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Litigating Before the IAD: Practice Tips for Hearing Preparation

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Canadian Immigration Lawyers Association

Types of Appeal

Sponsorship Appeal

- If PR or Canadian citizen sponsored a family member and their PR application is refused, they can appeal to the IAD
 - Exception: if the person you sponsored was found inadmissible to Canada, other than misrep, if the sponsored person is a spouse, common-law partner or child

Types of Appeal

Removal Order Appeal

- A PR, PR visa holder, Refugee or Protected person can appeal a removal order after they had an admissibility hearing before the Immigration Division **or** an examination by an immigration officer
- Exceptions: certain types of criminal and security inadmissibility
 - Being convicted of a crime punished in Canada with a **six months or more** sentence
 - Committing or being convicted of a crime **outside Canada** that would be punished in Canada by a maximum prison term of **ten years or more**
 - Being involved in organized crime, being a security threat or violating human or international rights

Types of Appeal

- **Residency Appeals**

- if your client applied to a Canadian visa office for a travel document **overseas** or if they received a removal order for not meeting residency obligation in Canada

- **Minister's Appeal**

- if the ID rules in your client's favour with respect to admissibility, the Minister can appeal the decision to the IAD and you have to respond to the appeal

De Novo Jurisdiction

De novo jurisdiction

- An appeal before the IAD is considered de novo, so IAD must make an independent decision based on its review of evidence including fresh evidence as well as consideration of equitable factors

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that ...

- (a) The decision appealed is wrong in law or fact or mixed law and fact;
- (b) A principle of natural justice has not been observed; or
- (c) ... taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case

Understanding the decision, the issues and assessing your client's credibility

- Understand the procedural history of your client's case to avoid surprises and anticipate any issues that may arise at the hearing
- It is difficult to understand all the details of the case until you have received and reviewed the Tribunal record from the IAD, which should contain the officer's notes, the evidence, decision, and reasons

Understanding the decision, the issues and assessing your client's credibility

Pin down the officer's main concerns:

- Were there any credibility issues? What was it based on?
- Was all the evidence considered? Was anything overlooked?
- Was the officer's review selective/one-sided?
- Was there an interview before a decision was made, and what does the interview notes reveal?
- Were there any procedural fairness issues/unfairness such as adverse findings that were not put to your client for input?

Meet with the Client:

Discuss weaknesses and strengths of the case

- Meet with your client, go over the decision, the interview notes and discuss the weaknesses and strengths of their case
- Manage your client's expectations
- Explain the officer's decision in simple terms and summarize the officer's mistakes
- Explain that the Tribunal has de novo jurisdiction, so that they can appreciate that new evidence can be presented in support of their case

Witnesses:

Pros and cons to calling witnesses and alternatives to testimony

- Anyone who testifies at the hearing (including you) to be listed as a witness
- Complete and send your **list of witnesses no later than 30 days before the hearing** to the IAD and Minister's Counsel providing:
 - The name of each witness and contact info
 - Your relationship to the witness
 - How long the testimony will take for each witness
 - Whether the witness will need an interpreter, in what language or dialect
 - Whether the witness will testify in person, by Microsoft Teams, or by telephone
 - Statement of the purpose and substance of the witnesses' testimony

Pros and Cons of Presenting a Witness

- What evidence are you trying to elicit from your witness?
- Any first-hand evidence to corroborate your client's case?
- Is there any damaging evidence that may come out?
- Minister's Counsel will also be asking them questions so anticipate the kind of questions they may be asking
- If you decide not to have the witness testify in person, you may still decide to prepare and submit an affidavit outlining their evidence
- You can also present an affidavit of your own client's basic uncontested evidence to save time and have the hearing and testimony focus on the main issues

Tips for preparing your client to testify

- Prepare questions and answers under different headings so that the client has a practice run
- Make sure the client is familiar with their own record, as the Minister's counsel may put some of the documents in front of your client at the hearing, before asking their questions
- If you have any doubts about the client's cognitive capacity, due to their age, you should recommend that they obtain a cognitive assessment ahead of the hearing
- Explain the importance of understanding the interpreter, and if any issue arises at the hearing to let you know at the earliest time

