Chapter Six

Bad Faith Family Relationships

THE LEGISLATIVE FRAMEWORK

Introduction

A Canadian citizen or permanent resident may sponsor an application for permanent residence made by a member of the family class. Section 117(1) of the *Immigration and Refugee Protection Regulations* (the "IRP Regulations") includes "the sponsor's spouse, common-law partner or conjugal partner" as a member of the family class.

The IRP Regulations have combined in one provision – "bad faith" – a test of relationship for a number of family relationships. Section 4 of the IRP Regulations provides a two-pronged test of relationship for marriage, common-law partnership, conjugal partnership and adoption. Section 4 relates to all applications not just family class applications. If both prongs of the test set out in section 4 of the IRP Regullations are met, the foreign national shall not be considered as within the particular family relationship. For family class sponsorships, if the foreign national is not within the specified family relationship, that person will not be a member of the family class in relation to their sponsor nor will that person be considered as within the specified family relationship to the person being sponsored. In this chapter, the scope of section 4 as well as other related provisions is reviewed. How these provisions are applied to a particular family relationship will be covered in chapter 5 of this paper (Spouses, Common-Law Partners and Conjugal Partners).

Statutory Provisions

Section 4 of the IRP Regulations[1] reads as follows:

> For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[1] This section was amended in 2004 to clarify the wording of the section. Prior to amendment it read as follows: "For the purposes of these Regulations, no foreign national shall be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act."

In 2004[2] a new provision, Section 4.1, was added to the IRP Regulations to cover the situation of a new relationship where a prior relationship was dissolved primarily for immigration purposes. Section 4.1 reads as follows:

> For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.

There are other IRP Regulations that deal with the *bone fides* of family relationships[3] in considering whether a person is a member of the family class as follows:

- Section 117(1)(g)(i) that deals with persons under 18 whom a sponsor intends to adopt in Canada requires that "the adoption is not primarily for the purpose if acquiring any privilege or status under the Act".[4]

- Section 117(4)(c) that deals with an adopted child who was adopted when the child was over age 18 requires that "the adoption is not primarily for the purpose if acquiring any privilege or status under the Act".

Section 63(1) of IRPA provides for the right of appeal against a decision not to issue a permanent resident visa to a member of the family class and reads as follows:

> A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

Pursuant to section 65 of the *Immigration and Refugee Protection Act* ("IRPA"), the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless the applicant is a member of the family class and their sponsor is a sponsor within the meaning of the IRP Regulations as:

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[2] SOR/2004-167, s. 3(E).

[3] A provision dealing with guardianship was never enacted.

[4] In addition, section 117(2) provides that where the child was adopted under the age of 18 years the adoption must be in the child's best interests within the meaning of the Hague Convention on Adoption otherwise the adopted child shall not be considered a member of the family class. Under section 117(3), one of the requirements to determine whether the adoption is in the child's best interests is that the adoption created a genuine parent-child relationship. For a discussion of this issue see the chapter in this paper on adoptions.

> In an appeal under 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and their sponsor is a sponsor within the meaning of the regulations.

In order to interpret section 4 and the related provisions in the IRP Regulations, it is helpful to consider the wording of similar provisions in the *Immigration Regulations, 1978* (the "former Regulations"), as there is considerable case law in relation to those provisions.

Section 4(3) of the former Regulations that dealt with marriages read as follows:

> The family class does not include a spouse who enters into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.

Section 6(1)(d)(i) of the former Regulations that dealt with the sponsorship of fiancées[5] read in part as follows:

> …where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member, and the member's accompanying dependants if … (d) in the case of a fiancée, … (i) the sponsor and the fiancée intend to reside together permanently after being married and have not become engaged primarily for the purpose of the fiancée gaining admission to Canada as a member of the family class…

Sections 2(1) and 6(1)(e) of the former Regulations that dealt with adoptions read in part as follows:

> 2(1) – "adopted" means a person who is adopted … but does not include a person who is adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person's relatives.

