; or
  + (e) on approval by an officer of their application to renounce their permanent resident status.
* If fail to meet requirements, you can appeal to IAD

FAMILY CLASS

**REQUIREMENTS**:

* IRPA s.12(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident

**1. Sponsorship**

**NEED:** (1) sponsor needs sponsorship application and (2) the spouse needs application for PR

* **Who can sponsor a FN?**
  + IRPA s.13(1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national
  + **IRPR s.130** **(1)** Subject to subsections (2) and (3), a sponsor must be a Canadian citizen or permanent resident who
    - **(a)** is at least 18 years of age;
    - **(b)** resides in Canada; and
      * except that Canadian citizens abroad may sponsor a spouse, partner, or dependent child if the parties will reside in Canada after the foreign nationals obtain permanent residence (the Regulations, s 130(1)(2)); and
    - **(c)** has filed a sponsorship application in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10
  + If sponsor does not live in Canada, can still sponsor as long as they will reside in Canada when the FN becomes a PR (IRPR s.130(2))
  + Cannot sponsor someone unless it has been at least 5 years since you yourself were sponsored (IRPR s.130(3))
  + **Requirements for sponsor:**
    - IRPA s.11(2)- The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.
    - IRPR s.133(1) (a) is a sponsor as described in section 130; (b) intends to fulfil the obligations in the sponsorship **undertaking**; (c) **not subject to a removal order** (d) **not detained in jail** (e)-(f) not been convicted of certain offences [unless given pardon or 5 years has elapsed]; (g) has not default of sponsorship undertaking (h) has not defaulted on payment of debt before (i) not bankrupt; and
      * (j) if the sponsor resides [**minimum income requirements**]\*
        + (i) in a province other than a province referred to in paragraph 131(b),

(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or

Minimum necessary income based on (a) sponsor & family members, (b) sponsored FN & family members (accompanying or not), (c) every other person & family members who sponsor or their spouse has given/cosigned undertaking (IRPR s.2)

calculated based on requirements in s.134(1)

(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(I) the sponsor’s mother or father,

(II) the mother or father of the sponsor’s mother or father, or

(III) an accompanying family member of the foreign national described in subclause (I) or (II), and

calculated according to requirements in s.134(1.1)

* + - * + (ii) in a province referred to in paragraph 131(b), is able, within the meaning of the laws of that province and as determined by the competent authority of that province, to fulfil the undertaking referred to in that paragraph; and
        + Officer may ask for updated income info if indicates that no longer able to fulfil obligation or more than 12 months have elapsed since application (IRPR s.134(2))
        + **\*DO NOT NEED MINIMUM NECESSARY INCOME IF SPONSORED PERSON IS**:

Spouse, CL partner or conjugal partner and has no dependent children

Spouse, CL, conj and has a dependent child who has no dependent children

Dependent child of the sponsor who has no dependent children, or adopted child

(IRPR s.133(4))

* + - * (k) does not receive social assistance for reasons other than disability
  + **CANNOT be a sponsor:**
    - If sponsor does not live in Canada and will not live in Canada when FN becomes PR 🡪 cannot sponsor IRPR s.130(2)
    - Cannot have entered as a sponsored spouse or partner within five years of applying to sponsor a spouse or partner (IRPR s 130(3))
    - IRPR s.133(1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor
      * **(c)** is not subject to a removal order;
      * **(d)** is not detained in any penitentiary, jail, reformatory or prison;
      * (e) has not been convicted under the *Criminal Code*
        + (i) an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person,
        + (i.1) an indictable offence involving the use of violence and punishable by a maximum term of imprisonment of at least 10 years, or an attempt to commit such an offence, against any person, or
        + (ii) an offence that results in bodily harm, as defined in section 2 of the *Criminal Code,* to any of the following persons or an attempt or a threat to commit such an offence against any of the following persons

(A) a current or former family member of the sponsor,

(B) a relative of the sponsor, as well as a current or former family member of that relative,

(C) a relative of the family member of the sponsor, or a current or former family member of that relative,

(D) a current or former conjugal partner of the sponsor,

(E) a current or former family member of a family member or conjugal partner of the sponsor,

(F) a relative of the conjugal partner of the sponsor, or a current or former family member of that relative,

(G) a child under the current or former care and control of the sponsor, their current or former family member or conjugal partner,

(H) a child under the current or former care and control of a relative of the sponsor or a current or former family member of that relative, or

(I) someone the sponsor is dating or has dated, whether or not they have lived together, or a family member of that person;

* + - * (f) has not been convicted **outside Canada** of an offence that, if committed in Canada, would constitute an offence referred to in paragraph (e);
      * (g) subject to paragraph 137(c), is not in default of
        + (i) any sponsorship undertaking, or
        + (ii) any support payment obligations ordered by a court;
      * (h) is not in default in respect of the repayment of any debt referred to in subsection 145(1) of the Act payable to Her Majesty in right of Canada;
        + **(i)** subject to paragraph 137(c), is not an undischarged bankrupt under the *Bankruptcy and Insolvency Act;*
      * **(k)** is not in receipt of social assistance for a reason other than disability
    - **If sponsor or co-signer is under proceedings for revocation of citizenship, report treated under 44(1) or charge alleging commission of offence punishable by 10 years 🡪 sponsorship application not processed until final determination is made** (IRPR s.136)
  + **Undertaking:**
    - The sponsorship undertaking is binding (IRPA s.13.1)
    - If required to do so by regulations – a FN who makes an application for a visa or for PR or TR status must obtain undertaking (IRPA s.13.2(1); IRPR s.120(a)-(b))
    - Commitment by a sponsor to ensure that the sponsored person does not receive any public social assistance over the term of the undertaking, including social assistance and “health care not provided by public health care, including dental care and eye care” (IRPR s.2)
    - If sponsor defaults – required to fully repay to federal or provincial authorities, the amount of public assistance paid to the sponsored person (IRPR s.132(1))
      * Barred from future sponsorship until debt repaid
      * Responsible despite breakdown of relationship
    - Duration (IRPR s.132(1))
      * (a) Beginning: (i) if FN enters with TRP, day of entry; (ii) if FN is in Canada, day which FN obtains TRP, following application to remain as a PR; (iii) in any other case, on the day the FN becomes a PR
      * (b) End:
        + (i) If spouse, CL partner, conjugal partner 🡪 3 years after becoming PR
        + (ii) If dependent child or adopted child and is less than 19 years old when become PR on the earlier of (A) 10 years after becoming PR; (B) day when PR reaches 22 y/o
        + (iii) if FN is dependent child and 19 years or older when become PR 🡪 3 years after PR
        + (iv) if FN is sponsor’s (A) mother or father (B) grandparent; (C) accompanying family member of the FN described in (A) or (B) 🡪 20 years after becoming PR
        + (v) if FN is not referred to in previous provisions 🡪 10 years after becoming PR
    - **Cosigning**: (IRPR s.132(5)) – spouse of sponsor can co sign if over 18 and resides in Canada – becomes jointly and severally bound

|  |
| --- |
| Canada (AG) v Mavi (2011 SCC Binnie J)  F: 8 sponsors denied liability for undertaking. Bc statutoru and contractual, gives rise to issues of procedural fairness.  I: Is govt constrained by procedural fairness in making enforcement decisions? How can the govt enforce sponsorship debt?  R: s.146 allows M to certify debt immediately or w/i 30 days of default and register the certificate w/ the FC (does not have to obtain judgment). Default begins when govt makes a payment, ends when reimbursed or ceases to be in breach of undertaking. **Does have limited discretion in collections** 🡪 **can *delay* debt, but not forgive it. In this discretion, they are bound by a minimal duty of fairness. As long as an agreement** (does not necessarily have floor or ceiling) is **made with the sponsor, s.135(b)(i) is fulfilled.**   * No hearing, no appeal procedure – but legitimate expectation that govt will consider relevant circumstances in making enforcement decision. Government’s choice of procedure is very broad, but must:   + (1) Notify a sponsor at his or her last known address of its claim   + (2) Give sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection   + (3) Consider any relevant circumstances brought to its attention, keeping in mind that the undertaking was the essential condition for sponsor to come to Canada in the first place   (4) Notify sponsor of governments decision – no reasons need to be provided (bc purely administrative) |

**Who can be sponsored?**

* **IRPR s.117(1)** A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is
  + **(a)** the sponsor's spouse, common-law partner or conjugal partner;

\*\* must obtain info about medical condition of FN in writing (IRPR s.118)

* + **(b)** a dependent child of the sponsor;
  + **(c)** the sponsor's mother or father;
  + **(d)** the mother or father of the sponsor's mother or father; [grandparent]
  + **(f)\*\*** a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner [dependent child] and who is
    - **(i)** a child of the sponsor's mother or father, [dependent sibling]
    - **(ii)** a child of a child of the sponsor's mother or father [dependent niece or nephew]
    - **(iii)** a child of the sponsor's child; [dependent grandchild]
  + **(g)\*\*** a person under 18 years of age whom the sponsor intends to adopt in Canada if
    - **(i)** the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,
    - **(ii)** where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and
    - **(iii)** where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption
      * **(A)** the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and
      * **(B)** the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or
  + **(h)** a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father (sibling), a relative who is a child of a child of that mother or father (niece or nephew), a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father (grandparents or grandparent’s children)
  + **NOT allowed to directly sponsor:** dependent siblings if parents are still alive (but can sponsor parents and then get sibling over) – this is also a means to exclude individuals
  + **ADDITIONAL REQUIREMENTS**:
    - IRPR s.121 🡪 Person who is a member of the family class or who is making an application under the family class must met requirements at the time of application and at the determination of the application
    - Sponsor cannot withdraw application (IRPR s.119)
  + **SHALL NOT BE CONSIDERED MEMBER OF FAMILY CLASS**: IRPR s.117(9)(d) by virtue of their relationship to a sponsor if the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.
* **(A) FAMILY MEMBER IS OVERSEAS**
* **(B) SPOUSE IS IN CANADA** (IRPR s.72(2) 🡪 **Spouse of CL partner in Canada Class**)
  + IRPR s.124 A foreign national is a member of the spouse or common-law partner in Canada class if they
    - (a) are the spouse or common-law partner of a sponsor and **cohabit** with that sponsor in Canada (see *Xuan*);
    - (b) have temporary resident status in Canada; and
    - (c) are the subject of a sponsorship application
  + IRPR s.127: sponsor must make undertaking and meet requirements of s.133 and 137
  + Must be a family member at time the application is made and time of determination (IRPR s.128)
  + **Exclusions:** 
    - **Definition of family member does not include conjugal partners**
    - IRPR s.125 (1) A foreign national ***shall not*** be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if
      * (a) FN is under 18 years of age;
      * (b) sponsor has an existing sponsorship undertaking & undertaking has not ended;
      * (c) the foreign national is the sponsor's spouse and
        + (i) the sponsor or the spouse was the spouse of another person at time of marriage, or
        + (ii) the sponsor has lived separate and apart from the foreign national for at least one year and

(A) the sponsor is the common-law partner of another person or the sponsor has a conjugal partner, or

(B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor;

* + - * (c.1) at the time the marriage ceremony was conducted either one or both of the spouses were not physically present; or
      * (d) sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined
        + Can never sponsor family members that you didn’t list on PR application (*de Guzman*)
    - **If sponsor withdraws 🡪 decision will not be made** (IRPR s.126)
  + If meet requirements of In-land spouse class 🡪 get open work permit (see *Xuan*)

**2. Accompanying Family Member**

* **If principal applicant has been admitted under one of the other classes**, can bring certain family members
  + Principal makes application under family class, accompanying family member is PR under (IRPR s.122)
* IRPR s.1(3) For the purposes of the Act *family member* means
  + (a) the spouse or common-law partner of the person;
  + (b) a dependent child of the person or of the person’s spouse or common-law partner; and
  + (c) a dependent child of a dependent child referred to in paragraph (b) [dependent grandchild]
* IRPR s.70(4) FN who is an **accompanying family member** of a FN who becomes a permanent resident ***shall*** be issued a permanent resident visa or become a permanent resident, as the case may be, if following an examination, it is established that
  + (a) the accompanying family member is not inadmissible
  + and IRPR s.129(a) that the person who made the application has become a permanent resident
* **Excluded:**
  + **IRPR s.117(9)**A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
    - (a) is **under 18 years of age**;
    - (b) sponsor has an **existing sponsorship undertaking**
    - (c) the foreign national is the sponsor's spouse and
      * (i) the sponsor or the foreign national was, **at the time of their marriage, the spouse of another person**, or
      * (ii) the **sponsor has lived separate and apart from the foreign national for at least one year and**
        + (A) the sponsor is the common-law **partner of another person** or the sponsor has a conjugal partner, or
        + (B) the foreign national is the common-law **partner of another person** or the conjugal partner of another sponsor; or
    - (c.1) the foreign national is the sponsor’s spouse and if at the time the marriage ceremony was conducted either one or both of the spouses were **not physically present** unless service member
    - (d) subject to subsection (10), the **sponsor** previously made an application for permanent residence and **became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined**.(*de Guzman*)

**Right to Appeal**

* If a person has filed in the prescribed manner an application to sponsor a FN as a member of the family class may appeal to the IAD against a decision not to issue a PR visa (IRPA s.63(1))

SPOUSES:

**Marriages:**

* IRPR div 1 s.(2)If the marriage took place outside Canada, must be valid both under the laws of the jurisdiction where it took place and under Canadian law (essential and formal validity)
  + Essential: legal capacity (prior existing marriages (*Amin; Gure*), non-consummation (*Agha*), consent, consanguinity)
  + Formal: ex. not physically present
* *Halpern* 🡪 excluding same sex couples violated 15(1) and was not justified under s.1

|  |
| --- |
| Agha v Canada (MC&I) (2008 FC)  F: A is Pakistani, married K who had been granted refugee protection. Marriage took place over the phone while A was in Pakistan. K was previously married (legally divorced), has young child**, arranged marriage, never met in person**. Got a fairness letter than his PR application was refused, because VO abroad had not been consummated & lack of credible evidence of contact and bc she had been previously married with son (not satisfied not bad faith). Application for JR.  D: JR allowed, decision set aside and sent back for determination  R: Erred in not considering reasons why had not met in person – decision letter does not explain. **It is relevant and important evidence that she cannot return to Pakistan due to persecution and he cannot come to Canada without a valid visa**. Decision was unreasonable – made w/o regard for evidence before VO, breached duty to explain evidence (silence on it means decision was made without regard for evidence) |

|  |
| --- |
| Amin v Canada (MC&I) (2008 FC)  F: A was married, successfully sponsored wife as PR to Canada. Marriage was purportedly dissolved in Pakistan, provided a notarized divorce deed – not registered under Muslim Family Laws Ordinance until 12 years later. Local laws required it to be registered with local arbitration counsel – it wasn’t. Application for JR from decision by the IAD.  D: Application dismissed  R: Declaration from High Court not conclusive. Unilateral, extrajudicial declaration of divorce made by A is not a form of divorce which meets Canadian notions of genuine divorce and it cannot be recognized here. **Divorces must accord with notions of due process and fairness**, in harmony with Canadian public policy. |

|  |
| --- |
| Gure v Canada (MC&I) (2002 IRB)  F: Polygamous husband’s application to sponsor first wife was rejected (didn’t meet defn of marriage). Divorced second wife and appealed initial rejection.  D: Refusal valid.  R: **Determinative date is at the *time of application* for permanent residence**. Divorce after the refusal does not cure the problem. |

**Common Law Relationships:**

IRPR s.1(1) provides that a common law partner, in relation to the sponsor, must be “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year

* BUT if don’t currently live together and relationship is continuing (and would otherwise be living together) that’s fine (Guidelines)
* ***Cohabitation***, defined in Xuan: living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.

