

Overview of Canadian Immigration Law and Policies on HIV

The Immigration and Refugee Protection Act has the following provisions on medical inadmissibility:

Section 38. (1) A foreign national is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health;
- (b) is likely to be a danger to public safety;
- (c) might reasonably be expected to cause excessive demand on health or social services.

The first two grounds of danger to public health or public safety are rarely used against persons with HIV. This would only be likely if there is evidence the HIV positive person is engaging in high risk behaviour that endangers other persons, such as sharing contaminated needles or engaging in unprotected sex, and is refusing to cooperate with public health authorities.

Most HIV positive persons are refused because of the third ground of excessive demand on health or social services. Presently, “excessive demand” is usually defined as exceeding \$15,000 of publicly funded health care costs over the next 5 years, but the assessment time can be extended to 10 years (and costs to \$30,000), if relevant to the medical condition. Not everyone who is HIV positive will be found medically inadmissible because of “excessive demand”. The current guidelines for assessing HIV cases state any applicant receiving anti-retroviral therapy (ARV) is inadmissible because of “excessive demand”. Persons not on ARV are assessed according to their CD4 lymphocyte counts.

There are significant differences in law and policy depending on the type of immigration status. The 3 major types of status are:

- Temporary Resident
- Applicant for Permanent Residence
- Refugees and protected persons

A Temporary Resident will be in one of 3 categories:

- Work Permit
- Study Permit
- Visitor

The medical examination requirements for visitors are set out at <http://www.cic.gc.ca/english/visit/medexams.html#occupational>
Foreign nationals who are medically inadmissible as permanent residents may still be admissible as temporary residents.

Work Permit Holders

Generally, no medical examination is required for work permits of less than 6 months duration. However, a medical examination is required if an applicant is to work in an occupation in which protection of public health is essential.

Section 30(1) of the *Immigration and Refugee Protection Regulations (IRPR)* requires certain temporary foreign workers pass a medical examination before working in Canada.

Section 30(1)(b) *IRPR* sets out occupations essential to protection of public health

- Workers in health sciences
- Teachers of primary or secondary schools or other teachers of small children
- Domestic workers / Live-in caregivers
- Workers who give in-home care
- Day nursery employees
- Agricultural workers from designated countries/territories

Section 30(1)(c) *IRPR* requires that all foreign nationals who intend to be in Canada for more than 6 months and have resided in a designated country for more than 6 months within the year preceding arrival in Canada must pass a medical examination. This examination includes testing for HIV. The designated country/territory list includes most countries with exceptions such as countries in Western Europe, the U.S.A., Australia, New Zealand, Japan. You can see the complete list at <http://www.cic.gc.ca/english/visit/dcl.html>

Tourists and Students

Generally tourists and students who are coming to Canada for less than 6 months do not require a medical examination. A medical examination is required if an applicant has resided or stayed in a designated country/territory for six consecutive months or more during the one year immediately preceding the date of seeking entry to Canada.

Applicants for Permanent Residence

Citizenship and Immigration Canada (CIC) has implemented HIV serological testing since January 15, 2002 for all individuals aged 15 years and older who apply for permanent residence.

There are two basic types of applications for permanent residence:

- Economic Class Applicants
- Family Class Applicants

Economic Class Applicants

Economic Class applicants are not exempt from medical inadmissibility due to excessive demand. The Economic Class includes:

- Skilled Workers
- Self-employed Persons
- Entrepreneurs
- Investors

HIV positive Economic Class applicants who have been refused because of a determination of medical inadmissibility due to excessive demand may:

- Apply for a Temporary Resident Permit
- Apply to Federal Court for leave for judicial review of the medical inadmissibility decision

Family Class Applicants

Canadian citizens or permanent residents of Canada may sponsor their:

- Spouse (including same-sex spouses if legally married in one of the Canadian jurisdictions that recognizes same-sex marriage)
- common-law partner (a same-sex or opposite-sex partner they have lived with for at least one continuous year in a conjugal relationship)
- conjugal partner (a same-sex or opposite-sex partner they have been unable to live with for one continuous year in a conjugal relationship but have been in a conjugal relationship with for at least one year)
- Dependent child
- Mother or father
- Grandparents

Certain Family Class members are exempt from medical inadmissibility due to excessive demand. These are:

- spouse
- common-law partner
- conjugal partner
- child

But not:

- father or mother
- grandfather or grandmother

An HIV positive Family Class member who is not exempt still has some options. These include:

- the Canadian sponsor can appeal the refusal to the Immigration Appeal Division (IAD) of the Immigration & Refugee Board
- the applicant can apply to Citizenship & Immigration Canada for a Temporary Resident Permit (TRP)

- the applicant can apply to Federal Court for leave for judicial review of the medical inadmissibility decision

Filing an appeal with the IAD is probably the best of the options. The grounds for an appeal to the IAD are:

- Mistake of fact or law
- Humanitarian and compassionate considerations that warrant the granting of special relief. This is significant because it gives a broader authority for decision-making to the IAD than either the visa officer initially assessing the application or a Federal Court judge on a judicial review application would have.

