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MLI

True North In Canadian Public Policy

Straight Talk

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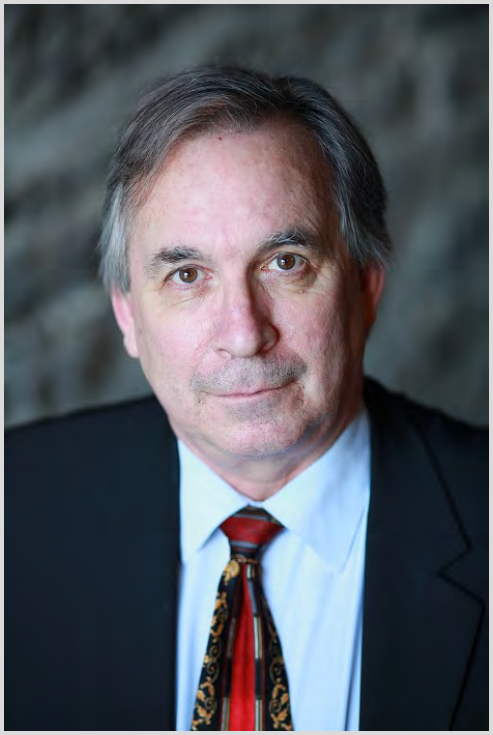
Scott Newark on immigration and national security

This is the fourth instalment in a dedicated six-part series of the Macdonald-Laurier Institute's Straight Talk on the subject of immigration and national security with nationally-recognized expert Scott Newark. This instalment examines better ways of removing people who are in Canada illegally

MLI: In theory, if we discover after we let someone enter Canada that they are not meant to be here, what is supposed to happen to them?

Newark: Actually discovering they shouldn't be here is only the beginning. There are defined grounds of inadmissibility and a process in place under the Immigration and Refugee Protection Act for determining that someone is here improperly. The problem is that there are multiple routes of appeal. First you can appeal against the determination and second we offer what are in effect escape valves where a person can appeal, including to the Minister directly, asking for an essentially subjective decision that they not be removed even though they meet the objective criteria for inadmissibility. The complexity and duplication of all of the reviews is a major problem.



Scott Newark's 30-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, and as a security and policy advisor to both the Ontario and federal Ministers of Public Safety.

And not just for security or crime-related removals though they get more publicity and are rightly the higher-priority cases.

MLI: Before we get to that let's deal with the simple part. What is the formal process for an initial determination that someone we did let in is actually not meant to be here, and are they entitled to defend themselves during that process?

Newark: In the context of security or criminality, people are inadmissible for one of two basic reasons. Either they should never have been let in because of a serious criminal record, because they are wanted by police elsewhere or because of involvement with terrorist groups, but they somehow bypassed initial screening or got through it when they shouldn't. The other is that they were admissible but then engaged in defined prohibited security related activities or committed a criminal offence after arriving in Canada, so they then become inadmissible. Incidentally, post entry conviction makes up the vast majority of these kinds of removals and it's especially frustrating because the basis of inadmissibility is not a subjective judgement about dubious associations but an objective fact – for instance that you got convicted of drug trafficking inside Canada – and yet we can't remove you quickly. Tightening up the rules in that area would probably give us the "biggest bang for the buck".

MLI: Why can't we remove them quickly? What's the process once we've determined that they're inadmissible?

Newark: The basic problem is too many appeals. In my view, the Immigration and Refugee Protection Act, or IRPA, introduced in 2001 is among the worst-drafted laws in Canada. It created needlessly complex and repetitive processes that are at the root of the inordinate delays in removing people today. Addressing at least part of this is what lies behind C-43 which the Government has introduced to increase the scope of exemption from some appeals by decreasing the sentence length that triggers the exemption.

