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ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

Vegreville Hutzpah[1]

Cecil L. Rotenberg, Q.C.

Your editor, who seems to attract unusual aspects of the decision making of the Minister of Immigration like a lightning rod, has again found another example of the high-handed conduct on the part of an officer from Vegreville. The facts of the case are simple.

The applicant is in Canada and he is married with children. His former Vietnamese wife left him and now lives in France with their daughter with whom he has not communicated in light years. In

1 For the uninitiated, your curmudgeon editor advises that this is a Jewish term incorporated into the legal jargon by Justice Muldoon which generally means unmitigated gall. A good example of hutzpah is at the trial of a defendant who is accused and charged for the murder of his parents, pleading leniency since he is now an orphan.

Full story on page 2

Impact of a Conviction in Canada Upon Right to Enter the United States

Edward C. Corrigan, B.A., M.A., LL.B.

An article published on August 5, 2007 in Montreal's *La Press* reported that more than 30,000 Canadians were refused entry into the United States since January 2007. This is an increase of 5,000 for the same period in 2006. The report indicates that many of the individuals who were refused entry had received pardons for their offences in Canada.

Full story on page 2

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Focus – Summer Round Up

Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

THOMSON CARSWELL

Vegreville Hutzpah

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his application for exemption on inland processing as a spouse, he was refused by an officer in Vegreville. This officer kept writing him that "we require to medically examine your child". The applicant, meanwhile, kept writing back "I do not know where my child is. She is in the custody of my former wife". In his latest correspondence, he submitted a long sworn affidavit saying that he is unable to comply with the officer's request because he does not know where his child is and asked them to exercise humanity and compassion and not deport him, as the officer had threatened to do, for failing to comply with his demand.

This is Vegreville hutzpah at its highest because it says that when you fail to comply with their demand, they will refuse your application. The matter is now under judicial review because I thought that demands of visa officers should be reasonable. No consideration is given to the applicant's existing children with his present wife.

A quick look at the manual indicates that the inadmissibility of the non-accompanying dependents who are in the custody of the separated spouse will not affect the admissibility of the applicant; provided also there is no chicanery. So if this is the case, what relevance does an examination of a child have other than the possibility of future exclusion under s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*?

What the officer has done is to demonstrate a continued disrespect for family migration that is more than evident since the arrival of the Harper government.

Impact of a Conviction in Canada

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The impact of a conviction in Canada, even a favourable plea bargain, can have serious unforeseen implications upon any travel or relocation to the United States. Individuals who have been convicted of "crimes of moral turpitude" are generally criminally inadmissible to the United States. With the enhanced security at the U.S. border since 9/11, many individuals have been refused entry for even minor indiscretions that occurred 30 years ago.

Crimes of Moral Turpitude

Under United States law, and specifically the *Immigration and Nationality Act*, certain individuals are excluded for entry into the United States. Under s. 212 of the *Immigration and Nationality Act*[1] the grounds of exclusion are set out. Criminal convictions are grounds for refusing admission into the United States.

Sec. 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

...

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other doc-

1 Title 8, Chapter 12, Subchapter II, Sec. 1182.

umentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

A person is inadmissible if he or she has any violations for laws relating to narcotics or controlled substances.

Individuals are excludable if they have convictions involving crimes involving moral turpitude. Examples of crimes of moral turpitude are theft, robbery, fraud, forgery, possession of stolen property, breaking and entering with intent, murder, rape, sexual offenses, assault with a weapon or with the intent to commit a crime involving moral turpitude, or any conviction for conspiring or attempting to commit any of the foregoing.

Black's Law Dictionary defines moral turpitude as follows:

> The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. *State v. Adkins*, 40 Ohio App.2d 473, 320 N.E.2d 308, 311, 69 O.O.2d 416. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. *Lee v. Wisconsin State Bd. of Dental Examiners*, 29 Wis.2d 330, 139 N.W.2d 61. The quality of a crime involving grave infringement of moral sentiment of the community as distinguished from statutory *mala prohibita*. *People v. Ferguson*, 55 Misc.2d 711, 286 N.Y.S.2d 976, 981.

