

Not just the luck of the draw:
***Explaining Leave Grant Rates at the
Federal Court***

Presenting today:

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The leave test

“...unless it is plain and obvious that the applicant would have no reasonable chance of succeeding...”

Saleh v Canada (MEI), [1989] FCJ No 825 (TD).

“...whether or not a fairly arguable case is disclosed...”

Bains v Canada (MEI) (1990), 47 Admin LR 317 (FCA).

“...if there appears to be any possibility of the applicant succeeding at the hearing...”

Virk v Canada (MEI) (1991), 13 Imm LR (2d) 119 (FCTD).

Previous studies

Ian Greene & Paul Shaffer, “Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?” (1992) 4:1 Int'l J Refugee L 71.

Jon B Gould, Colleen Sheppard & Johannes Wheeldon, “A Refugee from Justice? Disparate Treatment in the Federal Court of Canada” (2010) 32:4 Law & Pol'y 454.

Don Butler, “Would-be immigrants face uncertain justice”, Ottawa Citizen (26 November 2011).

Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw? (2012) 38 Queen's LJ 1.

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- Low leave grant rate: 16%
- Wide individual variability: 1% (Crampton, CJ) v 78% (Shore, J)
- Much higher ultimate JR grant rate (where leave is granted): 39%

Dataset – 50 cases (2005-2010)

Outcome

8/50 Leave granted (16%)
42/50 Leave denied (84%)

City of filing

28 filed in Toronto
18 filed in Montreal
2 filed in Vancouver
1 filed in Edmonton
1 filed in Calgary

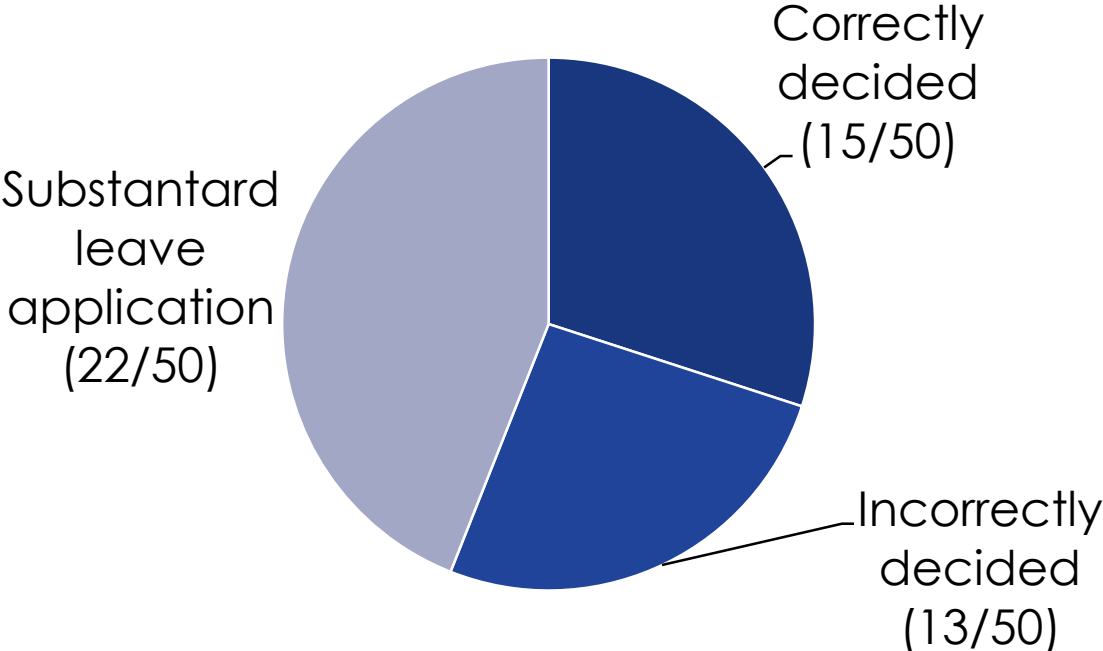
Family composition

13 single female
27 single male
10 couples or with children

Country of origin (28)

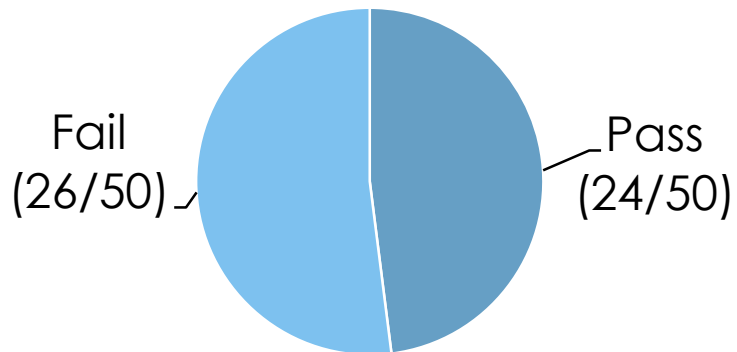
Mexico (9)
India, Columbia (4)
Israel/West Bank, China, Haiti (3)
Angola, Bangladesh, Brazil, Dominican Republic, El Salvador, Ghana, Guyana, Kenya, Kosovo, Mauritania, Nigeria, Pakistan, Paraguay, Peru, Romania, Sri Lanka, Saint Vincent and the Grenadines, Tunisia, Ukraine, Uruguay, Zimbabwe

RESULTS

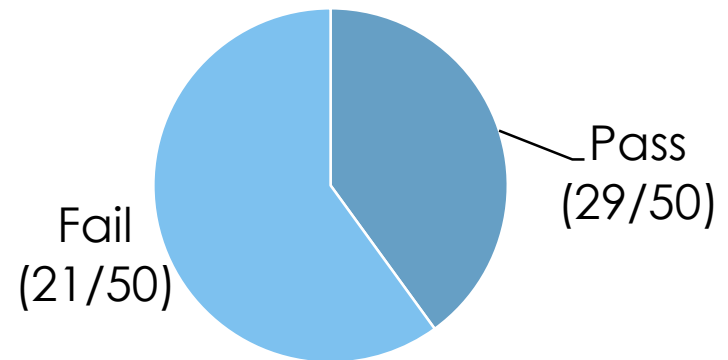


Quality of leave applications

Quality of memoranda



Quality of affidavit



Shortcomings of Leave Applications

Shortcomings of Substance of Affidavits/Memoranda	Number of Files (out of 50)	Percentage
Failed to adequately recreate record	21	42%
Failed to provide sufficient summary of facts	18	36%
Memoranda failed to correctly or completely identify legal issues	17	34%
Failed to link the facts and evidence to legal issues	20	40%
Failed to provide sufficient legal research and analysis	26	52%
Little or no discussion of leave test	33	66%
Provided no Reply Memorandum	39	78%

Professional responsibility tips for leave applications

1. **Form** does mean something: number paragraphs; use headings; append exhibits properly.
2. **Affidavits** are important: include only facts not argument; provide a full record through exhibits.
3. For both affidavits and memos, provide a sufficient summary of the **facts**.
4. Identify the **issues** as precisely as you can.
5. **Link** issues with facts and evidence
6. Do the **legal research**. Don't provide boilerplate.
7. Don't take for granted the **leave test**.
8. Provide a **Reply**.
9. Take the initiative and seek out **continuing legal education** on administrative law or legal writing. Seek out **help** when you need it.
10. **Start early** and review your case load and how you manage time.