> 6(1)(e) - …where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member, and the member's accompanying dependants if … (e) in the case of a person described in paragraph (b) of the definition of "member of the family class" in subsection 2(1), or a dependant of a member of the family class, who has been adopted, the person or dependant was

[5] It must be noted that fiancées are not members of the family class under IRPA or IRP Regulations. Section 356 of the IRP Regulations provides that where a fiancée application for a permanent resident visa was made before June 28, 2002, the application is governed by the former Act. See also the section in this chapter on the Transitional Provisions.

adopted before having attained 19 years of age and was not adopted for the purpose of gaining admission to Canada of the person or dependant, or gaining the admission to Canada of any of the person's or dependant's relatives.

Type of Refusal: jurisdictional or non-jurisdictional

Under the former Regulations, the onus was on the appellant to establish that the sponsored spouse was not excluded from membership in the family class by reason of the application of section 4(3)[6] or that an adopted child was not excluded from the definition of "adopted". In either case, if membership in the family class was not established, the appeal would be dismissed for lack of jurisdiction. Under the former Regulations, the Immigration Appeal Division had no jurisdiction to hear an appeal with respect to a sponsorship where the applicant was not a member of the family class in relation to the sponsor.

Under IRPA, the same issue arises. If a foreign national is not considered a spouse, a common-law partner, a conjugal partner or an adopted child of the sponsor due to the application of section 4 of the IRP Regulations, then the foreign national is not a member of the family class with respect to his or her sponsor.

Section 63(1) of IRPA provides that a person who has filed in prescribed manner an application to sponsor a foreign national as a member of family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa. Section 10(6) of the IRP Regulations provides that a sponsorship application not made in accordance with section 10(1) is considered not to be an application filed in a prescribed manner for the purposes of section 63(1) of IRPA in which case there would be no right of appeal to the Immigration Appeal Division. Section 10(1) of IRP Regulations sets out the form and content of an application.[7]

Section 65 of IRPA provides that in an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations. *At issue is whether the appeal to the Immigration Appeal Division is jurisdictional or non-jurisdictional.*

Based on the wording of sections 63(1) and 65 of IRPA and subject to sections 10(1) and 10(6) of the IRP Regulations, Immigration Appeal Division panels have treated family class sponsorship appeals as non-jurisdictional.[8] While the Immigration Appeal Division may not be

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[6] *M.C.I. v. Heera, Lilloutie* (F.C.T.D., no. IMM-5316-93), Noël, October 27, 1994.

[7] Where the sponsorship application is not filed in a prescribed manner per s. 10(6) of the IRP Regulations, any refusal will be jurisdictional.

[8] See for example *Zeng, Qing Wei v. M.C.I.* (IAD VA2-02640), Workun, April 22, 2003, where the appeal was dismissed as the refusal was valid in law and not dismissed for lack of jurisdiction.

able to exercise discretionary relief in favour of the appellant, it still has jurisdiction to hear the appeal. Accordingly, if the appellant is successful, the appeal will be allowed based on the refusal being not valid in law. If the appellant is not successful, the appeal will be dismissed based on the refusal being valid in law. As noted above, this can be contrasted to the situation under the former Regulations, where the appeal would have been dismissed for lack of jurisdiction. Where the appellant is not successful, there will be no recourse to the discretionary jurisdiction of the Immigration Appeal Division due to the application of section 65 of IRPA as the applicant will have been determined not to be a member of the family class.

THE JURISPRUDENCE

The Test

Under the former Regulations the test for marriages for immigration purposes was two-pronged; the applicant had to be caught by both prongs of the test to be excluded from the family class. To successful challenge this type of refusal, an appellant had to establish that the applicant did not enter into the marriage primarily to gain admission to Canada or that the applicant intended to reside permanent with the appellant.[9]

The test for adoptions for immigration purposes under the former Regulations had only one prong, the child was not to be a person adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person's relatives.

