

Chapter Eleven

Fairness and Natural Justice under the IRPA

Context for the Immigration Appeal Division

The Immigration Appeal Division (IAD) may allow an appeal if it is satisfied that “a principle of natural justice has not been observed”. This ground of appeal is expressly set out in the *Immigration and Refugee Protection Act (IRPA)*.¹

In a sponsorship appeal, it may be argued that the officer who denied a foreign national’s permanent resident visa application breached natural justice in some respect while processing the application and that the appeal should be allowed on that basis. Although the *IRPA* contemplates such a scenario in providing a legislative basis for the IAD to overturn an officer’s decision on this ground, in actual practice it is seldom argued or used as a basis for allowing an appeal. It is nevertheless useful to examine what the duty of fairness entails for officers administering the *IRPA* in a sponsorship context as there may be reason to advance a breach of fairness or natural justice as a ground of appeal.

Duty of Fairness for Officers under IRPA

Introduction

Under the *IRPA*, the Minister designates officers to carry out the purposes of the Act.² The officers perform their functions in accordance with any instructions that the Minister may give.³

Officers must comply with the duty of procedural fairness in the administration of the Act because their decisions affect the rights, privileges or interests of individuals.⁴

¹ *IRPA*, s. 67(1)(b).

² *IRPA*, s. 6(1).

³ For example, *IRPA*, s. 15(4), on conducting examinations.

⁴ *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

Content of the Duty of Fairness

General

The duty of fairness requires an officer to act with an open mind without unduly fettering their discretion and to give an applicant an opportunity to respond to the officer's concerns with respect to the processing of an application.⁵ Essentially, the question is whether, considering all the circumstances, a person whose interests are affected has a meaningful opportunity to present their case fully and fairly.

The requirements of fairness vary according to the circumstances. Some relevant factors are:⁶

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme in question and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the decision-maker, particularly when the statute leaves to the decision-maker the ability to choose its own procedures or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

Knowing Case to be Met and Opportunity to Respond

An officer must provide an applicant with an opportunity to refute evidence in the officer's possession which is relied on by the officer,⁷ and the officer must advise the applicant of any concerns and provide an opportunity to respond before making a decision,⁸ although an oral hearing is not essential for that purpose.⁹

⁵ The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 held that a full and fair consideration of the issues was required and the applicant must have a meaningful opportunity to present relevant evidence and have it fully and fairly considered

⁶ *Baker, supra*, footnote 5.

⁷ *Gill, Jhanda Singh v. M.E.I.* (F.C.T.D., no. T-501-90), Jerome, March 20, 1990.

⁸ *Begum, Shamsun Naher v. M.C.I.* (F.C., no. IMM-1947-02), Lemieux, January 30, 2004; 2004 FC 165.

⁹ *Yue, Zhao v. M.C.I.* (F.C.T.D., no. IMM-2015-01), Kelen, September 25, 2002; 2002 FCT 1004.

Use of Extrinsic Evidence

Extrinsic evidence means evidence that comes from an outside source.¹⁰ An applicant may be unaware of it. An officer should provide an applicant with an opportunity to comment upon extrinsic evidence.¹¹ Failure to share a document with an applicant may deny the applicant a meaningful opportunity to present the case fully and fairly.¹² Readily accessible public domain information (such as from the Internet) if novel and significant may as a matter of fairness need to be disclosed.¹³

Legitimate Expectations

The doctrine of legitimate expectations means that if an officer expressly or impliedly undertakes to follow a certain procedure, the officer may be held to their undertaking as a matter of procedural fairness.¹⁴ There is nothing unfair about a visa officer's request for DNA testing in circumstances where the documentary evidence falls short of establishing the claimed relationship.¹⁵

Bias

Bad faith, abuse of discretion or improper conduct on the part of an officer may amount to bias so as to invalidate the officer's decision for breach of fairness or natural justice. A reasonable apprehension of bias does not arise merely because the same officer has made the decision on the different processes whereby an applicant seeks legal status in Canada.¹⁶

¹⁰ *Dasent, Maria Jackie v. M.C.I.* (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.

¹¹ *Ngo, Tu Van v. M.C.I.* (F.C., no. IMM-5340-01), Dawson, November 7, 2002; 2002 FCT 1150.