For **couples** who cannot live together but in conjugal relationship: IRPR s.1(2) For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to **persecution or any form of penal control**, shall be considered a common-law partner of the person

**Conjugal Relationships:**

IRPR s.2*conjugal partner* means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year

Factors (*M v H* factors):

* **1. Shelter**—Whether the partners live together in the same home as a couple;
* **2. Sexual and personal behaviour**—Whether the partners’ relationship is exclusive, committed and evidenced by emotional, intellectual and physical interaction;
* **3. Services**—Whether household and other family-type responsibilities are shared and whether there is evidence of mutual assistance especially in time of need;
* **4. Social activities**—Whether the partners share time together or participate in leisure activity together—Whether they have relationships or interaction with each other’s respective family;
* **5**. **Economic** **support—**Whether the partners are financially interdependent or dependent— Whether the partners have joined, to some extent, their financial affairs (for example, as in joint-ownership of assets or arranged them to reflect their ongoing relationship) for example, naming the other partner beneficiary in an insurance policy or will);
* **6. Children**—The partners’ attitude and conduct towards children in the context of their relationship; and
* **7. Special perception**—Whether the partners are treated or perceived by the community as a couple

\*Look at factors as a whole

When evaluating factors of a conjugal relationship - **the panel must also consider the effect of social customs and practices, as well as the individual ways in which the partners express the conjugal relationship, and the cultural context** (*Morel*)

|  |
| --- |
| Macapagal v Canada (MC&I) (2004 IADD)  F: Appellant is PR of Canada, applicant is citizen of Philippines who was previously married. Met while A was on vacation in 1999, married in 2001, lived together for 3 weeks, then A returned to Canada. Sponsorship application refused on basis that she was not member of the family class b/c Appellant’s divorce in Canada was not recognized in the Philippines.  D: Denied.  R: Examined M v H factors. Evidence supporting conjugal relationship meager. No evidence from applicant directly – not necessarily fatal but A not best person to speak to her intentions, no evidence of interdependence in life, decision making or emotional ties. |

|  |
| --- |
| Canada (MC&I) v Morel (2012 FC)  F: M & G met on website, were in contact daily. M travelled to China, lived with G while there. Returned 3 times. G applied for PR. M is 59 was married; G was 21 when he met M. M named G as beneficiary in will. Both testified. Minister seeking to have sponsorship application set aside.  R: When examining conjugal relationships, look to the year before the PR application not the broader context (was it conjugal then?). Erred in finding that they shared a life together through the computer, **erred in failing to consider both party’s intentions** (did not believe G). |

REQUIREMENT OF ALL SPOUSES:

* IRPR s. 4(1)Shall not be considered a spouse if
  + (a) was **entered into primarily for the purpose of acquiring any status or privilege** under the Act; **or**
    - Primary purpose fixed at time of entry into relationship
  + (b) is **not genuine**
    - *Kuar*: if evidence leads to inference of non-genuine marriage, then there is a presumption that it was entered into for gaining status

🡪 **If rejected may appeal to IAD**

* FN not considered a spouse if has begun a new conjugal relationship with that person after a previous spousal relationship was dissolved so that FN, another FN or the sponsor could acquire any status/privilege (IRPR s.4.1)
* Federal Court Case: “A finding that the marriage is genuine lends considerable weight to the proposition that the marriage was not entered into primarily for the purpose of gaining status in Canada”
* Factors: inconsistent or contradictory statements regarding matters such as the origin and development of the relationship between the parties, evidence of a previous marriage for immigration purposes, the parties’ knowledge about each other, contact between the parties, family ties, exchange of gifts, and financial support are factors that have been considered indicators of the existence (or otherwise) of a genuine marriage or intention to reside with the sponsor, previous attempts to gain entry to Canada, compatibility (age, education, religion) but incompatibility does not mean it is not genuine.
* Arranged marriages are not inherently less credible – but pose evidentiary challenges (end up assessing based on customary practices and norms in community of origin)

**Excluded relationships:**

* One spouse is under 18 y/o (IRPR s.9(a));
  + (b) has another undertaking FN;
  + (c)(i) person was the spouse of another at time of marriage, (ii) person has
    - (A) lived separate and apart of the FN for 1 year and is
    - (B) the CL partner of another person; if one of the spouses was not physically present at ceremony
  + (c.1); if sponsor previous made application for PR and
  + (d) FN was non-accompanying family member and was not examined.
    - Does not apply to those who VO determined did not have to be examined (IRPR s.117(10) unless sponsor did not make FN available for examination, FN was spouse and living separate & apart & not examined (IRPR s.117(11))

**Obligations of VO**:

* Must conduct interview if they have concerns about applicant and are leaning towards refusal

**Appealing decisions:**

* The IAD may allow an appeal if there was an error in fact or law, a breach of the principle of natural justice or on “humanitarian and compassionate” considerations
* For inland spouse class, no appeal to the IAD for refused sponsorship – must directly seek JR before the FC.

|  |
| --- |
| Abebe v Canada (M C&I) (2011 FC)  F: **Arranged marriage** A’s wife was refugee in SA when they met, A entered Canada as a group sponsored refugee. Regularly communicated, met in person in SA. Letter stated she was refused because marriage was not genuine (inconsistent evidence, age difference, lack of proof of regular contact, did not send her gifts/money, spouse’s lack of knowledge about A’s children, spouse never talked about loving him, lack of logical progression)   * A argued cultural factors make the marriage different than Canadian marriage   D: Application allowed, sent back for reconsideration  R: It was unreasonable for Board not to considered whether cultural differences answer concerns about genuineness of the marriage especially considering they found A credible. **Arranged marriages should be considered in their context**. |

|  |
| --- |
| MacDonald v Canada (MC&I) (2012 FC)  F: Online dating site, began emailing with wife who is Chinese, made trips to visit her, married after a year of correspondence. VO concluded marriage was not bona fide. Appealed to IAD, dismissed (did not satisfy onus of demonstrating on BOP that marriage was genuine 🡪 spouse set parameters to English only, continue language barrier, lack of knowledge of A’s son, pushed A toward marriage; found him credible but not spouse). Seeks JR from this decision.  D: IAD provided sufficient justification, transparency and intelligibility. No reviewable error.  R: **Did not demonstrate the IAD ignored evidence** |

|  |
| --- |
| Canada (C&I) v Xie (2013 FC)  F: R was sponsored to come to Canada by first husband, obtained PR. Marriage ended 3 years later. Met L in China, spoe on phone frequently, proposed by phone, married in China, visited 4 separate times (including for a year period, other times up to three months). Has attempted to sponsor him 3 times. On third interview L used ‘cheat sheets’ for questions bc of memory problems. Minister seeks JR for decision of IAD which allowed the appeal.  D: Refused.  R: Not the role of the court to re-weigh evidence – did not ignore inconsistent evidence. |

|  |
| --- |
| ***Xuan v Canada (MC&I)*** (2013 FC)  F: Inland class. A came to Canada but lost refugee claim – married. Application was approved in principle. Claimed to be living together. Difference in addresses listed on spouse’s drivers licenses alerted CBSA officials to investigate. When came to house, there weren’t many of husband’s clothes at house, no toothbrush. Did not know daughter’s name or number.  R: **Definition of cohabitation:** living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.   * Joint interests do not establish cohabitation, but are consistent with marriage. * Did not have to assess genuineness requirement, because failed on cohabitation |

**Conditions**:

* Overseas and inland sponsorships where the relationships are less then two years in duration and the couple do not have a child together at the time of the application are contingent on a two-year cohabitation requirement (IRPR s.72.1)
  + Failure to cohabit for the requisite two years violates a condition of permanent residence under the IRPA, s.27(2) and s.41 makes a permanent resident inadmissible
  + Inadmissibility can be appealed to the IAD

|  |
| --- |
| Herman v Canada (MC&I) (2010 FC)  F: Separated from husband after he assaulted her. On conditional PR so subject to a removal order bc of separation. Submitted two H&C applications – VO rejected them.  D: Dismissed – w/i range of possible outcomes  R: Removal order is not automatically stayed by an H&C application. Even when a decision is contrary to the Guidelines, not necessarily unreasonable (s.25 is highly discretionary). |

CHILDREN

* Children < 18 cannot sponsor parents
* Dependent children qualify as ‘family members’ to accompany a principal applicant under IRPR s.1(3)(b)
* Relevant time: age of child at the time the application was received. For appeal purpose, age is considered at the time the visa was denied.
* **Cannot be a spouse or CL partner at time of application and when the visa is issued at entry**

IRPR s.2 child means:

* (a) has one of the following relationships with the parent, namely,
  + (i) is the **biological child** of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or
    - Guidelines: biological child can be a child that is not genetically related to the parent making the application but born through reproductive technologies but was born to the person or the person’s spouse but the female partner has to carry the child
  + (ii) is the **adopted child** of the parent; and
    - \*\*see Adoption section below for requirements
* (b) is in one of the following **situations of dependency**, namely,
  + (i) is less than 19 years of age and not a spouse or common-law partner, or
  + (ii) is 19 years of age or older and has depended substantially on the financial support of the parent since before the age of 19 and is unable to be financially self-supporting due to a physical or mental condition.

|  |
| --- |
| MAO v Canada (MC&I) (2003 FC)  F: A is citizen of Somalia and a PR, came as sponsored spouse of wife who had been granted refugee status. Has three children from first marriage. CIC asked for info to prove relationship to children, was unable to obtain documentation (civil war). “Invited” to undergo a DNA test – 1 child wasn’t his. AO bears his name, under Sharia law he was his legal son. Refused bc didn’t meet definition of child.  D: DNA evidence is to form no part of IAD’s decision when re-hear the matter.  R: Legal children who are not biological nor adopted are not considered ‘dependent children’ under the law. IAD erred in law in interpretation of nature of the evidence required 🡪 DNA evidence is not required, and it is a last recourse because of the deep invasion of privacy. |

Adopted Children

* defn of dependent child also includes adopted children
* IRPR 4(2): A foreign national shall not be considered an adopted child of a person if the adoption
  + (a) Was entered into primarily for the purpose of acquiring any status or privilege under the Act; or
  + (b) Did not create a genuine parent-child relationship.
* IRPR s.4(3) Sponsorship of adopted children
  + Subsection (2) does not apply to adoptions in ss. 117(1)(g) or 117(2) or (4). **BUT these provisions do not include genuineness** (but incl primarily for the purpose of…)
* IRPR s.3(2)Adoption severs pre-existing parent-child relationship
* In Canada
  + IRPR, s. 117(1)(g) a person under 18 years of age whom the sponsor intends to adopt **in Canada** if
    - (i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,
    - (ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and
    - (iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption
      * (A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption [orphaned, abandoned, placed with child welfare authority] and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and
      * (B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption
* Outside of Canada
  + IRPR s. 117(2) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was **under the age of 18** shall not be considered a member of the family class by virtue of the adoption unless
    - (a) the adoption was in the **best interests of the child\*\*** *within the meaning of the Hague Convention* on Adoption; and
      * \*\*best interests of child outlined below
    - (b) the adoption was not entered into primarily for the **purpose of acquiring any status** **or privilege** under the Act

**Best Interest of the Child**

* IRPR s.117(3) The adoption referred to in subsection (2) is considered to be in the best interests of a child if it took place under the following circumstances:
  + (a) a competent authority has conducted or approved a **home study of the adoptive parents**;
  + (b) before the adoption, the **child's parents gave their free and informed consent** to the child's adoption;
  + (c) the adoption **created a genuine parent-child relationship** (*Kwan*)
  + (d) the adoption was **in accordance with the laws of the place** where the adoption took place;
  + (e) the adoption was **in accordance with the laws of the sponsor's place** of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the **child's province** of intended destination has stated in writing that it does not object to the adoption;
  + (f) if the adoption is an international adoption and the country in which the adoption took place and the child's province of intended destination are parties to the Hague Convention on Adoption, the **competent authority of the country and of the province have stated in writing that they approve the adoption as conforming to that Convention**; and
  + (g) if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention on Adoption, there is **no evidence that the adoption is for the purpose of child trafficking or undue gain** within the meaning of that Convention

**Children > 18 years old**

* IRPR, s. 117(4) A FN who is the adopted child of a sponsor and whose adoption took place when the child was 18 years of age or older shall not be considered a member of the family class by virtue of that adoption unless it took place under the following circumstances:
  + (a) the adoption was in accordance with the **laws of the place** where the adoption took place and, if the sponsor resided in Canada at the time of the adoption, the adoption was in accordance with the **laws of the province** where the sponsor then resided, if any, that applied in respect of the adoption of a child 18 years of age or older;
  + (b) a **genuine parent-child relationship existed at the time of the adoption and existed before the child reached the age of 18**; and
  + (c) the adoption was not entered into primarily for the **purpose of acquiring any status** or privilege under the Act.

|  |
| --- |
| Kwan v Canada (MC&I) (2002 FC)  F: A, resident of Canada, submitted an undertaking of assistance to sponsor an application for PR made by his purported adopted child, Qi who had allegedly been adopted 3 months earlier when she was 10 y/o. Had lived with bio parents, was financially supported by them. VO found her inadmissible under 19(2)(d) of IRPA 🡪 genuineness was not proven on BOP; still calls them aunt/uncle. Appealed to IAD, dismissed the appeal.  R: Must assess qualitatively the relationship (not merely verify its existence). Finding that she wanted a child is not sufficient to establish that a genuine relationship existed.   * Consider *Waldman* factors:   + Evidence of ties between adoptive parents and child   + Communication between adoptive parents and child   + Financial support between adoptive parents and child   + Control exercised by adoptive parents over life of child   + Why adoption was entered into   + Relationship between bio parents and child is also relevant * *Guzman* 🡪 factors that may assist in assessing a relationship of parent and child. These are:   + (a) motivation of the adopting parent(s) and;   + (b) to a lesser extent, the motivation and conditions of the natural parent(s);   + (c) authority and suasion of the adopting parent(s) over the adopted child;   + (d) supplanting of the authority of the natural parent(s) by that of the adoptive parent(s)     - 🡪 this was fairly pivotal in this case   + (e) relationship of the adopted child with the natural parent(s) after adoption   + (f) treatment of the adopted child versus natural children by the adopting parent(s)   + (g) relationship between the adopted child and adopting parent(s) before the adoption;   + (h) changes flowing from the new status of the adopted child such as records, entitlements, etc., including documentary acknowledgment that the adopted child is the son or daughter of the adoptive parents; and   + (i) arrangements and actions taken by the adoptive parent(s) as it relates to caring, providing and planning for the adopted child. (ex. child care etc.)   \*NOT EXHAUSTIVE  A: no name change, adoption not generally known outside the family, no change of parental authority, continued to refer to them as aunt/uncle, continued to regard bio parents as authority/parental figures, would not be considered child of adoptive parents until arriving in Canada.  R: **Requires that the relationship of parent and child commence at the time of adoption, geographic separation notwithstanding** |

PARENTS AND GRANDPARENTS (IRPR s.117(1)(c) &(d))

* Family class
  + Raised income requirements and requires 3 years minimum income requirement
  + Undertaking extended to 20 years
  + Imposed cap of 5000 applications for parents/grandparents
  + The sponsor’s income in the previous three years must be 130 percent of the “low income cut-off”
* \*\*Remember Super Visa
  + For parent/grandparent of citizen or PR
  + Be admissible to Canada, consider:
    - 1. the person’s ties to the home country;
    - 2. the purpose of the visit;
    - 3. the person’s family and financial situation;
    - 4. the overall economic and political stability of the home country; and
    - 5. an invitation from a Canadian host
  + Other conditions:
    - 1. provide a written commitment of financial support from their child or grandchild in Canada who meets a minimum income threshold;
    - 2. prove that they have bought Canadian medical insurance coverage for at least one year; and
    - The annual cost of medical insurance increases with the age of the applicant and must be for a minimum of $100,000 coverage.
    - 3. complete an Immigration Medical Examination (provs?)
  + Limitations:
    - Cannot bring other dependents (other than spouse)
    - Cannot access public healthcare, ineligible for social assistance

ECONOMIC CLASS

IRPA s.12(2) A foreign national may be selected as a member of the economic class on the basis of their ability to **become economically established in Canada**

IRPA s.14.1gives M power to give MIs

**Must fit into 1/3 divisions:**

* 1. Skilled Workers [Express Entry]
  + FSW
  + FST
  + CEC
  + PNP
* 2. Business Immigrants
  + Immigrant Investor Venture Capital Program
  + Start-up Visa
  + Self-Employed
* 3. Caregiver Program

