Chapter Four

Adoptions

A child who has been adopted by a permanent resident or a Canadian citizen may qualify as a member of the family class pursuant to paragraph 117(1)(b) of the *Immigration and Refugee Protection Regulations* ("IRP Regulations") as a dependent child of the sponsor. The *Immigration and Refugee Protection Act* (IRPA) also allows for adoptions of persons 18 years of age or older[1] in prescribed circumstances. As well, a child whom the sponsor intends to adopt may also quality as a member of the family class.[2]

Section 4 of the IRP Regulations, the "bad faith" provision, applies to applicant spouses, common-law partners, conjugal partners and adopted children. With respect to an adopted child, the IRP Regulation states that a foreign national shall not be considered an adopted child if the adoption is "not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act." Under the former Regulations pursuant to the *Immigration Act*, in order to meet the definition of "adopted", a person had to show that the adoption creates a "genuine parent-child relationship" and the adoption was not for an "immigration purpose".

Adoption of minors

IRP Regulations

> 3(2) For the purposes of these Regulations, "adoption", for greater certainty, means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship.
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> 117(2) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of that adoption unless it was in the best interests of the child within the meaning of the Hague Convention on Adoption.
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> 117(3) The adoption referred to in subsection (2) is considered to be in the best interests of a child if it took place under the following circumstances:
>
> (*a*) a competent authority has conducted or approved a home study of the adoptive parents;

[1] IRP Regulation 117(4). It should be noted that the adult adoptee must still meet the definition of "dependent child" at IRP Regulation 2, and IRP Regulation 117(1)(b).

[2] IRP Regulation 117(1)(g).

> (*b*) before the adoption, the child's parents gave their free and informed consent to the child's adoption;
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> (*c*) the adoption created a genuine parent-child relationship;
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> (*d*) the adoption was in accordance with the laws of the place where the adoption took place;
>
> (*e*) the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the child's province of intended destination has stated in writing that it does not object to the adoption;
>
> (*f*) if the adoption is an international adoption and the country in which the adoption took place and the child's province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have stated in writing that they approve the adoption as conforming to that Convention; and
>
> (*g*) if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention on Adoption, there is no evidence that the adoption is for the purpose of child trafficking or undue gain within the meaning of that Convention.

In *Sertovic*,[3] the issue to be decided was whether the adoption had created a legal parent-child relationship and severed the pre-existing legal parent-child relationship, as required by section 3(2) of the IRP Regulations. According to the adoption laws of Bosnia-Herzegovina, the adoption of the applicant was considered to be an "incomplete adoption" because the child was over the age of five at the time of the adoption. The effect of the law in that country is that the adoptive parents gain the full rights of parents but the natural parents' rights are not affected. The legal relationship between the applicant child and her mother, the only surviving parent, had not been severed. Although the panel found that the appellant and her spouse had been actively involved in parenting the applicant, the appeal was dismissed because there was no severance of the legal parent-child relationship between the child and her natural parent.

Regulation 117(3) sets out the criteria that must be met in order to demonstrate that an adoption of a child under 18 was in the best interests of the child in accordance with s. 117(2). The criteria are: a competent authority has conducted or approved a home study of the adoptive parents; the child's parents must have given their free and informed consent to the child's adoption; the adoption created a genuine parent-child relationship; the adoption was in accordance with the laws of the place where the adoption took place; the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time of adoption, the competent authority of the child's province of intended destination has issued a no-objection certificate; if the adoption is an international one and the

[3] *Sertovic, Safeta S. v. M.C.I.* (IAD TA2-16898), Collins, September 10, 2003.

country in which the adoption takes place and the child's province of intended destination are parties to the Hague Convention on Adoption, the competent authorities of each give written approval of the adoption as conforming to the Convention; and if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention, there must be no evidence that the adoption is for the purpose of child trafficking or undue gain within the meaning of that Convention.

Refusals under the IRPA are most often based on s. 117(2) and 117(3)(c) and 117(3)(d) of the IRP Regulations. The key issue in these appeals is whether the adoption created a genuine parent-child relationship. Whether the adoption was in accordance with the laws of the place where the adoption took place remains an important issue. The case law which developed under the old *Immigration Act* concerning genuine parent-child relationships continues to be relevant under the IRPA. Under the IRPA, even if the Immigration Appeal Division finds that there is a genuine parent-child relationship and the adoption was in accordance with the laws of the place where the adoption occurred, the panel will have to be satisfied that all of the other requirements in Regulation 117(3) have been met. If all of the requirements are not met, the child cannot be considered a member of the family class.

Genuine Parent-Child Relationship

The determination of whether or not a particular adoption creates a genuine parent-child relationship is a question of appreciation of all the facts and circumstances surrounding the adoption.

The Immigration Appeal Division, in *De Guzman*,[4] examined the issue of "genuine relationship of parent and child" as follows:

> The question then is, what constitutes a genuine relationship of parent and child? Or more appropriately, what are the factors that could be considered in assessing the genuineness of a parent-child relationship in respect of an adoption within the meaning of the *Immigration Regulations, 1978?*
>
> The answer to such a question may appear to be intuitive, however, upon reflection, like all considerations involving human conditions, the answer is inherently complex. Nonetheless, guidance may be found in the commonly accepted premise that generally parents act in the best interest of their children.[5]

De Guzman identified some of the factors used in assessing the genuineness of a relationship of parent and child as follows: [6]

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[4] *De Guzman, Leonor G. v. M.C.I.* (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995.

[5] *Ibid.*, at 5.

[6] *Ibid*., at 6.

- motivation of the adopting parent(s);[7]
- to a lesser extent, the motivation and conditions of the natural parent(s);
- authority and suasion of the adopting parent(s) over the adopted child;
- supplanting of the authority of the natural parent(s) by that of the adoptive parent(s);
- relationship of the adopted child with the natural parent(s) after adoption;[8]
- treatment of the adopted child versus natural children by the adopting parent(s);
- relationship between the adopted child and the adopting parent(s) before the adoption;
- changes flowing from the new status of the adopted child such as records, entitlements, etc., and including documentary acknowledgment that the child is the son or daughter of the adoptive parent(s); and
- arrangements and actions taken by the adoptive parent(s) as they relate to caring, providing and planning for the adopted child.

In other IAD decisions, the following additional factors have also been examined:

- the nature and frequency of continued contact, if any, between the child and the natural parents;
- the viability, stability and composition of the adoptive family;
- the timing of the sponsorship of the adopted child's application in the context of the particular facts; [9]
- the composition of the adopted child's biological family, including the cultural context of the family (for example,

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[7] In *Dizon, Julieta Lacson v. M.C.I.* (IAD V98-02115), Carver, September 1, 1999, the panel was of the view that in a case involving the unusual circumstance of grandparents adopting children from living and caring biological parents, it is extremely important that a credible motivation for the adoption be provided. See too *Kwan, Man Tin v. M.C.I.* (F.C.T.D., no. IMM-5527-00), Muldoon, August 30, 2001. The fact that the adoptive mother wanted a child in her home concerns her motivation to enter into an adoption, but does not establish that a genuine relationship existed.

