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Canada Study Permit Litigation – Critical Analysis of Inconsistent Jurisprudence on Financial Requirement

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Case Commented On: *Ocran v Canada (Citizenship and Immigration)*, 2022 FC 175 (CanLII)

Early this year, Justice Little of the Federal Court released the much-awaited decision in *Ocran v Canada (Citizenship and Immigration)*, 2022 FC 175 (CanLII). I am not aware of any study permit judicial review litigation that attracted the attention of Canadian immigration lawyers as much as *Ocran*. The notoriety of this judicial review litigation was based on the fact that it was a test case that the Department of Immigration, Refugee and Citizenship Canada (IRCC) sought to use to obtain judicial approval for its use of the controversial Chinook software in processing of immigration applications. That approval never came. But the fixation on Chinook software caused many immigration lawyers to miss a very important and controversial judicial pronouncement in *Ocran* relating to the financial requirement for Canadian study permit applications.

In *Ocran*, Justice Andrew Little took the position that an applicant for a Canadian study permit needs to show availability of funds sufficient to cover the *entire* duration of their program of study as opposed to the historical position in the IRCC's *Operational Instructions and Guidelines* on study permits which requires the applicant to show "financial sufficiency for only the *first year* of studies, regardless of the duration of the course or program of studies in which they are enrolled". This is in addition to evidence that the *probability* of funding for future years does exist. I recall calling the applicant's counsel in *Ocran* and raising my concerns with him about the court's position on this issue. But somehow, I did not take it seriously as I thought that Justice Little's position was an isolated judicial pronouncement that may not make its way into any subsequent judicial decisions. But I realized how wrong I was after the recent Federal Court decision by Justice Favel in *Ibekwe v Canada (Citizenship and Immigration)*, 2022 FC 728 (CanLII). In *Ibekwe*, Justice Favel not only took the same position as Justice Little but even cited *Ocran* in support of his position. Before going into the details and controversies arising from these decisions, lets take a quick look at the financial requirement for study permit applications in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) as well as the supplemental IRCC *Operational Instructions and Guidelines* (*Guidelines*).

Financial Requirement for Canadian Study Permit

Section 216(1) *IRPR* requires an officer to issue study permit where it is established that the foreign national has met the requirements of the *IRPR*. One of the requirements which relates to financial resources is provided for in Section 220 *IRPR*. The officer shall not issue a study permit unless it can be shown that the applicant has "sufficient and available financial resources, without working in Canada," to, among others, pay their tuition and maintain themselves (and accompanying family

members). Vital to the interpretation of section 220 is the amount of financial resources required of the applicant to show they met the requirement in the *IRPR*. No guidance was provided (and rightly) in the *IRPR* for the determination of this amount. This now leads us to the IRCC's *Operational Instructions and Guidelines*. These are policy documents produced by the IRCC to guide officers in applying and interpreting the provisions of the *IRPR* as well as the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). As a courtesy, the IRCC has made these *Guidelines* publicly available to stakeholders e.g. immigration applicants and their representatives.

Part of the *Guidelines* relating to study permit provides a guide to assist officers in the assessing whether a study permit applicant meets the financial requirement in section 220 *IRPR*. It states in very clear terms:

> Students are required to demonstrate financial sufficiency for only the first year of studies, regardless of the duration of the course or program of studies in which they are enrolled. In other words, a single student entering a four-year degree program with an annual tuition fee of $15,000 must demonstrate funds of $15,000 to satisfy the requirements, and not the full $60,000 which would be required for four years. Officers should be satisfied however that the probability of funding for future years does exist (i.e., parents are employed); scholarship is for more than one year. (*Guidelines*, emphasis added)

Many study permit applicants and their representatives have often (and reasonably) relied on this guide in the preparation of their study permit applications. In fact, in *Ocran*, Justice Little noted that based on "the evidence in the record, it appears that the applicant prepared her visa application form based on one year's expenses, but in fact, her proposed program of studies would occur over two years" (at para 44). While the *Guidelines* are not law or binding on the court, the contents are publicly available and applicants relying on the contents in the course of the preparation of their study permit applications have a reasonable expectation that complying with the requirements in the *Guidelines* will suffice for the purpose of proving financial sufficiency in section 220 *IRPR*.

