Focus

IMMIGRATION

MIPAN / ISTOCKPHOTO.COM

Slow start to express entry

Evelyn Ackah

The promise of the new express-entry permanent residence (PR) program, launched on Jan. 1, was that it would be a "faster and more effective way for Canada to welcome skilled immigrants," to quote the government news release. Express entry is an online application system that determines eligibility of workers based on a calculation of points, and was expected to be flexible, efficient and responsive to changing immigration priorities as set by the Canadian government. But after the first five months it's clear the new PR process has missed the mark on all three of its goals. Worse, the new program has created some unintended consequences.

First, the application system is restrictive and leaves little room for discretion. With only an e-mail address for inquiries, no one is available to talk to throughout the process.

Second, it reduces the independence of PR applicants. They must wait for an "invitation to apply" (ITA) along with tens of thousands of other applicants, based on a points threshold set by the government which can change week to week.

Third, the program also seems to miss the mark by assigning 600 additional points to those who have labour market impact assessments (LMIA) or provincial nomination certificates under the provincial nominee program (PNP). This could result in applicants who have less experience or education being chosen for PR status ahead of more experienced or senior executive skilled professionals. This unfairly penalizes foreign workers who entered Canada under NAFTA or by intra-company transfer and who don't have an LMIA.

Express entry is based on a comprehensive ranking system of factors such as age, education, language ability (English and French), Canadian work experience and skills transferability that assigns points to a maximum of 1200. Canadian Immigration and Citizenship can determine the point score they require in order to accept an application and issue an ITA for PR.

When the program was initially launched, the criteria was nearly 900 points of out 1200, meaning that only those with LMIAs or PNP certificates would be selected. It has become increasingly challenging to obtain LMIAs or PNP nominations.

Since launching, the selection points required have been reduced significantly and most recently was set at 453 points, as the government realized very few people would qualify for PR without having an LMIA or PNP certificate. The first three months of the year negatively affected those without LMIAs or PNP certificates and the government has made further adjustments by reducing the selection criteria by almost 400 points in order to increase the number of qualified applicants.

During the past five years, Canada has accepted about 250,000 PRs. Since Jan. 1, about 10,000 applicants have received an ITA. However, many of them will not have

Skilled, Page 15

Focus IMMIGRATION

Deportation used to avoid criminal trials

Nikolay Chsherbinin

National security is one of the key objectives of Canadian immigration legislation. This objective is given effect by preventing the entry of applicants with criminal records, as well as removing individuals from Canada for deportable offences. Immigration law has become adjunct to criminal law and it is increasingly being used as a law enforcement tool to permanently remove offenders from our shores. Non-citizens who are alleged to have been engaged in organized criminality or terrorism may be found to be inadmissible to Canada without being charged with criminal offences. This application of immigration law in high-stake accusations is troubling, because it proceeds on a reductionist understanding of crime and punishment theory, as well a much lower standard of proof and rules of evidence which can include hearsay.

In the wake of the events of September 11, 2001, immigration law has been employed as an integral part of the ongoing terrorist and organized criminality investigations. A case in point is the recent arrest of Jahanzeb Malik, a permanent resident who is alleged to have been plotting a terrorist attack against the U.S. consulate in Toronto. Despite this serious allegation, the government chose to prosecute Mr. Malik under the inadmissibility provisions of the *Immigration and Refugee Protection Act* (IRPA) and not to charge him criminally.

The dichotomy between the terrorism-related accusations and refusal to charge an accused criminally might perplex those unfamiliar with the workings of the IRPA. When evidence against the accused is not as cogent to succeed in the criminal law forum, the Crown will be reluctant to lay charges. However, the IRPA clothes the Canada Borders Services Agency with powers that permit it to attempt to rid Canada of the alleged terrorist by proceeding via immigration law, where the evidentiary standard of proof is that of reasonable grounds to believe. This standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities, and much less than proof beyond reasonable doubt that applies in criminal law proceedings. In the context of organized criminality, the government may elect to proceed with the immigration prosecution in order to remove the violators despite the fact that the criminal charges against them were either dropped or disposed of in their favour.