1. EXPRESS ENTRY

* Must be invited to apply for PR
* Run under MIs, theoretically area of absolute discretion (unclear whether there is review)

|  |
| --- |
| Liang v Canada (MC&I) (2012 FC)  F: IRPA was amended to include s.87.3 which authorized M to issue MIs re: which applications would be eligible for processing, removed obligation to process every application received (were prospective only – applied only to FSW applications submitted after 27 Feb 2008); 4 sets of instructions:   * MIs created a hierarchy of processing 🡪 MI2 and 3 were given highest priority, then MI1 then Pre-Bill C-50 * As seek mandamus compelling M to process apps for PR under the FSW (Liang representing those who submitted before 27 Feb 2008, Gurung representing those who submitted between then and 26 June (between MI1 and MI2)   + Liang had received over required points, positive selection decision but did not move to acceptance, remains outstanding; got notice that they were not actively processing FSW cases before Feb – argues essentially terminates application   I: Unreasonable delay in processing applications?  D: For mandamus (test 🡪 see page 128 of notes)   * Minister owes a duty to the applicants to process their applications, and that unreasonable delay amounts to an implied refusal to perform the duty * Unreasonable delay?   + Has been longer than nature of the process required (Prec50: outstanding 4.5 years, some 9; MI1: M indicated in media release that would receive decision w/i 6-12 months, some have been outstanding 24-52 months)   + A and counsel are not responsible for delay   + Authority responsible for delay has not provided satisfactory justification     - Inapplicable to pre-C-50 applications – prospective only and the other applications be processed in a manner existing at the time of application; Fails MI1 as well 🡪 set policy, did not meet it.     - Were not to be subject to subsequent instructions     - M framed argument that would eliminate duty to process applications in a reasonably timely manner (which is a duty)       * **Deference to M in setting policies, but limit of deference is legal duty (to process applications in a reasonable timeframe) under IRPA** * Liang meets test for mandamus 🡪 granted * BUT nothing to suggest a legitimate expectation that applications would be processed on a first in/first out basis |

|  |
| --- |
| Austria v Canada (C&I) (2014)  F: M refused to process applications of 1400 FNs who applied before 27 Feb 2008 for PR visas as FSW. IRPA s.87.4(1) terminated these applications. Seeking mandamus 🡪 requiring M to process PR apps.   * Argues it offends the rule of law (retrospective).   D: Dismiss all appeals.  R: Intended to deal with backlog, valid objective. Cannot be interpreted that requires IO to exercise discretion in whether a particular application is terminated. Does not offend rule of law (*Imperial Tobacco*).   * Had the right to have their applications considered in accordance with the IRPA; However, they did not have the right to the continuance of any provisions of the IRPA that affected their applications * S.7 not engaged by termination of FSW applications. |

**STEP 1: Meet requirements for FSW/FST/CEC/PNP**

**STEP 2: Expression of Interest** [Eligibility Stage]

* Fill out online form
* Meet minimum requirements of named economic class
* If don’t have job offer or nomination, must registered with job bank w/i **90 days**

**STEP 3:** Invitation Stage

* IRCC ranks Expression of Interests using Comprehensive Ranking System
* **A. Core / human capital factors 500 (460)**
  + Age  100 110
  + Level of education  140 150
  + Official languages proficiency  150 160
  + Canadian work experience  70 80
* **B. Spouse or common-law partner factors 40**
  + Level of education  10
  + Official language proficiency  20
  + Canadian Work Experience  10
* **C. Skill Transferability factors 100**
* A. Core/human capital + B. Spouse or common-law partner + C. Transferability factors = Maximum 600 points
* **D. Additional points**
  + Arranged employment 600
  + PN nomination 600
* SUM: up to 1200 points

\*Job offer has to be indefinite, permanent (not seasonal)

* **There are rounds of invitations every year, each with own pass-score (in MIs)**
* **After invitation, have 60 days to apply for PR (must provide proof of representations during application process)**

A. FEDERAL SKILLED WORKERS

IRPR s.75(1)\*\*: For the purposes of subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec

**Requirements**:

* **(1) Meet minimum requirements** (IRPR s.75(2))
  + (**a) 1 year full-time experience (or part-time equivalent) during 10 years preceding application in management level occupation or occupation that normally requires university education, college education, or apprenticeship training (NoC O, A or B)**
    - IRPR s.73(1) defn *full time work* 🡪 30hrs/week
    - (b) A must show that they performed the activities set out in the “lead statement” for their occupation and (c) performed a substantial number of the main duties (including all essential duties)

|  |
| --- |
| ***Taleb v Canada (C&I)*** (2012 FC)  F: A had listed two NOC codes. Was refused at pre-qualification stage, on grounds that she did not meet requirements of 75(2) 🡪 did not provide sufficient evidence that performed all main duties in NOC.  D: IO’s decision was unreasonable.  R: While visa officers have discretion, it is not within the visa officer’s discretion to determine what the burden of proof a skilled worker must meet, cannot judge professional competency. Evidence must be assessed as a whole. Even if main duties are not specified/listed in detail, corroborating evidence is sufficient (**can draw inferences from documentary record**) |

* + **(d) English or French language proficiency, less than 2 years old when application made** (IRPR s.74)
    - Demonstrate in all 4 language areas (reading, writing, speaking, listening)
    - Each class has a different benchmark (FSW: 7)
    - Only designated organizations can evaluate language proficiency (IRPR s.74(3))
  + **(e) (i) Canadian educational credential or foreign diploma, certificate, or (ii) credential that has been assessed as equivalent to Canadian educational credential required to practice the applicant’s occupation in at least one province**
    - Designated organization (IRPR s.74(2.1) & (4))
    - Equivalency certificate is conclusive evidence (IRPR s.74(8))

**\***Does not lead to actual credential recognition

* + **IF NOT MET 🡪 no other processing takes place** (IRPR s.75(3))
* **(2) Assess using points system** (IRPR s.76-83)
  + IRPR s.76(1)\*\* Criteria \*\*must be met at time of application for PR and when it is issued
    - (a) the skilled worker must be awarded not less than required points in (2) on the basis of the following factors, namely,
      * (i) education (s.78)
      * (ii) proficiency in the official languages of Canada (s.79)
      * (iii) experience (s.80)
      * (iv) age (s.81)
      * (v) arranged employment (s.82)
      * (vi) adaptability (s.83) see *Patel*, *Shahid*

|  |
| --- |
| ***Canada (MC&I) v Shahid*** (2011 FCA)  F: Appeal by M against decision which granted app for JR of decision denying PR as a FSW. Was awarded 63 points (no points under adaptability for spouse’s education credentials – claims should have been awarded 4 under 78(2)(d)(ii) for two year university educational credential and total of 14 years full time or full time equiv studies.   * AppJ rendered decision based on spouse as external candidate in Pakistan (never attended classes, only completed exam) did not meet definition of ‘full time’. * JR: decision was unreasonable.   I: **Meaning of full time & FT equivalent** (extend to those completing ‘self-study’?)  D: Appeal allowed.  R: *studies* is defines as undertaken at university. Did not meet criteria. **Full time equivalent applies when discrepancy between time an individual obtained a educational credential, and the time required to obtain same credential when full time**. Consider both the nature and quantity of instruction received. **Does not include independent study**. |

|  |
| --- |
| ***Canada (MC&I) v Patel*** (2011 FCA)  F: R applied for PR as FSW, claimed 74 points (incl 5 points for adaptability based on two years Canadian post-secondary). VO refused application (only got 63) because he attended 3 semester as a college as FT student, got diploma, went to different college for 1 term, did not complete program.  I: Does 83(3) require a single program or can aggregate programs that are not 2 years each?  D: Allow appeal – dismiss application for JR.  R: VO correctly interpreted – decision was reasonable. **Should not aggregate disparate programs of study and award points if the total period of study amounts to or exceeds two years of full-time study at one or more post-secondary institutions** |

* + - (b) the skilled worker must
      * (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an **amount equal to one half of the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members**, or
      * (ii) has arranged employment.
  + (2) **Points required = 67**
    - IRPR s.76(3) **BUT DISCRETION:** Substituted evaluation 🡪 Whether or not awarded minimum points, officer may substitute their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.
      * (4) requires concurrence
      * Not bound to embark on such an evaluation unless there is a specific request by the applicant to do so
      * *Yan*  🡪 court held that even if the applicant had a slim chance of success based on his request for an exercise of discretionary authority, the fact that the officer ignored the request constituted a breach of procedural fairness sufficient to vitiate the decision (under former IA though)

|  |
| --- |
| ***Chen v Canada (ME&I)***  F: Chen worked in Canada for 2 years, then worked in US on temporary visa. While in US applied for PR. Was granted sufficient points, VO indicated would have to pass medical test and security check. Considerable delay in security clearance. TRV expired in US. Chen sent VO $500 in card. In interview admitted he sent money but that it was a custom. VO wrote to have him refused by discretion – approval obtained, refusal letter sent.  I: What is the scope of discretionary power?   * Procedural fairness? Should be have been told they had concerns at 2nd interview?   + Content of procedural fairness is variable and is to be decided according to the circumstances of each case   + Does not require him to be immediately told of alleged bribery concerns (was informed conduct would be taken into account)   **Dissent \*adopted by SCC**: **scope of discretion is not so broad, criteria must be restricted to matters relating to ability to make a living** (cannot consider moral turpitude – for that must use inadmissibility provisions) |

* **(3) Have settlement funds or job offer** (under IRPR s.76(1)(b)(i))
  + Available when application is made and when visa is issued (IRPR s.77)

B. FEDERAL SKILLED TRADES

* Categories in IRPR s.87.2(1)
  + Skill level B (NOC)
* Become part of the FST class in IRPR s.87(2) if meet requirements, **IRPR s.87.2(3):**
  + (a) Language proficiency (level 5)
  + (b) 2 out of last 5 years full time work experience (or equivalent) in categories listed in IRPR s.87.2(1)
    - Meet NOC (lead statement, main duties, essential duties)
  + (c) Employment requirements (Trade certification or Canadian work experience, full-time job offer for 1 year minimum)
  + (d) one out of: (i) certificate of qualification (ii) in Canada, hold work permit that is valid etc
* Substitution of evaluation 🡪 IRPR s.87.2(4)
* IRPR s.87.2(5) unless have work permit, **need transferable and available funds**…half of minimum necessary income applicable to FST and family members

C. CANADIAN EXPERIENCE CLASS

* 2 steps: here temporarily 🡪 then apply for PR
* To become part of the CEC class [IRPR s.87.1(1)], requirements are in IRPR s.87.1(2):
  + (a) Work experience: 1/3 last years full time (or equivalent) in Skill Type 0 Management Occupations or Skill Level A or B)
    - (b) Performed actions in lead statement (c) performed main duties and all essential
    - Work during full-time study, self-employment, unauthorized work does not count (IRPR 87.1(3))
    - Must have had temporary resident status during work experience and study
  + (d) Language proficiency
  + (e) If have work experience based on two different occupations, have language requirements for longer job

D. PROVINCIAL NOMINEE PROGRAM (prescribed class under IRPR s.87(1))

* No one can force you to stay in province (s.6) but to apply must have intent to reside in province
* IRPA s.8 empowers the minister of citizenship and immigration to enter into such agreements with the provinces and territories
  + IRPR s.204(c) work permits may be issued authorizing them to work pursuant to these agreements
* IRPA s.9 FN, unless inadmissible under this Act, ***shall*** be granted PR status if FN meets the province’s selection criteria (FN shall not be granted PR status if FN does not meet the province’s selection criteria (IRPA ss.9(1)(a) and 9(1)(b))
* **Get 600 points under Express Entry**
* Responsibilities shared between two levels of govt:
  + Fed: inadmissibility assessment
  + Prov: recruitment and selection
  + Immigration should be undermine balance of federalism (IRPA s.3(1))

**PROVINCIAL TRACK: \*\*\*NOT EXPRESS ENTRY**

**STAGE 1: Apply to province** (pass provincial criteria, pay fees)

* Province issues a certificate of nomination, and notifies appropriate visa office

**STAGE 2: Apply for PR**

**Requirements:**

* + IRPR s.87(2) A FN a member of the provincial nominee class if
    - (a) they are named in a **nomination certificate** issued by the government of a province under a provincial nomination agreement between that province and the Minister; and
      * *shall* not be considered member of PNP if nomination was based on provision of capital by FN or FN intends to participate in immigration-linked investment scheme (IRPR s.87(5)) – **prevents investor programs for provinces**
        + (6) Does not apply if:

(a) the **capital is provided** by the foreign national **to a business** in the province that nominated them, other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains;

(b) the foreign national controls or will control

s(i) a percentage of equity in the business equal to or greater than 33 1/3 per cent, or

(ii) an equity investment in the business of at least $1,000,000;

(c) the foreign national provides or will provide active and ongoing management of the business from within the province that nominated them; and

(d) the terms of the investment in the business do not include a redemption option

* + - (b) they **intend to reside in the province that has nominated them**.
  + (3) **Officer may substitute evaluation if criteria in (2) are not a sufficient indicator** **that will become economically established**
    - (4) requires concurrence
    - *Kikeshian* (2011)🡪 duty to consult with the province; if there is a PNP there is an presumption that you will become economically established

**EXPRESS ENTRY TRACK**:

**STAGE 1: Apply for Express Entry** (enter pool)

* \*Must meet requirements of express entry and FSW/FST/CEC

**STAGE 2: Get offer from province? Or employer in province?**

2. BUSINESS CLASS IMMIGRANTS

* Selected on basis of ability to create jobs for other Canadians
* Overhauled by MIs

Types:

* (1) ~~Investors~~ Immigrant-Investor Venture Capital Class
* (2) ~~Entrepreneurs~~ Start up Visa Program
* (3) Self-Employed Persons (artists, cultural workers, athletes, experience managing farms)

**Immigrant-Investor Venture Capital Class**

* Terminated Investor Class applications under IRPA s.87.5
* Requirements for this class in MIs
  + (1) Have net worth of $10 000 000, lawfully acquired through business/investment activity
    - Lawfully acquired 🡪 requires due diligence report from designated provider
  + (2) Willing to make a 15 year, $2 million, non-guaranteed investment in newly established fund that will be invested in innovation based Canadian companies
  + (3) Official language requirement 🡪 level 5
  + (4) Canadian diploma, certificate or credential (or equivalency)
    - BUT: if net worth of $50 000 000 are exempted from this

**Start-Up Visa Program**

* Terminated Entrepreneur class under IRPA s.87.5
* Goal: to recruit innovative entrepreneurs
* (1) Allows for the immigration of applicants who receive a **written commitment** from one of three kinds of Canadian organizations to support their plans for a new company:
  + (1) a commitment from a designated “business incubator” that it is accepting an applicant’s new business into its business incubator program
  + (2) a commitment from a designated angel investor group, or more than one group, to invest $75,000 or more in the applicant’s business
  + (3) a commitment from a venture capital fund to invest $200,000 or more in the applicant’s business.
* (2) A’s business must be incorporated in Canada (or incorporation conditional on issuance of PR visa)
* (3) A must own 10% of business, no entity other than A or designated group/fund must own controlling share
* (4) Language requirements: level 5
* (5) Settlement funds (half LICO)
* **BUT CAN SUBSTITUTE EVALUATION** (no substituted positive evaluation is possible if the applicant has no commitment from a designated program, group, or fund)
* **Limits:**
  + No more than five foreign nationals are to be considered members of the start-up business class in respect of the same business

**Self Employer Persons** (prescribed class: IRPR s.100(1))

* IRPR s.88(1):
  + *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.
  + *specified economic activities*, in respect of
    - (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; and
    - (b) a self-employed person selected by a province, has the meaning provided by the laws of the province.
* **Step 1: meet requirements** (IRPR s.88(1))
  + 2 /last 5 ears experience in: cultural activities, athletics, purchase and management of a farm (see 88(1))
  + If does not meet requirements 🡪 no further assessment (IRPR s.100(2))
* **Step 2: modified points system** \*self-employed person selected by province is not assessed using points system(IRPR s.101)
  + IRPR s.102(1) For the purpose of determining whether a foreign national, as a member of the investor class, the entrepreneur class or the self-employed persons class, and the foreign national's family members will be able to become economically established in Canada, an officer shall assess that foreign national on the basis of the following factors:
    - (a) age, (s.102.1);
    - (b) education (s.102.2);
    - (c) proficiency in the official languages of Canada, (s.102.3);
    - (d) experience, (s.103); and
    - (e) adaptability, (s.104) in the case of a member of the investor class or the entrepreneur class, and in accordance with section 105 in the case of a member of the self-employed persons class.
  + **Needs 35/100 points**
  + **IRPR s.108(1)** O ***shall*** issue PR visa to FN and accompanying family members if (a) FN & family members (accompanying or not) are not inadmissible

HUMANITARIAN ADMISSIONS

Inadmissible FNs who are not entitled to an appeal before the IAD or those whose appeal has been denied may apply to the minister’s delegate under s.25 for PR status or an exemption for any of the applicable criteria of the Act

* IO may grant status whether opinion that justified for H&C reasons, taking into consideration best interest of child
* Individuals or groups
* Minister can consider H&C on own initiative (IRPA s.25.1(1))