Common convictions which are not crimes involving moral turpitude are: common assault, firearms violations, gambling offences, traffic violations, smuggling and other customs/immigration violations, mischief, taking an automobile without consent, tax violations, simple breaking and entering.

A person is inadmissible to the United States if he or she has any convictions of crimes involving moral turpitude. There is a "petty offence" exception if there was only one such crime, and the maximum penalty possible for the crime (as opposed to what was actually imposed) did not exceed imprisonment for one year, and if the actual prison time imposed was six months or less (regardless of how much time was actually served).

An absolute discharge is treated as no conviction and does not bring about the enforcement of the exclusion provision. However, a conditional discharge is treated as a conviction for U.S. Immigration purposes.

A pardon issued by the Canadian government does not erase a criminal conviction for purposes of U.S. Immigration. U.S. authorities will continue to view the convictions as relevant regardless of the granting of the pardon.

For example, a conviction under s. 173(1)(a) of the *Criminal Code*[2] (wilfully committing an indecent act in a public place) will clearly be considered a crime of moral turpitude as it is a sexual offence. This type of conviction is excludable under 212(a)(2)(A)(i)I of the *Immigration and Nationality Act*. However, if there is only one such conviction and no other criminal convictions, the individual would probably qualify under the "petty offence" exception. However the U.S. Department of Homeland Security is taking an increasingly harder line in enforcing exclusion provisions.

There is a zero tolerance provision with respect to narcotics convictions and an increasingly tougher approach with respect to convictions involving moral turpitude. There is also a certain degree of discretion as to whether an INS officer would enforce the exclusion provisions. If there is more than one conviction, even of relatively minor crimes involving moral turpitude, exclusion would normally be enforced.

The best result for the individual facing a conviction for committing a crime of moral turpitude would be to obtain an absolute discharge. Such a result would not be considered a con-

2 R.S.C. 1985, c. C-46, s. 173(1)(a).

viction under U.S. Immigration Law. Even a conditional discharge would be grounds for exclusion under s. 212 of the *Immigration and Nationality Act*. Exclusion would be the most likely result if there were two convictions involving moral turpitude not arising out of the same incident.

The only way to overcome exclusion under the *Immigration and Nationality Act* is to obtain a Waiver or Advance Permission to Enter the United States (INS Form I-192) under s. 212(d)(3) of the *Immigration and Nationality Act*. The U.S. Immigration and Naturalization Service has removed the option of receiving a Border Card which did away with the requirement of renewing the Waiver each year. Accordingly, a waiver must be renewed each year with payment of the required fees. The current fee for obtaining a waiver is $545 US.

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West Coast Perspective

Vancouver, British Columbia

Chu v. Canada (Minister of Citizenship and Immigration), 2007 CarswellNat 1469, 2007 FCA 205

May 29, 2007

In *Chu v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal dismissed an appeal from the Federal Court finding that the five year period in s. 28 of the *Immigration and Refugee Protection Act* ("IRPA") applies to periods prior to June 28, 2002. The court also held that s. 28 of IRPA does not retroactively breach s. 7 of the *Canadian Charter of Rights and Freedoms*.

Chu is a case involving a citizen of Hong Kong who came to Canada in November 1994 under the entrepreneur category and became a permanent resident of Canada upon satisfying the terms and conditions of her entry. Between 1995 and 2003, Chu spent time in both Hong Kong and in Canada and gave birth to a child in Canada. In 2003, while Chu and her daughter were visiting Hong Kong, Chu fell ill and was unable to travel back to Canada for several months.