In fact, in some litigation before *Ocran*, the Federal Court had accepted compliance with the *Guidelines* as sufficient proof of the financial requirement in section 220 *IRPR*. For example, in *Lingepo v Canada (Citizenship and Immigration)*, 2021 FC 552 (CanLII), the applicant was a citizen of the Democratic Republic of Congo who applied for a study permit to undertake a program of study at Laval University. He sought judicial review of his study permit refusal related to financial requirements. The study permit application showed a financial statement with over US$67,440 in cash, and monthly income of US$4,500. The applicant argued that he had "demonstrated financial self-sufficiency well in excess of the standard prescribed by the visa office's Operational Instructions and Guidelines, which state that students must demonstrate financial self-sufficiency for their first year of study only, regardless of the length of their studies." (at para 5). In allowing the judicial review, Justice Russel accepted the argument relating to financial requirement. He noted that "the applicant filed bank account statements indicating that he had a cash balance of over US$67,440 and that his tuition was $21,063.18 per year. Even considering the costs of housing, living expenses, and transportation, on the face of it, the applicant appears to have the means to cover the first year of his education." (at para 20, emphasis added).

Similarly, in *Kouyaté v Canada (Citizenship and Immigration)*, 2021 FC 622 (CanLII), the applicant, a citizen of Guinea in West Africa, sought judicial review of her study permit refusal by the visa officer on the ground that she "did not have sufficient financial resources to cover the cost of her stay and her studies in Canada". In allowing the application for judicial review, Justice Shore noted that "the officer ignored the evidence showing that the applicant had met her financial obligations to the university institution for her *first year of her studies*." (at para 8, emphasis added). Also, in granting the judicial review application relating to study permit refusal in *Cervjakova v Canada (Citizenship and Immigration)*, 2018 FC 1052 (CanLII), Justice Noris noted that "[t]he applicant presented evidence that she had adequate funds to support herself and her family, especially considering that a policy manual states that the applicant's ability to fund the first year of the proposed course of studies is the primary consideration. (After that, an applicant need only demonstrate a probability of future sources of funding.)" (at para 14, emphasis added).

Thus, there is a preponderance of Federal Court jurisprudence pre-*Ocran* which interpret the financial requirement in section 220 *IRPR* in line with the IRCC's *Operational Instructions and Guidelines.* But the reverse was the case in *Ocran.*

In *Ocran*, Justice Little took the position that compliance with section 220 *IRPR* requires the study permit applicant to show that she had $58,000 funds which is the total estimated cost of her two-year college program. Justice Little faulted the applicant's preparation of her study permit application based on one year's expense. This position was adopted by Justice Favel in *Ibekwe*. The applicant in *Ibekwe* was a Nigerian citizen who was being sponsored by his father for a four-year undergraduate program at the University of Manitoba. The estimated expenses per year including tuition and living expenses was $34,100. However, the applicant submitted financial statement showing the existence of $75,992.34. Yet, the application was refused because the visa officer was "not satisfied that sufficient funds are available to support applicant's study plan in Canada". Justice Favel ruled in *Ibekwe* that the financial statements did not show sufficient funds.

Justice Favel cited *Ocran* in support of his position in *Ibekwe*, refusing the applicant's argument that he was required to show proof of funds for only the first year of study. Other cases cited by Justice Favel which predates *Ocran* were *Onyeka v Canada (Citizenship and Immigration)*, 2017 FC 1067 (CanLII) and *Kavugho-Mission v Canada (Citizenship and Immigration)*, 2018 FC 597 (CanLII). In *Onyeka*, Justice Mactavish was of the position that to grant a study permit, the visa officer would require evidence that the applicant had sufficient cash to fund *each* of the two years of his study in Canada. (para 12). Even without reference to *Ocran*, Justice Brown in *Bestar v Canada (Citizenship and Immigration)*, 2022 FC 483 (CanLII) tangentially expressed views clearly in line with *Ocran.* In *Bester*, Justice Brown noted that "the Applicant had a duty to show sufficient funds to cover her tuition each year she is here" (at para 20).

Thus, it appears from all indication that there is now two inconsistent Federal Court jurisprudence on the financial requirement for study permit set out in section 220 *IRPR*. Also, recent jurisprudence in this area seems to be gravitating toward the more onerous financial requirement for Canadian study permit applications as evident in *Ocran*. Using critical race theory, I will go further to argue that this is very unfair and discriminatory to study permit applicants from the Global South.