**Two kinds:**

* **(1) Humanitarian and compassionate considerations** 
  + IRPA s.25(1):
    - Minister ***must***, on request of FN in Canada who applies for permanent resident status and who is **inadmissible** — other than under inadmissible s.34 [security] , 35 [human or international rights violations] or 37 [organized criminality]— **or who does not meet the requirements of this Act**, and ***may***, on request of a FN outside Canada — other than a foreign national who is inadmissible under 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected
  + **Restrictions**:
    - Minister cannot grant PR status to FN in 9(1) if des not meet province’s selection criteria (IRPA s.25.1(3))
    - IRPA s.25(1.01) – may not make request if designated FN: within 5 years of final determination of refugee claim etc.
    - IRPA s.25(1.2) Minister may not examine if:
      * (a) FN has already made request and its pending,
      * (b) request is for exemption from any criteria/obligations in Division 0.1 (meaning that if they cannot request H&C for being barred from submitting an expression of interest for PR bc of misrepresentation
      * (c) if FN made claim for refugee protection and its pending or if less than 12 months have passed since FN’s claim for refugee protect was last rejected, withdrawn, or abandoned
        + UNLESS: FN would be subjected to risk to life as a result of COR’s ability to provide adequate health or medical care; or whose removal would have adverse effect on the best interest of the child directly affected (IRPA s.25(1.21))
* **(2) Public policy reasons** (IRPA s.25.2(1))
  + The Minister ***may***, in examining the circumstances concerning a FN who is inadmissible or who does not meet the requirements of this Act, grant that person PR status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by **public policy considerations**
  + **Restrictions**:
    - Minister cannot grant PR status to FN in 9(1) if des not meet province’s selection criteria (IRPA s.25(3))

**REQUIREMENTS**: \*Onus on claimant

* Must be an application in writing and an application for PR (or if outside Canada, application for PR visa) (IRPR s.66) [deciding based on written submissions; *Baker* 🡪 no requirement that they interview you]
  + **If outside Canada** 🡪 IRPR s.67 exempts then from meeting requirements of the class as long as they meet 70(1)(b) [FN coming into establish PR] and is not otherwise inadmissible and family members are not inadmissible (IRPR s.67)
    - If accompanying family member of individual issued PR visa under s.67 🡪 must be not inadmissible (IRPR s.69)
  + **If in Canada** 🡪 if exemption from meeting requirements of s.72(1)(a) [applied to remain in Canada as member of class] (c) [member of the class] and (d) [meet selection criteria and other requirements of class] FN becomes PR if following an examination, FN meets requirements in (b) [are in Canada to establish PR] and (e) [FN and family members are not inadmissible, hold document in 50(a)-(h), hold medical certificate] and is not otherwise inadmissible, and family members are not inadmissible (IRPR s.68)
    - If accompanying family member of individual issued PR status under s.68 🡪 must not be inadmissible (IRPR s.69)

**Factors Considered**:

* (1) Degree to which A is established in Canada
  + Stable employment, pattern of sound financial management, integration into community, civil record, links to family members (and impact on them if A is removed)
* (2) Hardship that would result to A and children if were required to leave

**Problems**:

* H&C takes a long time, if subject to removal order, could file a stay in FC but does not lik to grant stays 🡪 could be deported while waiting for H&C to be decided
  + Removals officer has discretion
* **There is no appeal but can apply for JR with leave**

|  |
| --- |
| Baker v Canada (MC&I) (1999 SCC L’Heureaux Dube)  F: Baker is citizen of Jamaica who entered Canada as a visitor and never left (supported herself illegally). Has 4 children, all Canadian citizens. Diagnosed with paranoid schizophrenia and 2 children placed in father’s care, other 2 in foster care (those 2 now back in her care). Was ordered to be deported after it was discovered that she overstayed her visa. Applied for an exemption from requirement to apply for PR outside Canada based on H&C grounds.   * Argued that treatment may not be available for her there, was sole caregiver of 2 young children. * IO decided she would be a strain on social welfare for rest of her life * Appealed 🡪 deportation has been stayed pending results   D: Unreasonable 🡪 dismissive of A’s children’s interests, based on **objectives in s.3(c) [family]**  R: The fact that a decision is administrative and affects “the rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness.  **Content of the duty of fairness**:   * + **(1) the nature of the decision being made and the process followed in making it**     - The more the process provided for, function of tribunal, nature of the decision making body, and determinations that must be made to reach a decision look like judicial decision making the more will be required by the duty of fairness   + **(2) nature of the statutory scheme and the terms of the statute pursuant to which the body operates**     - Greater procedural protections required when no appeal procedure in statute, or when decision is determinative of the issue and further requests cannot be submitted   + **(3) the importance of the decision to the individual or individuals affected**   + **(4) the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances**     - If legitimate expectation exists 🡪 will affect the content of the duty of fairness owed       * **But cannot lead to substantive rights outside procedural domain**   + **(5) the choices of procedure made by agency itself (particularly where statute lets decision maker choose own procedure or when agency has expertise in determining what procedures are appropriate)**   **\*Not exhaustive**  Application: Did not give rise to legitimate expectations that specific procedural rights would be accorded (best interest of the child)   * H&C decision involves exercise of *considerable discretion,* requires consideration of multiple factors * H&C decision is also an exception to general principles of immigration law * This suggests more relaxed requirement under the duty of fairness   + BUT there is no appeal procedure (although JR may be applied for with leave)   + Has exceptional importance for those affected by decision   + M given flexibility to decide on procedure   **The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations – no requirement to provide an oral hearing**.   * In certain circumstances, duty of procedural fairness will require written reasons (where decision is of importance significance, when statutory right of appeal or in other circumstances)   + BUT: fulfilled in this case 🡪 notes provided by IO * **Must be free from reasonable apprehension of bias**:   + **Applies to all IOs who play significant role in making decisions**   + Standard varies with context, type of function performed by administrative decision maker   + Here, the notes written by IO give rise to apprehension of bias. Taint decision itself.     - Context: decision of great importance, also critical to interests of Canada as a country (individualized decisions), require recognition of diversity, understanding and openness to difference * **Must consider best interests of the child** (uses intnl instruments to guide interpretation (not implemented)) |

|  |
| --- |
| ***Caliskan v Canada (MC&I)*** (2012 FC)  F: Claimed refugee status – denied bc of credibility and had not established personal risk (decision is final). Then made application for PR under H&C. Application denied. JR of that decision.  R: Focus upon the **hardship to the individual.** Included within the broader exercise in considering such hardship is consideration of “adverse country conditions that have a direct negative impact on the applicant”. Decision improperly focused on risk (diff personalized from general) – this is wrong 🡪 do not put them in a risk assessment like PRRA or s.96/97 app.  \*Kanthasamy says that hardship is one factor to consider |

|  |
| --- |
| Hinzman v Canada (MC&I) (2010 FC)  F: American soldier who has strong views against war. Has been AWOL. Unsuccesssful refugee claim. Filed PRRA and H&C PR – both refused. JR on H&C app.  R: Should have considered family-related interests. **His deeply held political and religious beliefs should have been considered.** |

**Best Interests of the Child**

* *Baker* 🡪 must be considered (test)
* *Hawthorne* 🡪 BIOC should be given priority/preponderance, children are never deserving of any hardship 🡪 **‘undue hardship’ is presumptively inapplicable to assessment of hardship for children**
* *Williams* 🡪 BIOC test is what is in the child’s best interest, not whether basic needs are being met [more robust]
* *Kanthasamy* 🡪 triggers BIOC, but also affects how other circumstances are considered

|  |
| --- |
| Kanthasamy v Canada (MC&I) (2015 SCC Abella J)  F: K is from Sri Lanka – questioned by army & police, family arranged for him to travel to Canada (16 y/o). K’s application for pre-removal risk assessment was rejected, refugee claim was refused. Filed application for H&C relief under 25(1) – refused - IO concluded that was not satisfied would return to Sri Lanka would result in hardship that was unusual, undeserved or disproportional. FC found it was not unreasonable. FCA agreed.  D: Decision was unreasonable.  R: Purpose of s.25 is to offer equitable relief. Will inevitably be hardship if required to leave, but this alone will not generally be sufficient to warrant H&C. Must consider all factors (*Baker*). May base their requests for [humanitarian and compassionate] consideration on any number of factors.  **H&C factors *including, but not limited to*:**   * establishment in Canada; * ties to Canada; * the best interests of any children affected by their application;   + the age of the child;   + the level of dependency between the child and the [humanitarian and compassionate] applicant or the child and their sponsor;   + the degree of the child’s establishment in Canada;   + the child’s links to the country in relation to which the [humanitarian and compassionate] assessment is being considered;   + the conditions of that country and the potential impact on the child;   + medical issues or special needs the child may have;   + the impact to the child’s education; and   + matters related to the child’s gender * factors in their country of origin (this includes but is not limited to: Medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described * health considerations; * family violence considerations; * consequences of the separation of relatives; * inability to leave Canada has led to establishment; and/or * any other relevant factor they wish to have considered   \*within factors, hardship is the measure  The words “unusual and undeserved or disproportionate hardship” should be treated as descriptive, not as thresholds/tests.  **Decision under 25(1) will be unreasonable if children affected are not sufficiently considered**.   * When child is applicant, triggers BIOC requirement **but also affects how other circumstances are evaluated** (may affect child differently than an adult)   Application: IO failed to give sufficient consideration to age, mental health (must be considered regardless of whether treatment is available in Sri Lanka), evidence he would suffer discrimination if returned – can use factors from ss.96 and 97 to do a discrimination analysis. **Discrimination can be inferred if A shows he/she is a member of a group that is discriminated against**.  Dissent: “simply unacceptable” test |

INADMISSIBILITY

**Burden** of showing not inadmissible to **enter** Canada is on FN who have not entered yet; but if FN has already been authorized to enter or where individual is PR, burden of showing inadmissibility lies on **government** (IRPA s.45(d))

IRPR s.33 facts that constitute inadmissibility under sections 34-37 [security, human and intl rights violations, criminality, serious criminality] include facts arising from omissions and, unless otherwise provided, include facts for which there are **reasonable grounds to believe** that they have occurred, are occurring or may occur (*Suresh*, *Chiau*, *Charkaoui*, *Harkat*, *Jaballah*)

* *Chiau* 🡪 does not require proof on BOP (affirmed in *Jaballah*)
* *Suresh* 🡪 requires an objective basis for belief in information that is compelling and credible
* *Charkaoui* 🡪 reasonable person in similar circumstances would have believed reasonable grounds existed, more than suspicion

|  |
| --- |
| Almrej (Re) (2009 FC)  F: A was believed to have supported terrorism (not directly engaged in).  R: Where legislation requires “reasonable grounds to believe” a certain fact, proof of that fact is not itself required. Evidence that falls short of establishing the fact will be sufficient if it shows reasonable grounds for belief in the fact.   * **Reasonable grounds to believe implies a threshold test for establishing facts necessary for an inadmissibility determination (Minister’s evidence must meet at a minimum** * **Standard of proof for inadmissibility is less than a civil standard** * **When there are competing versions of the facts before the Court, the reasonableness standard requires a weighing of the evidence and findings of which facts are accepted**. |

1. SECURITY (IRPA s.34)\*\*

**CANNOT apply for H&C grounds if found inadmissible under this section.**

* **Reasonable grounds to believe that** (IRPR s.33) 🡪 A PR or FN is inadmissible on security grounds for (IRPA s.34 (1))

\*\*IRPA s.42.1 – Discretionary

May declare that do not constitute inadmissibility of a FN (NOT PR) if satisfy Minister that it is not contrary to national interest

* + (a) engaging in an act of espionage that is against Canada or that is contrary to Canada’s interests; [practice of spying]
  + (b) engaging in or instigating the subversion by force of any government;
  + (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada; [overthrowing of a regime]
  + (c) engaging in terrorism;
    - To determine whether inadmissible under (c), three different ways (IRPR s.14(a)-(c))
    - *Suresh*: terrorism includes any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”
    - Criminal Code definition: s.83.01
      * *Khajawa*: If operating in armed conflict and conduct complied with international law, exempted from definition of terrorism (does not require proof of physical presence in area of armed conflict) just have to be committed during an armed conflict
  + (d) being a danger to the security of Canada;
  + (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
  + (f) being a **member of an organization** that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).
    - *Kanthapathy* 🡪 can be either formal, membership by association or informal participation

|  |
| --- |
| Poshteh v Canada (MC&I) (2005 FC)  F: A is citizen of Iran, father was member of MEK (terrorist). When he was 15, father died. Blamed Iranian government for his death – wanted to join MEK. Father’s friend would not let him join, was able to participate only by disseminating propaganda (distributed 2-3 times a month from 2000-2002 until when he was almost 18). Had no other involvement. Was found inadmissible to Canada under 34(1)(f).   * A argues that he was not sufficiently integrated – he was not directly involved.   R: Status as minor 🡪 Act expressly provides for individual assessments for admissibility – status as minor is a further consideration.   * **Relevant considerations in paragraph 34(1)(f) would be matters such as whether the minor has the requisite knowledge or mental capacity to understand the nature and effect of his actions. It is open to the minor to advance those considerations and whatever other arguments support an exemption and provide evidence** * No error. |

|  |
| --- |
| TK v Canada (Minister of Public Safety and Emergency Preparedness) (2013 FC)  F: LTTE maintained strong presence where A lived. A was member of small union, not connected to LTTE. But was told to attend a training session, was forced to assist LTTE, funded them indirectly by paying the union, did what they asked out of fear. Could not seek protection from authorities (would face repercussions from LTTE, gov was suspicious of Tamils).  R: **The criteria to determine whether someone is a member of an organization: the person’s involvement in the organization, the length of time associated with the organization, and the person’s degree of commitment to the organization and its objectives.** Should not just have to rely on ministerial discretion (as Minister suggested). |

**🡪 If found inadmissible under 34: referred to ID for admissibility hearing under 44(2)**

2. HUMAN AND INTERNATIONAL RIGHTS VIOLATIONS (IRPA s.35)

**CANNOT apply for H&C grounds if found inadmissible under this section**

* **Reasonable grounds to believe that** (IRPR s.33) 🡪 IRPA s.35(1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
  + (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;
    - Three types of decisions under IRPR s.15

|  |
| --- |
| Mugasera v Canada (MC&I) (2005 SCC)  F: A made a speech in Rwanda with anti-Tutsi content. Fled the country and made an application for PR in Canada. Minister sought deportation, alleging speech was an incitement of murder, hatred and genocide (crime against humanity).  D: Reasonable grounds to believe A committed a crime against humanity and is therefore inadmissible.  R: Whether facts meet requirements for crime against humanity is a question of law (not subject to ‘reasonable grounds to believe’ 🡪 must show speech did constitute a hate crime   * **A criminal act rises to the level of a crime against humanity when four elements are made out**:   + 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act (AR) and had the requisite guilty state of mind (MR) for the underlying act);     - **Must have AR and MR for underlying act**   + 2. The act was committed as part of a widespread or systematic attack;     - The act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it   + 3. The attack was directed against any civilian population or any identifiable group of persons; and     - Civilian population must be the primary object of the attack (not merely collateral victim)   4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack (MR for Crime against Humanity) |

* + (b)\*\* being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity; or
  + (c)\*\* Person other than PR whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association

3. CRIMINALITY \*Does not apply to PR (IRPA s.36)

Serious Criminality (both PR and FN)

* **Reasonable grounds to believe that** (IRPR s.33)🡪 IRPA s.36(1)**(a)** FN or PR having been convicted **in Canada** of an offence punishable by a maximum term of imprisonment of AT LEAST 10 years, or of an offence where A has been sentenced to more than six months in prison;
  + **(b)** having been convicted of an offence **outside Canada** that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; [equivalency] or
    - **BUT** excludes people who have been rehabilitated or deemed rehabilitated (IRPA s.36(3)(c))
  + **(c)** committing an act **outside Canada** that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.
    - Determined on a **BOP** (IRPR s.36(3)(d))
    - **BUT** excludes people who have been rehabilitated or deemed rehabilitated (IRPA s.36(3)(c))

Ordinary Criminality (ONLY FN)

* **Reasonable grounds to believe that** (IRPR s.33)🡪 IRPA s.36(2)
  + **(a)** having been convicted **in Canada** of an offence punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
    - prescribed class under IRPR s.18.1
  + **(b)** having been convicted **outside Canada** of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
    - **BUT** excludes people who have been rehabilitated or deemed rehabilitated (IRPA s.36(3)(c))
  + **(c)** committing an act **outside Canada** that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament;
    - **BUT** excludes people who have been rehabilitated or deemed rehabilitated (IRPA s.36(3)(c))
    - No conviction certificate or when charges have been laid, will be laid or are pending
  + **(d)** committing, on entering Canada, an offence under an Act of Parliament **prescribed by regulations**
* IPRA s.36(3)(a) if hybrid 🡪 deemed indictable

EXCEPTIONS:

* (1) and (2) DO NOT APPLY if: given pardon/absolute discharge/conditional discharge/acquittal (IRPA s.36(3)(b)), or if **rehabilitated** (c), or young offender (e)

|  |
| --- |
| ***Saini***(2002 FC)  F: Convicted of hijacking an airlined – later pardoned.  R: Before a foreign discharge or pardon may be recognized: (1) the foreign legal system as a whole must be similar to that of Canada; (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and (3) there must be no valid reason not to recognize the effect of the foreign law   * Gravity of offence should be considered |