The Federal Court in a number of cases including *Mohamed*,[10] *Donkar,*[11] *Ouk,*[12] *Khella,*[13] and *Khera*[14] has concluded that "section 4 of the Regulations must be read conjunctively, that is the questioned relationship must be both not genuine and entered into primarily for the purpose of acquiring any status or privilege under the Act"[15] for the section to apply to exclude the sponsored foreign national as a member of the family class. This means that section 4 of the IRP Regulations applies to a relationship described in section 4 only if both of the two prongs of the bad faith test apply to the relationship. Accordingly, to succeed in an appeal, the appellant need only show that one of the two prongs does not apply to the relationship. This is unchanged from

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[9] *Horbas v. Canada (Minister of Employment and Immigration),* [1985] 2 F.C. 359 (T.D.), at 369. In *Sanitchar, Omeshwar v. M.C.I.* (F.C. no. IMM-5233-04), Beaudry, July 25, 2005; 2005 FC 1015 the Court found that *Horbas* continues to be useful for the purpose of the immigration element of the bad faith test under the IRP Regulations. However, the Court noted that the element of the sponsored spouse's intention of residing permanently with the sponsoring spouse is no longer present under section 4 of the IRP Regulations.

[10] *Mohamed, Rodal Houssein v. M.C.I.* (F.C. no. IMM-6790-05), Beaudry, June 5, 2006; 2006 FC 696.

[11] *Donkar, Sumaila v. M.C.I.* (F.C. no. IMM-654-06), Mosley, September 12, 2006; 2006 FC 1089.

[12] *Ouk, Chanta v. M.C.I.* (F.C. no. IMM-865-07), Mosley, September 7, 2007; 2007 FC 891.

[13] *Khella, Palwinder Singh v. M.C.I.* (F.C. no. IMM-1811-06), de Montingny, November 10, 2006; 2006 FC 1357.

[14] *Khera, Amarjit v. M.C.I.* (F.C. no. IMM-6375-06), Martineau, June 13, 2007; 2007 FC 632.

[15] *Donkar, supra,* footnote 11.

section 4(3) of the former Regulations where, as noted above, both prongs must apply for a spouse to be excluded from the family class. Therefore, there is no need to pursue an analysis with respect to the second prong when the first prong is not met.[16]

In *Ni*,[17] the Court held that the test in section 4 of the IRP Regulations can only be applied to a marriage defined in section 2 of the IRP Regulations, and to interpret "genuine" as meaning "legal" would render section 4 of the IRP Regulations redundant.

In applying the new test, it will be necessary for the Immigration Appeal Division to consider the meaning of "genuine" and the phrase "was entered into primarily for the purpose of acquiring any status or privilege under the Act." It appears that "genuine" encompasses factors relevant to the second prong of the test from the former Regulations ("intention of residing permanently with the other spouse"), although it appears to be broader and more flexible than that test. [18] In *Kang*[19] the panel agreed with the submissions of counsel for the Minister that a genuine marriage is "one in which both parties are committed to living with one another for the rest of their lives." In *Ouk*,[20] the Court noted that the focus of the examination under section 4 is on the relation between the couple and that "while family connections may be seen as a consideration to be weighed, the genuineness of the marriage should be a separate question from concerns about familial connections."[21]

In *Khera*,[22] the Court in reviewing the panel's decision that a marriage was caught by section 4 noted as follows: "Indeed, the IAD was allowed to consider, and considered in its decision, the length of the parties' prior relationship before their arranged marriage, their age difference, their former marital or civil status, their respective financial situation and employment, their family background, their knowledge of one another's histories (including the applicant's daughters' ages and general situation), their language, their respective interests, the fact that the sponsoree's mother, two of his brothers, as well as aunts and cousins were living in British Columbia, and the fact that the sponsoree had tried to come to Canada before."

Member Hoare in *Chavez*[23] had the following to say regarding genuineness:

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[16] *M.C.I. v. Davydenko, Anna* (F.C. no. IMM-1482-00), Pinard, March 30, 2001; 2001 FCT 257.

