

CONDITIONAL PERMANENT RESIDENCE

The Dangers of Making Immigration Status
Conditional on Living with a Spouse

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Conditional Permanent Residence:

The Dangers of Making Immigration Status Conditional on Living with a Spouse¹

In October 2012 the federal government amended Canada's immigration regulations by introducing the status of "conditional permanent residence" for spouses.² Some spouses must, as a condition of their permanent residence status, co-habit continuously in a conjugal relationship³ with their spouse for a period of two years after they receive their permanent residence. The federal government has stated that the rationale for these proposed changes was to curb the incidence of marriage fraud. No conclusive evidence has been provided by the federal government of either i) the high incidence of marriage fraud, or ii) that the introduction of conditional permanent residence would reduce marriage fraud.

Prior to these amendments, all spousal applicants whose applications were approved by Citizenship and Immigration Canada ("CIC"), were provided with permanent residence status – no conditions attached; if the spouses split up, the sponsored spouse did not lose their permanent residence status. Now, even if the spousal application was genuine and there was no misrepresentation in obtaining this status, conditional permanent residents are at risk of losing their status in Canada if it is discovered by CIC that their relationship with their spouse has broken down within two years after receiving their permanent residence. This means that the immigration status of some sponsored spouses will be tied to remaining in their spousal relationship. There are two exceptions provided for in the legislation: i) the death of a spouse and ii) situations where the sponsoring spouse engages in abusive and/or neglectful behaviour.

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- 1 Written by Lobat Sadrehashemi, staff lawyer at the BC Public Interest Advocacy Centre, August 2014. The information contained in this article is not legal advice and it is not intended that this article should in any way replace legal advice from a qualified lawyer. Individuals with specific legal problems should seek advice from a qualified lawyer.
 - 2 See s. 72.1 of the *Immigration and Refugee Protection Regulations*
 - 3 Conjugal relationship is defined in CIC's Operational Bulletin 480 as "being a relationship where individuals are interdependent – financially, socially, emotionally, and physically – where they share household and related responsibilities, and where they have made a serious commitment to one another."

Who is impacted by the change?

Not every spousal applicant will have conditions tied to the permanent residence they receive. Only spouses in the following circumstances will receive a conditional permanent residence upon approval of their application by CIC:

- i. the spousal sponsorship application was filed on or after October 25, 2012; and
- ii. at the time that the application was filed, the spouses had been married, in a conjugal relationship or living in a common-law relationship⁴ for a period of less than two years; and
- iii. at the time that the application was filed the couple had no children in common.⁵

It is important to note the critical point in time to determine whether the conditional permanent residence will apply is at the time the application for permanent residence is filed. Even if by the time the application is approved the couple have been married for longer than two years or the couple now has a child in common, the conditional permanent residence status still applies to sponsored spouse because at the time they applied for permanent residence they met the conditions of being married less than two years and having no child in common.

The abuse/neglect exception

When the federal government first proposed these changes in March 2011, they heard from anti-violence against women and refugee advocacy organizations about the harmful impacts this change would likely have on women who were living with abusive spouses.⁶

The exception for sponsored spouses and children living with abuse and/or neglect is drafted broadly in the legislation. Abuse is defined as including any of the following:⁷

- i. physical abuse, including assault and forcible confinement
- ii. sexual abuse, including sexual contact without consent
- iii. psychological abuse, including threats and intimidation, and
- iv. financial abuse, including fraud and extortion

Neglect is defined as consisting of “the failure to provide the necessities of life, such as food, clothing, medical care or shelter, and any other omission that results in a risk of serious harm.”⁸

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- 4 Immigration and Refugee Protection Act defines common law as living in a conjugal relationship for a period of one year.
 - 5 See s. 72.1(2) of the Immigration and Refugee Protection Regulations
 - 6 See for example the brief of the Canadian Counsel of Refugees (CCR) – <https://ccrweb.ca/files/cprcommentsmar2012.pdf>
 - 7 See s.72.1(7)(a) of the *Immigration and Refugee Protection Regulations*
 - 8 See s.72.1(7)(b) of the *Immigration and Refugee Protection Regulations*

The exception can apply because of abuse and/or neglect by:

- i. the sponsor, or
- ii. a family member of the sponsor, whether or not this family member lives with the sponsored spouse.

In order for the exception to apply, the abuse and/or neglect could be directed at:

- i. the sponsored spouse, or
- ii. the child of either the sponsored spouse or the sponsor, or
- iii. another family member who habitually lives in the home.