* **Rehabilitation:**
  + Applies to s.36(1)(b)-(c), (2) (b)-(c)

|  |  |  |
| --- | --- | --- |
|  | Deemed IRPR s.18(2) | Apply IRPR s.17 |
| **Conviction** of an fffence outside Canada that would be punishable by < 10 years | At least 10 years after completion of sentence | 5 years after completion of sentence |
| **Commission** of an offence outside Canada that would be punishable by < 10 years | At least 10 years after commission of offence | 5 years after commission of offence |
| **Conviction** or **commission** of offence outside Canada that would be 10 years or more | N/A | 5 years from completion of sentence or commission of offence |
| Conviction for two or more offences outside Canada that would constitute summary conviction offences (IRPR s.18.1) | At least 5 years after the sentences were served or to be served | N/A |

\*Cannot have been convicted of an offence since

* + If record of conviction **in Canada** 🡪 must seek a record suspension from PBC before admissible to Canada

EQUIVALENCY:

3 ways to determine equivalency (*Hill*)

* (1) by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences (*Hill*)
* (2) by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada
* (3) by a combination of one and two

|  |
| --- |
| ***Karchi v Canada (MC&I)*** (2006 FC)  F: A was refused PR visa because husband is inadmissible based on serious criminality. Spouse had been given suspended sentence of 3 months imprisonment after being convicted of involuntary manslaughter (was driving, tried to avoid vehicle).  D: JR allowed.  R: Question of law whether it is equivalent. **Essential elements must be equivalent**. In Canada carelessness is not criminal. Algeria does not require marked departure. Not equivalent. |

|  |
| --- |
| ***Li v Canada (MC&I)*** (1997 FC)  F: A was formed chairman of Hong Kong Stock Exchange – was convicted of two offences, sentenced to 4 years imprisonment. Sought entry into Canada.  R: The definition of an offence involves the elements **and defenses** particular to that offence, or perhaps to that class of offences. **Do not consider procedural, evidentiary rules, and standard of proof**. |

4. ORGANIZED CRIMINALITY (IRPA s.37)

**CANNOT apply for H&C grounds if found inadmissible under this section**

* **Reasonable grounds to believe that** IRPA s.37(1)\*\* A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
  + (a) being a **member of an organization** that is believed on reasonable grounds to be or to have been engaged in activity that is part of a **pattern** **of criminal activity** planned and organized by **a number of persons acting in concert** in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or
  + (b) engaging, **in the context of transnational crime**, in activities such as **people smuggling**, **trafficking in persons** or **laundering of money or other proceeds of crime**.
    - People smuggling 🡪 prohibits a person from knowingly organizing, inducing, aiding or abetting the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the Act (IRPA s.117(1))
* (2) BUT (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the PR or FN entered Canada with the assistance of a person who is involved in organized criminal activity.

|  |
| --- |
| Chiau v Canada (MC&I) (2001, FCA)  F: A works for studios that are believed to be controlled by a triad. Had applied for a visa before, VO conducted interview. Decided there were reasonable grounds to believe he was a member of a criminal organisation.  R: Member of criminal organization:   * Not easy to determine bright line between legitimate and illegitimate businesses   + A person’s participation in a legitimate business, knowing that it is controlled by a criminal organization, in some circumstances may support a reasonable belief that the person is a member of the criminal organization itself   Procedural fairness, depends on:   * (i) Importance of decision to the individual   + No connection to Canada, not that important to him. Refusal to issue visa not final (can apply again) * (ii) The nature of the decision and decision-making process   + Not an adjudication   + But would point to higher duty: more objective criteria, specific to A * (iii) Public interest   + Confidential information must be kept from appellant * (iv) Factual context   + Must also include a consideration of the extent to which the individual’s knowledge of the nature of the visa officer’s concerns effectively enabled him to respond   + Was relatively well informed * **No breach in duty of fairness**. |

|  |
| --- |
| B010 v Canada (MC&I) (2013 FCA)  F: B010 arranged with smuggler to bring him to Canada. Was asked to serve as a crew member on the ship. When arrived, reported inadmissible under 37(1)(b).  R: Canada has chosen to adopt a wider definition of smuggling than in the Protocol (does not require material benefit). **Finding of inadmissibility is not the same as removal or refoulement** (still a number of stages before removal from Canada can occur – can apply for Ministerial relief under s.25, for example). |

5. HEALTH \*Does not apply to PR (IRPA s.38)

* IRPA s.38(1) A foreign national is inadmissible on health grounds if their health condition
  + (a) is **likely** to be a danger to public health;
    - Conditions that are contagious, for ex.
  + (b) is **likely** to be a danger to public safety; or
  + (c) might reasonably be expected to cause excessive demand on **health** or **social** **services**.
    - “Excessive demand” is either
      * Demand for which anticipated cost would exceed average per capita Canadian cost over period of 5 years, unless evidence points to significant costs beyond that (then the period is 10 years)
      * Or, demand that would add to existing waiting lists and would increase the rate of morality for PR and citizens as a result of denials/delays in provision of services
    - **Does not apply to** FN who is 2(a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations; (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances; (c) is a protected person; or(d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

**🡪 reading s.38 alongside s.42 means that only a sponsor who enters into a spousal, common law, or conjugal relationship after acquiring permanent residence or citizenship in Canada can claim the benefit of the s 38(2) exemption from excessive demand**

* IRPR s.20: IO shall determine that a FN is inadmissible on health grounds if assessment of health condition has been made and IO concluded they were **likely** to be a danger to public health or public safety or might reasonably be expected to cause excessive demand

|  |
| --- |
| Zhang v Canada (MC&I) (2012 FC)  F: A, citizen of China, had been selected as an immigrant under Quebec’s investor program. Family: 3 children & wife, one son is disabled (not-accompanying). Letter notified A to submit an individualized plan & a declaration of ability/intent to pay for social services. Submitted declaration of ability/intent and that his plan was to leave son in China. VO found this insufficient (did not address how he would mitigate costs if he became PR).  R: Paragraph 38(1)(c) of the Act, which speaks of inadmissibility on health grounds because the health condition of the foreign national “might reasonably be expected to cause excessive demand on health or social services”. **Up to A to discharge onus by providing credible plan for mitigating excessive demand on social services.** |

|  |
| --- |
| Hilewitz v Canada (MC&I) (2005 SCC Abella J)  F: As qualified for PR, but were denied admission bc of the intellectual disability of a dependent child. In SA, H never resorted to public funds, intended to send him to private school in Canada. Had interview was found credible and would be valuable to Canada. Sent him a fairness letter, advising that he should submit further evidence. Application was refused.  R: Importance of individualized assessments, personal circumstances should be considered. **Assess likely demands, not remote possibility of demands.**  Dissent: wealth is not a relevant consideration; inadmissibility is not part of the same inquiry as potential contribution. This inquiry is looking at whether it is undermined in some way.  NOTE: **this case does not apply to APPLICANTS, just their families** |

6. FINANCIAL \*Does not apply to PR (IRPA s.39)

* IRPA s.39 A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.
* BUT: with IRPR s.133(1)(j) [exemptions to LICO] sponsors are not required to meet minimum income for spouse, CL or conj partner, dependent child 🡪 but sponsor can still be found inadmissible under s.39 of the IRPA

7. MISINTERPRETATION (IRPA s.40(1)(a)-(c))

* IRPA s.40(1) A permanent resident or a foreign national is inadmissible for misrepresentation
  + (a) for directly or indirectly **misrepresenting or withholding material facts** relating to a relevant matter that induces or could induce an error in the administration of this Act;
  + (b) for being or having been **sponsored by a person who is determined to be inadmissible for misrepresentation**; [by association]
    - Does not apply unless Minister is satisfied the facts justify inadmissibility (s.40(2)(b))
  + (c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or
  + (d) on ceasing to be a citizen under
* IRPA s.40(2) **continue to be inadmissible for 5 years following a final determination or date of enforcement of the removal order**

8. NON-COMPLIANCE WITH ACTS (IRPA s.41)

* IRPA s.41 A person is inadmissible for failing to comply with this Act
  + (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and
  + (b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28 [apply with conditions placed on PR; residency obligations]
* **Must combine with allegation of contravention of another provision**
  + Ex. arrive without a visa, work without a work permit

9. INADMISSIBLE FAMILY MEMBER \*Does not apply to PR (IRPA s.42)

* IRPA s.42(1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if
  + (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or
    - IRPR s.23 For the purposes of paragraph 42(1)(a) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that
      * (a) the foreign national is a temporary resident or has made an application for temporary resident status, an application for a permanent resident visa or an application to remain in Canada as a temporary or permanent resident; and
        + Applies to CEC class, provincial nominee program, live-in caregiver program
      * (b) the non-accompanying family member is
        + (i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact,
        + (ii) the common-law partner of the foreign national,
        + (iii) a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law, or
        + (iv) a dependent child of a dependent child of the foreign national and the foreign national, a dependent child of the foreign national or any other accompanying family member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.
  + (b) they are an accompanying family member of an inadmissible person
* These two sections means that ONLY those who enter into a relationship after becoming PR can claim benefit of IRPA s.38(2) (exclusion from health inadmissibility) – can claim H&C or TRP

**For TEMPORARY residents:**

* **(2)** In the case of a foreign national referred to in subsection (1) who is a **temporary resident** or who has made an application for temporary resident status or an application to remain in Canada as a temporary resident,
  + **(a)** the matters referred to in paragraph **(1)(a)** constitute inadmissibility **only if** the family member is inadmissible under **section 34, 35 or 37**; and
  + **(b)** the matters referred to in paragraph **(1)(b)** constitute inadmissibility only if the foreign national is an accompanying family member of a person who is inadmissible under **section 34, 35 or 37**

MINISTERIAL DECLARATION:

* **IRPR s.42.1(1)** The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b**)** [prescribed senior official] and (c)[entry restricted because of sanctions]and subsection 37(1**)** [criminality] **do not constitute inadmissibility** in respect of the foreign national if they satisfy the Minister that it is **not contrary to the national interest**

THE PROCESS OF REMOVAL

TWO WAYS TO BE SUBJECT TO REMOVAL ORDER:

* **(1) s.44(2) Report**
  + STAGE 1:
    - IRPA s.44(1) an IO who believes FN or PR is inadmissible ***may*** prepared a report setting out the facts
    - Report is forwarded to minister’s delegate who must determine whether it is well founded
      * Individual appears before MD
    - If so, IO ***may*\*** make a removal order
      * See *Cha* for criminality
  + STAGE 2:
    - If PR is inadmissible bc failed to comply with residency obligations 🡪 **removal order** (IRPA s.44(2))
    - IF FN inadmissible because of: (IRPR s.228(1))
      * Serious criminality or criminality 🡪 **deportation order** (IRPA s.228(1)(a))
        + Was the person rehabilitated under IRPR s.18.1?
      * Misrepresentation 🡪 **deportation order**(IRPA s.228(1)(b))
      * Cessation of refugee protection 🡪 **departure order** (IRPA s.228(1)(b.1))
      * Non-compliance with act: (IRPA s.228(1)(c))
        + Failure to appear for examination/admissibility hearing 🡪 **exclusion order**
        + Failure to obtain authorization of officer 🡪 **deportation order**
        + Failure to establish they hold visa or other document 🡪 **exclusion order**
        + Failure to leave Canada by end of period authorized 🡪 **exclusion order**
        + Failure to comply with leaving at end of period as a result of non-compliance with any condition set out in s.184 or 220.1(1) 🡪 **exclusion order**
        + Trying to seek to enter/remain as TR while being subject to declaration under 22.1(1) 🡪 **exclusion order**
      * If FN is inadmissible bc of inadmissible family member 🡪 **same removal order as was made wrt the inadmissible family member**(IRPA s.228(1)(d))
        + BUT if family member is inadmissible because of security, intl human rights violations, or organized criminality 🡪 **deportation order**
      * IRPA s.44(3) **IO may impose conditions**
      * **\*\***must be over 18 and have mental capacity in IRPR s.228(4)
    - **In all other cases**, Minister ***may*** refer the report to ID for admissibility hearing (IRPA s.44(2))

|  |
| --- |
| Cha v Canada (MC&I) (2006 FCA)  F: A is from Korea, entered Canada in 1996 with student authorization; has been on renewed authorizations since entry but never completed any course or program. Was convicted of driving under the influence. IO made report under 44(1), inadmissible on criminality. MD decides that the report is well founded, Cha signed that he understood.  I: What is the scope of discretion under 44(2)?  D: Allow appeal, restore deportation order.  R: No discretion 🡪 IO and MDs expected to prepare a report if found inadmissible for criminality or serious criminality under s.36. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. This represents a legitimate, non-arbitrary choice of parliament.   * **Assessed *Baker* factors for duty of fairness:**   + (1) nature of decision and procedures: straightforward and fact driven, far away from judicial process   + (2) nature of statutory scheme   + (3) important of the decision to individual affected: when appears before MD only real chance to stay apart from JR to prevent finding of inadmissibility 🡪 higher duty of fairness than in cases where report is referred to ID; but there are still other remedies (H&C stay of removal, PRRA)   + (4) legitimate expectations: statute gives decision maker ability to choose own procedure (this should be respected); low degree of participatory rights is warranted   + **Meets duty of fairness: given copy of report, informed of allegations made in report, the case to be met and nature and possible consequences of decision to be made; conduct an interview in presence of the person, given opportunity to present evidence relevant to case and express POV**.     - **DOES NOT have to give notice they have a right to counsel**     - BUT the failure to notify A of purpose of the interview was a breach of the duty of fairness, but this would not have made a difference 🡪 **does not automatically lead to setting aside the decision**.     - 36(3) is the bases of discretion |

|  |
| --- |
| Monge Monge v Canada (2009 FC)  F: A was convicted of armed robbery, dangerous operation of a motor vehicle and possession of a weapon. Was 27th conviction. Had been PR for 16 years. Found inadmissible on serious criminality. IO assessed A using Ribic factors: age at time of landing, length of residence, location of family support and responsibilities, conditions in home country, degree of establishment, criminality and history of non-compliance and current attitude and exercised discretion not to sent report to an inadmissibility hearing.  R: **Can consider Ribic Factors** **when determining whether to send an inadmissibility report**. |

* **(2) Admissibility Hearing**
  + IRPA s.45 At the end of the admissibility hearing, ID makes one of 4 decisions:
    - (a) right to enter Canada for citizens, IND, PRs
    - (b) grant PR status or TR status to a FN if FN meets requirements;
    - (c) authorize a PR or FN (w or w/o conditions) to enter Canada for further examination;
    - **(d) make the applicable removal order against a FN or PR** 🡪 IRPR s.229(1):
      * (a) Security grounds 🡪 deportation order

UNLESS \*(2) eligible for refugee protection, or \*\*(3) was previously subject to a removal order and were inadmissible on the same grounds as in that order, has failed to comply with any conditions/obligations imposed on them (unless this is basis for removal), has been convicted in Canada of an indictable offence or two offences (unless convictions are grounds for removal) 🡪 **DEPORTATION ORDER**

* + - * (b) Violating human/intnl rights 🡪 deportation order
      * (c) PR or FN for serious criminality 🡪 deportation order
      * (d) Criminality 🡪 deportation order
      * (e) Organized criminality 🡪 deportation order
      * (f) Health grounds\*/\*\* 🡪exclusion order
      * (g) Financial grounds\*/\*\* 🡪 exclusion order
      * (h) Misrepresentation for 40(1)(a) or (b) \*\* 🡪 exclusion order
      * (i) Misrepresentation for 40(1)(d) [citizenship revoked] 🡪 deportation order
      * (j) Failing to comply with requirements to appeal for examination (41(a)) \*/\*\* 🡪 exclusion order
      * (k) If PR, by failing to comply with conditions or residency requirements (41(b)) 🡪 departure order
      * (l) Failing to establish came to Canada to establish PR \*\* 🡪 exclusion order
      * (m) Failing to establish that they will leave Canada\* 🡪 exclusion order
      * (n) Failing to comply with the Act \*/\*\* 🡪 exclusion order

Types of Removal Orders (3 types (IRPR s.223))

**IRPA s.52(1)** If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances [request authorization when apply for new visa]

SHALL NOT return if FN is removed at Canada’s cost unless the costs are repaid ($750 to US; $1500 to any other country) (IRPR s.243)

**(1) DEPARTURE** **ORDER**: exempt from requirement to obtain authorization to return to Canada (IRPR s.224(1))

* (2) Must meet requirements of 240(1)(a)-(c) **within 30 days** or becomes deportation order
  + IRPR s.240(1): **(a)** appears before an officer at a port of entry to verify their departure from Canada; **(b)** obtains a certificate of departure from the Department; **(c)** departs from Canada
* (3) If FN is detained within 30 day period, the removal order is stayed until they are released or removal order becomes enforceable
* **Can request this if have intent and means to leave** 🡪 if do not leave, subject to immigration warrant