[8] Visa officers sometimes express concern when the applicant continues to reside with the natural parents after the adoption. For a discussion of this issue, see *Toor, Gurdarshan Singh v. M.C.I.* (IAD V95-00959), McIsaac, February 4, 1997; *Gill, Gurmandeep Singh v. M.C.*I. (IAD W95-00111), Wiebe, October 17, 1996, where the applicant had continued contact with his biological parents, although he did not reside with them; *Molina, Rufo v. M.C.I.* (IAD T98-04608), Kelley, November 8, 1999; *Rajam, Daniel v. M.C.I.* (IAD V98-02983), Carver, November 5, 1999; and *Minhas, Surinder Pal Singh v. M.C.I.* (IAD M98-10540), Colavecchio, December 15, 1999. The relationship between the natural parents and the child after adoption is often relevant, although it is not determinative, *Kwan, supra,* footnote 7. See also *Ly, Ngoc Lan v. M.C.I.* (IAD T99-04453), Kelley, June 22, 2000 which, in part, discusses the issue from the child's perspective. In *Sai, Jiqiu (Jacqueline) v. M.C.I.* (IAD TA0-11403), Michnick, August 22, 2001, the panel found that evidence from the child's perspective must be evaluated in light of the particular circumstances of the individual adoption.

[9] With regard to the timing of the sponsorship, while delay in sponsorship sometimes attracts a negative inference, there may be valid reasons for the delay: *Sohal, Talwinder Singh v. M.C.I.* (IAD V95-00396), Clark, May 23, 1996. In addition, a prospective filial relationship is not sufficient; there must be evidence of a genuine parent and child relationship at the time of the hearing: *Capiendo, Rosita v. M.C.I.* (IAD W95-00108), Wiebe, August 18, 1997.

whether or not the child is an only child or has siblings of the same sex);

- the viability and stability of the biological family;
- the age of the child at the time of the adoption;
- depending on the age of the child, the extent of the child's knowledge of the adoptive family;
- the age difference between the child and the adoptive parents;
- previous attempts by the biological family to immigrate to Canada;
- that the child's name had not been changed;
- that the adoption was not generally known outside the child's natural family;
- the sending of money and gifts by the adoptive parent(s);
- plans and arrangements for the child's future.

The Immigration Appeal Division must consider all the evidence in context. Where the Immigration Appeal Division failed to consider facts that were not contradicted and showed that a genuine parent-child relationship existed, the Court held that the Immigration Appeal Division ignored the evidence. "…[t]he Board in failing to consider the context, the distance and the separation, and particularly the way the applicant made efforts to create and sustain the parent-child relationship, made a reviewable error."[10]

The Court found the visa officer's conclusion that there was no genuine parent-child relationship unreasonable where it was not supported by the preponderance of the evidence and was based solely upon an inference which was equally consistent with another conclusion[11].

In assessing the genuineness of the relationship created by the adoption, no guidance is provided in the definition of "adopted" as to whose intentions should be looked at (those of the adoptive parents, the natural parents or the child. The Immigration Appeal Division generally considers all of the circumstances of the case, including the demonstrated intentions and declarations of the both natural and adoptive parents where available. In the case of young children, the Federal Court has found their intentions may not be a proper consideration.[12] Testimony of other witnesses, both ordinary and expert may assist the Immigration Appeal Division in its assessment.[13]

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[10] *Pabla, Dial v. M.C.I.* (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000.

[11] *Sinniah, Sinnathamby v. M.C.I.* (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822.

[12] See, by analogy, *Bal, Sukhjinder Singh v. S.G.C.* (F.C.T.D., no. IMM-1212-93), McKeown, October 19, 1993.

[13] In *Dooprajh, Anthony v. M.C.I.* (IAD M94-07504), Durand, November 27, 1995, the Appeal Division was favourably impressed by the testimony and the Adoption Home Study Report of a social worker for Quebec's Secrétariat à l'adoption internationale.

The Immigration Appeal Division has made findings in many cases that the sponsor and the applicant have a genuine relationship but that the relationship in not one of parent and child.[14]

Determining the Legal Validity of the Adoption

Most adoption cases that come before the Immigration Appeal Division involve foreign adoptions. Where the refusal is based on the legal validity of the adoption, the sponsor must establish that the adoption is valid under the laws (sometimes under the customs) of the jurisdiction where the adoption took place. This involves presenting evidence of the content and effect of the foreign law or custom.[15] For example, in the case of Indian adoptions, that evidence is usually the *Hindu Adoptions and Maintenance Act, 1956* (HAMA).

In addition to the actual foreign law, sponsors may also submit other forms of evidence such as expert evidence, doctrine, foreign case-law, declaratory judgments, decrees and deeds.

In determining whether an adoption is legally valid as required by IRP Regulation 117(3)(d), it is important to understand how foreign law is proved and it is necessary to identify and understand the principles of conflicts of laws which touch upon the effect of foreign laws and judgments on Canadian courts and tribunals.[16]

Foreign Law

Glossary of terms

The following terms are used in reference to foreign law:

[14] In *Reid, Eric v. M.C.I.* (F.C.T.D., no. IMM-1357-99), Reed, November 25, 1999, the Court noted that it is not unusual to see an older sibling provide support, love and care of a younger sibling but that this does not convert the relationship into one of parent and child. Another example is *Brown, Josiah Lanville v. M.C.I.* (IAD T89-02499), Buchanan, June 23, 1999, where the member concluded that the sponsors, the uncle and aunt of the applicant, had a well meaning intention to extend their financial support to their niece by sponsoring her to Canada but that the relationship between them was not that of parents and child.

[15] For an example of cases where the adoption in question was proven by custom, see *Bilimoriya, Parviz v. M.C.I.* (IAD T93-04633), Muzzi, September 18, 1996; and *Vuong, Khan Duc v. M.C.I.* (F.C.T.D., no. IMM-3139-97), Dubé, July 21, 1998. However, in *Seth, Kewal Krishan v. M.C.I.* (IAD M94-05081), Angé, March 27, 1996, the sponsor failed to establish that there existed a custom in the Sikh community permitting simultaneous adoptions; and in *Kalida, Malika v. M.C.I.* (IAD M96-08010), Champoux, July 3, 1997, the sponsor failed to show that Moroccan law allowed adoption.

[16] In this regard, see Castel, J.-G., *Introduction to Conflict of Laws* (Toronto: Butterworths, 1986, at 6, where it is stated that "when the problem involves the recognition or enforcement of a foreign judgment, the court must determine whether that judgment was properly rendered abroad."

*"declaratory judgment": a judgment declaring the parties' rights or expressing the court's opinion on a question of law, without ordering that anything be done;[17]

*"*in personam*": where the purpose of the action is only to affect the rights of the parties to the action *inter se* [between them];[18]

*"*in rem*": where the purpose of the action is to determine the interests or the rights of all persons with respect to a particular *res* [thing];[19]

*"deed of adoption": registered document purporting to establish the fact that an adoption has taken place.