Critical Race Analysis of Financial Requirement for Canadian Study Permit

Critical Race Theory (CRT) was developed by legal scholars who were intent in understanding the lived experiences of people of colour in a judicial system that presented itself as objective, race neutral, and colour blind. Scholars are progressively utilizing CRT to analyse and identify implicit bias evident in what may appear on the surface to be race-neutral and colour-blind laws and policies. One thing that may not be immediately evident in *Ibekwe*, and which was observed by Steven Meurrens, a Vancouver-based immigration lawyer, is the fact that the case itself and all the cases that were cited by Justice Favel in support of his position relating to the interpretation of financial requirement in section 220 *IRPR* were cases involving litigants of African descent - *Ibekwe* (Nigerian), *Ocran* (Ghanaian), *Onyeka* (Nigerian) *Kavugho-Mission* (Congolese). In fact, a review of many Federal Court litigation relating to financial requirements regarding study permit applications will further reveal that majority of the cases involve study permit applicants from the Global South. To understand why this is the case, let us go back to the IRCC's *Operational Instructions and Guidelines.*

A critical review of the IRCC's *Operational Instructions and Guidelines* will reveal that it was deliberately designed to provide an easy pass for study permit applicants from a section of the global community who are considered low-risk applicants, and make it more stringent for others, who in essence are considered high risk by Canadian immigration officials. For the privileged low-risk applicants, the *Guidelines* grant the visa officers broad discretion to limit or even waive any evidence of financial requirement in proof of financial sufficiency in section 220 *IRPR*. On the other hand, when it comes to the classified 'high risk' applicants, the *Guidelines* rings a serious warning bell requiring "systematically verifying substantial history of funds and supplementary individual or family financial and employment documentation".

So, this bring us to a very important question: who are the low-risk and high-risk applicants? The *Guidelines* is very clear on former – they are applicants from countries exempted from the requirement to obtain a temporary resident visa to enter Canada. The *Guidelines* is even more specific, they are "[s]tudents from developed countries who are both visa exempt and from socio-economic backgrounds similar to Canada". These are citizens of Canadian visa exempt countries predominantly in Europe. To be clear, there is no Global South country on that list. In fact, for these applicants from developed countries mainly in Europe, they "might only be required to state their available funds" in their application without being required to produce any evidence in proof of the existence of the funds.

However, for study permit applicants from the 'high-risk' countries in the Global South, Will Tao, an Immigration lawyer based in Vancouver noted that IRCC visa officers would vet the proof of funds for their study visa application "with a fine-tooth comb." This explains why Federal Court litigation in this area is dominated by cases involving applicants from the Global South. So, how fair is our immigration system when a Canadian study visa applicant from Europe can easily meet the financial requirement in section 220 *IRPR* by simply stating in their application the amount of funds they possess for their study and no more. On the other hand, a Mr. Ibekwe from Nigeria who has produced a financial statement showing the availability of some cash deposit of $75,992.34 to commence a four-year program in Canada is deemed not to have met the requirement in section

220 *IRPR* unless he can show the availability of a cash deposit of "$136,400 CAD plus travel expenses" (at para 30), which is the total estimated cost of his four-year academic program in Canada?

This might be the appropriate point to ask yourself if you had $136,400 in your (or your parent's) bank account when you enrolled for your university studies. If section 220 *IRPR* appears race neutral on its face, a critical race analysis will show that its implementation is completely devoid of that, and this also extends to the judicial interpretation of that legislative provision as evident from recent Federal Court jurisprudence noted above.

The Way Forward

Clearly, Federal Court jurisprudence on section 220 *IRPR* is inconsistent. The position in *Ocran* and *Ibekwe* if allowed to stand would greatly disadvantage Canadian study permit applicants from the Global South who are already being adversely impacted by an immigration system that has been characterised by bias, discrimination, and racism. This fact was evident in the IRCC Anti-Racism Employee Focus Groups Final Report.

Since Federal Court decisions have persuasive but not binding authority on the court itself, a resolution of the diverse jurisprudence emerging from the court would require an appellate decision. For now, immigration lawyers arguing judicial review litigation before the Federal Court may need to explicitly draw the attention of the judge to the more reasonable jurisprudence evident in *Lingepo, Kouyaté* and *Cervjakova* as well as the IRCC's *Operational Instructions and Guidelines.* However, the ultimate resolution of this diverse jurisprudence may require an appellate decision. For this opportunity to arise, lawyers undertaking judicial review applications involving section 220 IRPR may do well to advance questions for certification which may open the door to a possible appellate pronouncement on this issue.

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