**(2) EXCLUSION ORDER**: must seek written permission to return to Canada during 1 year following enforcement (IRPR s.225(1)), unless issued for misrepresentation which is 5 years (IRPR s.225(3))

* (4) IF **accompanying family member of an inadmissible person** 🡪 exempt from authorization to return

**(3) DEPORTATION ORDER**: written authorization is required FOREVER if want to return (IRPR s.226(1))

* (2) UNLESS accompanying family member of an inadmissible person 🡪 do not need authorization

|  |
| --- |
| Sahakyan v Canada (2004 FC) F: A had arrived in Canada to attend wedding, claimed refugee status within a week. Was denied, did not leave Canada (departure order became deportation order). Were allegations did not pay for ticket to leave. He has now been selected for PR pursuant to a fed-prov agreement. VO decided not to grant authorization – not in national interest to grant the return. This is JR of decision by VO.  R: If A had left under the departure order when he was supposed to, he could come back whenever.   * Procedural fairness: not entitled to interview but should have been given an opportunity to address the officer’s concerns 🡪 could have explained that he had to give up passport to get a Mexican visa, and couldn’t leave before passport was returned. Was not given opportunity to prove that he paid for his ticket. * **The fact that he made another application does not mean he should not be granted JR. Set aside decision and refer matter back for redetermination**. |

**IRPA s.48(1) A REMOVAL ORDER IS ENFORCEABLE IF IT HAS COME INTO FORCE AND IS NOT STAYED**

* **If enforceable, FN must leave Canada immediately and the order must be enforced ASAP** (IRPA s.48(2))
* A removal order comes into force on the latest of: (IRPA s.49(1))
  + (a) the day the removal order was made, if there is no right to appeal
  + (b) the day the appeal period expires, if there is a right to appeal and no appeal is made
  + (c) the day the final determination of the appeal, if an appeal is made
* **Removal order against FN is also one against their family** (IRPR s.227)
* Removal orders do not become void because of any lapse of time (IRPR s.235)
* **Removal order is enforced by voluntary compliance of FN or by the removal of the FN by the Minister** (IRPR s.237)
  + **Voluntary**: must show that they have the intent and means (IRPR s.238)
    - **If removal orders are voluntarily complied with, person may choose destination** (IRPR s.238) UNLESS: danger to public, fugitive, seeking to evade justice in Canada or abroad.
    - **OTHERWISE will be removed to** IRPR s.241(1): the country from which the person came to Canada, the country of last permanent residence, a country of which the person is a citizen, or the country of the person’s birth
      * If none of these countries authorize entry w/i a reasonable time 🡪 Minister shall select a country that will authorize entry (IRPR s.241(2))

REMOVAL

**ENFORCED REMOVAL ORDER:** (when individual leaves country)

* IRPR s. 240(1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national
  + (a) appears before an officer at a port of entry to verify their departure from Canada;
  + (b) obtains a certificate of departure from the Department;
  + (c) departs from Canada; and
  + (d) is authorized to enter, other than for purposes of transit, their country of destination.
* **RESULT**: **Loss of status**: TR (IRPA s.47); PR (IRPA s.46)

|  |
| --- |
| Canada (Minister of Employment and Immigration) v Chiarelli (1992) (SCC Sopinka J)  F: Italian citizen, immigrated as a teenager. Was convicted of an offence w/ term of imprisonment 5 years or more. Was found inadmissible on grounds of criminality, issued a deportation order. Normally would have been able to appeal to IAD which could take into account circumstances of case, including humanitarian & compassionate considerations but Minister started special process that involved *in camera* hearing – focussed on connections with organized crime. Security Intelligence Review Committee reported that there were reasonable grounds to believe he would engage in organized crime, issued a certificate that automatically caused appeal to be dismissed.   * Argued that the in camera process violated his s.7 rights and that deportation w/o considering all the circumstances violated his s.7 rights   I: Is it necessary to consider all the circumstances for deportation orders? Does deportation engage s.7?  R: Deportation for serious offences is not a deprivation of liberty The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country   * The distinction between citizens and non-citizens is recognized in the Charter (s.6) * This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country * Therefore no breach of fundamental justice in giving effect to termination of a non-citizens right to remain in Canada * Procedures were not inconsistent with s.7 (Later: found to infringe s.7 in *Charkaoui*) * A also argued that deportation is cruel and unusual punishment, **but deportation is not punishment** (no breach of s.12) * Should he be allowed to appeal?   + Purely discretionary, executive has retained power to prevent an appeal because of security concerns; s.7 does not mandate compassionate appeal from a decision that does not violate fundamental justice |

|  |
| --- |
| Suresh v Canada (M C&I) (2002)  F: Came to Canada 1990, recognized as a Convention Refugee in 1991 and applied for landed immigration status. In 1995 government detained and began proceedings to deport. During application process for PR, govt formed opinion that he was a member of the Tamil Tigers. Court also accepted that members of the group were likely to be subjected to torture by the government. Suresh challenged order of deportation.  I: Does the Charter preclude deporting someone to face prima facie risk of torture? What is the standard to apply in reviewing ministerial decisions to deport?  R: *Burns* **🡪 s**.7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition 🡪 Should be applied to deportation as well.   * Test: **the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected**   + Balancing approach (depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel)   + **“[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter”**   R: Barring exceptional circumstances, deportation to torture will generally violate s.7 (because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis). International treaties are not binding in Canada unless they have been incorporated into Canadian law by enactment but the courts may be informed by intnl law. |

|  |
| --- |
| Charkaoui v Canada (M C&I) (2007 SCC McLachlin CJ)  F: A is PR, others are FN who had been recognized as Convention Refugees. Had been detained for years based on allegations that they constituted a threat to security of Canada (connections to terrorism). IRPA allows M C&I issue certificate of inadmissibility (national security) – certificate and detention are subject to review by a judge for reasonableness. If reasonable 🡪 no appeal, no way to have it judicially reviewed.   * Consequences of confirmation of certificate is different depending on whether person is PR or FN.   + PR: may be detained if threat to national security or unlikely appear at hearing – detention must be reviewed within 48 hours; entitled to review every 6 months.     - If reasonable 🡪 removal order (subject to review same terms as FN)   + FN: must be detained, must apply for review and may not do so until 120 days after judge determines certificate is reasonable. (this has changed under the IRPA); if has not been removed w/i 120 days, judge may order the person released if “satisfied that the foreign national will not be removed from Canada within a reasonable time and that it will not pose a danger to national security”   + Also lose protection of non-refoulement if deportation is due to national security   I: Does the security regime violate the Charter?  D: Unjustifiably violates s.7 by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests; sometimes continuing detention violate ss. 9 & 10 because can be arbitrary (no breach of s.15, no breach of s.12)  R: **Deportation doesn’t engage s.7, but the procedures might**. Detention clearly deprives them of life, liberty and security of the person. *Chiarelli*🡪 principles of fundamental justice depend on the context.   * Context: important consequences for detainee (*Suresh*), also context of security concerns – but cannot erode s.7 * Overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them **a fair judicial process within context of detention:**   + = **(i) right to a hearing before an independent and impartial magistrate, (iii) decision on the facts and the law, and (iv) right to know the cause put against one, and a right to answer that case** (how these are met vary with context, but each must be met in substance)   A: 1st is met, but 2nd and 3rd criteria are not met:   * (1) hearing in front of judge independent and impartial (not only beimpartial but appear impartial)   + Subject of hearing is not present   + Judge is designated under IRPA   + May give rise to perception that judge may not be entirely impartial/independent(may appear co-opted by the executive branch); assists in “investigation” to ensure the certificate is reasonable – more like adjudicative review than investigation 🡪 **does not compromise the perceived independence of judge** * (2) decision based on fact and law   + normal standards of reliability do not apply – all material produced by government and vetted for reliability   + named person shown little of this information   + cannot be sure the judge is exposed to full factual picture   + same concerns arise re: law 🡪 may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence * (3) “case to meet”   + **Fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case**   + Right to know the case to meet is not absolute   + National security concerns can limit it (*Chiarelli*)   + Depends on the situation   + If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here * **🡪** ultimately deciding the issues on the basis of incomplete and potentially unreliable information * **The question at the s. 7 stage is whether the basic requirements of procedural justice have been met either in the usual way or in an alternative fashion appropriate to the context, having regard to the government’s objective and the interests of the person affected**   Justified under s.1?   * Fails minimum impairment (there are less intrusive alternatives)   The time constraints do not breach ss.7 or 12 if accompanied by a process that provides regular opportunities to review the detention  s.15 is not breached because s.6 differentiates between citizens and non-citizens – deportation regimes cannot be the basis of s.15 claim  Also not inconsistent with the rule of law 🡪 **no constitutional right to an appeal; does not prohibit automatic detention**  **Although deportation does not in itself offend s 7, procedures and principles surrounding it are to be subject to s 7 scrutiny**  **Within the context of detention: procedural fairness requires three things (vary in substance based on context)** |

RECOURSE FROM REMOVAL:

STAYING A REMOVAL ORDER

* Removal order can be stayed if: IRPA s.50(1)(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order; (b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed; (c) for the duration of a stay imposed by the IAD or any other court of competent jurisdiction; (d) for the duration of a stay under paragraph 114(1)(b); and (e) for the duration of a stay imposed by the Minister.
* **Entire Countries**:
  + IRPR s.230(1) Minister may impose a stay on removal orders to a country or place if it poses a generalized risk to the entire civilian population as a result of: (a) armed conflict within the country or place; (b) environmental disaster resulting in disruption of living conditions; (c) any situation that is temporary and generalized
    - (2) may cancel if no longer poses a threat
    - (3) DOES NOT APPLY TO: inadmissible for security grounds, violating human or international rights, serious criminality, organized criminality, or if they consent
* IRPA S.231(1) A removal order is stayed if individual makes application for leave for JR on a decision for refugee protection except those who are inadmissible bc of serious criminality.
* **Granted stay if made application for a PRRA** (IRPR s.232)
* **H&C or public policy considerations: removal order is stayed if the Minister is of the opinion that the stay is justified under s.25 or 25.1(1) or by public policy considerations under 25.2(1). The stay is effective until a decision is made to grant, or not grant, PR status** (IRPR s.233)

OTHER APPEALS:

IAD:

\*\* IAD may not consider H&C grounds unless has decided that FN is member of the family class and their sponsor is a sponsor w/I meaning of IRPR (IRPA s.65)

* Is the competent board for appeals (IRPA s.62)
* **Who can appeal?**
  + Someone who has filed to sponsor a FN as a member of the family class against a decision not to issue a PR visa (IRPA s.63(1))\*\*
    - EXCEPT if inadmissible because of misrepresentation, unless FN in question is sponsor’s spouse, CL partner, or child (IRPA s.64(3))
  + FN who holds a PR visa may appeal against a decision to make a removal order against them (IRPA s.63(2))\*\*
  + A PR or protected person may appeal against a decision to make a removal order against them (IRPA s.63(3))
  + PR may appeal against a decision made outside Canada on the residency obligations (IRPA s.63(4))
    - If dismisses appeal under this provision and PR is in Canada, shall make a **removal order** (IRPA s.69(3))
  + Minister may appeal against a decision of the ID in an admissibility hearing (IRPA s.63(5))
* **Who CANNOT appeal?**
  + **FN,** or **sponsor,** or **PR** if they have been found to be inadmissible on grounds of security, violating international or human rights, serious criminality or organized criminality (IRPA s.64(1))
    - Serious criminality = crime that was punished in Canada by term of imprisonment at least 6 months, or that is described in 36(1)(b) or (c) (IRPA s.64(2))
* **Results:**
  + IRPA s.66 – IAD may:
    - IRPA s.67(1) **allow** **appeal**;
      * To allow an appeal 🡪 must be satisfied that, at the time the appeal is disposed of,

\*\*BUT under IRPA s.69(2) when Minister appeals and IAD is satisfied (taking into account best interest of the child) that sufficient H&C considerations warrant special relief 🡪 may stay the applicable removal order or dismiss the appeal despite being satisfied of matter set out in 67(1)(a) or (b)

* + - * + (a)\*\* the decision appealed is wrong in law or fact or mixed law and fact;
        + (b)\*\* a principle of natural justice has not been observed; or

If IAD stays a removal order under 66(b), shall impose following conditions: inform changes to address, provide copy of travel document, not commit any crimes, report any charges to Department

* + - * + (c) other than when Minister appeals, taking into account the best interest of the child direct affected by the decision, sufficient **humanitarian and compassionate considerations** warrant special relief in light of all circumstances of the case

This is NOT s.25 🡪 specific basis for IAD to make an appeal.

**This is where you assess the Ribic Factors:**

**seriousness of offence**

**possibility of rehabilitation**

**circumstances surrounding failure to meet conditions**

**length of time in Canada**

**degree of establishment**

**dislocation to the family**

**support in the community**

**degree of hardship faced upon return**

|  |
| --- |
| ***Khosa 🡪*** s.67(1)(c) Ribic factors for discretionary relief for removal order appeals under humanitarian and compassionate grounds for removal based on criminality   * Nature of the discretion is subject to reasonableness |

* + - * **Effect**: shall set aside original decision and substitute a determination that should have been made or refer to appropriate decision maker for reconsideration (IRPA s.67(2))
        + The decision by the IAD to allow an appeal for a PR of FN is finding on an officer (IRPA s.70(1))
    - (b) stay the removal order; or
      * IRPA s.68(1) To **stay a removal order**, the IAD must be satisfied, taking into account the **best interests of a child** directly affected by the decision, that sufficient **H&C considerations** warrant special relief in *light of all the circumstances of the case*
        + **Consider Ribic factors** (above)
      * **Effect**: IRPA s.68(2)(a) shall impose any condition that is prescribed and may impose any condition it feels is necessary (b) all conditions imposed by ID are cancelled (c) may vary or cancel any non-prescribed condition imposed under (a); (d) may cancel the stay on application or own initiative
      * IF granted stay for FN or PR who was found inadmissible on serious criminality or criminality, and they are convicted of another offence **the stay is cancelled by operation of law and the appeal is terminated** (IRPA s.68(4))
      * IF stay removal order 🡪 mandatory conditions in IRPR s.251
    - (c) dismiss the appeal
      * IF does not stay or allow the appeal 🡪 must dismiss (IRPA s.69(1))

|  |
| --- |
| Cheiu v Canada (MC&I) (2002 SCC Iacobucci)  F: On original application did not list wife and child, when PR applied to bring them. Found inadmissible for misrepresentation. Argues that ‘having regard to all the circumstances’ should consider place individual would be removed to.  R: Potential hardship abroad is a relevant factor. **Ribic factors are not exhaustive**. **In light of all circumstances = broadly construed.** |

FC JUDICIAL REVIEW:

**When can you apply for judicial review?**

* Do so by making an application for leave
* Within Canada 🡪 within 15 days of final decision (IRPA s.72(2)(b))
* Outside of Canada 🡪 within 60 days of final decision (IRPA s.72(2)(b))
* **Federal Court**: decides leave based on written submissions (to apply: IRPA s.72(1))
* Decision to grant/deny leave cannot be appealed

**What are the grounds for seeking judicial review?**

\*See Stays below (can seek a stay while JR is pending)