¹² *Singh, Amarjit v. M.C.I.* (F.C., no. IMM-6526-02), Mactavish, February 4, 2004; 2004 FC 187 (applicant on "h&c" application should have been provided with negative PRRA report).

¹³ *Ali, Mohammed Elsheikh v. M.C.I.* (F.C., no. IMM-8683-04), Mosley, February 23, 2006; 2006 FC 248.

¹⁴ A legitimate expectation was created when an applicant was advised his supplementary information would be considered and it was a breach of natural justice for the officer to decide without having considered it: *Pramauntanyath, Teeradech v. M.C.I.* (F.C., no. IMM-1622-03), Mactavish, February 2, 2004; 2004 FC 174. On the other hand, an officer was under no obligation to advise of the future consequences of not having a dependant examined: *Jankovic, Milos v. M.C.I.* (F.C., no. IMM-567-02), Russell, December 17, 2003; 2003 F.C. 1482 nor of the avenue of redress in s. 25 of the *IRPA* (humanitarian and compassionate relief): *Mustapha, Javed v. M.C.I.* (F.C., no. IMM-7286-05), von Finckenstein, September 13, 2006; 2006 FC 1092.

¹⁵ *Obeng, Addo Kwadwo v. M.C.I.* (IAD VA5-01112), Workun, August 14, 2006.

¹⁶ *Kouka, Serge v. M.C.I.* (F.C., no. IMM-1823-06), Harrington, October 17, 2006; 2006 FC 1236.

Delay

In order for delay in processing an application to be unreasonable and to constitute a breach of the duty of fairness, the delay must be unacceptable to the point of being so oppressive as to taint the proceedings.¹⁷

Providing Reasons for Decision

An officer's failure to give reasons may be a breach of fairness depending on the consequences of the decision to the person affected.¹⁸ Before the IAD, the CAIPS notes in conjunction with the refusal letter may adequately set out the reasons for refusal and satisfy the requirements of natural justice.¹⁹

Interview

The duty of fairness includes the right to have counsel attend and observe an applicant's interview with the officer.²⁰ The initiative to have counsel present must come from the applicant as the officer is under no duty to inform the applicant of this right.²¹ The duty of fairness does not necessarily require an officer to conduct an oral interview before reaching a decision.²² It may not be unfair to conduct an interview without prior notice to the individual.²³ There is no duty to interview third parties identified in the context of any given application.²⁴ The procedure whereby an interview is conducted by one officer and the decision made by a different officer is not a breach of fairness.²⁵

¹⁷ *Malhi, Kalmajit Singh v. M.C.I.* (F.C., no. IMM-8368-03), Martineau, June 2, 2004; 2004 FC 802.

¹⁸ *Figuroa, Sandra Toscano v. M.C.I.* (F.C., no. IMM-69-03), Heneghan, December 18, 2003; 2003 FC 1339. See also *Baker, supra*, footnote 5 (officer's notes were held to constitute sufficient reasons).

¹⁹ *Lee, Dip Gai v. M.C.I.* (IAD WA5-00010), Rozdilsky, January 4, 2006.

²⁰ *Ha, Mai v. M.C.I.* (F.C.A., no. A-38-03), Sexton, Linden, Malone, January 30, 2004; 2004 FCA 49. The Court did not decide whether in other circumstances a more active or limited role for counsel would be required.

²¹ *MPSEP v. Cha, Jung Woo* (F.C.A., no. A-688-04), Décary, Noël, Pelletier, March 29, 2006; 2006 FCA 126.

²² *Aigbirior, Doris v. M.C.I.* (F.C.T.D., no. IMM-2833-01), Blais, August 13, 2002; 2002 FCT 854.

²³ *Bhandal, Tej Kaur v. M.C.I.* (F.C., no. IMM-4679-05), Blais, April 3, 2006; 2006 FC 427.

²⁴ *Obeng, Addo Kwadwo v. M.C.I.* (IAD VA5-01112), Workun, August 14, 2006.

