Canada: the evolution of electronic travel authorisations

Back to Immigration and Nationality Law Committee publications (/LPD/Human_Resources_Section/Immigration_Nationality_Law/Publications.aspx)

Sergio R Karas
Karas Immigration Law, Toronto
karas@karas.ca (mailto:karas@karas.ca)

Teresa Jiuling Li
Karas Immigration Law, Toronto
teresaj.li@mail.utoronto.ca (mailto:teresaj.li@mail.utoronto.ca)

The electronic travel authorisation (eTA) is an entry requirement for visa-exempt foreign nationals travelling to Canada by air. An eTA is linked to a traveller's passport and valid for up to five years. The eTA is a screening tool that is intended to minimise the risk of an inadmissible traveller flying to Canada. While useful for reducing processing times at ports of entry, eTAs can be difficult to obtain for some travellers with past immigration history or a record of minor offences.

In 2016, Canada began requiring temporary foreign visitors from visa-exempt countries to obtain eTAs before boarding their flights to Canada. The purpose of the eTA programme is to minimise the number of visitors who may be inadmissible when appearing at a port of entry. An eTA is linked to its holder's passport and allows its holder to board flights to Canada. Since its inception, the eTA programme has been refined through statutory amendments and litigation.

Section 11(1.01) of the Immigration and Refugee Protection Act (IRPA)[1] stipulates that travellers seeking to enter Canada must apply for an eTA, unless the regulations state otherwise. The eTA application must be submitted electronically through an online system and may be examined by an officer.

Section 7.1 of the Immigration and Refugee Protection Regulations (IRPR)[2] describes the applicability of the mandatory eTA requirement. According to subsection (1), visa-exempt foreign nationals who seek to temporarily stay in Canada must apply for an eTA before they fly to or transit at Canadian airports, unless they are otherwise exempt.[3] Subsections (2) and (3) describe the individuals who are exempt from the eTA requirement.[4] A complete list of exemptions can also be found at: **www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/entry-requirements-country.html#eta-exemptions (https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/entry-requirements-country.html#eta-exemptions)**.

In general, citizens of visa-exempt countries and United States permanent residents must obtain eTAs before they arrive in Canada by air. If they seek to enter by other means (ie, by land or sea), they do not need to obtain an eTA. The list of visa-exempt foreign nationals can be found in Part 9, Division 5 of the IRPR.[5]

Foreign nationals with valid Canadian Temporary Resident Visas (TRVs) do not need to obtain an eTA, since they are pre-screened at visa posts outside Canada.

In 2017, the Federal Government expanded the mandatory eTA requirement to include all citizens of Bulgaria, as well as select citizens of Brazil and Romania. Romanian nationals who either possess machine-readable passports or obtained valid eTAs before 1 December 2017 may now enter Canada by air with an eTA. Brazilian citizens may apply for an eTA if they either have held a TRV within the past ten years, or currently possess valid US non-immigrant visas. Individuals who do not belong to these categories are ineligible for an eTA and must obtain a TRV instead.

Individuals who applied for (or renewed) study or work permits do not need to submit separate eTA applications. Under Sections 12.04(5) and (6) of the IRPR,[6] an application for a work or study permit, or a renewal thereof, constitutes an application for an eTA.

To apply for an eTA, travellers must submit applications using an online form at **www.canada.ca/eta (http://www.canada.ca/eta)**. Applicants will be asked to provide the following information:

- biographic and employment information;
- passport and travel document information;
- background information, travel history and plan (if available);
- email address;
- additional details if the applicant is represented or advised in connection with the application; and
- credit or debit card information, to pay the CA$7 application fee.

The online application does not require or allow applicants to upload any documents. However, applicants may provide additional information at the end of the application form to facilitate processing. For instance, applicants may indicate an urgent need to travel.

Applicants will receive confirmation emails from Immigration, Refugees and Citizenship Canada (IRCC) after submitting their application. Usually, an application is approved within minutes and applicants will be notified by email. Some applications may take days to be processed or require the applicant to submit additional documents. In those cases, IRCC will email applicants within 72 hours of the initial submission and set out the next steps.

Enache v Canada (Citizenship and Immigration)[7] concerns an eTA applicant's right to procedural fairness, in case IRCC follows-up with an additional inquiry. In that case, based on allegations made in a poison pen letter, IRCC requested the applicant to submit supporting documents but did not mention the letter in their correspondence. The court granted the application for judicial review and held that IRCC cannot withhold information that may affect the outcome of the application, thereby depriving the applicant of the opportunity to respond.

