

An Overview of Medical Inadmissibility in Canadian Immigration Law

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Pursuant to section 38(1) of the *Immigration and Refugee Protection Act* (the ‘*Act*’),

38. (1) A foreign national is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health;
- (b) is likely to be a danger to public safety; or
- (c) might reasonably be expected to cause excessive demand on health or social services.¹

Section 38(2) of the *Act* exempts foreign nationals who fall under the following three categories from the application of paragraph 38(1)(c) of the *Act*, although,, there are no exemptions from paragraph 38(1)(a) and (b) :

1. a member of the family class who is the “spouse, common-law partner, or child” of his/her sponsor;
2. a “protected person,” or a” Convention refugee or a person in similar circumstances;” or
3. the “spouse, common-law partner, child or other family member” or a protected person or a Convention refugee or a person in similar circumstances.

It should be noted that section 38(1) has been broadly interpreted by officers and common health conditions, such as diabetes, have led to inadmissibility determinations by officers in the past.

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

A. Excessive demand on health or social services under section 38(1)(c)

The majority of the case law deals with inadmissibility for “excessive demand on health or social services” under paragraph 38(1)(c) of the *Act*.

The terms “excessive demand,” “health services,” and “social services” are defined under section 1(1) of the *Immigration and Refugee Protection Regulations* (the '*Regulations*') as follows:

“Excessive demand” means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the medical examination, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of the denial of or delay in the provision of those services to Canadian citizens or permanent residents.

“health services” means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.

“social services” means any social service, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.²

The assessment of the demand for health or social services must consider the foreign national's actual health condition as an individual,³ the availability of familial assistance,⁴ the publicly-funded services that will be available to the foreign national given the foreign national's proposed immigration status in Canada (i.e. temporary resident or permanent resident) and place of residence while in Canada,⁵ and the health care costs of similarly situated Canadians, such as Canadians from the same age group.⁶ For foreign nationals who are applying for permanent residence, the assessment will also extend to a 10-year projection – in other words, whether there will be “excessive demand” anytime during the next ten years due to a deterioration in the foreign national's health condition.

However, it should be noted that the threshold for excessive demand is extremely low – even comparatively minor illnesses that may be controlled with medication will qualify - and that “excessive demand” may refer to either the cost of services or the *supply* of services such that a foreign national may be medically inadmissible because of the lack of

2 Immigration and Refugee Protection Regulations, SOR/2002-227

3 *Vashishat*, 2008 FC 1346

4 *Velasquez Perez*, 2011 FC 1336

5 ENF 2 at section 7.1

6 *Aggarwal*, 2008 FC 639

availability of the applicable services, regardless of the foreign national's ability to pay for said services.

If an officer requires further information in order to complete the assessment, then they may submit a request to the foreign national in question. The foreign national is obliged to provide information “of a quality and standard that permits an appropriate assessment.” If the foreign national fails to provide such information within the allowed period of time, the officer may automatically decide that the foreign national is medically inadmissible.⁷

Pursuant to immigration policy, upon the completion of the assessment, the medical officer will complete an opinion consisting of:

- a medical narrative followed by a list of the required services and the anticipated costs; and
- a statement as to the probable costs of anticipated services which would likely exceed the average Canadian per capital health and social services over a period of five or ten consecutive years immediately following the foreign national's most recent medical examination.⁸

Upon receipt of the medical opinion, an immigration or visa officer will then provide the foreign national with a procedural fairness letter, the relevant sections of the *Regulations*,

7 CIC Operational Bulletin 063B – Assessing Excessive Demand on Social Services ('OB 063B')

8 OB 063B

and the Declaration of Ability and Intent. The procedural fairness letter should expressly inform the foreign national of the requisite services upon which the finding of medical inadmissibility is based, as well as the fact that the foreign national may provide a plan detailing where they will secure the requisite services and how they will pay the costs of said services.⁹ The foreign national may also challenge the diagnosis of their medical condition.

Alternatively, if the foreign national chooses to submit a proposed plan, the degree of detail and planning in submissions regarding an applicant's ability and willingness to pay for the costs associated with his or her medical condition is highly significant. On one hand, the Federal Court has held that it is unreasonable to find an applicant inadmissible under section 38(1)(c) of the *Act* where an applicant submits a detailed plan for payment of the costs associated with his or her medical condition, such as medical insurance from a prospective Canadian employer.¹⁰

On the other hand, the Federal Court has held that personal undertakings to not access publicly-funded health services are unenforceable and insufficient,¹¹ and a willingness to pay is insufficient without evidence of an ability to pay.¹² Furthermore, the availability of private services and the ability of a foreign applicant to pay are not relevant where the foreign national cannot opt out of the publicly-funded services in question because it is

⁹ *Ibid.*

¹⁰ *Ovalle*, 2012 FC 507; see also *Hilewitz*, [2003] 2 F.C. 3, revd 2003 FCA 420, revd 2005 SCC 57

¹¹ *Chauhdry*, 2011 FC 22; *Deol*, 2002 FCA 271; *Lee*, 2006 FC 1461

¹² *Airapetyan*, 2007 FC 42

contrary to public policy to discriminate against certain permanent residents with respect to health services.¹³