* May apply to FC for **leave to seek JR** of ***any*** *decision made relating to their removal from Canada* (a decision, determination or order made, a measure taken or a question raised) (IRPA s.72(1))
* IRPA s.72(2) **Application must not be made until:** (a) **any right of appeal that may be provided in the Act is exhausted** (b) notice requirements and disclosure requirements; (c) judge may allow more time (d) Court shall dispose of application without display and **without personal appearance**; (e) no appeal lies from the decision of the Court with respect to an interlocutory judgement
* IRPA s.74 – JR is subject to the following:
  + (a) Judge who grants leave shall fix the day and place for the hearing (b) hearing shall be no sooner than 30 days later than 90 days after leave was granted, unless parties agree to earlier date (c) shall dispose of application without delay and (d) **may only be made if a FCA judge certifies a question of general importance is involved and states the question**
* Procedure: (a decision maker breached a principle of procedural fairness in the course of making the decision)
  + Not according to fair procedure, natural justice or other procedure required by law (FCA s.18.1(3)(b))?
    - Adequate notice of proceedings, issue to be decided, concerns of decision maker?
      * Fairness letter is standard practice 🡪 if there is a concern eligible or admissible.
    - Granted adequate disclosure of material on which decision will be made?
    - Sufficient opportunity to present their case and to respond?
      * Interview required for credibility concerns (*Maklakov*)
    - Accorded the opportunity to be represented by counsel?
    - Accorded the services of a competent interpreter?
    - Person who hears the case the decision maker?
    - Legitimate expectations? (*Baker)*
    - Reasonable apprehension of bias? (*Baker*; *Maklakov*)
* Substance:
  + Was the decision not within jurisdiction, conferred by statute on the decision maker (FCA s.18.1(3)(a))?
  + Erred in law in making a decision or an order (whether or not the error appears on the face of the record) (FCA s.18.1(3)(c))?
    - Not an appropriate exercise of discretion (? Not in compliance with relevant provisions (properly interpreted)?
  + Based its decision or order on an erroneous finding of fact that is made in a perverse or capricious manner or without regard for the material before it (FCA s.18.1(3)(d))?
  + Acted in any other way that was contrary to law? (FCA s.18.1(3)(e))
  + Ex. acting arbitrarily, considers irrelevant factors/does not consider relevant factors
* Remedies: set out in s.18.1(3)
  + *Certiorari*🡪 quash decision and send back to decision maker to re-determine the matter according to law
  + *Mandamus* 🡪 order to perform a specific legal duty that decision maker failed to perform
  + Prohibition 🡪 order not to do something
  + Stay of removal🡪 form of injunctive relief
* Appeal:
  + Only possible if FC judge certified a series question of general importance (IRPA s.74(d))

|  |
| --- |
| Maklakov v Canada (M C&I) (2013)  F: A tried several times to obtain a visa (3x study permit; 5x visitor visa). Although this is permitted, past rejection can become a reason for future denials. Application for judicial review pursuant to s.72 IRPA for decision to reject application for study permit under s.11 IRPA. Trouble was due to earlier application where he used a fraudulent letter to bolster economic situation; had disclosed subsequently.   * Was accepted to SAIT, would live with S&BL, had $20 000, wife would continue to work & reside in Ukraine, had business there. * VO was not satisfied that the purpose and current employment situation indicated he would leave. Also was concerned that he had a history of misrepresentation and lack credibility.   I: Do credibility concerns give rise to entitlement to an interview so A has chance to respond?  D: Remitted, considered by different VO.  R: VO considered past misrepresentations as a credibility issue. **Procedural fairness requires interviews in some circumstances** **incl. for credibility concerns** (otherwise could never be overcome) |

H&C APPLICATIONS: s.25

***SEE* H&C ADMISSIONS ABOVE PAGE 45**

TEMPORARY RESIDENT PERMIT

**Scope is broader than H&C because do not need to reply on public policy or H&C considerations**

**IRPA s.24(1)** A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit.

* + **Test: reason FN needs to enter or remain in Canada is compelling and presence in Canada outweighs risks to Canadians or Canadian society** (balancing)
  + Duration: IRPR s.63
    - (a) May be cancelled at any time under 24(1)
    - (b) If permit holder leaves Canada w/o prior authorization
    - (c) period of validity ends
    - (d) can last maximum of 3 years from date of validity

But they don’t become a TR until they are examined upon arrival in Canada (IRPA s.24(2))

* + Can access social services & healthcare, can submit study/work permits from inside Canada (IRPR s.199, s.215(1))
  + IRPA s.24(4) – FN cannot request TRP if claim for refugee protection has been denied or rejected in last 12 months

**BECOMING PR: Can become PR in some circumstances** 🡪 IRPR s.64-65

|  |
| --- |
| Betesh v Canada (MCI) (2008 FC)  F: A from Israel, entire family resides in Canada (one child born in Canada). H&C application was rejected, aske for leave, was granted and stay of removal. Made second H&C, no decision has been made. [has covered every avenue under the Act] Applied for TRP. **If have to leave Canada will have to close business (NOT H&C reasons, financial/business reasons**). Alleges organized crime in Israel – has been threatened in Canada. TRP denied.  R: Doubling of review would occur – just because the channels are not identical does not mean there would not be duplication. **Circumstances must include other applications** |

PRE REMOVAL RISK ASSESSMENT (PRRA)

* Most of the time, only relevant for failed refugee claimants, BUT can file it even if never put in refugee claim
* Have to be subject to a removal order that is enforceable
* Idea that A will face serious risks if removed to country of origin

IRPA s. 112 (1) A person in Canada, other than a person referred to in subsection 115(1) [non-refoulement, with exceptions], may, in accordance with the regulations, **apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate** [security certificate] described in subsection 77(1)

* (2) Subject to (1) may not apply for protection if (a) extradition; (b) refugee protection (b.1) less than 12 months or 36 months have passed since claim for refugee protection was rejected (c) less than 12 or 36 months since last application for protection was rejected
  + Exceptions to (b.1) and (c): nationals of a country
* (3) Refugee protection may not be conferred if inadmissible bc of security, violating rights, or organized criminality; or inadmissible bc of serious criminality > 10 years within Canada or equivalent; or **named in a certificate**
  + IRPA s.113: If not inadmissible bc of above, assessed on IRPA s.96-98 (get refugee protection or protected person if successful); if inadmissible only assessed wrt IRPA s.97 and if inadmissible bc of serious crinality, whether they are a **danger to the public** or any other applicant because of **danger or nature and security of the acts**
    - **BUT if received a sentence of < 2 years, can be considered under s.96 and 97, but will not be granted protected person status, only removal order stayed** (IRPA s.114)
* **Result:** 
  + If not described in s.112(3) 🡪 **refugee protection**
  + If described in s.112(3) 🡪 **staying removal order**

|  |
| --- |
| Varga v Canada (2007 FCA)  F: M appealing decision by FC to grant JR to Hungarian family, 2 Canadian born children. Judge set aside negative decision by PRRA O bc didn’t take into account children.  D: Do not have to take into account interests of Canadian born children.  R: **Only risks relevant to applicants are relevant here** (only considered under H&C). H&C and PRRA should not be confused/duplicated. REMOVALS officer can give considerations to ST interests of children – could delay to allow them to complete school year but not PRRA officer. |

STAYS OF REMOVAL

STATUTORY STAYS:

* IRPA s.50: Removal order stayed if (a) criminal matter is pending (b) until jail sentence is complete; (c) for duration of stay imposed by IAD or any other court of competent jurisdiction; (d) duration of stay under s.114(1)(b) [PRRA granted stay]; (e) duration of stay imposed by M (either: H&C where stay is given at same time application is considered or by country/place under s.230 IRPR \*does not apply to serious inadmissibility)
  + s.230 Minister can grant:
    - TSR: Temporary Suspension of removal: will usually be in place for a long time (three countries under TSRs: DRC, Iraq, Afghanistan)
    - Administrative Deferral of Removals: shorter-term; defers removals where there is a humanitarian crisis

\*\*Just *pause* removal

* IRPR s.232: removal order is stayed when makes application under PRRA
* IRPR s.233: removal order against FN and family members is stayed if application made under H&C (remember: serious criminality cannot apply for H&C)
* IRPA .68(1) IAD can stay a removal order **but only those with access to appeals through IAD** 🡪 must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case

JUDICIAL STAYS:

**FC Judicial Stays:** FC can grant say while application for JR is determined

* Toth test: (1) serious issue to be tried; (2) irreparable harm\*; (3) balance of convenience

|  |
| --- |
| Omar v Canada (2009 FC)  F: Citizen of Somalia, arrived in Canada in 2000, claimed refugee status. Determined to be a convention refugee. Lengthy criminal record, long history of misconduct while incarcerated. Found to be a danger to the public under s.115 IRPA. No general stay of removals under s.230. Has not shown meets branches of Toth test.  R: (1) No serious issue, (2) **cannot be speculation/possibility** – has to be clear and non-speculative (3) **balance of convenience favours M when A has criminal record**. |

|  |
| --- |
| Mauricette v Canada (2008 FC)  F: 25 year old St. Lucian citizen, 3 Canadian born children w/ medical issues. Abusive ex-boyfriend; extended family in Canada. Pending H&C application. PRRA application was denied. Is witness is pending criminal trial  R: Toth test: (1) Must be not-frivolous Met: A set out a number of factors which, taken together, render her removal unreasonable at this time 🡪 duty exists to be “alert, alive and sensitive” to the best interests of the Applicant’s child or children. **Higher threshold here when it is a request for a stay where there was a refusal to defer removal.** (2) Must consider children’s best interest.   * Where the Court is **satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant** |

DETENTION AND SECURITY CERTIFICATES

*Charkaui* 🡪 deportation does not breach charter rights but circumstances *surrounding* deportation might

**Both FN and PRs get detention reviews now**

* **Whole regime is under the FC**

IRPA s.33 – M must have reasonable grounds to believe that the facts giving rise to the inadmissibility have occurred, are occurring, or may occur

* Grounds incl: engaging in terrorism, being a danger to the security of Canada, engaging in acts of violence that would or might endanger the lives or safety of persons in Canada, or being a member of an organization that engages in terrorism: IRPA s.34

IRPA s.77(1) Minister shall **sign a certificate** stating that a PR or FN is inadmissible on grounds of **security**, **violating human or international rights**, **serious criminality** or **organized criminality**, and shall refer the certificate to the Federal Court

* These are the only grounds that can be used to issue a security certificate
* (2) When certificate is referred, M shall file a summary of info and other evidence that allows the named person to be **reasonable informed of the case** but does **not include anything that would be injurious to national security or endanger the safety of any person if disclosed** [DISCLOSURE]

**Then certificate is referred to a FC J** (IRPA s.77(1)) **who determines whether it is reasonable** (IRPA s.78)

* This determination can be appealed to the FCA if the FC J certifies a question (IRPA s.79)
* Minister can appeal (w/o J having to swear question of serious importance) (IR

**Almost automatic detention:** certificate that is determined to be reasonable is conclusive proof that the individual is inadmissible and is deemed to be a removal order that is in force (IRPA s.80)

* Minister may issue a warrant for the **arrest and detention** of the person if they have reasonable grounds to believe they are a danger to national security or safety of any person or is unlikely to appear at a proceeding for removal (IRPA s.81)

**PROCEDURES** (apply to s.78, 82 and 82.2)

* IRPA s.83(1)(a) J shall proceed informally and expeditiously as the circumstances and considerations of fairness and natural justice permit
  + (b) **judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national** and the Minister and after giving **particular consideration and weight** to the preferences of the permanent resident or foreign national [special advocate]
    - *Harkat* 🡪 role is to protect interests of named person (IRPA s.85.1(1)), no solicitor client relationship exists but solicitor client privilege is deemed to apply (IRPA s.85.1(3)); test relevance, reliability, and sufficiency of evidence (IRPA s.85.1(2)). **Active participants in closed hearings**.
      * Cannot communicate with anyone about proceedings w/o judge’s permission (IRPA s.86.4(2))
  + (c) at any time during a proceeding, the judge may, on the judge’s own motion — and shall, on each request of the Minister — **hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel** if, in the judge’s opinion, its disclosure could be injurious to national security or endanger the safety of any person
  + (d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister **if, in the judge’s opinion, its disclosure would be injurious to national security or endanger the safety of any person**
  + (e) J shall ensure the PR of FN is provided with a summary of information and other evidence that allows them to be reasonable informed of the case, but does not include injurious. [DISCLOSURE]
  + (h) the judge **may receive into evidence anything that, in the judge’s opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence**
    - *Harkat* 🡪 usual rules of evidence do not apply.
  + (i) the judge may **base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national**

**Judicial Review**:

* Minister may apply for JR at any stage of the proceedings for a decision made regarding s.86 (non-disclosure). If dangerous to national security, etc. (IRPA s.86.1) which suspends the execution of the decision (except in the case of detention review) until application has been finally determined (2)

|  |
| --- |
| Harkat v Canada (2014 SCC)  F: Post-Charkaoui. M seek to have A declared inadmissible. Challenged scheme on s.7 grounds – whether it gave him the ability to defend himself against allegations bc national security reasons prevented him from seeing entire record.  D: It is constitutional  R: s.7: *Charlkaoui* 🡪 basic requirements of procedural justice must be met in an alternative fashion. **So must constitute a substantial substitute to full disclosure**. The J must be diligent, take into account fairness and natural justice (IRPA s.83(1)(a)) and special advocate is a substantial substitute for personal participation. **There is an incompressible minimum amount of disclosure that named person must receive to comply with s.7** (but scheme is silent on what would happen if there is an irreconcilable tension 🡪 minister would have to withdraw information or evidence, essentially put an end to the proceedings 🡪 J would have to quash pursuant to s.78). Only info that raises **SERIOUS RISK** of injury to national security/safety of another person can be withheld. |

**REVIEW FOR SECURITY CERTIFICATES:**

* IRPA S.82(1) A J shall commence a review of the reasons for person’s continued detention within 48 hours after the detention begins
  + (2)\* Until determined whether certificate is reasonable, J shall commence another review **at least once in the 6 month period** following the conclusion of each preceding review
  + (3) A person who continues to be detained after a certificate is determined to be reasonable may apply for FC for another review if a period of **6 months** has expired since last review
  + (4) A person released from detention under conditions may apply to FC for review of reasons if period of **6 months** has expired since last review
  + (5) On review, J (a) shall order person’s detention continued if J is satisfied that it would be **injurious to national security, endanger safety of any person, or would be unlikely to appear;** (b) in any other case, shall order or confirm the person’s release from detention and set any conditions considered appropriate
    - Judge may vary an order made under this provision on application of M or of the person subject to the order if satisfied that it is desirable because of a material change in the circumstances (IRPA s.82.1(1)\*)

**\*Conditions**:

* Peace officer may arrest and detain a person released under s.82(2) and 82.1 if they have reasonable grounds to believe that the person has or is about to contravene any condition
  + Then they must be brought in front of a judge w/I 48 hours (IRPA s.82.2(2)), who determines whether their detention should be continued, confirm the release order, or vary the conditons (IRPA s.82.2(3))
    - Can be appealed (82.3; 82.31)

DETENTION

* **IRPA s.55(1)** An officer may issue a **warrant** for the arrest and detention of a permanent resident or a foreign national who the officer has ***reasonable grounds to believe*** is **inadmissible** and is a **danger to the public** or is **unlikely to appear** for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2)
  + (2) may w/o warrant, arrest and detain a FN other than a protected person who (a) O has **reasonable grounds to believe** is inadmissible and is a **danger to the public** or **unlikely to appear** for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order [this is VERY BROAD 🡪 any proceeding]
    - OR (b) **if not satisfied of ID of FN**
  + (3) Detention on **entry** where O (a) considers it necessary for the **examination to be completed**, or (b) has reasonable grounds to suspect that PR or FN is inadmissible on security, human rights, serious criminality or organized criminality
  + (4) If taken into detention O shall without delay give notice to ID

**Period of Detention:**

* **IRPA s.56(1)** An officer may order the **release** from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the **officer** is of the opinion that the **reasons for the detention no longer exist**. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary
  + UNLESS designated FN (2)

**REVIEW**

* **On review, the onus is always on the Minister to demonstrate on a BOP that there are reasons that warrant continued detention**
* **IRPAs.57(1)** Within **48 hours** after a PR or a FN is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.
  + **(2)** At least once during the **seven days** following the review under subsection (1), and at least once during each **30-day** period following each previous review, the Immigration Division must review the reasons for the continued detention.
  + **(3)** In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.
* **Factors for Release**:
  + **IRPA s.58(1)** The ID ***shall*** order the release of a PR or a FN unless it is satisfied, taking into account prescribed factors, that:
    - **(a)** they are a **danger to the public**;
    - **(b)** they are **unlikely to appear** for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
    - **(c)** the Minister is taking **necessary steps to inquire into** a **reasonable suspicion that they are inadmissible** on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
    - **(d)** the Minister is of the opinion that the **identity** of the foreign national … **has not been, but may be, established and they have not reasonably cooperated** with the Minister by providing relevant information for the purpose of establishing their
    - **Prescribed factors**:
      * **IRPR s.244**  factors set out in this Part shall be taken into consideration when assessing whether a person
        + **(a)** is **unlikely to appear** for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act;

IRPR s.245(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

(b) voluntary compliance with any previous departure order;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

(g) the existence of strong ties to a community in Canada

* + - * + **(b)** is a **danger to the public**; or

IRPR s.246 (a) person constitutes danger to public or security of Canada

(b) associated with criminal organization

(c) engaged in people smuggling or trafficking

(d) conviction of sexual assault or offence involving violence or weapons

Or conviction outside Canada (f)

(e) Conviction for trafficking or importing drugs

Or conviction outside Canada (g)

* + - * + **(c)** is a foreign national whose **identity** has not been established

IRPR s.247(1)(a) FN’s cooperation in providing evidence of ID or assisting in obtaining evidence

Do not affect minor children (IRPR s.247(2))