When a sponsored spouse is raising the abuse/neglect exception they would have to be able to demonstrate two things:

- i. they were cohabiting continuously in a conjugal relationship with their spouse until the abuse/neglect happened; and
- ii. the sponsor was abusive and/or was neglectful.

The sponsored spouse should collect evidence about the abuse/neglect. Some examples may be their own notes about what happened in the relationship, a letter from a shelter or other support people, letter from a family member, police report, medical report, court documents, photographs, emails, voicemails, statements from any witness, etc. Evidence of the genuineness of the relationship up until the cohabitation stopped due to the abuse would also be required. Some examples may be photographs with the spouse throughout different periods of time, letters from friends and family, joint bank statements, rental agreements, etc. There are many situations where the type of evidence listed will not be available to the sponsored spouse. There is some material in the guidelines (Operational Bulletin 480) recognizing that sponsored spouses may have difficulties providing documentation of the abuse.

Enforcement

It is still too early to know how CIC and/or the Canada Border Services Agency (“CBSA”) intend to ensure that those who are subjected to the co-habiting condition respect the condition. CIC has stated that they may do random investigations of conditional permanent residents during the two year conditional period, and/or may rely on tips from others about breaches.⁹

The abuse/neglect exception can be raised at the time of an investigation by CIC or CBSA, or a sponsored spouse can pro-actively inform CIC that she has left the home and is requesting an exception to the condition for abuse. Sponsored spouses should obtain legal advice if they are thinking about making this call or are subject to an investigation by CIC. It is important to gather evidence to support the claim that the relationship was genuine and that there was abuse or neglect in the home.

9 See Operational Bulletin 480

It is too early to know how CIC will apply the exception. The definition has been drafted in a broad way. Given that it is too early to understand the way in which CIC and CBSA will undertake their investigations or the manner in which individual officers are applying the abuse/neglect exception, it is difficult to advise sponsored spouses in this situation.

Moreover, although the conditional nature of the permanent residence disappears after the two year period, those who were subjected to it may be investigated after the fact for violations of the condition during the two-year period. There is no time limit set out by which the compliance with the condition investigation must be complete.¹⁰ With no time limit on investigations, it may be difficult to preserve, or obtain evidence of abuse or, conversely, compliance.

If an officer determines that the condition has been breached, i.e. the sponsored spouse did not live with the sponsor for a two-year period following the receipt of their permanent residence status and the abuse/neglect exception did not apply to them, the officer will write a report and refer the matter to a hearing at the Immigration Division. The Immigration Division must make a determination as to whether the sponsored spouse did in fact breach the condition, making them inadmissible to Canada. The exception to the condition could be raised here as well. If the Immigration Division finds that the sponsored spouse did breach the condition and no exception applied, they would be entitled to an appeal at the Immigration Appeal Division. At the Immigration Appeal Division the decision-maker could consider the humanitarian factors in deciding whether to allow the sponsored spouse to maintain their permanent residence status. A negative decision from the Immigration Appeal Division can be reviewed at the Federal Court by way of judicial review.

Sponsored spouses subject to an admissibility hearing or an appeal at the Immigration Appeal Board should obtain legal advice. Legal Services Society will likely fund these types of hearings.

The abuse/neglect exception doesn't protect victims of abuse

In the course of my immigration and refugee legal practice, I have worked with many women who were living with an abuser. In my view, the broadly-defined exception is not enough – the damage is done by making a person's immigration status conditional upon living with a spouse. The threat of deportation has been consistently documented as a tool used by abusers to keep their victims quiet about their violence. Making permanent residence conditional puts vulnerable women and children at greater risk of abuse. It creates additional barriers to leave an abusive spouse. Some won't know about the abuse and neglect exception and will be led to believe that they will be deported if they leave during the two-year conditional period; others will know about it but will not be willing to risk their status by asking for an exemption from two-year period from an immigration officer. It is bad public policy and law to tie immigration status to remaining with a spouse.

10 See the April 2012 submission of the Canadian Bar Association where they recommend that there is a time limit on compliance investigations included in the legislation – <http://www.cba.org/cba/submissions/pdf/12-24-eng.pdf>

Tying immigration status to remaining in a spousal relationship poses a number of possible risks to vulnerable groups, even with a broadly-defined exception for abuse and neglect in the legislation. The following are just four examples of reactions that I have heard during the course of my immigration practice since the amendments came into effect in October of 2012:

i. “Immigration told me I had to live with him for two years or I could lose my status.”