Under Section 12.05 of the IRPR,[8] an eTA will remain valid for five years or until the traveller's passport or travel document expires, whichever occurs sooner. An eTA could also be invalidated if an officer cancels it; if a new eTA is issued with respect to the same passport; or if the traveller's country of citizenship is no longer visa-exempt. It is worth noting that a Romanian citizen, on a non-biometric passport and with an eTA issued before 1 December 2017, could still use that eTA based on the exceptions in Section 12.05(2) of the IRPR.[9]

In *Calin v Canada (Citizenship and Immigration)*[10] the applicants were Romanian citizens whose eTAs were invalidated during their flight to Canada, as the new regulation limiting visa exemption to only Romanian citizens with biometric passports took force during their flight. The applicants challenged the exclusion orders by alleging they would suffer irreparable harm if they returned to Romania. The court granted the motion for a stay of removal, although a motion for stay of removal is not an appropriate forum to argue irreparable harm. This case was given exceptional treatment because the applicants did not have the opportunity to apply for asylum. Therefore, the court's assessment of irreparable harm would not be an exercise of re-litigating an issue.

It appears that the fact situation in *Calin* will likely never arise again, as Section 12.5(2) of the IRPR now precludes IRCC from invalidating an eTA issued before 1 December 2017 and linked to a non-biometric Romanian passport.[11] However, *Calin* could still offer some guidance to litigants, in case they seek to challenge the exclusion orders following their eTA invalidation. Courts have consistently rejected using the stay of removal proceedings to re-litigate issues that should be tried in asylum or PRRA proceedings. *Calin* shows that, in cases where an applicant wishes to apply for asylum yet is precluded from doing so by an already-issued exclusion order, the applicant might have a chance of securing a stay of removal.

Section 12.07 of the IRPR stipulates that an officer may cancel an eTA if the holder becomes inadmissible or ineligible to continue holding such authorisation.[12] Conditions for inadmissibility and ineligibility are outlined in Sections 34 to 42 of the IRPA,[13] and Section 12.06 of the IRPR respectively.[14]

A significant number of eTA-related cases concern cancellations due to foreign nationals being found inadmissible for misrepresentation. Under Section 40(1)(a) of the IRPA,[15]misrepresentation is one of the grounds for inadmissibility. Section 44 of the IRPA stipulates that an officer may issue a report to the Minister's Delegate if he or she believes the foreign national is inadmissible.[16] If the Minister's Delegate finds the report to be well-founded, they may refer that report to the Minister for an admissibility hearing, unless stated otherwise.

In *Reyes Garcia v Canada (Citizenship and Immigration)*,[17] the applicant failed to disclose his previous criminal charge in his eTA application and was found to be inadmissible during his examination by the immigration officer at a port of entry. This case is informative because, firstly, it clarifies the process outlined in Section 44 of the IRPA.[18] The court held that although an immigration officer has to form an opinion of inadmissibility before issuing a report, they have no authority to make an inadmissibility finding. Also, an immigration officer has very little discretion *not* to issue a report: this discretion could only be exercised to avoid duplicative efforts for removal. Second, this case is significant because it is the first judicial review of an eTA cancellation decision after the Supreme Court of Canada ruling in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[19] The court held that, for issues of misrepresentation and cancellation, the reasonableness standard will continue to apply. For issues of procedural fairness, the court will continue applying the correctness standard.

Smith v Canada (Citizenship and Immigration) and *Moon v Canada (Citizenship and Immigration)* are two cases that can help us to better understand what constitutes misrepresentation in an eTA application.[20] In *Smith*, the applicant failed to disclose his dismissed criminal charges and expunged criminal records. He challenged the misrepresentation finding by claiming that he made an honest mistake. The court clarified that misrepresentation encompassed innocent failures to provide material information. Only under very exceptional circumstances, in which applicants 'honestly and reasonably believed they were not misrepresenting a material fact', could applicants refute the misrepresentation findings. Also, to support a finding of inadmissibility, the alleged misrepresentation did not have to be decisive or determinative of the result and only had to be important enough to affect the issuance of the eTA. Similarly, in *Moon* the applicant sought to challenge the refusal of her eTA application, in which her consultant answered the question about her criminal record incorrectly. By precedent, misrepresentation encompassed mistakes made by a third party without the applicant's knowledge. However, the court held that this case fell within a narrow exception from this rule. It was impossible, in this case, for the applicant to become aware of the misrepresentation as she did not know that her representative applied for the eTA on her behalf. The court therefore set aside the decision.