IRPA also created an unnecessary obstacle to an initial finding of inadmissibility. Under the old system, any peace officer, and that of course included police, that discovered someone was inadmissible had an obligation to report that fact to the Minister, which started the removal process. When I say "discovered" I don't necessarily mean they undertook a long, expensive investigation that discovered some secret from his past. It could be as simple as noticing that a guy they had charged for drug trafficking was a non-citizen. Unfortunately, IRPA removed that authority from police officers and vested it exclusively in Federal immigration officers and, what's more, converted it from a mandatory 'shall' report to a discretionary 'may' report. It makes no sense to create an extra step to simply start the process. Restoring mandatory reporting by any peace officer is, therefore, a desirable reform.

MLI: OK, suppose one of these people who "may" report it actually does report it, what happens? If it's someone convicted of a crime within Canada, they've already had a chance to defend themselves during their trial and despite all the protections in our legal system they have been formally convicted. If they then get declared inadmissible do they have another appeal process?

Newark: Yes. One legitimate reason the whole thing takes time is that until the trial is finished nothing can happen because technically the person is not inadmissible until they are convicted. Then the federal officer reports into the system that the person is now inadmissible. But a less legitimate reason for delays, in my experience, is that if the person is sent to jail officials generally do not start the paperwork until they're well into their sentence. Then the person can appeal and seek to have the removal prevented on a variety of grounds, all of which have an administrative and judicial component.

MLI: What kind of paperwork is involved here and how much discretion does the system have about whether to go forward?

Newark: IRPA creates a multi-step system that starts with discretionary authority of an officer to write an inadmissibility report which is then forwarded to the Minister. The Minister then has the discretion to refer the case to an administrative tribunal called the Immigration Division although there are exceptions to this contained in the statute and its regulations. The Immigration Division, which has a myriad of other admissibility responsibilities, then conducts an admissibility hearing, following which it may issue a removal order. Removal orders are theoretically enforceable on defined dates but there are exceptions for refugee claimants and if the order is appealed, which it can be with some exceptions, to the Immigration Appeal Division (IAD) the removal order can be stayed.

The removal order can be 'stayed' in a variety of circumstances including if directed by a judge in a judicial proceeding, until a criminal sentence is "completed", for any period ordered by the IAD or a court conducting a judicial review of the removal order, for a period ordered at the Minister's discretion or if they are seeking a 'protection order' to prevent removal (which has a separate determination and appeal process). The Immigration Appeal Division is then obliged to conduct its own hearing (and it too deals with other admissibility issues) on the validity of the removal order although there are exceptions to this such as supposedly if the removal was for 'serious criminality' which is defined in the Act. The 'exception' currently has an exception as the no appeal rule only applies if the sentence imposed for the serious criminal offences was two years or more. This is why you'll see two years less a day sentences ('deuce less' as it's known in the business) routinely being sought by non-citizen bad guys' lawyers. Hard as it is to believe, in 2011 the Manitoba Court of Appeal actually retroactively (after expiry of appeal period) allowed a non-citizen career criminal's appeal to reduce his latest sentence for fraud, forgery, counterfeiting, and breaching bail to allow him to take advantage of the less than two year expanded appeals. And people wonder why the Harper Government is moving to restrict judicial discretion? C-43, if passed, will substitute a six month no special appeal rule for the current two year rule which should make it much harder for judges to play deportation avoidance games when passing down sentence.

Back to the IRPA treadmill…the Immigration Appeal Division has the discretion to uphold or overturn a removal order or send the case back for rehearing and start things all over again. In exercising its discretion it is guided by vaguely expressed principles including consideration of 'humanitarian and compassionate grounds' and whether the principles of 'natural justice' have been observed. Where the IAD has upheld a removal order but the person has not left Canada, the Act also authorizes the IAD to reconsider its original denial of the appeal again on grounds relating to 'natural justice'.

IRPA also allows review of IAD decisions by the Federal Court and of those, with restrictions, by the Federal Court of Appeal and ultimately the Supreme Court.

MLI: And then we're done?