When a sponsored spouse receives her conditional permanent residence, she is told by the CIC officer that it is a conditional status, that as a condition of her immigration status she must live with her spouse. The overarching message these spouses receive is that for two years they must live with their spouse. With language and cultural barriers, it is not surprising that some may not understand that there is an exception for abuse and/or neglect in the legislation – whether they are informed about the exception or not.

ii. “My husband told me if I leave he will tell them that I made up the abuse – they won’t believe me and I will be deported.”

The abuser can use the threat of deportation as a way to have the spouse remain tied to their violence. Even if the spouse knows about the abuse and neglect exception, her abuser could threaten to tell the officer she is lying about the abuse. The abuser could also threaten to tell the officer that their whole relationship is a fraud. If the condition is breached, the onus is on the victim of the abuse to demonstrate that the relationship was genuine until the abuse/neglect happened and that there was in fact a situation of abuse/neglect. It is only the abused spouse that is at risk of losing her status.

iii. “I will wait the two years out – I don’t want to take any risk that I could lose my status.”

Some women will know about the abuse and neglect exception but will not want to take the risk to leave and jeopardize their status and/or their children’s status in Canada. There is no guarantee that a CIC officer will agree that they fit within the exception. Unwilling to risk their secure immigration status, a sponsored spouse may choose to remain living with the abuser. The possibility of deportation creates an additional barrier to leave.

iv. “I heard that if you don’t live with your spouse they can deport you.”

There will be some cases where spouses whose permanent residence status is not subject to any condition will remain in an abusive home for fear of losing their status. Some women will be given full permanent residence at the time the approval and yet will have heard from their community, their settlement worker, their neighbour or their abuser that they must live with their spouse or else they will be deported. There is, and will continue to be, misinformation about conditional permanent residence; people share information who do not understand the legislation – do not understand to whom it applies or that there is an exception for abuse and/or neglect.

Challenging Conditional Permanent Residence Status

In March 2011 the federal government first gave notice of its plan to introduce conditional permanent residence for some spouses. A year and half later these amendments were put into law. In April and May 2014 a Standing Committee on Citizenship and Immigration was held to study a report on “Strengthening the Protection of Women in our Immigration System”; the federal government repeatedly heard from witnesses that the conditional permanent residence amendments put women at risk and should be abolished.¹¹

We need to challenge these changes to spousal sponsorships that put some of the most vulnerable at risk. The federal government has said that the introduction of conditional permanent residence is about protecting the integrity of our immigration system – to prevent marriage fraud. Despite this claim, there has not been any conclusive evidence presented about either the high incidence of marriage fraud or that this change would reduce the occurrence of marriage fraud.

Right to life, liberty, and security of the person in section 7 of the Charter

The conditional permanent residence provision is overbroad. It applies to those who entered into their relationships in good faith and had genuine spousal relationships. It will apply to some sponsored spouses who want to leave because of abuse and/or neglect and others whose relationships have broken down before the two year conditional period has ended.

There is no way to make a conditional status a safe option for spouses living with abuse; it puts them in an inherently dangerous position. The legislated exception requires sponsored spouses to prove to a CIC officer that their relationship was genuine and that abuse and/or neglect took place. Given that the application of the exception is subject to the discretion of a CIC officer, some sponsored spouses will be unwilling to leave the abuse and put their immigration status at risk. The imposition of this condition to co-habit with their spouse in order to maintain their immigration status increases the risk of physical harm and psychological stress.

Even in cases where there is no abuse it would violate a person's right to make fundamental choices about their personal life to be forced to live with their spouse in a conjugal way when they no longer want to, in order to maintain the status of the sponsored spouse. For spouses in this situation there is no exception provided for in the legislation; if their relationship with their sponsor breaks down and they stop living with their sponsor in a conjugal way, they will lose their status. The imposition of a condition to remain in a conjugal relationship with a spouse in order to maintain immigration status is an intrusion into a core aspect of one's security of the person and therefore a potential violation of section 7 of the Charter.

11 See testimony of the witnesses here: <http://www.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Cmte=CIM&M&Stac=8237399&Language=E&Mode=1&Parl=41&Ses=2>

Equality rights in section 15 of the Charter

Sponsored spouses in abusive relationships are predominantly women of colour, an already disadvantaged group. Women in abusive relationships are at greater risk of increased physical and psychological harm due to the introduction of these amendments.

By making the status of some of these sponsored spouses conditional, the federal government has imposed a further barrier on these women and their children from being able to live free from abuse. This is a potential violation of the equality guarantees in the Charter.