R v Lazar[21] held that misrepresentation in eTA applications could, in extreme cases, result in fines or imprisonment under Section 128 of the IRPA.[22] In that case, the applicant withheld his past deportation order and criminal record and obtained an eTA under a new name, received after entering into a marriage of convenience. He was sentenced to four and half months'imprisonment for the offence of misrepresenting or withholding material facts to induce an error in the administration of the *IRPA*.

Lazar was an exceptional case, since the applicant had a high degree of moral blameworthiness for deceiving the Canadian immigration authorities and making multiple 'planned and deliberate efforts to illegally enter Canada'.[23] This case warns of the more serious consequences of misrepresentation in an eTA application.

A foreign national with a valid eTA will only be examined at a port of entry. Once they are found inadmissible by misrepresentation, the Immigration Division will issue an exclusion order, unless the case falls within the exceptions for a deportation order in Section 229(3) of the IRPR.[24] *Li v Canada (Public Safety and Emergency Preparedness)* is a relevant case.[25] The applicant previously contravened the stipulations of the IRPA and later was found inadmissible for misrepresentation in her eTA application. The Immigration Division declined to issue a deportation order under the exception in Section 229(3)(b)[26] and issued an exclusion order instead. The Immigration Appeal Division later reversed this decision, and clarified that Section 229(3) of the IRPR offered no discretion to the Immigration Division.

In conclusion, the legislation and case law show that the eTA programme has undergone significant changes since 2016. As a result of its evolution, the programme has become increasingly intricate and convoluted in the eyes of applicants. Since the courts have adopted a broad approach to making findings of misrepresentation, there will likely be more cases of travellers being found inadmissible when appearing at a port of entry. Ironically, the purpose of the eTA program was to avoid this kind of situation. Therefore, practitioners and travellers should remain vigilant to the requirements and regulations of the eTA programme.

[1] SC 2001, c 27, s 11(1.01) [IRPA].

[2] SOR/2002-227, s 7.1 [IRPR].

[3] IRPR, supra, s 7.1(1).

[4] IRPR, supra, ss 7.1(2)— (3).

[5] IRPR, supra, s 190.

[6] IRPR, supra, ss 12.04(5)— (6).

[7] Enache v Canada (Citizenship and Immigration), 2019 FC 182.

[8] IRPR, supra, s 12.05.

[9] IRPR, supra, s 12.05(2).

[10] Calin v Canada (Citizenship and Immigration), 2018 FC 707 [Calin].

[11] IRPR, supra, s 12.5(2).

[12] IRPR, supra, s 12.07.

[13] IRPA, supra, ss 34—42.

[14] IRPR, supra, s 12.06.

[15] IRPA, supra, s 40(1)(a).

[16] IRPA, supra, s 44.

[17] Reyes Garcia v Canada (Citizenship and Immigration), 2020 FC 66.

[18] IRPA, supra, s 44.

[19] Canada (Citizenship and Immigration) v Vavilov, 2019 SCC 65.

[20] Smith v Canada (Citizenship and Immigration), 2018 FC 1020; Moon v Canada (Citizenship and Immigration), 2019 FC 1575.

[21] R v Lazar, 2019 NSPC 31 [Lazar].

[22] IRPA, supra, s 127—128.

[23] Lazar, supra, note 21 at para 38.

[24] IRPR, supra, s 229(3).

[25] Li v Canada (Public Safety and Emergency Preparedness),2018 CanLII 89028 (CA IRB).

[26] IRPR, supra, s 229(3)(b).

Back to Immigration and Nationality Law Committee publications (/LPD/Human_Resources_Section/Immigration_Nationality_Law/Publications.aspx)

Similar topics

Immigration and Nationality (/Search/Taxonomy.aspx?Taxonomy=Immigration and Nationality&TaxonomyUid=b9af7cf4-88e1-4f77-96c4-e6e7e2cfa864), Newsletters (/Search/Taxonomy.aspx?Taxonomy=Newsletters&TaxonomyUid=319939b0-dcbe-4420-b79e-30e32824ed07)