²⁵ *Ngo, supra*, footnote 11. The Court held that the content of the duty of fairness was limited by the context of an "h & c" decision, for example, it does not require an oral interview. See *Aujla (Sidhu), Jagwinder Kaur v. M.C.I.* (IAD VA5-02812), Shahriari, April 17, 2007 where in the context of a spousal refusal it was not a breach of natural justice for one visa officer to conduct the interview and another officer to make the decision.

Revisiting a Decision

The doctrine of *functus officio* does not apply to prevent an officer from refusing a visa after another officer had initially offered a visa,²⁶ nor is it contrary to natural justice or fairness.

Remedies for Breach of Fairness/Natural Justice

The usual consequence of a denial of fairness or natural justice is to render the resulting decision invalid.²⁷ The Supreme Court of Canada has introduced an exception to this principle,²⁸ and where it is certain that even if a fair hearing is held, the applicant cannot as a matter of law succeed, the remedy may be withheld.²⁹

The IAD may allow an appeal from an officer's decision not to issue a foreign national a permanent resident visa if the IAD is satisfied that a principle of natural justice has not been observed by the officer in the processing of the application.³⁰ Failure of Canadian officials to apply their policy may amount to a breach of natural justice.³¹

The *de novo* nature of appeal proceedings in the IAD may remedy a breach of natural justice at the officer level.

The IAD must first decide the issue of an applicant's membership in the family class before it can address any allegation that the officer breached the rules of natural justice or fairness in connection with the processing of a sponsorship application.³²

Reopening in the IAD for Breach of Natural Justice

Under the *IRPA*, the IAD may reopen an appeal if it failed to observe a principle of natural justice in the case of a foreign national under a removal order.³³ Since the *IRPA* only

²⁶ *Lo, Kin Ching v. M.C.I.* (F.C.T.D., no. IMM-4927-01), Beaudry, November 7, 2002; 2002 FCT 1155.

²⁷ *Cardinal, supra*, footnote 4.

²⁸ *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

²⁹ *Bermido, Marites Hugo v. M.C.I.* (F.C., no. IMM-2866-03), von Finckenstein, January 14, 2004; 2004 FC 58.

³⁰ *IRPA*, s. 67(1)(b).

³¹ *Balla, Bradley Dale v. M.C.I.* (IAD VA6-00305), Lamont, July 4, 2007.

³² *M.C.I. v. Petrea, Marian* (F.C.T.D., no. IMM-4395-00), Blanchard, December 13, 2001; 2001 FCT 1373; *Sertovic, Safeta v. M.C.I.* (IAD TA2-16898), Collins, September 10, 2003. Where a sponsor argued that the visa officer ought to have considered humanitarian and compassionate factors for an applicant excluded from the family class which allegedly resulted in a breach of natural justice, the IAD held that the avenue of redress should be to the Federal Court not to the IAD: *Patel, Amit Krishnakant v. M.C.I.* (IAD TA5-11490), Collins, March 14, 2006.

³³ *IRPA*, s. 71.

addresses reopening in a removal order situation, a sponsor who alleges a breach of natural justice in a sponsorship appeal may not apply to reopen under section 71 of the Act.³⁴ However, a sponsor may apply to reopen for breach of natural justice under common law.

The principles of natural justice in the IAD generally relate to procedural matters such as notice, opportunity to be heard and knowledge of the case to be met.³⁵ The incompetence of counsel may constitute a breach of natural justice.³⁶ A change in the law is not a basis for reopening for denial of natural justice.³⁷ There must have been a breach of natural justice in the first proceeding as a basis for reopening.³⁸

³⁴ *Mustafa, Ahmad v. M.C.I.* (IAD VA1-02962), Wiebe, February 13, 2003.

³⁵ *Huezo Tenorio, Alex Ernesto v. M.C.I.* (IAD VA2-01982), Wiebe, March 31, 2003.

³⁶ *Ye, Ai Hua v. M.C.I.* (IAD VA1-01247), Wiebe, August 5, 2003. Counsel's incompetence must be egregious in order to result in a denial of natural justice.

³⁷ *Clarke, Lloyd Charles v. M.C.I.* (IAD T97-01824), MacAdam, January 9, 2003.

³⁸ *Johal, Gurwinder Kaur v. M.C.I.* (IAD VA2-02295), Workun, October 3, 2006.

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