[17] *Ni, Zhi Qi v. M.C.I.* (F.C. no. IMM-4385-04), Pinard, February 17, 2005; 2005 FC 241.

[18] For a brief discussion of section 4 in relation to adoptions see chapter 4 of this paper, with that issue considered in relation to common-law partners and conjugal partners in chapter 5 of this paper.

[19] *Kang, Randip Singh v. M.C.I.* (IAD VA2-02099), Clark, June 3, 2003.

[20] *Ouk, supra*, footnote 12.

[21] In *Ouk, supra*, footnote 12, the Court noted at paragraph 17 that: "It was open to the appeal panel to find that the sponsoree is inadmissible for misrepresentation pursuant to s. 40 of the *Act* or that the marriage is not genuine, but the distinction between these two avenues of inquiry must be kept clearly separate."

[22] *Khera, supra*, footnote 14 at paragraph 10.

[23] *Chavez, Rodrigo v. M.C.I.* (IAD TA3-24409), Hoare, January 17, 2005 at paragraph 3.

> The genuineness of the marriage is based on a number of factors. They are not identical in every appeal as the genuineness can be affected by any number of different factors in each appeal. They can include, but are not limited to, such factors as the intent of the parties to the marriage, the length of the relationship, the amount of time spent together, conduct at the time of meeting, at the time of an engagement and/or the wedding, behaviour subsequent to a wedding, the level of knowledge of each other's relationship histories, level of continuing contact and communication, the provision of financial support, the knowledge of and sharing of responsibility for the care of children brought into the marriage, the knowledge of and contact with extended families of the parties, as well as the level of knowledge of each other's daily lives. All these factors can be considered in determining the genuineness of a marriage.

Member Hoare went on in the same paragraph to comment on the second prong of the test as follows;

> The second prong of the test - whether the relationship was entered into primarily for the purpose of acquiring any status of privilege under IRPA - is self-evident and self explanatory. The advantage sought in spousal appeals is generally entry to Canada and the granting to the applicant of permanent resident status as a member of the family class.

Under the former Regulations, the word "primarily" in section 4(3) has been defined as "of the first importance, chief." Thus, the objective of gaining admission to Canada must be "the dominant driving force" for the marriage before an applicant is caught by section 4(3) of the former Regulations.[24] A similar argument may be made under the current provision. In *Lorenz*[25], the Immigration Appeal Division panel found that immigration was probably a factor in the applicant wanting to marry a Canadian, but that the evidence as a whole did not support a finding that it was the primary factor.

The Court in *Gavino*[26] concluded that so long as the primary purpose of the marriage was to ensure that some privilege under IRPA would be conveyed to someone, the marriage fails the second prong of the bad faith test. Section 4 does not require a consideration of whether that primary purpose was achieved and a status or privilege was acquired. The privilege need not accrue to the person applying for permanent residence. In this case, the purpose of the marriage was to facilitate or permit the sponsorship of the person's children.

It will be necessary for the Immigration Appeal Division to differentiate between the two prongs of the test under the IRP Regulations. Is there an overlap between the first and the second

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[24] *Singh, Ravinder Kaur v. M.E.I.* (I.A.B. 86-10228), Chu, Suppa, Eglington (dissenting), August 8, 1988, at 5.

[25] *Lorenz, Hubert Calvin v. M.C.I.* (IAD VA6-00444), Nest, June 15, 2007.

[26] *Gavino, Edwin Dorol v. M.C.I.* (F.C., no. IMM-3249-05), Russell, March 9, 2006; 2006 FC 308.

prong of the new test? It will also be necessary for the Immigration Appeal Division to determine which prong would be emphasized in its decisions. As evident from the Immigration Appeal Division decision in *Chavez*[27], it appears emphasis is being placed on the "genuineness" first prong of the test with that prong being the first prong to be analyzed by the panel.

