

The 2008 Annotated Immigration and Refugee Protection Act of Canada

Goslett, Henry M., Caruso, Barbara Jo



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 - Federal Courts Act -- amended by S.C. 2005, c. 46 (former Bill C-11); S.C. 2006, c. 9 (former Bill C-2); and S.C. 2006, c. 11 (former Bill C-17)
 - Federal Courts Rules -- amended by SOR/2007-130
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Preface

The starting point for anyone interested in immigration law is the position of the alien at common law. In this regard, Lord Denning M.R.'s concise summary of the common law in the case of *R. v. The Governor of the Pentonville Prison, ex parte Azam*, [1973] 2 All E.R. 741 at 747 is most helpful:

At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason: see *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 49 at 168. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country: see *R. v. Brixton Prison (Governor), ex parte Soblen*, [1963] 2 Q.B.243 at 300 301. The position of aliens at common law has since been covered by the various regulations; but the principles remain the same.

This annotation is directed at the question of the extent to which the common law has been affected by the *Charter of Rights and Freedoms*, the *Immigration and Refugee Protection Act of Canada* and the Regulations passed pursuant to that Act.

A number of recent Supreme Court of Canada decisions have confirmed that although "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada" this does not mean that the proceedings related to deportation in the immigration context are immune from scrutiny under section 7 of the Charter.

We have preserved summaries of decisions annotated under the former Act which dealt with the definition of a Convention refugee. These case summaries are included in a separate section entitled "Refugee Decisions under the former Act". We included cases interpreting subsections 2(1), (2), and (3) of the former Act as well as cases concerning the Schedule — Sections E and F of Article 1 of the *United Nations Convention Relating to the Status of Refugees*. The case summaries concerning the Schedule to the former Act follow the Schedule to the IRPA.

In addition, procedural decisions regarding refugee hearings under the former Act are collected and tabbed separately. Decisions concerning the sufficiency of reasons in refugee cases which were decided under the former Act are collected under Refugee Protection Division Rule 61.

Cases under the former legislation dealing with the requirements to obtain a stay of a removal order are collected under section 18.2 of the *Federal Courts Act*. It is recognized that in some cases the application for a stay is made because an H&C application is pending. Such orders are perhaps inherently different than those described in section 18.2. We decided that it was better to

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collect all of the decisions involving judicial stays under the former Act in one place and chose section 18.2 of the *Federal Courts Act* for that purpose.

Considerable judicial resources have been applied to marking the boundary between national security obligations and individual rights. We have included at the beginning of Part 1, Division 9, annotations of decisions taken under section 40.1 of the former *Immigration Act*. While the security provisions of the former Act are differently worded, it is thought that these annotations may contribute to the development of the law in this very difficult area.

Once again, we have observed numerous counsel advocating and litigating various issues under the *Immigration and Refugee Protection Act* and have been impressed with the extent to which they have pursued litigation, not only in the interest of their clients but in the interest of the evolution of the interpretation and application of this relatively new legislation. Both the Immigration Bar and the Minister's representatives have made a significant contribution in this regard. Often, it is more cost efficient to reapply or at least, to avoid the risk of having a negative decision for the client in a judicial forum; however, countless times over this past year, cases have been judicially reviewed for the benefit of all future applicants applying under the provisions of IRPA. These litigants, their counsel and the Minister's representatives should all be commended for their advocacy skills.

We are indebted once again to those members of the legal profession, Citizenship and Immigration Canada, the Canadian Border Service Agency and the Immigration and Refugee Board who have provided constructive criticism to us throughout the year. All of these comments were most gratefully received and many of them have been incorporated into this year's edition. We wish to thank our publisher for its assistance in providing us with decisions, and the citations which appear in our text and the table of cases. We also wish to thank all those who assisted in proofreading.

We wish to express our thanks to Natalie Lofeudo for her assistance in the preparation of the 2008 edition. We also wish to recognize the contribution of Pamela Hudson to previous editions of our text. Without the care and attention of these persons, this edition would not have been possible. This edition contains all relevant cases which have come to our attention as of June 30, 2007.

October 2, 2007
Toronto, Ontario
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