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RHYME & REASON

Appealing an Immigration Refusal

One of the most frequent questions I am asked upon meeting a client who just received an immigration application refusal is: can we file an appeal?

The answer to this question is often not as simple and straightforward as one might expect.

First, it must be noted that an appeal in the immigration context has a specific legal meaning. It is a right generally given only to permanent residents (PR) and which can be brought before the Immigration Appeal Division of the Immigration and Refugee Board (IRB) in specified cases. These include family sponsorship refusals, non-fulfilment of residency obligation and issuance of removal orders. The only exception to the PR requirement is in the case of failed refugee claimants who may file an appeal with the Refugee Appeal Division of the IRB.

In most instances, a negative immigration decision (by an administrative decision maker) may be elevated to the Federal Court via an application for leave and judicial review.

In a sense, a Federal Court judicial review application is also a form of appeal in that it gives a further chance to be heard by another decision maker. Under Canadian immigration law however, an appeal is distinct from a Federal Court judicial review application as these legal remedies have specific purposes, requirements and limitations.

As stated, an immigration appeal is filed with the Immigration Appeal Division of the IRB which is an administrative tribunal while an application for leave and judicial review is filed with the judicial courts. Since immigration laws are under Federal jurisdiction, this means the Federal Court of Canada.

An appeal is a trial *de novo* (or a trial "anew"*)*, thus allowing the appellant to present both new and previously submitted evidence in support of the appellant's case. The decision maker in an appeal (who is a tribunal board member and not a judge) can substitute its decision over that of the originating decision-maker.

In a judicial review on the other hand, a Federal Court judge can only determine whether or not the decision of the administrative tribunal was reasonable or consistent with legal and natural justice principles. If judicial review is allowed (i.e. the court finds the administrative decision to be unreasonable), the judge will send back the matter for redetermination by another administrative decision-maker. A Federal Court judge cannot itself render the administrative decision such as that of granting an immigration application.

The closest that a Federal Court judge can get to directly intervening with an immigration process is via the filing of a motion to stay a removal order which, if granted, prevents the removal of the applicant pending the final decision on the underlying application for leave and judicial review. However, the final decision on the immigration application still rests with the administrative officer or tribunal.

A stay motion filed with the Federal Court involves specific procedures and strict deadlines. Aside from the notice of application for leave and judicial review, there is the motion record which ideally consists of properly indexed, paged and bound compilation of facts (presented through affidavits), supporting documents, legal arguments and a book of authorities.

In many cases, preparing for a stay motion requires an enormous amount of physical and mental energy for all the legal research and analysis to be done within often very tight timelines. A copy of the record needs to be served on the Department of Justice (DOJ) before 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). After all of these steps have been taken, the judge will decide whether or not to stay the removal order, that is, allow the applicant to remain in Canada in the meantime. It is not unusual for a judicial stay to be granted at the very last minute, e.g. when the applicant is already at the airport waiting for a flight back to the home country.

The Federal Court application for leave and judicial review on the other hand, is where the serious legal and/or factual issues are actually decided upon by the Federal Court judge. Apart from the expected logical and succinct presentation of facts and legal arguments, the application record must comply with strict technical rules involving the number of pages, margins, tabbing, binding, etc. The application record is submitted within a set period and is reviewed by a judge who will then decide whether leave will be granted. If leave is not granted, the judicial review will not proceed. If leave is granted, the matter is scheduled for hearing before another Federal Court judge.

Although lawyers can come up with creative legal arguments in most cases, a judicial review application would be rather weak if the foundation or the originating case itself is weak. In a judicial review application, the evidence is limited to those that were previously submitted to the administrative officer in the decision under review. It is not an "appeal" after all, but a "review" of the administrative decision by a judicial body. Hence, winning at the Federal Court will be a tough battle if the originating application is weak, unless there are clearly serious procedural and substantive administrative errors committed by the administrative decision-maker.

Thus, if a lawyer is initially called upon to assist only at the Federal Court level to seek leave to file judicial review 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 are weak or had been weakened by errors committed at the earlier stages of the immigration application.

It is also important to note that some immigration refusals can still be reconsidered. In some cases, a reapplication might even be a quicker and more cost-effective solution than pursuing an appeal or judicial review of a previously refused application. Thus, when discussing possible remedies with a legal advisor, it is important to canvass the various options and their implications rather than assuming that an appeal or judicial review is the only way to go. After all, lawyers are not just trained as litigators, but more importantly, as advocates and problem solvers.

Happy and blessed Easter wishes to all!

The above is provided for legal information purposes only and not intended as specific legal advice. It is best to consult with a legal professional to discuss your particular circumstances.
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