Proof of foreign law

The usual rule in Canada is that foreign law is a fact which must be pleaded and proved.[20] The Immigration Appeal Division cannot take judicial notice of it. In cases before the Immigration Appeal Division, the burden of proving the foreign law or custom lies on the party relying on it, in most cases, the sponsor.[21]

There are several ways in which foreign law can be proved, including statute, expert evidence, and agreement of the parties (consent). The foreign law ought to be proved in each case. The Immigration Appeal Division is not entitled to take judicial notice of the proof presented in other cases,[22] although it can adopt or follow the reasoning of other panels regarding their interpretation of the foreign law. The Immigration Appeal Division has also examined the text of the law itself and given it a reasonable interpretation where expert evidence respecting its meaning was lacking.[23] The Immigration Appeal Division has rejected arguments that it is not competent to interpret foreign law.[24]

Section 23 of the *Canada Evidence Act*[25] provides that evidence of judicial proceedings or records of any court of record of any foreign country may be given by a certified copy thereof,

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[17] Dukelow, D.A., and Nuse, B., *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991), at 259.

[18] McLeod, J.G., *The Conflict of Laws* (Calgary: Carswell, 1983), at 60.

[19] *Ibid.*

[20] Castel, *supra*, footnote 16, at 44. For a case where the Appeal Division ruled that foreign law must be strictly proved, see *Wang, Yan-Qiao v. M.C.I.* (IAD T96-04690), Muzzi, October 6, 1997. Also, in *Okafor-Ogbujiagba, Anthony Nwafor v. M.C.I.* (IAD T94-05539), Aterman, April 14, 1997, the panel held that the evidence failed to establish that the adoption in question had been carried out in accordance with Nigerian law.

[21] *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576; 8 Imm. L.R. (2d) 175 (C.A.).

[22] *Kalair, Sohan Singh v. M.E.I.* (F.C.A., no. A-919-83), Stone, Heald, Urie, November 29, 1984.

[23] *Gossal, Rajinder Singh v. M.E.I.* (I.A.B. 87-9401), Sherman, Chu, Benedetti, February 15, 1988. Reported: *Gossal v. Canada (Minister of Employment and Immigration)* (1988), 5 Imm. L.R. (2d) 185 (I.A.B.).

[24] *Gill, Ranjit Singh v. M.C.I.* (IAD V96-00797), Clark, April 7, 1999.

[25] R.S.C. 1985, c. C-5.

purported to be under the seal of the court, without further proof. However, the Immigration Appeal Division does not normally require strict proof in this manner although the failure to comply with section 23 has been relied on in weighing the evidence produced.[26]

The jurisdiction of the Immigration Appeal Division in an adoption case is to determine whether or not the adoption in question falls within the IRP Regulations, i.e. (i) it has been proven under the relevant law, (ii) is genuine and (iii) has not been entered into primarily for the purpose of acquiring any status or privilege under the Act. It is not to adjudicate the status of adoption generally.[27] The IRP Regulations require that the adoption be in accordance with the laws of the jurisdiction where the adoption took place.

For example, in *Siddiq*,[28] the issue was whether the adoption in question was valid under the laws of Pakistan. The expert evidence submitted by the Minister was to the effect that in Pakistan, legal adoptions were not recognized and could not be enforced. The sponsor was unable to obtain evidence to the contrary and therefore, failed to establish that the adoption was valid. The absence of an adoption law in the foreign jurisdiction could not have the effect of allowing the Immigration Appeal Division to adjudicate the adoption under Canadian law.

Another example is *Alkana*,[29] where the alleged adoption was challenged on the basis that there was no provision for Christian adoptions under Pakistani laws. The sponsor attempted to prove the adoption by means of a "Declaration of Adoption", which was essentially an affidavit made by the natural parents giving their approval or consent to the adoption. In the absence of proof of a law in Pakistan allowing for adoption, the appeal was dismissed. The panel recognized the hardship created by the ruling and recommended that the Minister facilitate the admission of

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[26] *Brar, Kanwar Singh v. M.E.I.* (IAD W89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989.

[27] In *Singh, Babu v. M.E.I.* (F.C.A., no. A-210-85), Urie, Mahoney, Marceau, January 15, 1986, at 1, the Court indicated that the Immigration Appeal Board was entitled to conclude that the adoption in question had not been proven, but that it was not authorized to make a declaration that the adoption was "void as far as meeting the requirements of the Immigration Act, 1976". In *Canada (Minister of Employment and Immigration) v. Sidhu*, [1993] 2 F.C. 483 (C.A.), at 490, the Court noted that "[the Appeal Division's] jurisdiction is limited by the *Act* which, in turn, is subject to the *Constitution Act, 1867*. Parliament has not purported to legislate independently on the subject matter of adoption for immigration purposes. On the contrary, on that very point, it defers or it adopts by reference the foreign legislation." The Court added in a footnote that "[t]he provision generally reflects the characterization made by English Canadian common law courts, i.e., that adoption relates to the recognition of the existence of a status and is governed by the *lex domicilii* [the law where a person is domiciled]."

[28] *Siddiq, Mohammad v. M.E.I.* (I.A.B. 79-9088), Weselak, Davey, Teitelbaum, June 10, 1980. See also *Addow, Ali Hussein v. M.C.I.* (IAD T96-01171), D'Ignazio, October 15, 1997, for a case involving a purported Somalian adoption; and *Zenati, Entissar v. M.C.I.* (IAD M98-09459), Bourbonnais, September 17, 1999, for a case involving a purported Moroccan adoption. For a decision involving a case of guardianship in Morocco, see *Demnati, Ahmed v. M.C.I.* (M99-10260), di Pietro, April 3, 2001.

[29] *Alkana, Robin John v. M.E.I.* (IAD W89-00261), Goodspeed, Arpin, Rayburn, November 16, 1989.

the child into Canada so that he could be adopted here "[...] to alleviate the hardship created by the statutory lacuna in Pakistan regarding Christian adoptions."[30]

In a much earlier case, *Lam*,[31] the Immigration Appeal Board put it thus:

> No proof was adduced that the law of China prevailing in that part of Mainland China where the appellant and his alleged adopted mother resided at the time of the alleged adoption – the province of Kwangtung – recognized the status of adoption, or that if it did, how this status was established. This is not a situation where the lex fori may be applied in the absence of proof of foreign law.[32]

Declaratory judgments and deeds

Sponsors before the Immigration Appeal Division often seek to establish the status of applicants for permanent residence through the production of foreign judgments declaring the applicants' status in the foreign jurisdiction.

The issue has been expressed as one of determining whether the Immigration Appeal Division ought to look behind the judgment to determine either its validity or its effect on the issues before the Immigration Appeal Division.

As stated by Wlodyka, A. in *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*:[33]

> The starting point in any discussion of the legal effect of a declaratory judgment [...] is the decision of the Federal Court of Appeal in *Taggar*[34]. This case stands for the proposition that a declaratory judgment is a judgment "in personam" and not "in rem". Therefore, it is binding only on the parties to the action. Nevertheless, the declaratory judgment is evidence and the weight to be accorded to the declaratory judgment depends on the particular circumstances of the case.