Onus

Under the former Regulations, the Minister did not have the burden on an appeal to the Immigration Appeal Division to demonstrate that the visa officer's refusal of an application for permanent residence was correct.[28] The onus was on the appellant to prove that the applicant was not caught by the excluding section (such as section 4(3))[29] or met the requirements set out in the relevant provision within section 6 (for example fiancées). Additional evidence that was not before the immigration or visa officer could be taken into account by the Immigration Appeal Division on appeal.[30]

Section 4 of the IRP Regulations does not change the onus or evidence that may be presented at the appeal. The Federal Court has concluded that the onus is on the appellant to show that section 4 does not apply to the relationship.[31] In *Thach*,[32] the Court rejected the applicant's submission that the Immigration Appeal Division erred in law by not finding that the burden shifted to the Minister once an appellant has adduced evidence in support ot the genuineness of the marriage as the onus was on the appellant to show his wife was a member of the family class.

Intention

Under the former Regulations, the intention of the foreign spouse was paramount for spousal sponsorship refusals for immigration purposes[33] and the intention of both fiancées was

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[27] *Chavez, supra*, footnote 23.

[28] *Heera, supra*, footnote 6.

[29] *S.G.C. v. Bisla, Satvinder* (F.C.T.D., no. IMM-5690-93), Denault, November 28, 1994.

[30] *Kahlon, Darshan Singh v. M.E.I.* (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: *Kahlon v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).

[31] See for example *Morris, Lawrence v. M.C.I.* (F.C. no. IMM-5045-04), Pinard, March 18, 2005; 2005 FC 369 and *Khera, supra*, footnote 14.

[32] *Thach,Phi Anne v. M.C.I.* (F.C. no. IMM-5344-06), Heneghan, February 1, 2008; 2008 FC 133.

[33] *Bisla, supra*, footnote 29.

relevant for fiancée sponsorship refusals for immigration purposes.[34] For adoptions sponsorships refused for immigration purposes, no guidance was 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).

Section 4 of the IRP Regulations requires the assessment of the appellant's and applicant's intention. In *Gavino,*[35] the Court noted that the evidence of both spouses was relevant to determining intention. An issue to be resolved is the relative weight to be given to the appellant's intention – should equal weight be given or should the applicant's intention be given greater weight. In *Tran*[36] the panel concluded: "while the intentions of both the appellant and the applicant must now be examined, it is the applicant's intention that will remain a key determinant." In *Duong*[37] the panel determined that it is the applicant's intention that governs stating: "… it is the applicant who wishes to come to Canada and if the applicant's intentions show that he/she is caught by the excluding provisions, then it is my view that this should take precedence over the intentions of the appellant, which must also be assessed."

FACTORS TO BE CONSIDERED

As noted in by the Federal Court and by the Immigration Appeal Division in *Chavez*,[38] there are a number of factors that assist in determining whether a relationship is genuine or whether the primary purpose of the relationship was for immigration purposes. Case law under the IRP Regulations as well as from the former Regulations (which remains relevant in considering these factors) have dealt with the following factors:

A) Inconsistent or contradictory statements

Where there are significant discrepancies between the information that a sponsor provides to an immigration officer and the information that an applicant gives to the visa officer abroad about such matters as the origin and development of the relationship between the couple, this may result in a refusal. Allegations that an applicant's lack of knowledge may have been caused by difficulty with the interpretation at the interview must be supported by the evidence.[39]

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[34] *Sidhu, Kulwant Kaur v. M.E.I.* (I.A.B. 88-35458), Ahara, Rotman, Eglington (dissenting), August 25, 1988; *Rasenthiram, Kugenthiraja v. M.C.I.* (IAD T98-01452), Buchanan, February 17, 1999.

[35] *Gavino, supra*, footnote 26.

[36] *Tran, Quoc An v. M.C.I.* (IAD TA2-16608), MacPherson, September 26, 2003.

