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RHYME & REASON

Appeals vs. Judicial Review Applications

Since most immigration applications are submitted without legal representation, it is often only when these applications are refused that the applicants will decide to seek the legal services of an immigration lawyer. The first question asked of the lawyer is, can we appeal the negative decision?

It must be noted that there are limited types of immigration decisions that can be appealed with the Immigration Appeal Division of the Immigration and Refugee Board (IRB). Most immigration decisions however, can be elevated to the Federal Court via an application for leave and judicial review.

What is the difference between these two legal remedies? Isn't the Federal Court application also a form of appeal? In the sense that it gives a further chance to be heard by another decision maker, yes, it may be considered a form of "appeal". Under Canadian immigration law however, an appeal is distinct from a Federal Court judicial review application. Each of these legal remedies has specific purposes, requirements and limitations.

An immigration appeal is filed with the Immigration Appeal Division of the IRB (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*, thus allowing the appellant to present as evidence not only documents already before an officer but also additional factual evidence not previously submitted. The decision maker in an appeal (a tribunal board member) can substitute its decision over that of the originating decision-maker.

A Federal Court judge on the other hand, can only decide on judicial review 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 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 judge can get to intervening with an immigration process is via the filing of a motion to stay a removal order which, if granted, prevents the enforcement of a removal order against the applicant pending the final decision on the underlying application for leave and judicial review. In rare instances, some Federal Court judges have also granted stays of removal orders until a final decision is rendered on an existing immigration application. In either case, the final decision on the immigration application still rests with the administrative officer or tribunal. .

The 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 to be

submitted which must consist of a properly indexed, paged and bound compilation of facts (presented through affidavits), supporting documents, legal arguments and a book of authorities. One can only imagine the amount of physical and mental energy (i.e. legal research and analysis) entailed by the preparation of these submissions within very limited time constraints. 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). Only after all these have been done will the judge decide whether or not to stay the removal order. 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 or has even boarded the airplane!

The application for leave and judicial review on the other hand, is where the serious legal and/or factual issues are actually decided upon, i.e. the main application upon which the stay motion is based. Apart from the expected logical and succinct presentation of facts and legal arguments, the 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 if granted leave, the matter is scheduled for hearing before another Federal Court judge. While it is possible to find legal arguments in many cases, the case would still be very weak if the foundation itself is weak. It is an important principle to note that in a judicial review application, additional evidence cannot be submitted which were not also presented to the administrative officer for consideration in the decision 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 there are clearly serious procedural and substantive administrative errors committed by the administrative decision-maker. If the judicial review is allowed, 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 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 earlier on.

Hopefully, the above has somehow aided towards a better understanding not only of immigration appeals vis-à-vis Federal Court judicial review applications and motions, but also on the role of immigration lawyers in these processes.

Please note that the above are for legal information only and not intended to provide specific legal advice. It is strongly advised that you consult with a legal professional to discuss your particular circumstances.

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