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[30] *Ibid*., at 7. However, in *Jalal, Younas v. M.C.I.* (IAD M93-06071), Blumer, August 16, 1995, reported: *Jalal v. Canada (Minister of Citizenship and Immigration)* (1995), 39 Imm. L.R. (2d) 146 (I.A.D.), the Immigration Appeal Division held that in the absence of legislation in Pakistan, the Shariat applies in personal and family law, and the prohibition against adoption does not apply to non-Muslims. The Immigration Appeal Division accepted the expert evidence that Christians in Pakistan may adopt.

[31] *Lam, Wong Do v. M.M.I.* (I.A.B.), October 2, 1972, referred to in *Lit, Jaswant Singh v. M.M.I.* (I.A.B. 76-6003), Scott, Benedetti, Legaré, August 13, 1976.

[32] *Lit, ibid*., at 4.

[33] 25 Imm L.R. (2d) 8.

[34] *Taggar, supra,* footnote 21.

In *Sandhu*,[35] a pre-*Taggar* decision, the Immigration Appeal Board was of the opinion that a foreign judgment, "even one *in personam* is final and conclusive on the merits [...] and can not be impeached for any error either of fact or of law."[36] The declaratory judgment in question was issued in an action for a permanent injunction restraining interference with lawful custody of the applicant. The panel was of the view that the judgment would have to have been premised on a decision about the adoptive status of the applicant. The panel treated the judgment of the foreign court as a declaration as to status, conclusive and binding on the whole world (including Canadian authorities), and thus found the adoption was valid under Indian law. The panel did not feel required itself to examine whether the adoption was in accordance with Indian law.[37]

Sandhu was distinguished in *Brar*[38] as follows:

> [...] the decision in Sandhu was not intended to have universal application in cases where foreign judgments are presented as proof of the validity of adoptions and can be distinguished in this case.
>
> In Sandhu the judgment was accepted as part of the record and at no time was the authenticity of the document challenged by the respondent. The authenticity of the judgment referred to in Sandhu was not an issue. However, in the present case the Board has been presented with a document which contains discrepancies, has not been presented in accordance with section 23 of the Canada Evidence Act and purports to validate an adoption which clearly does not comply with the requirements of the foreign statute.[39]

The majority of the panel determined that the declaratory judgment had no weight.[40] The member who concurred in part was of the view that the reasoning in *Sandhu* applied and that the declaratory judgment was a declaration as to status and was binding on the Immigration Appeal Division.

In *Atwal*,[41] the majority accepted the declaratory judgment but noted that

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[35] *Sandhu, Bachhitar Singh v. M.E.I.* (I.A.B. 86-10112), Eglington, Goodspeed, Chu, February 4, 1988.

[36] *Ibid.*, at 14.

[37] *Sandhu, Bachhitar Singh, supra*, footnote 35 was followed in *Patel, Ramesh Chandra v. M.E.I.* (I.A.B. 85-9738), Jew, Arkin, Tisshaw, April 15, 1988.

[38] *Brar, supra*, footnote 26.

[39] *Ibid.*, at 10.

[40] For other cases in which it has been held that declaratory judgments are not determinative, see *Singh, Ajaib v. M.E.I.* (I.A.B. 87-4063), Mawani, Wright, Petryshyn, April 26, 1988 (declaratory judgment disregarded where internally inconsistent, collusive, and did not result from fully argued case); *Burmi, Joginder Singh v. M.E.I.* (I.A.B. 88-35651), Sherman, Arkin, Weisdorf, February 14, 1989 (regarding a marriage); *Badwal, Jasbir Singh v. M.E.I.* (I.A.B. 87-10977), Sherman, Bell, Ahara, May 29, 1989; and *Atwal, Manjit Singh v. M.E.I.* (I.A.B. 86-4205), Petryshyn, Wright, Arpin (concurring), May 8, 1989, where the concurring member gave no weight to the declaratory judgment. In *Pawar, Onkar Singh v. M.C.I.* (IAD T98-04518), D'Ignazio, October 1, 1999, the panel held that notwithstanding the existence of a declaratory judgment, the evidence established that there was no mutual intention of either the birth parents or the adoptive parents to transfer the child and therefore, the adoption did not meet the requirements in HAMA.

[41] *Atwal, ibid.*

> [i]t is the opinion of the Board that a foreign judgment is not to be disturbed unless there is proof of collusion, fraud, lack of jurisdiction of the court and the like. No such evidence was presented to the Board.[42]

In *Sran*,[43] the Immigration Appeal Division expressed it thus:

> [...] a declaratory judgment [...] is merely evidence which must be considered along with other evidence in determining the validity of the adoption. By itself, it does not dispose of the issue.

This decision appears to reflect the current decision making of the Immigration Appeal Division in light of *Taggar*.[44]

An adoption deed may be presented as proof of the validity of an adoption. In *Aujla*,[45] the panel ruled that:

> The Board accepts the Adoption Deed as prima facie evidence of an adoption having taken place. However, as to whether the adoption was in compliance with the requirements of the [Indian] Adoptions Act is a question of fact to be determined by the evidence in each case. In this connection, the Board also drew counsel's attention to a recent Federal Court of Appeal[46] decision where the Court expressed the view that it was proper for the Board to determine whether the adoption had been made in accordance with the laws of India, and that the registered Deed of Adoption was not conclusive of a valid adoption.[47]

Presumption of Validity under Foreign Law

The Immigration Appeal Division has dealt with the issue of adoption deeds in the context of section 16 of HAMA, which creates a presumption of validity.[48] In *Dhillon*,[49] the sponsor

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[42] *Ibid.*, at 4.

[43] *Sran, Pritam Kaur v. M.C.I.* (IAD T93-10409), Townshend, May 10, 1995, at 6.

[44] *Taggar, supra,* footnote 21.

[45] *Aujla, Surjit Singh v. M.E.I.* (I.A.B. 87-6021), Mawani, November 10, 1987.

[46] *Dhillon, Harnam Singh v. M.E.I.* (F.C.A., no. A-387-85), Pratte, Marceau, Lacombe, May 27, 1987.

[47] *Aujla, supra,* footnote 45, at 5. See also *Chiu, Jacintha Chen v. M.E.I.* (I.A.B. 86-6123), Mawani, Gillanders, Singh, July 13, 1987; and *Jaswal, Kaushaliya Devi v. M.E.I.* (IAD W89-00087), Goodspeed, Wlodyka, Rayburn, September 27, 1990.