Tips on submissions

- Client's testimony is of course critical to their credibility assessment
- Focus your oral submissions on issues that arise at the hearing and the concerns on the mind of the board member
- IAD Rule 76(1) states that submissions must be made **orally** at the end of the hearing unless the Division orders otherwise

Tips for representation: objections, procedural fairness issues, and civility

- For any procedural fairness issues, it is important to raise an objection at the hearing and place it on the record along with your reasons for the objection (for example, interpretation issues or persistent technical issues that can impact the overall fairness of the hearing)
- If there is a long gap between the two hearings, you may wish to request a copy of the audio recording
- Conducting yourself in a professional and civil manner is required by the LSO Rules of Professional conduct

Early Resolution and ADR Process

Evidence and submissions for early resolution

- Client's affidavit with their personal evidence complemented by their supporting documents and documentary evidence
- Where there are no credibility issues, the tribunal may proceed to make its decision without a hearing
- If the case proceeds with a hearing, update the record with any additional evidence

Early Resolution and ADR Process

ADR Process

- Where an appeal could be resolved without a hearing
- ADR conference is an informal meeting between you, the Minister's counsel and an Early Resolution Officer ('ERO')
- Meant to clarify the main issues and encourage both sides to resolve the appeal without a hearing
- Review the refusal letter or removal order you received from the Minister and the reasons/notes from the officer

Early Resolution and ADR Process

- Prepare to discuss mistakes of fact and law at the conference
- Highlight important supporting evidence in support of your case and why the appeal should be allowed
- The ERO will open the meeting and ask you questions about your case
- The Minister's counsel will also question your client (so make sure to prepare your client)

Early Resolution and ADR Process

- The ERO will meet privately with the Minister's counsel to discuss whether the appeal can be resolved without a formal hearing
- You can also ask to meet privately with the ERO to discuss the chance of your appeal succeeding if it goes to a hearing
- When you are back together, the Minister's counsel will give their recommendation

Early Resolution and ADR Process

- If the Minister's Counsel makes a favourable recommendation, the ERO will prepare an ADR Agreement with reasons to allow the appeal
- You and the Minister's counsel will review the agreement, sign the agreement or verbally confirm the agreement
- An IAD Member will review and approve the agreement and you will receive a final decision
- The Minister's counsel will briefly give their reasons and the matter will be set down for a hearing if Minister's Counsel's recommendation is not in your favour

Discussions at the ADR conference are confidential with exceptions

- If you proceed with a hearing, the Minister's counsel cannot use the information discussed during the conference later in the appeal

There are 3 exceptions to this rule:

- You agree to share it at the hearing
 - The information is publicly available
 - The information is about an offence you have committed under immigration legislation or a breach of the IAD rules of practice
- Documents you have already provided, including for the ADR conference or another informal resolution process, are not confidential and will remain in your file.

Conclusion

- Every case has its own unique set of facts and circumstances which can be used as building blocks to persuade the Member
- Get the Member to see the elements of the case through the lens that you are presenting with supporting evidence
- Your client's testimony and any other witnesses are critical to the success of your case
- A lot of the heavy lifting is done up front in terms of preparation of your case, your client and your witnesses

Conclusion

- It is the client who needs to be given the confidence throughout the process of preparation and collaboration to handle the questions that will come their way effectively
- Anticipate your opponent's strategy, minimizing the surprise element at the hearing and project confidence
- The more in control of the process you are, the better positioned your client will be, and better the chances of success at the hearing

Conclusion

- You may still encounter a difficult board member or Minister's counsel and you need to be prepared to step in and even the playing field if there are procedural fairness issues
- Even if you lose at the IAD, you can still build a strong record for a potential judicial review
- You cannot win them all in the first instance, but it doesn't mean that you won't win in the end 😊