Newark: We're not done yet. The Act also allows for persons ordered removed to seek a 'protection order' from the Minister which necessitates a pre-removal risk assessment that is conducted administratively and that can include a formal hearing. Ultimately the order of protection is within the discretion of the Minister but the Act contemplates both a right of re-application upon rejection and judicial review of the process to ensure 'natural justice' was provided. The presumptive 'safe country' designation now in place thanks to C-11 will hopefully expedite this process as well.

There is also an entirely separate and more restrictive process replete with administrative hearings, appeals, and rights of judicial review for persons who are determined to be inadmissible but who have already been granted refugee status.

While this multi-layered, multiple appeal process may ensure Mercedes Benzes for immigration lawyers, it is not exactly effective in terms of removing these people from Canada.

MLI: Now suppose a person is here and instead of breaking Canadian law after they arrive we somehow discover that they were inadmissible all along because of something they did abroad. How is this finding formally established, are they able to represent and defend themselves while that's happening, and once such a finding has been made, is there the same appeal process or a different one?

Newark: First, the individual is notified that they are the subject of an inadmissibility review and they are allowed to make submissions. Obviously that review is more subjective if the problem is association with a terrorist group than if they were convicted of a serious offence in another country. But in any case if that review goes against them the same appeals process exists as if they're convicted of a crime in Canada.

MLI: So the first area of improvement would be to streamline the appeal process circus?

Newark: Yes. We need changes in the law which is what C-43 starts to do. But there's also an operational issue here, as well as some technological things I'll talk about later. From the point of view of public safety, we should obviously be focusing more on deporting convicted criminals and less on cleaning ladies who've overstayed their visas. There has clearly been some improvement in the last couple of years but we need to ensure that the Canada Border Services Agency (CBSA) makes serious criminals their highest removal priority.

MLI: Is that purely operational or would we need changes in the law?

Newark: Both. In 2008 the Auditor General reported that there were 42,000 people who'd been ordered removed from Canada and had gone through all of the stages and they'd simply fled and had warrants out for their arrest. About 15 percent of those were being removed for criminal acts. While it's tempting to wonder why these people had been released in the first place, you have to remember that the decision making and appeal process creates such delays that bail tends to get granted. So, let's expedite the removals process but in the meantime let's also take operational steps like using electronic monitoring for criminal and security deportees.

Consider how effective it has been since CBSA started posting names and faces of its most-wanted list? Contrary to the original 'no can do' response from CBSA, it didn't require any change in the Privacy Act for the release of the information to happen. It just took greater determination, directed from above, to use existing powers in a sensible way. And we could do the same thing by, for instance, making sure law enforcement agencies coordinate on serious offences so, for instance, police tell CBSA a non-citizen has been busted on a major grow-op and they can start the ball rolling, determining what documents are available, if they typically face delays getting information from the country of origin, ensuring the Crown is aware of the person's background including previous convictions to oppose bail, figuring out if he's already in the removal process and so on. In my view, officials seem to wait until a person is on their way to early release parole eligibility to get organized on the immigration question, at which point they're on their way out of jail and back on the street while the appeal process grinds on.

MLI: Legally speaking, could they begin the removal process while the person was serving their sentence provided they did not throw them out until it was over?

Newark: Yes. But there's also a legislative change that would be a big help. Under the International Transfer Offenders Act we actually can send a non-citizen serving their sentence in a Canadian jail back to their own country to serve their sentence. The problem is that currently three parties must consent: 1) Canada, 2) the country we send them back to, and 3) the convict. Not surprisingly, very few of them give their consent as they prefer to remain in Canada. This rule is especially silly because the country with the largest number of its citizens in our jails is the United States. I know American jails aren't as comfy as ours, but surely we should be able to send people back to the US to serve their sentences, and vice versa, without asking for their consent.

MLI: What happens if they commit a new crime between their release from prison and the time they're actually removed?

Newark: That brings me to what I think is the greatest absurdity in the whole process. The one sure way to avoid being removed from Canada is to commit a new crime because that puts the original process on hold until the new charges are dealt with, including completion of any new sentence, which effectively fuels up the removals merry-go-round all over again.

