

The Immigration Consequences of Organized Criminality

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A criminal conviction is not the only way a permanent resident or foreign national could be rendered inadmissible on the basis of criminal allegations. A conviction is not required in order to render an individual inadmissible on grounds of organized criminality under section 37 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”).

The Minister of Public Safety and Emergency Preparedness (the “Minister”) can rely on the evidence gathered and introduced in a criminal proceeding to find the individual inadmissible on the ground of organized criminality. They can do so regardless of the outcome of the criminal proceedings themselves.

The Standard of Proof:

Pursuant to section 37(1)(a) of the *IRPA*, a permanent resident or foreign national is inadmissible on grounds of organized criminality for:

- (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; ...

In plain language, the Minister needs to establish the individual allegedly was or is a member of a group that engaged in a pattern of criminal activity, in furtherance of an offence punishable under an Act of Parliament.¹

The applicable standard of proof in these cases is “reasonable grounds to believe”.² On a spectrum of certainty, this standard is lower than a balance of probabilities but higher than a mere possibility. Therefore, even if on a balance of probabilities the facts do not support the conclusion that an individual was engaged in organized criminality, as long as there is some credible evidence, an inadmissibility finding should be entered.

¹ Lorne Waldman, *Canadian Immigration & Refugee Law Practice* (Toronto: LexisNexis, 2016) at 655.

² *Ibid.*

Definition of Criminal Organization and Membership:

Criminal Organization:

The term “criminal organization” has been broadly construed by the jurisprudence. The threshold is met where there are reasonable grounds to believe the organization is engaged in a pattern of criminal activity that is planned and organized by persons acting in concert.

Based on this broad definition, a person can be found inadmissible if he engages in a pattern of organized criminal activity together with at least one other person. There is no need that he or she be a member of a larger group. For example, if two permanent residents are alleged to have committed a series of criminal offences (two or more) in concert, they can be found inadmissible based on organized criminality, even if they are acquitted by the criminal justice system.³ This is primarily because of the extremely low threshold of “reasonable grounds to believe”, as opposed to the “beyond a reasonable doubt” standard applied in criminal law settings.

Member:

The legislation does not define the term “member”. The courts have consistently held that membership is to be broadly construed and it is not simply viewed from the perspective of the organization or the person concerned. Rather, a matrix of factors must be considered in determining whether an individual is a member of an organization involved in a pattern of criminality. These factors include:⁴

- The nature of the person’s involvement;
- The length of time the individual has been involved;
- Relevant factors that inform the degree of commitment the person shows or has shown to the organization.

It is worth noting the person does not need to be a current member, as past membership can be sufficient, even if the membership occurred at a time when the person was a minor.⁵

Accordingly, even in the absence of a conviction, criminal proceedings can lay the foundation for an inadmissibility finding under s. 37. The Minister can obtain and rely on the Crown’s disclosure and evidence that may not have been admissible under the more strict rules of evidence applied in criminal courts.

³ *Ibid* at 656.

⁴ *Ibid* at 647.

⁵ *Ibid* at 645.

Consequences of Inadmissibility due to Organized Criminality:

If an individual is found inadmissible under the organized criminality provision, they will be issued a deportation order. In addition, their family members can also be found inadmissible and issued deportation order(s). Most importantly, an individual found inadmissible under this section will not have access to the Immigration Appeal Division, where s/he can receive equitable remedies.⁶ Furthermore, the individual can never overcome this inadmissibility through humanitarian and compassionate considerations under s. 25(1) (more commonly known as, “H&C Applications”).⁷

Under IRPA, inadmissibility based on organized criminality carries many consequences similar to those imposed on inadmissibility based on involvement in terrorism and international human rights violations. Accordingly, the consequences of such a finding are extremely harsh and nearly impossible to overcome.

Given that the Minister may rely on evidence obtained from the criminal brief, in some circumstances, it may be preferable to take the criminal case to trial rather than negotiating a pre-trial resolution, as it may be harder for the Minister to rely on evidence that has specifically been rejected by a criminal trier of fact. As with any criminal case, this will depend on defence’s assessment of the strengths of the Crown’s case and whether there is any particularly weak evidence being relied upon to link a client’s alleged criminal activity with another individual or larger group.

In conclusion, where a permanent resident or a foreign national is charged with an offence or subject to a criminal investigation involving a group of individuals, it is paramount to advise them of the potential immigration consequences of their alleged involvement. They should also be offered the opportunity to obtain independent legal advice. Importantly, they must understand that there may be immigration consequences regardless of the outcome of the criminal process and that evidence obtained through the criminal investigation may be relied upon by the Minister to render the inadmissibility ruling.

⁶ *Immigration and Refugee Protection Act*, SC 2001, c.27, s. 64(1).

⁷ *Ibid* at s. 25(1).