[48] Section 16 of HAMA provides that:

> 16. Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

[49] *Dhillon, Harnam Singh, supra,* footnote 46. The facts of the case are set out in *Dhillon, Harnam Singh v. M.E.I.* (I.A.B. 83-6551), Petryshyn, Glogowski, Voorhees, January 3, 1985.

presented as evidence a registered deed of adoption and argued that section 16 of HAMA was substantive, and therefore the adoption in question had to be considered valid unless disproved by an Indian court. The Federal Court of Appeal rejected the argument:

> There is, in our view, no merit in that submission. Under subsection 2(1) of the *Immigration Regulations*, the Board had to determine whether the adoption had been made in accordance with the laws of India. If, as contended, the Board was required to apply section 16 of the *Hindu Adoptions and Maintenance Act, 1956* in making that determination, it was bound to apply it as it read, namely, as creating merely a rebuttable presumption regarding the validity of registered adoptions. As there was no doubt that the adoption here in question had not been made in accordance with Indian laws, it necessarily followed that the presumption was rebutted.[50]

In *Singh*,[51] the Federal Court of Appeal went further when it stated:

> Presumptions imposed by Indian law on Indian courts, which might be relevant if the issue were simply to know, in private international law terms, the status of the sponsorees in India, are of no assistance in determining whether either of them qualifies as an "adopted son" for the very special purposes of the *Immigration Act* [...] the presumption in section 16 is directed specifically to "the court", it is difficult, in any event, to conceive of it as being other than procedural since it is unlikely to have been the intention of the Indian Parliament to bind a court over which it had no authority or jurisdiction.[52]

In *Seth*,[53] the Immigration Appeal Division followed *Singh* and added that it is not up to the Canadian High Commission in New Delhi to seek standing before an Indian court to have the adoption declared invalid. Instead, the visa officer is entitled to conclude that an alleged adoption has not been proven for immigration purposes.

The Immigration Appeal Division has applied the reasoning of the Federal Court of Appeal in *Singh* to cases of adoptions in countries other than India. For example, in *Persaud*,[54] the Immigration Appeal Division considered a final order of the Supreme Court of Guyana and held that the order is one piece of evidence but is not determinative of whether the adoption is in compliance with the *Immigration Act*. In *Sinniah*[55], the Court held that it was patently unreasonable for the visa officer to ignore the effect at law of a final Court order and to decide, in

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[50] *Dhillon, Harnam Singh, supra*, footnote 46, at 2.

[51] *Singh v. Canada (Minister of Employment and Immigration*), [1990] 3 F.C. 37; 11 Imm. L.R. (2d) 1 (C.A.); leave to appeal to Supreme Court of Canada (Doc. 22136, Sopinka, McLachlin, Iacobucci) refused on February 28, 1991, *Singh v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 46 [Appeal Note].

[52] *Ibid*., at 44.

[53] *Seth, supra*, footnote 15.

[54] *Persaud, Kowsilia v. M.C.I.* (IAD T96-00912), Kalvin, July 13, 1998.

[55] *Sinniah, supra*, footnote 11.

the absence of cogent evidence, that an order pronounced by a court in Sri Lanka was insufficient to establish that an adoption was made in accordance with the laws of Sri Lanka.

Parent and child relationship created by operation of law

This issue has arisen in the context of section 12 of HAMA,[56] which many Immigration Appeal Board decisions interpreted as having the effect of creating a parent and child relationship by operation of law.[57]

In *Sharma*,[58] the Federal Court – Trial Division indicated that

> [a] parent and child relationship is not automatically established once the requirements of a foreign adoption have been demonstrated. In other words, even if the adoption was within the provisions of HAMA, whether the adoption created a relationship of parent and child, thereby satisfying the requirements of the definition of "adoption" contained in subsection 2(1) of the *Immigration Regulations, 1978*, must still be examined.[59]

In *Rai*,[60] the applicant had been adopted under the *Alberta Child Welfare Act.* The Immigration Appeal Division rejected the argument that the granting of an adoption order under that Act was clear and incontrovertible proof that a genuine parent and child relationship was created.

Power of attorney

In cases where a sponsor, for one reason or another, does not travel to the country where the applicant resides in order to complete the adoption, the sponsor may give a power of attorney[61] to someone to act in his or her stead. The power of attorney gives the person named in

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[56] Section 12 provides, in part, as follows:

> 12. An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family [...]

[57] See, for example, *Sandhu, Gurcharan Singh v. M.E.I.* (I.A.B. 87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987; and *Shergill, Kundan Singh v. M.E.I.* (I.A.B. 86-6108), Mawani, Gillanders, Singh, April 8, 1987. Reported: *Shergill v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 126 (I.A.B.).

[58] *M.C.I.* v. *Sharma, Chaman Jit* (F.C.T.D., no. IMM-453-95), Wetson, August 28, 1995.

[59] *Ibid.*, at 4. This two-stage process was followed in *M.C.I.* v. *Edrada, Leonardo Lagmacy* (F.C.T.D., no. IMM-5199-94), MacKay, February 29, 1996 and *Gill, Banta Singh* v. *M.C.I.* (F.C.T.D., no. IMM-760-96), Gibson, October 22, 1996 (upheld by the Federal Court of Appeal in *Gill, Banta Singh* v. *M.C.I.* (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998. These cases indicate that the issue had already been determined by the Federal Court in *Singh, supra*, footnote 51.

[60] *Rai, Suritam Singh v. M.C.I.* (IAD V95-02710), Major, Wiebe, Dossa, November 30, 1999.

[61] *Black's Law Dictionary* defines "Power of Attorney" as "[...] an instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and his power is revoked on the death of the principal by

it the authority to do whatever is necessary in order to complete the adoption in accordance with the laws of the jurisdiction where the adoption is to take place.

An issue that has arisen in this area with respect to Indian law is whether HAMA requires that a power of attorney be in writing and registered for an adoption to be valid. In a number of decisions, panels have ruled that neither is required.[62]

Another issue is whether a sponsor can give a power of attorney to the biological parent of the person to be adopted. In *Poonia*,[63] in dealing with the requirements of a giving and taking ceremony under Indian law, and after reviewing a number of Indian authorities, the Immigration Appeal Division held that the power of attorney must be given to a third party who cannot be the biological parent as that person is a party to the adoption.

Revocation of adoption

The concept of revocation of adoption is found in IRP Regulation 133(5).[64] This provision allows an officer (and the Immigration Appeal Division) to consider whether the revocation by a foreign authority or by a Canadian court was obtained for the purpose of sponsoring an application for permanent residence made by a member of the family class (of the biological family) and if it was, to rule that the intended sponsorship is not permissible.

In the past, visa officers refused to recognize revocations by foreign authorities and in a number of cases involving the failed sponsorships of biological parents by their former children, the Immigration Appeal Division (and the Immigration Appeal Board) have had occasion to consider the matter.

In *Sharma*,[65] the Immigration Appeal Division was presented with a declaratory judgment from an Indian court nullifying the adoption of the sponsor. The judgment was obtained by the

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operation of law [...]." *The Canadian Law Dictionary* gives the following definition: "An instrument in writing authorizing another to act as one's agent or attorney. It confers upon the agent the authority to perform certain specified acts or kinds of acts on behalf of his principal. Its primary purpose is to evidence the authority of the agent to third parties with whom the agent deals."

[62] See, for example, *Gill, Balwinder Singh v. M.E.I.* (IAD W89-00433), Goodspeed, Arpin, Rayburn, September 13, 1990; *Paul, Satnam Singh v. M.E.I.* (I.A.B. 87-6049), Howard, Anderson (dissenting), Gillanders, February 13, 1989; and *Kler, Sukhdev Singh v. M.E.I.* (I.A.B. 82-6350), Goodspeed, Vidal, Arpin, May 25, 1987.