MLI: What else should we do in terms of legislative changes?

Newark: Bear in mind that when it comes to inadmissibility you're dealing with some subjective criteria like whether a person is financially dependent or should not be allowed to stay here because of a serious pre-existing medical problem, and some very objective ones like being convicted of drug dealing or child molestation. There will always be subjective circumstances but I'd focus on the objective ones like being a non-citizen and getting convicted of defined crimes. In these kinds of cases, we could even do what Ireland does and allow the court when passing criminal sentence on defined crimes to also order deportation with a single merged appeal from both.

But whatever decisions we make, the main thing is to streamline the appeals process. This includes restricting judicial review of Ministerial discretion to ensuring due process was followed rather than substituting the appeal body's judgment for the Minister's. Also, we need to remove repetitive appeals of the same issue. I'd also suggest that Canada should proactively enter into treaties with countries where we mutually agree not to abuse returned citizens who are deported. This would help on the pre-removal risk assessments, the security certificate cases, and the potential transfers under the International Transfer of Offenders Act after we've removed the need for prisoner consent.

This entire issue of the potential of 'mistreatment' is riddled with hypocrisy as the UN Convention Against Torture that causes us to delay or prevent removals is supposedly adhered to by the countries we are told we must be concerned about and who sit next to us at the same UN. Proclaiming the sanctity of the UN while in the next breath saying we can't trust its member countries is beyond illogical.

The idea of bringing human judgment into the current robotic appeals process has clearly taken hold as Immigration Minister Jason Kenney has now used his newly acquired statutory authority and designated 27 presumptively safe countries which will result in us processing refugee claims from those countries in a dramatically expedited way. My bet is that this change will also save us hundreds of millions of dollars which may annoy immigration lawyers but is good for taxpayers and for persons legitimately within the system who will likely find processing times improved as well. Hopefully that concept of applying fact based human judgement will spread so we can at least distinguish between prisoner transfers to the US and to Iran.

MLI: What about technology improvements?

Newark: Electronic monitoring would assist in not having people flee before they are removed but we need to use it selectively. In my view, it's appropriate for people who are inadmissible because of a risk they pose to Canadians or if they are a recognized flight risk. In an optimally designed system, we should literally be taking non-citizen criminals from their prison cell to the tarmac and putting them on a flight. But when there is some legitimate reason for delay, the law should at least permit us to put them under electronic monitoring until removal. As I said in an earlier instalment of this series, a biometric 'bad guy' lookout system at the border is critically important so it's encouraging to see this is now enacted thanks to Bill C-31. The bottom line is that it's better to catch inadmissible people, including people we've previously deported for criminality, *before* they come into the country than to try and remove them once they're here.

MLI: Before we go, I have noticed that there seem to be more press releases about the fact that people are being found and thrown out. Does this represent real improvement, or just a PR strategy?

Newark: I think it's a real improvement which is based on clear direction from the Minister that the status quo approach is no longer acceptable, which seems to be getting through to officials. Additionally, there are also signs of improvement in recently introduced and enacted legislation to create greater certainty and reduce the repetitive and duplicative nature of appeals. Finally, Minister Kenney's decision through C-31 and its just published Regulations to require biometric screening and matching to an inadmissible database, albeit in defined circumstances, is also a huge step toward maintaining an active immigration system while ensuring its integrity and security for Canadians. There is much to be done but we appear to be finally moving in the right direction on several fronts.

Recommendations

1) Change the law to streamline the appeals process and create greater objective certainty for criminality removals and remove the requirement for prisoner consent under the International Transfer of Offenders Act.

2) Make removal of criminals and security risks a higher priority and improve coordination between police, courts, and the CBSA to initiate removal proceedings sooner for convicted criminals.

3) Use electronic monitoring of high-risk individuals between initial finding of inadmissibility and actual removal and deploy face recognition biometrics for identity verification and screening purposes.

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