Temporary Resident Permits

A Temporary Resident Permit (TRP) is a document that allows inadmissible or removable persons to legally enter into and/or remain in Canada for a temporary period.

A TRP is issued under discretionary authority. No applicant has the right to receive a TRP.

The applicant must show compelling reasons—either humanitarian and compassionate or in the national interest. The guidelines used by visa officers to assess TRP applications can be found at <http://www.cic.gc.ca/manuals-guides/english/op/op20e.pdf>

A TRP is valid for up to 3 years and may be renewed. A TRP holder can obtain permanent residence after 3 years on TRP. Because a TRP is discretionary it can be cancelled at any time and the holder deported. There is no discretion involved in granting permanent residence to persons who meet the requirements of the permit holders class. Persons who remain continuously in Canada on a permit for the specified time and do not become inadmissible on other grounds will be granted permanent residence.

Even if a person knows they are HIV positive and will be medically inadmissible because of excessive demand, they cannot directly apply for a TRP. You must first file a permanent residence application and wait until after you are determined to be medically inadmissible before you can file a TRP.

In most provinces and territories, immigrants who are found medically inadmissible and issued a TRP are not eligible for publicly insured health services.

Refugees and Protected Persons

Canada distinguishes between refugees making claims in Canada and those outside of Canada in its immigration legislation and has created separate rules for the two kinds of refugee claimants. Persons can make a refugee claim in

Canada either at a port of entry (airport or border crossing) when they first arrive or at a Canada Immigration Centre. Persons who make refugee claims at a Canadian visa office outside of Canada may be excluded as medically inadmissible excessive demand as well as for danger to public health or safety.

Protected persons, Convention refugees or a person in similar circumstances are exempt from medical inadmissibility due to excessive demand on health or social services. After a refugee claimant has been determined by the Refugee Protection Division to be a Convention refugee or a protected person they are sent a Notice of Decision and can file their permanent residence application from within Canada. Persons who are failed refugee claimants may apply for the Pre-Removal Risk Assessment before they are removed from Canada. If they are successful, they will be protected persons.

Protected persons and Convention refugees will still be required to take the standard medical examination but cannot be excluded from permanent residence because of their HIV status unless they are found to be a danger to public health or public safety.

Refugee claimants are covered under the Interim Federal Health Program and not under the Medical Services Plan while their claims are waiting for final determination. This program is not as extensive as the MSP and is basically designed to cover emergency medical services.

HIV positive refugee claimants may base their refugee claim on their HIV status. The United Nations Convention on Refugees does not explicitly list HIV status as one of the five grounds for claiming refugee status. However, there is case law that one of the five grounds, "membership in a particular social group" refers to groups defined by an "innate or unchangeable characteristic" such as gender, linguistic background, or sexual orientation. HIV positive status certainly qualifies as being an unchangeable characteristic and has been found to constitute membership in a particular social group.

This may be either their only basis for claiming refugee status or may be in addition to other grounds for claiming refugee status. For example, someone who is a well-known AIDS activist could claim refugee status both because of political opinion as well as their HIV status. Someone who is gay could also claim refugee status because of their sexual orientation in addition to their HIV status. It is to a claimant's advantage to claim more than one ground of persecution if there is evidence to support this.

Persons who have a well-founded fear of persecution because of their HIV status should be determined to be Convention refugees. Persons whose only fear for returning to their own country is because there is not the same level of health services available to them as in Canada would not be determined as Convention refugees.

From what countries have HIV-positive people made successful refugee claims?

The published decisions from the Refugee Protection Division include claims from:

- Mexico
- Chile
- Peru
- Poland
- Philippines
- Singapore
- Ecuador
- Egypt
- Uganda
- Antigua
- St. Vincent
- Jamaica
- Vietnam

Just because there has been a previous successful refugee claim based on HIV status from a certain country does not mean that all HIV positive refugee claimants from that country will be accepted as Convention refugees. Each claim must be determined on its own merits.