[63] *Poonia, Jagraj v. M.E.I.* (IAD T91-02478), Arpin, Townshend, Fatsis, October 5, 1993.

[64] S.133(5) of the IRP Regulations reads:

(5) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority or by a court in Canada of competent jurisdiction may sponsor an application for a permanent resident visa that is made by a member of the family class only if the revocation of the adoption was not obtained for the purpose of sponsoring that application.

[65] *Sharma, Sudhir Kumar v. M.E.I.* (IAD V92-01628), Wlodyka, Singh, Verma, August 18, 1993.

sponsor's biological father in an uncontested proceeding. After considering the expert evidence presented by the parties, the Immigration Appeal Division concluded that the judgment was *in personam* and that the weight to be given to it would depend on the particular circumstances of the case. The Immigration Appeal Division inferred from the evidence that the Indian court had not been informed of the immigration purpose for the action and gave the judgment little weight. It also found that the only possible reason for nullifying an adoption under Indian law, misrepresentation, was not present in the case.[66]

In *Chu*,[67] the panel acknowledged that an adoption can be terminated in China with the agreement of the parties. However, because neither the sponsor nor her adoptive father had any real and substantial connection with China at the time the revocation was obtained, the panel ruled that the applicable law was not Chinese law but British Columbian law. Under this law, termination of adoption was not possible.

In *Purba*,[68] the sponsor had been adopted by her grandparents, but when she was granted an immigrant visa, it was on the basis that she was their dependent daughter. The fact of the adoption was not disclosed to the visa officer. A few years later, she attempted to sponsor her biological mother but that application was refused. The evidence presented at the Immigration Appeal Division hearing showed that the adoption was void *ab initio;*[69] however, the appeal was dismissed on the basis of *estoppel*. As the panel put it:

> [The sponsor] was granted status in Canada as a landed immigrant and subsequently as a Canadian citizen based on a misrepresented status which was acted upon by Canadian immigration officials. In my view, she is estopped from claiming a change in status to enable her to sponsor her biological mother [...].[70]

Bad faith relationships

In *Sahota*,[71] the application for permanent residence was refused under section 4 of the IRP Regulations, as well as under subsections 117(2) and 117(3)(a), (c), (d) and (e) of the Regulations. The panel found that in most appeals of adoption refusals where there are a number of grounds of refusal, a determination should first be made in relation to section 4 of the IRP Regulations. If there is a determination that the foreign national is an "adopted child" pursuant to

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66 See also *Heir, Surjit Singh v. M.E.I.* (I.A.B. 80-6116), Howard, Campbell, Hlady, January 16, 1981.

67 *Chu, Si Gina* v. *M.E.I.* (IAD V90-00836), Wlodyka, MacLeod, June 28, 1990.

68 *Purba, Surinder Kaur v. M.C.I.* (IAD T95-02315), Teitelbaum, September 10, 1996.

69 The evidence included a judgment of a court in India declaring the adoption null and void. The grandfather already had three daughters and therefore did not have the legal capacity to adopt another daughter under HAMA.

70 *Purba, supra*, footnote.68, at 8.

71 *Sahota, Gurdev Kaur v. M.C.I.* (IAD VA2-03374), Mattu, February 23, 2004.

section 4 of the IRP Regulations, then a determination should be made in relation to all or some of the provisions of section 117 of the IRP Regulations, as necessary.

Section 4 of the IRP Regulations states, among other things, that for purposes of the Regulations, no foreign national shall be considered an **"adopted child"** if the adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the IRPA, whereas, subsection 117(2) of the IRP Regulations states that a foreign national **"who is the adopted child"** of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of that adoption unless it was in the best interests of the child within the meaning of the Hague Convention on Adoption (emphasis added). In the words of the panel,

> "When the words of sections 4 and 117(2) of the Regulations are read in their ordinary and grammatical sense, in a manner to blend harmoniously with the scheme of the IRPA and its Regulations and the object and intention of Parliament, I am satisfied that there should be a determination under section 4 of the Regulations as to whether or not the foreign national is an "adopted child" before any determination is made under section 117(2) of the Regulations that the adoption is in the best interests of the child. I come to this conclusion because section 117(2) of the Regulations appears to only apply in cases where the foreign national has been determined to be an adopted child."[72]

In *Sahota*, the panel found that a two-fold test must be applied in order to disqualify an adopted child under section 4 of the IRP Regulations.[73] The two elements are: that the adoption is not genuine and that the adoption was entered into primarily for the purpose of acquiring any status or privilege under the IRPA. The panel also found that in the circumstances of an adoption the status or privilege that can be acquired under IRPA is that the adopted child is granted permanent resident status in Canada through membership in the family class when the adopted child qualifies to be sponsored to Canada.[74] The panel noted that the term "genuine" has not been defined in IRPA or the IRP Regulations.[75] In the panel's view, the fundamental nature of an adoption is the relationship between parent and child. Noting that Parliament specifically included the factor of a genuine parent-child relationship as one element in the determination of the best interests of the child in the context of section 117(3) of the IRP Regulations, the panel found the issue of a genuine parent-child relationship to be of primary relevance in the context of considering the genuineness of an adoption. While conceding that this factor is not the only factor that could be used to determine whether or not an adoption is "genuine" in the context of section 4 of the IRP Regulations, the panel found it to be a key factor to consider in the determination of the genuineness of an adoption.

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[72] *Ibid*., paragraph 14.

[73] *Ibid*., paragraph 17.

[74] *Ibid*., paragraph 18.

[75] *Ibid*., paragraph 19.

In *Singh*[76] the Immigration Appeal Division adopted the reasoning in *Sahota*[77] and held that it was appropriate to make a final determination under section 4 of the IRP Regulations with respect to whether the adoption was in bad faith before undertaking a consideration of whether or not the adoption was in the best interests of the child under section 117(3) of the IRP Regulations.

In *De Guia*,[78] the panel found that the adoption fell within Regulation 4 of the IRP Regulations. The adoption took place in 1989 when the applicant was four years old and the appellant's application to sponsor the applicant was submitted more than twelve years after the adoption was finalized. The appellant was unable to explain satisfactorily the delay in sponsoring the applicant. When the applicant was interviewed, he stated that the appellant adopted him because his parents were jobless and for his future. The appellant had not visited him since 1988, and she never provided for his physical and emotional needs on a daily basis. He continued to live with his biological father after the adoption. While the appellant provided financial support for the applicant's education, she did not direct his education and was not advised within a reasonable timeframe of his decision to quit school. The Immigration Appeal Division found that a parent-child relationship did not exist between the appellant and the applicant at the time of the adoption, and that no such relationship had developed over the years. The adoption was not genuine and was primarily for the purpose of acquiring a status or privilege under the Act.

In *Hussein*,[79] the sponsored application for permanent residence of the appellant's adopted children (his sister's children) was refused pursuant to s.4 of the IRP Regulations. There was evidence at the hearing of the appeal that was not before the visa officer to the effect that the appellant had been making major decisions for the applicants since their father died, including decisions that were contrary to their biological mother's wishes. While the elder applicant had told the visa officer that she intended to continue to have a normal mother-daughter relationship with her biological mother after the adoption, it would be a denial of reality to expect teenage children to forget their biological mother. It was more important that the applicants had accepted the appellant as their father and regarded his counsel and authority as paramount to that of their biological mother.