In January 2004, ready to return to Canada, Chu made an application for a travel document in Hong Kong. Prior to the application being determined, Chu entered Canada as a permanent resident. In February 2004, Chu's application for a travel document was refused on the basis that Chu had not fulfilled the residency requirements as a permanent resident pursuant to s. 28 of IRPA that came into force on June 28, 2002. The residency requirement pursuant to s. 28 of IRPA requires that every permanent resident of Canada be physically present in Canada for 730 days in the previous five years. In the refusal letter issued to Chu, the officer indicated that in making the assessment of residency, the relevant period taken into consideration was the five year period preceding January 8, 2004, the date Chu submitted her application for the travel document in Hong Kong.

Chu appealed the decision to the Immigration Appeal Division ("IAD") and the appeal was denied. Application for leave and judicial review was granted. Madame Justice Heneghan of the Federal Court heard the application for judicial review on November 30, 2005. Chu argued that in making the determination that she was not a permanent resident of Canada, the immigration officer improperly applied the new IRPA provisions retroactively to Chu's case, thereby affecting Chu's vested rights. Chu submitted that she maintained her permanent resident status in Canada prior to the enactment of IRPA on June 28, 2002 because under the former *Immigration Act*[1] no fixed limit residency obligation was imposed on permanent residents. Under the old Act, a permanent resident only lost status when they left Canada or were outside of Canada with the intent of abandoning Canada as their place of permanent residence. Time spent in Canada was not determinative of permanent residence. Chu submitted, in accordance with common law principles, that legislation should not be applied retroactively or retrospectively unless there is a clear expression of such intention on the face of the statute. Section 28 of IRPA does not expressly indicate retroactive or retrospective application.

The Federal Court dismissed the application but the following two questions of general importance were certified (at para. 33):

1. Does the five year period in s. 28 of IRPA apply to periods prior to June 28, 2002; and

1 R.S.C. 1985, c. I-2.

MARCH 2007

Immigration Sponsorship Problems

Ed Corrigan

Many individuals sponsor new spouses or other family members to come to Canada. The sponsorship process is complicated and many sponsorship applications get rejected and the result is either a dropped sponsorship or an expensive and lengthy appeal. If the sponsorship application is rejected an appeal must be filed with the Immigration Refugee Board Appeal Division within 30 days or appeal rights will be lost. Problems that can result in a rejected family class sponsorship include a bad interview, submitting false or incomplete information, and not providing adequate support material. One must also have the ability to financially support a family class member.

There are a number of other problems that can arise. Sometimes Immigration does not recognize a foreign divorce as being legal in Canada. This can lead to a rejection of the Spousal Sponsorship Application. Sometimes individuals get married to a second spouse before the divorce proceedings are complete for the previous spouse. This will also lead to a rejection of the validity of the marriage and the sponsorship will not be considered part of the family class.

If one has defaulted on a previous undertaking of assistance to look after a spouse or other family member and that person is forced to take welfare assistance, a new sponsorship will be rejected. The standard period for such undertaking of assistance is three years for a spouse and ten years for a parent or child. This money is seen as debt owed to Canada for a breach of a promise to support a family member sponsored to immigrate to Canada. A subsequent Sponsorship Application will be rejected until the debt is paid or until repayment arrangements are made satisfactory to the agency which provided the assistance.

Another problem occurs when new immigrants get a landing visa to come to Canada based on the Skilled Worker Program, Business or Investor Program. However, before they become landed immigrants, they get married in their home country just before coming to Canada. When they try to sponsor their new spouse, their application is rejected because they failed to report the change in marital status before they came to Canada. An additional problem exists where there is an unreported marriage. Citizenship and Immigration Canada can revoke the original landed immigrant visa due to the failure to disclose a material fact or change in the application. It is very important to be truthful in answering all questions in an Immigration Application and to report all changes, such as a new marriage or birth of a child. Failure to do so could lead to deportation from Canada. New medicals and security checks must be completed before the application will be approved.

If you are considering sponsoring a spouse or a member of your family, it can be a wise investment to seek legal advice.

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