BENJAMINEC / ISTOCKPHOTO.COM

> It appears naive to assume that deporting terrorists without criminal persecution and incarceration enhances our safety. Deportations merely re-allocate the problem without creating greater long-term safety, since terrorist activities may be run from abroad.
>
> **Nikolay Chsherbinin**
> Chsherbinin Litigation

It appears naive to assume that deporting terrorists without criminal persecution and incarceration enhances our safety. Deportations merely re-allocate the problem without creating greater long-term safety, since terrorist activities may be run from abroad. Moreover, in cases where terrorists are being removed to the countries in which they are able to operate more freely, deportation, arguably, defeats the IRPA's key objective set out in section 3(1)(h): maintaining the security of Canadian society. The current efforts of deporting terrorists create a false sense of security, but provide the platform for advocating for further border security initiatives.

Last Dec. 12, Bill C-4, *A Second Act to implement certain provisions of the budget tabled in Parliament on March 21,* 2013 *and other measures*, received royal assent. It contains key amendments to the Canadian immigration scheme that will introduce the "expression of interest" system in Canada. It is a two-stage active immigration process where applicants would be required to first submit an online form through the Citizenship and Immigration Canada's website, which it would then evaluate against certain criteria. The CBSA also hopes to soon implement a "board/no board" policy which would allow entry decisions to be made before an individual was allowed to depart for Canada.

The current focus on increased scrutiny at points of entry and heightened removal through the IRPA prosecutions is designed to enhance national security, or at least its perception. While enhanced border controls may reduce the number of criminals entering, they surely cannot prevent offences committed by non-citizens who do not become involved in terrorist or criminal activities until after they are lawfully admitted to live in Canada, or preclude native-born or naturalized citizens from engaging in terrorism. For example, in June 2006, 18 Canadian-born Muslims were arrested and charged with planning a series of terrorist attacks against selected Canadian targets, including the Canadian Parliament buildings and the Prime Minister.

This argument demonstrates that our immigration laws are both too powerful and not powerful enough to provide us with security. As with any great power, exemplified in the context of immigration prosecutions by the right to detain (with or without warrant) and deport non-citizens, there should be greater accountability or it could become subject to easy abuse.

When it comes to an individual's involvement in organized crime, an old adage — "tell me who your friends are and I will tell you who you are" — takes on a literal meaning, because a person's mere association with individuals who are believed to have been engaged in activity that is part of a pattern of planned and organized criminal activity may, in certain circumstances, suffice to be found inadmissible to Canada and be deported.

Consequences flowing from the finding of inadmissibility on the grounds of organized criminality or security are harsh, including elimination of the statutory right to appeal removal orders, suspension or termination of a claim for refugee protection, and, *inter alia*, removal of an opportunity to seek discretionary relief from the deportation order itself.

Nikolay Chsherbinin is an employment lawyer at Chsherbinin Litigation and author of The Law of Inducement in Canadian Employment Law. He can be reached at 416-907-2587, nc@nclaw.ca or nclaw.ca.

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Skilled: Restrictions, tech glitches mar new permanent residence program

Continued from page 14

their applications advanced successfully to PR because they only have 60 days to provide all the required documentation, including proof of medicals, police checks, work experience, travel history and financial ability. Certain countries may not be able to provide police certificates within such a short period of time, and wait times to obtain medical exams by designated panel physicians have increased.

In the past, it was possible to request an extension to gather the necessary documentation. However, the express-entry system removes the human element completely and extensions are no longer permitted. Applicants who cannot complete their applications in 60 days will lose their ITA and return to the express-entry pool to wait to be ranked and selected all over again.

There are also major technological problems. For example, information sometimes has to be entered several times before it will be accepted. The portal will only allow you to be logged into the system for a short period of time, at which point it will kick you out. Because the application process is all online, it is challenging to review your application to ensure accuracy, which raises issues of potential misrepresentation. Five months after launch, these technological bugs have yet to be fixed and no comprehensive user manual exists for reference purposes.

Although the idea of an express-entry system for PR sounds great, it has clearly failed to launch successfully and fulfil expectations. One can only hope these problems will be resolved quickly so that immigration lawyers can get back to practising law and not fighting with technology and tight timelines. It will be interesting to see how express entry is working a year after implementation and if the government meets its annual target of welcoming 250,000 PRs to Canada, or if applicants will become frustrated and choose to immigrate elsewhere.

Evelyn Ackah, founder and managing lawyer of Ackah Business Immigration Law. She advises clients on bringing workers with needed talent and skills to Canada, including permanent residence and NAFTA professional work permits. She can be reached at evelyn@ackahlaw.com or (403) 452-9515, ext. 100.