

The role of lawyers in the immigration process

As an immigrant and foreign-trained professional, it only seemed logical that I gravitated towards the practice of immigration law. This is not to say that immigrants and foreign-trained professionals do not have other skills and interests; I just felt that my personal journey and struggles encountered in the process of migrating to Canada furthered my passion and determination to assist others in this oftentimes tricky and complicated area of law.

The process of applying to migrate to Canada appears to be a rather simple and manageable one. The comprehensive Citizenship and Immigration Canada (CIC) website with all the necessary forms, guides and manuals detailing the application process, allows practically anyone who can read and understand English to prepare an immigration application package. In fact, the CIC website emphasizes that hiring a lawyer or consultant is not required in this process.

While this may be true for the most part, the reality is that many applications get denied for simple (or not-so-simple) errors that could have been avoided if the applicant sought professional help in the first place. With the multiple forms, supporting documentation and other requirements (that are often known or familiar only to those who have gone through this process numerous times), it is easy to miss some seemingly insignificant data but which could ultimately spell the difference between success and failure in an application. Aside from the often lengthy processing times, CIC officers are vested with substantial discretion in the decision-making process. It is therefore important to do the application right at the first opportunity.

All too often, the services of immigration lawyers like myself are obtained when the initial application has been refused or when ‘self-prescribed’ remedies have failed. It can be especially frustrating when, after some egregious errors have been committed, a client suddenly comes and expects the lawyer to miraculously resolve the issues in a matter of days. In one extreme instance, I received a phone call seeking assistance about half an hour prior to a person being deported. With no signed Use of a Representative form, no substantial information on hand and almost an hour’s drive to the airport, I almost wished I were a superhero so I could get to the venue pronto.

Of course, I am no superhero and can only do so much depending on the situation. For instance, one of the most stressful remedies that an immigration lawyer undertakes on behalf of a client is the filing of a Motion to Stay a removal order as part of an underlying Application for Leave and Judicial Review (JR) with the Federal Court. Stay motions are often a last resort remedy for those who have been ordered to leave Canada after all other administrative remedies have failed and they were found not to qualify as persons in need of protection (through the pre-removal risk assessment procedure). Therefore, these are usually filed at the very last minute, in an attempt to delay the removal date pending the

resolution of the JR application. And what the lawyer files is not simply a piece of paper and voila, the removal will be stayed!

Far from it. Since the Stay Motion is being filed with the Federal Court, there are particular procedures to be followed and strict deadlines to be met. Aside from the JR application notice, there is the Motion Record to be submitted containing a properly indexed, paged and bound compilation of facts (presented through affidavits), supporting documents, legal arguments and a book of authorities. If one wants the submission to look presentable (especially to avoid annoying the Motions judge), they need to be at least properly paged, preferably tabbed and cerlox-bound. One can only imagine the amount of energy (manual and mental, i.e. legal research and analysis) as well as paper (!) that are entailed by the preparation of these submissions within very limited time constraints. Moreover, a copy of the record needs to be served on the Department of Justice (DOJ) before three copies are submitted to the Federal Court registry with proof of service to DOJ. The matter must then be orally argued before a Federal Court judge on Motions day (or any other day with leave of court). Only after all these have been done will the judge decide whether or not to stay the removal order.

The JR Application is another matter whereby the serious legal and/or factual issues are actually decided upon, i.e. the main application upon which the Motion was based. An Application record is submitted within a set period and if granted leave, the matter is scheduled for hearing before another Federal Court judge. While there are always technical arguments that could be made, the case would still be very weak if the foundation itself is weak. It is an important principle to note that in a JR application, additional evidence cannot be submitted which were not earlier submitted to the administrative officer whose decision is under review. It is not an “appeal” after all, but a “review” of the administrative decision by the judicial branch. Therefore, in these instances, winning at the Federal Court level will be a tough battle, unless of course, there are clearly serious procedural and substantive administrative errors committed by the administrative decision-maker. If the JR is allowed/granted, the matter will be sent back to another administrative decision-maker for redetermination.

While non-lawyers are allowed to represent clients at the Immigration and Refugee Board, only lawyers can appear before the Federal Court. However, at both levels, there are specific rules to be followed and evidentiary burdens to be met. If the lawyer is called upon to assist only at the Federal Court level to seek JR and/or file a motion to stay the removal order, it will be a very challenging task to obtain a positive ruling if the legal and factual foundation is weak or has been weakened by errors committed earlier on.

Hopefully, the above has somehow aided towards a better understanding not only of the further remedies available in the immigration system, but also on the role of immigration lawyers in the entire process.

The author would be interested to receive any feedback and may be reached at mdsantos@osgoode.yorku.ca.