Finally, even if an applicant is financially stable and in excellent health at the time of the application, the applicant must still demonstrate plans for the payment of any costs that might be incurred for the duration of their proposed stay in Canada.¹⁴

Upon receipt of the foreign national's response to the procedural fairness letter, the officer will review the response and, as needed, "verify the authenticity of the plan, the validity of the associated costs and the cost mitigation strategy."¹⁵

However, even if the officer accepts the plan proposed by the foreign national, a new assessment of the foreign national's health condition that may lead to a new finding of medical inadmissibility for a condition unaddressed by the foreign national's plan will be required if the officer's assessment expires.¹⁶

B. Assessment Procedures for Temporary Residents not Automatically Requiring a Medical Test

An officer may form an opinion that a foreign national may be inadmissible based on observation or questioning (e.g. recent stays in a hospital, recent illness, medication, etc.).

¹³ *Hilewitz*, [2003] 2 F.C. 3, revd 2003 FCA 420, revd 2005 SCC 57; *Jafarian*, 2010 FC 40

¹⁴ *Chauhdry*, 2011 FC 22

¹⁵ OB 036B

¹⁶ *Ibid.*

¹⁷ While a person who has failed a temporary resident medical examination is likely to fail a permanent resident examination, an officer “cannot use [the] results of a temporary resident examination to refuse an application for permanent residence.”¹⁸

If the officer does form such an opinion, then the officer may require the foreign national in question to report for a medical examination, which may include any or all of the following: laboratory tests, diagnostic tests, and a medical assessment of their health records.¹⁹ If the foreign national is at a port-of-entry and the officer believes that there is sufficient evidence to ground a finding that a foreign national is, on a balance of probabilities, medically inadmissible, then the request for a medical examination will proceed as follows:

Action at land ports/ferry ports

At land or ferry ports, persons who require an immigration medical examination will be required to go to a designated medical practitioner in the United States of America (USA).

A list of accredited designated medical practitioners in the USA will be issued to the person. If the person continues to demand immediate entry into Canada, or leaves but returns to seek entry into Canada prior to having an electronic —medical certificate in FOSS - that indicates the person is not inadmissible on health grounds [see R30(4)], an officer may choose to write an A44(1) inadmissibility report citing allegation A41(a) and A20(1)(a) or (b), as appropriate.

In the case of a foreign national, this allegation is within the jurisdiction of the Minister’s delegate and may result in the Minister’s delegate making a removal order against the person [R228(1)(c)(iii)].

¹⁷ ENF 02 – *Evaluating Inadmissibility* (‘ENF 02’) at section 7.1

¹⁸ ENF 02 at section 7.2

¹⁹ *Ibid.*

Action at international airports

Where it is believed that a person may be medically inadmissible at an international airport, normally, after consultation by telephone with a medical officer with the Operations Directorate, Medical Services Branch, CIC, the examination should be adjourned under the provisions of A23.

The person would then be required to undergo a medical examination pursuant to R30(1)(d) by a Designated Medical Practitioner in Canada. Officers must ensure they impose appropriate conditions as allowed for under R32 in addition to those conditions that must be imposed pursuant to R43(1) ; that is, that the person is required to report at a specified time and place for a medical examination and is to provide proof, at a specified time and place, of compliance with conditions imposed.

Because of the aforementioned, where feasible, officers should make every effort to make the appointment for the person. All appointments should be scheduled for the earliest possible date.²⁰

The foreign national will be required to pay for the medical examination in question.²¹

Notably, if the officer believes that the foreign national in question is “an immediate public health or safety risk,” then the officer will prepare a section 44(1) report, detain the foreign national, and immediately notify a medical officer.²²

C. Reviewing a refusal based on a finding of medical inadmissibility

If a foreign national is refused for medical inadmissibility, the foreign national’s only resort is judicial review in the Federal Court. The foreign national must file an application

²⁰ *Ibid*

²¹ *Ibid*

²² *Ibid*

for leave and for judicial review and serve certified copies on the Minister of Citizenship and Immigration within 15 days of being notified of the refusal for medical inadmissibility if the refusal was made inside Canada, or within 60 days if the refusal was made outside of Canada. It should be noted that the application for leave is considered without personal appearance, and that there is no appeal if leave is refused.

However, if the foreign national was being sponsored for permanent residence, then his or her sponsor may appeal to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board within 30 days of the refusal. If the appeal is allowed and the original decision is set aside, CIC will resume processing of the sponsorship application, although the Minister of Citizenship and Immigration may apply to the Federal Court for leave and for judicial review of the IAD's decision.

Grounds for review of a finding of medical inadmissibility on a standard of correctness include a failure to conduct an individualized assessment of the foreign national's particular health condition or to provide sufficient notice to the foreign national of the case to be met.

Bibliography

Legislation & Policy

1. *ENF 02 – Evaluating Inadmissibility*
2. OB 063B – Assessing Excessive Demand on Social Services
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Case Law

1. *Aggarwal v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 639

2. *Airapetyan v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 42
3. *Chaudhry v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 22
4. *Hilewitz v. Canada (Minister of Citizenship & Immigration)*, [2003] 2 F.C. 3, revd 2003 FCA 420, revd 2005 SCC 57
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