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[76] *Singh, Jaspal* v. *M.C.I.* (IAD TA2-17789), Hoare, August 6. 2004.

[77] *Sahota, supra*, footnote 71.

[78] *De Guia, Avelina Fernandez Quindipan* v. *M.C.I.* (IAD TA4-11030), Waters, December 14, 2005.

[79] *Hussein, Mohammed Yassin* v. *M.C.I.* (IAD WA5-00123), Ostrowski, December 15, 2006.

Adult Adoptions

IRP Regulations

> 117(4) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was 18 years of age or over shall not be considered a member of the family class by virtue of that adoption unless it took place under the following circumstances:
>
> (a) the adoption was in accordance with the laws of the place where the adoption took place and, if the sponsor resided in Canada at the time of the adoption, the adoption was in accordance with the laws of the province where the sponsor then resided;
>
> (b) a genuine parent-child relationship exists at the time of the adoption and existed before the child reached the age of 18; and
>
> (c) the adoption is not primarily for the purpose of acquiring a status or privilege under the *Act*.

Adult adoptees were not previously sponsorable under Canadian immigration law as members of the family class; pursuant to the IRP Regulations they may be sponsored provided they also meet the definition of "dependent child" in the IRP Regulations. The Immigration Appeal Division has not yet had the occasion to decide an appeal from a refusal of a sponsored application for permanent residence based on section 117(4) of the IRP Regulations.

Intent to adopt provisions

Statutory Provision

IRP Regulations

> 117(1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is:
>
> (g) a person under 18 years of age whom the sponsor intends to adopt in Canada if
>
> (i) the adoption is not primarily for the purpose of acquiring any privilege or status under the *Act*,
>
> (ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention; and

> (iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption
>
> (A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and
>
> (B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption;

In *Vaganova*,[80] the appellant appealed from the refusal of the sponsored application for permanent residence of her grandnephew, whom she intended to adopt. The issue was whether the intended adoption met the requirements of section 117(1)(g)(iii)(A) of the IRP Regulations. The IRP Regulations require that the applicant be placed for adoption in the country in which he or she resides or be otherwise legally available for adoption in that country. The panel held that whether an applicant is "otherwise legally available for adoption" is to be assessed against the country of the applicant's residence rather than the province of his destination. The appellant produced two consents to adoption signed by the applicant's biological mother, but no expert evidence was presented as to whether the signing of a consent to adopt by the biological mother placed the applicant for adoption in Russia or resulted in the applicant being otherwise legally available for adoption in Russia. The intended adoption did not meet the requirements of section 117(1)(g)(iii)(A) of the IRP Regulations.

It should be noted that in *Vaganova*, although a "no objection" letter from the province of intended destination was provided to the panel by the appellant, counsel did not rely on, nor did the panel turn its mind to, s.117(7)(b) of the IRP Regulations.[81]

In *Al-Shikarchy*,[82] another 117(1)(g)(iii) intent to adopt in Canada case, the panel commented that although neither party referred to s.117(7) of the IRP Regulations, the provision would appear to be relevant to the applicant's circumstances. The appeal was decided on other grounds so the panel did not undertake an analysis of the impact of s.117(7) of the IRP

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[80] *Vaganova, Ludmila* v. *M.C.I.* (IAD TA4-17969), Waters, May 18, 2006.

[81] This provision reads as follows:

> (7) If a statement referred to in clause (1)(g)(iii)(B) or paragraph (3) (c) or (f) has been provided to an officer by the foreign national's province of intended destination, that statement is, except in the case of an adoption where the adoption is primarily for the purpose of acquiring a status or privilege under the Act, conclusive evidence that the foreign national meets the following applicable requirements:
>
> (b) in the case of a person referred to in paragraph (1)(g), the requirements set out in clause (1)(g)(iii)(A);

[82] *Al-Shikarchy, Salam* v. *M.C.I.* (IAD TA5-13169), Band, September 5, 2007.

Regulations. The meaning to be given to the words "has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption" interpreted in light of 117(7)(b) of the IRP Regulations thus remains an outstanding issue for the Immigration Appeal Division.

The panel in *Al-Shikarchy* citing s.121 of the IRP Regulations, found that the applicant did not qualify as a member of the family class in light of the fact that she was over the age of 18 when the immigration authorities received her application for a permanent resident visa and over 18 years of age when her application for a permanent resident visa was determined.[83]

In *Taylor*[84] the question before the panel was at what point in time is an applicant's age to be calculated in order to determine whether he or she is over or under 22 years of age and therefore a dependent child. In contrast to the findings of the panel in *Al-Shikarchy*, who found both the date of receipt of the application for permanent residence and the date of the determination of the application to be relevant, the panel in *Taylor* concluded that the only relevant date, when the issue is the applicant's age, is the date of receipt of the application for permanent residence.[85] There appears to be conflicting jurisprudence in the Immigration Appeal Division as to whether or not there is a "lock-in" date with respect to the applicant's age in light of s.121 of the IRP Regulations. Is an applicant a member of the family class as a "child to be adopted" if the applicant was under 18 years of age at the time his or her application was received by immigration authorities but over 18 when the application is being determined by a visa officer?

Canadian Charter of Rights and Freedoms

Sponsors have also argued that certain provisions in the foreign adoption legislation are discriminatory and thus contrary to the *Canadian Charter of Rights and Freedoms*. The Immigration Appeal Division (and the Immigration Appeal Board) have rejected these arguments.[86]

In a different context, the Federal Court of Appeal, in *Li*,[87] dealt with an argument that an adjudicator considering the issue of equivalency must have regard to whether the procedures

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[83] *Ibid*, at 21. See also *Chandler, Lucy Mary* v. *M.C.I.* (IAD VA4-01200), Boscariol, September 26, 2006.

[84] *Taylor, Joan* v. *M.C.I.* (IAD TA4-00871), Whist, May 19, 2004.

[85] In *Lidder*, the court found that the effective ("lock-in") date of a sponsored application for permanent residence is the date of the filing of the application for permanent residence. *Canada (Minister of Employment and Immigration)* v. *Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).

[86] See, for example, *Dhillon, Gurpal Kaur v. M.E.I.* (I.A.B. 83-9242), D. Davey, Benedetti, Suppa, July 30, 1985; *Mattam, Mary John v. M.E.I.* (I.A.B. 86-10213), Arkin, Fatsis, Ahara, December 10, 1987; *Magnet, Marc v. M.E.I.* (IAD W89-00002), Arpin, Goodspeed, Rayburn, April 10, 1990; and *Syed, Abul Maali v. M.E.I.* (IAD T89-01164), Tisshaw, Spencer, Townshend, January 7, 1992.