(c) destruction of ID or travel documents, use of fraudulent documents

(d) using contradictory information by FN

(e) existence of documents that contradict info provided by FN about ID

* + **If you have been reviewed before,** , then you go to these factors **before making a final decision** (guard against indefinite detention)
    - **IRPR s.248** If it is determined that there are grounds for detention, the following factors ***shall*** be considered before a decision is made on detention or release: [**Sahin factors**]
      * **(a)** the reason for detention;
      * **(b)** the length of time in detention;
      * **(c)** whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
      * **(d)** any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
      * **(e)** the existence of alternatives to detention.
      * \*Not exhaustive
* If ID orders release, can impose any conditions it considers necessary (IRPA s.58(3))
* **Minors**:
  + Minors should only be detained as a measure of last resort (IRPA s.60)
  + Members should consider a number of factors when determining whether to continue detention or release of a minor, including the best interests of the child.
  + Prescribed factors: (s.249 IRPR)
    - Availability of alternative arrangements with local child-care agencies or CPS for the care and protection of minor children
    - The anticipated length of detention
    - The risk of continued control by the human smugglers or traffickers who brought the children to Canada
    - The type of detention facility envisaged and the conditions of detention
    - The availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children
    - The availability of services in the detention facility, including education, counseling and recreation
  + When considering whether to release or continue detention of a foreign national who is a minor under paragraph 58(1)(d) of the IRPA because identity may not have been established, factors that may apply with respect to an adult will not have an adverse impact with respect to minors

ORGANIZED CRIME, HUMAN TRAFFICKING, AND PEOPLE SMUGGLING

TRAFFICKING:

* Doesn’t necessarily involve crossing a border (don’t need to go to IRPA as first resort)
* The recruitment, transportation, transfer, harbouring or receipt of persons, by **means** of the threat or use of **force** or other forms of **coercion**, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the **purpose of exploitation** (*Palermo Protocol*)
* Consent is irrelevant
* *Criminal Code*: s.279.01(1): Every person who **recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person**, **for the purpose of exploiting them or facilitating their exploitation** is guilty of an indictable offence
  + A person **exploits** another person **if** they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that **their safety or the safety of a person known to them would be threatened** if they failed to provide, or offer to provide, the labour or service (Code s.279.04)
* **IRPA, 118** (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.
  + (2) For the purpose of subsection (1), *organize*, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons
  + **Aggravating factors**: for which penalty to be imposed under 118 or 119
    - **121** (1) The court, in determining the penalty to be imposed under section 120, shall take into account whether
      * (a) bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence;
      * (b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
      * (c) the commission of the offence was for profit, whether or not any profit was realized; and
      * (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence

SMUGGLING:

* **Seen as a crime against the country**
* The procurement, in order to obtain, directly or indirectly, a financial or other material **benefit**, of the **illegal entry of a person into a State** Party of which the person is not a national or a permanent resident (Protocol)
  + “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving state
  + **Must cross an international border**
* Seen as ag **agreement, voluntary**
* IRPA s.117(1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.
  + Does not contain a reference to obtaining material benefit

|  |
| --- |
| R v Appulonappa (2014 BCCA) F: Canada intercepted freight ship with 76 Sri Lankan Tamil asylum seekers, none of who had proper documentation  Extent of A’s involvement was they had organized the asylum seekers and served as the chief crew  I: Whether s.117 was too broad and inconsistent with s.7?  R: Undisputed that their s.7 rights were engaged by charges they face under s.117. Say that because the AG has to consent to the proceedings, cannot prosecute those who are being altruistic – **but discretion is not a remedy to a constitutional breach**. Possibility under provision that family members who helped one another would be caught under the provision. Read down provision 🡪 People smuggling excludes mere humanitarian conduct, mutual assistance, or aid to family members. |

**DESIGNATION:**

* **20.1** **(1)** The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she
  + **(a)** is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or
  + **(b)** has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit [smuggling], or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.
* **(2)** When a designation is made under subsection (1), a foreign national — other than a foreign national referred to in section 19 — who is part of the group whose arrival is the subject of the designation becomes a designated foreign national unless, on arrival, they hold the visa or other document required under the regulations
* **Detention is mandatory (normally) upon arrival, and detention review is modified, looks more a security certificate than FN**
* **Prevented from accessing discretionary modes of staying**
* These designated FN cannot make a claim for PR until 5 years after the determination w/ regard to refugee protection, or 5 years after the day become a FN or if designated after an application for PR, their application is suspended until the same amount of time (IRPA s.11(1.2))
* Cannot make a claim for TR permit either until 5 years (IRPR s.24(5)) and TR permit will be suspended (s.24(6))

|  |
| --- |
| B010 v Canada (C&I) (2015 SCC)  F: Found inadmissible under s.37(1)(b) of IRPA on grounds that they engaged in smuggling. Say that they were helping fellow migrant seekers and were not engaged in smuggling – took over various duties after being abandoned. Some obtained benefits.  R: Must consider humanitarian concerns here. 🡪 **Acts committed by people who are not themselves members of criminal organizations, who do not act in knowing furtherance of a criminal aim of such organizations, or who do not organize, abet or counsel serious crimes involving such organizations, do not fall within s. 37(1)(*b*).** Presumed not to intend absurd results (ex. family member thing). S.37(1)(b) applies only to people who **act to further illegal entry of asylum‑seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime**  🡪 can escape inadmissibility if merely aided in illegal entry in course of collective flight to safety |

CITIZENSHIP

ACQUIRING CITIZENSHIP:

**3 WAYS:**

* (1) JUS SOLI (BIRTH)
  + *CA* s.3(1) a person is a citizen if (a) the person was born in Canada after February 14, 1977
    - Does not apply to a person if at the time of their birth either of parents

|  |
| --- |
| Budalakoti  F: Was convicted of an offence. While in prison, C&I determined that despite his passport he has never been a citizen. Admissibility report pursuant to s.44 🡪 declared inadmissible on basis of serious criminality. Was born in Canada but parents were employees of India. Dispute about whether  R: For s.6 to be engaged, must be a citizen. Denial of citizenship not synonymous with deportation.  🡪 could try H&C, TRP |

* (2) JUS SAGUINIS (BLOOD)
  + *CA* s.3(1) a person is a citizen if: (b) the person was **born outside Canada** after February 14, 1977 and at the time of his birth **one of his parents, other than a parent who adopted him, was a citizen**
    - “Lost Canadians”: war brides, people born abroad to Canadian parent before 1977, people born to parents of dual citizens, second generation born abroad since 1977.
    - 28 year old rule: Prior to legislative amendments enacted in 2009, it was possible for multiple generations of children born abroad to Canadian parents to pass citizenship to their children, so long as certain steps were taken.
      * People born between Feb 15 1977 and April 16, 1981 are subject to loss of citizenship on after 28 yearsn
        + Can apply for PR, then naturalization, ministerial discretion
  + If child born outside Canada, and parents acquired citizenship through decent 🡪 denied citizenship (CA s.3(3)) a Canadian parent can only pass citizenship to child where parent was born in Canada or obtained citizenship through naturalization
    - Except when part of armed forces, work for government, or have retained a sufficient link to justify regarding them as citizens
  + Assisted Human Reproduction:

|  |
| --- |
| Kandola v Canada (MC&I) (2014 FCA)  F: R was born in India, at time of birth her legal guardian and mother were already married (listed as father and mother on birth certificate). Mr K was Canadian and Mrs K had undertaken steps to become PR through sponsorship. Was conceived through IVF – no genetic connection to either parent. Rejected application for citizenship certificate pursuant to 3(b).  D: Dismiss application for JR  R: **In the absence of a genetic link, derivative citizenship cannot be conveyed even where there is a legal parent/ child relationship –** 3(b) REQUIRES a genetic link. |

* + International Adoption
    - S.5.1 allows parent to apply for citizenship for the adopted child *before* child arrives in Canada (BUT then child will not be able to pass on citizenship to a child born outside Canada, if want to avoid that, can sponsor adopted child as PR, then they apply for naturalization).
      * **BUT: does not apply where parent was not born in Canada and obtained citizenship through descent** 🡪 would have to sponsor child and seek PR visa (only able to apply for citizenship after arrival)

|  |  |  |  |
| --- | --- | --- | --- |
| Adoptee 🡪 Citizen | Result | Adoptee’s children born oversees | Adoptee’s adopted children born oversees |
| Naturalization | No first-generation limit | Canadian at birth | Can receive direct grant of citizenship |
| PR upon arrival then direct grant after entry | First generation limit | NOT Canadian at birth  *Unless* other parent born in Canada, or became citizen through naturalization  Must be sponsored/become PR before gaining citizenship | Not eligible for direct grant of citizenship |
| Citizen direct grant prior to entry | First generation limit | NOT Canadian at birth  *Unless* other parent born in Canada, or became citizen through naturalization  Must be sponsored/become PR before gaining citizenship | Not eligible for direct grant of citizenship |

* (3) NATURALIZATION
  + *CA* s.3(1) a person is a citizen if: (c) the person has been **granted or acquired citizenship** pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship
  + **Obtaining citizenship after acquiring PR and meeting other requirements of s.5(1) of CA:**
    - (a) makes application for citizenship;
    - (b) is eighteen years of age or over;
      * **s.5(2)** permits a minor child of a Canadian citizen to obtain citizenship before the age of 18.
    - (c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act , has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has, since becoming a permanent resident
      * (i) **physically present in Canada for at least 1,095 days** **during the five years immediately before the date of his or her application**, (3/5 years), calculated based on s.5(1.001)
        + **(a)**for every day during which the person was physically present in Canada as a **temporary resident or protected person** under the *Immigration and Refugee Protection Act* before becoming a permanent resident, the person accumulates **half of a day of physical presence**, up to a maximum of 365 days
        + (b) for every day during which the person has been physically present in Canada since becoming a **permanent resident**, the person accumulates **one day of physical presence**
      * (iii) tax return
      * **Intent to reside as a citizen**
    - (d) If under 65 on date of application, has adequate language knowledge (CLB level 4)
      * Must submit objective evidence they have adequate knowledge of English or French
      * If there is doubt, interview will be used to assess it
    - (e) If under 65, citizenship test
      * s.15(1) CR tells what is required: adequate knowledge of Canada, responsibilities and privileges of citizenship
      * An applicant who fails the citizenship test a second time is offered an interview with a citizenship judge
    - (f) not under a removal order
    - **s.5(3)** allows the minister to waive the age, residency, language, and knowledge requirements
  + Then, invited to attend a citizenship ceremony, all participants over 14 swear an oath of citizenship. Under s.12(3) citizenship does not take effect until after the person has sworn the oath

|  |
| --- |
| McAteer et al v AG Canada (2013 ONSC)  F: A immigrated from Ireland – holds republican beliefs (against Queen); Topey adheres to Rastafarian faith, against religious values, Bar-Natan says oath is repulsive because states some are born with privilege.  R: Meaning of Queen is symbolic, doesn’t undermine expression, but underlines it. |

|  |
| --- |
| Ishaq v Canada (2015 FC)  F: Devout Sunni Muslim – religious beliefs reqire her to wear a niqab. Challenges government policy that reqires her to remove her niqab.  R: **17(1)(b) of the Regulations , which requires a citizenship judge to “administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof” 🡪** This must trump the guidelines. (does not look at Charter issues) |

BARS TO CITIZENSHIP

CA ss.19-22:

* s.19: a person should not be granted citizenship under section 5 … or administered the oath of citizenship … because there are reasonable grounds to believe that the person will engage in activity
  + (a) that constitutes a threat to the security of Canada, or
  + (b) that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment.
  + Requires that a statement summarizing evidence to enable person to be as fully informed as possible, when governor in council declares there are reasonable grounds to believe that person will engage in such activity, application for citizenship is **deemed to be refused.**
* **s.22** **(1)** Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship
  + **(a)**while the person, under any enactment in force in Canada,
    - **(i)**is **under a probation order**,
    - **(ii)**is a **paroled inmate**, or
    - **(iii)**is **serving a term of imprisonment**;
  + [general criminal things that you would be inadmissible for]

PROCESS OF ACQUIRING CITIZENSHIP

* Minimized role of citizenship judge – applications are determined by delegate of the Minister
  + Only in exceptional cases, most notably when the minister’s delegate is not satisfied that the residence requirement has been met, does a citizenship judge have the jurisdiction to review a negative decision (s.14)
* No appeal 🡪 but s.22.1 allows application for leave to seek JR may be made to FC

REVOKING CITIZENSHIP

* **CA s.10(1)** Subject to subsection 10.1(1), the **Minister** may revoke a person’s citizenship or renunciation of citizenship if the Minister is satisfied on a **balance of probabilities** that the person has obtained, retained, renounced or resumed his or her ***citizenship*** by **false representation** or **fraud** or by **knowingly concealing material circumstances**.
* CA s.10.1(1): If Minister has reasonable grounds to believe that person has obtained, renounced, or resumed citizenship by **false representation or fraud or by knowingly concealing material circumstances** with regard to  **s.34, 35 or 37**, citizenship may be revoked only if **Minister seeks a declaration**. [serious ground of inadmissibility]
* CA s.10.2: Extends to PR application (if became PR for fraud, misrepresentation etc.)
* Kinds of revocation: concealing crime, misrepresenting residency (how long they are here for), dependent children, who is in your family
* **NO APPEAL for revocation**
* **Process**:
  + M is required to give notice to the citizen in question of his or her intention to report the matter to the governor in council. If the citizen does not request that the matter be referred to the Federal Court within 30 days, then the minister reports to the governor in council. If the citizen requests that that the matter be referred to the court, then the court investigates whether the citizen obtained citizenship through false representation, fraud, or concealing material circumstances
    - If court decides claim not founded: inquiry ends
    - If decides that obtained through fraud etc. 🡪 reports to governor in council
      * If GOC is satisfied 🡪 revokes citizenship through an order in council
      * Where citizenship is revoked, becomes PR, but that status is list if then found inadmissible.
        + If the false representation or fraud or concealing of material circumstances was with respect to a fact described in sections 34, 35 or 37 of the IRPA 🡪 FN

Renunciation

* CA s.9: may renounce if:
  + **(a)** is a citizen of a country other than Canada or, if his application is accepted, will become a citizen of a country other than Canada; can’t be stateless.
  + **(b)** is not the subject of a declaration by the Governor in Council made pursuant to section 20;
  + **(c)** is not a minor;
  + **(d)** is not prevented from understanding the significance of renouncing citizenship by reason of the person having a mental disability; **and**
  + **(e)** does not reside in Canada.
* CA s.11: allows M to grant citizenship to those who have ceased to be a citizen
  + Person who renounces citizenship and retains permanent residence may apply to resume citizenship after residing in Canada for a year. A person who has lost permanent resident status would need to reapply for that

The Passport

* Canadian citizens are not entitled to a passport. They must apply for one and must be found to be eligible to obtain one
* Minister may refuse to issue passport (s.9) to a number of classes of individuals: ex. those who are charged with an indictable offence and those who are indebted to the Crown for expenses related to repatriation to Canada or for other consular financial assistance
* S.10, M may revoke a passport on a number of grounds, including that the person to whom it was issued has permitted another person to use it.
* *Khadr* 🡪 government refused to issue a passport to a citizen for reasons of national security
  + Government amended the Order to include national security grounds as a reason for denial (s 10.1) and then refused again to issue a passport

|  |
| --- |
| Abdelrazik v Canada (2009 FC)  F: Convention refugee, took steps & obtained citizenship. Was friends with man who plotted to blow up LA airport. No evidence he had connection to terrorism. Travelled to Sudan. Arrested by Sudanese authorities. Did not issue him a passport for years. Challenges constitutionality of 10.1  D: Breach of rights, unjustified, must take immediate action so he can return  R: **Where a citizen is outside Canada, the Government of Canada has a positive obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the Charter is illusory**.   * Where the Government refuses to issue that emergency passport, it is a prima facie breach of the citizen’s Charter rights unless the Government justifies its refusal * **In my view, denying a citizen his right to enter his own country requires, at a minimum, that such increased risk must be established to justify a determination made under section 10.1 of the Canadian Passport Order**   + In short, the only basis for the denial of the passport was that the Minister had reached this opinion; there has been nothing offered and no attempt made to justify that opinion |

|  |
| --- |
| Kamel v Canada (AG) (2014 FCA)  F: A appealing judgment from FC who dismissed application for JR on decision of Passport Canada to refuse to issue him a passport. Was informed in a letter, refusal based on national security (10.1). He was convicted in France of forging passports he brought from Canada, arrested and convicted of membership of terrorist organization.  D: Refusal is fine.  R: Here there was a causal link between national security and Minister’s refusal; Large and liberal interpretation for ‘national security’ (deference); Could apply for temporary passport   * Refusal valid for limited time (now 10 years) |