[87] *Li, Ronald Fook Shiu v. M.C.I.* (F.C.A., no. A-329-95), Strayer, Robertson, Chevalier, August 7, 1996. Reported: *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (C.A.).

followed in the country of conviction would be acceptable under the *Charter*. The Court rejected the argument and noted that

> [...] the Supreme Court of Canada has held the Charter to be irrelevant abroad even where acts by foreign police officers inconsistent with the Charter have yielded evidence for use in a Canadian court. In *Terry v. The Queen*[88] [... a person] was given the warnings required by U.S. law but was not advised immediately of a right to counsel as would have been required by [...] the Charter had he been arrested in Canada. Nevertheless statements made by him to police [...] were held admissible at a subsequent trial in Canada. The Court held that the Charter could not govern the conduct of foreign police acting in their own country. The same must surely be true of a foreign court trying a person then subject to its jurisdiction.[89]

The other type of *Charter* challenge involves an attack on the constitutional validity of particular provisions of the *Immigration Act* or *Regulations*. For example, in *Dular*,[90] the Immigration Appeal Division found that the age 19 limitation in the definition of "son" in the *Regulations* was contrary to section 15 of the *Charter* and not saved by section 1 of the *Charter*. However, the Federal Court disagreed with the panel's section 1 analysis and set aside its decision.[91] A different approach was followed in *Daley*,[92] where the Immigration Appeal Division held that if there was discrimination on the basis of age (in this case, the age limitation was 13), it was the applicant's rights and not the sponsor's which were being infringed. As the applicant was outside Canada, the *Charter* had no application.

In *Rai*,[93] the Immigration Appeal Division held that the requirement that an adoption not be for immigration purposes does not violate the s.15 Charter rights of adoptive parents.

In *Chandler*,[94] the appellant's challenge to the constitutionality of s.117(1)(g) of IRPA failed. Counsel argued that limiting the sponsorship of children intended to be adopted in Canada to the age of under 18 years, when dependent biological or adopted children can be sponsored to the age of 22, contravened sections 12 and 15 of the *Canadian Charter of Rights and Freedoms.* The distinction between biological and adopted children and children intended to be adopted in Canada violates section 15 of the *Charter* but was justified under section 1 of the *Charter*. The appellant was not subjected to cruel and unusual treatment contrary to section 12 of the *Charter.*

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88 *R. v. Terry*, [1996] 2 S.C.R. 207.

89 *Li, supra,* footnote 87, at 257.

90 *Dular, Shiu v. M.C.I.* (IAD V93-02409), Ho, Lam, Verma, February 22, 1996. See also *Bahadur, Ramdhami v. M.E.I.* (IAD T89-01108), Ariemma, Tisshaw, Bell (dissenting), January 14, 1991 (re the age 13 limitation in the former *Regulations*).

91 *M.C.I. v. Dular, Shiu* (F.C.T.D., no. IMM-984-96), Wetston, October 21, 1997.

92 *Daley, Joyce v. M.E.I.* (IAD T89-01062), Sherman, Bell, Chu, February 3, 1992.

93 *Rai, supra,* footnote 60.

94 *Chandler, supra*, footnote 83.

Repeat Appeals

In adoption applications, there is no fluidity with respect to the point at which the determination is made as to whether the applicant is a member of the family class. That point in time is fixed by the IRPA. Therefore, in repeat appeals from adoption refusals, the evidence must always relate to the intention at the time the applicant was purported to become a member of the family class.[95] Repeat appeals from these refusals require a more restrictive approach. Where an appellant attempts to relitigate unsuccessful appeals, two doctrines may be applicable: *res judicata* and abuse of process[96]. The Immigration Appeal Division must allow the sponsor to present the alleged new evidence before finding either an abuse of process or *res judicata*.[97]. The Immigration Appeal Division is under no obligation to grant a full oral hearing; new evidence by way of affidavit is acceptable.[98]

If the evidence adduced is in fact new evidence, then the Immigration Appeal Division can decide whether the issues raised are *res judicata*. Even where all the criteria for the application of *res judicata* are met, a repeat appeal will only be *res judicata* if there exist no special circumstances that would bring the appeal within the exception of the application of the doctrine. Such special circumstances would include fraud or other misconduct in the previous proceedings which would raise natural justice issues, or where there is the discovery of decisive new evidence that could not have been discovered by the exercise of reasonable diligence in the first proceeding. [99] Further, whether or not to apply the doctrine of *res judicata* in any case is a matter of discretion.[100] In *Bhatti*[101], the Appeal Division dismissed the appeal on the basis of the doctrine of *res judicata* in that there was no "decisive new evidence" which could have altered the result of the first appeal.

If the Immigration Appeal Division decides the evidence adduced does not constitute new evidence then it is open to it to dismiss the appeal on the ground that it is an abuse of process.[102] In some cases, it may be appropriate to consider applying the doctrine of abuse of process instead of or in addition to *res judicata*.[103] See Chapter 6, ("Repeat Appeals") for an in-depth discussion of these issues.

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[95] *Singh, Gurmukh v. M.C.I.* (IAD T98-08941), Wales, March 15, 2000.

[96] *Hira, Chaman Lal v. M.C.I.* (IAD V99-01877), Boscariol, Ross, Mattu, July 14, 2000.

[97] *Kular, Jasmail v. M.C.I.* (F.C.T.D., no. IMM-4990-99), Nadon, August 30, 2000.

[98] *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.

[99] *Sangha, Amarjit v. M.C..I.* (IAD VA1-04029), Boscariol, February 21, 2002.

[100] *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.R. 460; *Raika, Labh Singh v. M.C.I.* (IAD VA1-02630), Boscariol, June 6, 2002.

[101] *Bhatti, Darshan Singh v. M.C.I.* (IAD VA1-03848), Workun, April 19, 2002.

[102] *Toor, Rajwant Singh v. M.C.I.* (IAD VA0-00917), Clark, June 1,2001 (reasons signed June 8, 2001); *Kaler, Gurdip Singh v. M.C.I.* (IAD V99-04536), Baker, October 10, 2000; *Gill, Balvir Singh v. M.C.I.* (V99-03132), Mattu, September 25, 2000; *Punni, Pal Singh v. M.C.I.* (IAD V99-01483), Boscariol, June 30, 2000.

[103] *Sangha, supra*, footnote 99; *Bagri, Sharinder Singh v. M.C.I.* (VA1-00913), Boscariol, December 10, 2001.

An issue that arose after the IRPA came into effect was whether or not *res judicata* continues to apply as a result of the change in wording of the test to be applied in section 4 of the IRP Regulations, including the change in timing of the assessment of the test. In *Vuong*[104] the Immigration Appeal Division panel held that the changes between section 4(3) of the former Regulations and section 4 of the IRP Regulations are not of sufficient legal significance to create an exception to *res judicata* and concluded that *res judicata* applied.

The Federal Court has ruled[105] that the *Vuong* approach is correct and that except in unique or special circumstances that the principle of *res judicata* applies as it is not in the public interest to allow the re-litigation of failed marriage appeals unless there are special circumstances.

[104] *Vuong, Phuoc v. M.C.I.* (IAD TA2-16835), Stein, December 22, 2003.

[105] *Mohammed, Amina v. M.C.I.* (F.C. no. IMM-1436-05), Shore, October, 27, 2005: 2005 FC 1442.

CASES