[37] *Duong, Nhon Hao v. M.C.I.* (IAD TA2-19528), D'Ignazio, November 12, 2003.

[38] *Chavez, supra*, footnote 23.

[39] *M.C.I. v. Singh, Jagdip*, (F.C.T.D., no. IMM-2297-01), Tremblay-Lamer, March 22, 2002; 2002 FCT 313. [Judicial review of IAD VA0-00314, Mattu, April 26, 2001]. The Appeal Division found the applicant's and sponsor's **testimony** regarding the circumstances of the marriage consistent. In granting the judicial review, the Court concluded that "**the evidence**" did not support this finding in that the statement provided during the applicant's immigration interview and the sponsor's testimony were inconsistent.

As noted by the Court in *Roopchand*[40]: "The section [section 4 of the IRP Regulations] raises questions of fact with respect to the intent and purpose of the sponsored spouse. As a practical matter, a person's intent is not likely to be successfully tested by a grilling cross-examination designed to elicit an admission of fraud or dishonesty. Rather, in the usual case, the trier of fact will draw inferences from such things as inconsistent or contradictory statements made by the parties, the knowledge the parties have about each other and their shared history, the nature, frequency and content of communications between the parties, any financial support, and any previous attempt by the applicant spouse to gain admission to Canada."

In *Bhango*,[41] the Court noted that there must be a link between credibility issues of an applicant and section 4 of the IRP Regulations.[42]

Procedural fairness does not require an immigration officer to give spouses the opportunity to respond to discrepancies in the evidence they have presented in their separate interviews.[43]

B) Previous attempts by applicant to gain admission to Canada

Relevant, though not conclusive,[44] is the applicant's history of previous attempts to gain admission to Canada.[45] A marriage contracted when removal from Canada is imminent, in and by itself, does not support a conclusion that the marriage is not *bona fide*.[46]

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[40] *Roopchand, Albert v. M.C.I.* (F.C. no. IMM-1473-07), Dawson, October 26, 2007; 2007 FC 1108.

[41] *Bhango, Gurpal Singh v. M.C.I.* (F.C. no. IMM-625-07), Dawson, October 5, 2007; 2007 FC 1028.

[42] The Court in overturning an Immigration Appeal Division decision noted that the contradictions relied upon have to be relevant to the point at hand which was whether or not the marriage was primarily for the purpose of acquiring a status or privilege under IRPA: *Habib, Mussarat v. M.C.I.* (F.C. no. IMM-5262-06), Harrington, May 16, 2007; 2007 FC 524. As noted by Justice Harrington in *Owusu, Margaret v. M.C.I.* (F.C. no. IMM-1402-06), Harrington, October 6, 2006; 2006 FC 1195, the Immigration Appeal Division cannot engage in conjecture as an evidentiary basis for finding that a marriage is a bad faith marriage.

[43] *M.C.I. v. Dasent, Maria Jackie* (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996.

[44] *Sandhu, Corazon Dalmacio Campos v. M.E.I.* (I.A.B. 86-4082), Rayburn, Goodspeed, Arkin, April 7, 1987; *Malik, Estelita v. M.E.I.* (I.A.B. 86-4271), Rayburn, Goodspeed, Petryshyn, April 11, 1988. A previous application for permanent residence may show an applicant has an interest in admission to Canada but that does not in itself establish that the applicant has become engaged primarily for that objective: *Jung, Harry Kam v. M.E.I.* (I.A.B. 84-6237), D. Davey, Chambers, Anderson, May 17, 1985. Similarly, the mere fact that an applicant has immigration problems does not necessarily lead to a conclusion that his marriage is for immigration purposes: *Sau, Cecilia Mui Fong v. M.C.I.* (IAD V96-00079), Boscariol, January 2, 1997.

[45] For example, marriage shortly after the refusal of a false refugee claim: *Singh, Muriel v. M.E.I.* (I.A.B. 86-1098), Angé, Cardinal, Lefebvre, January 8, 1987. The Immigration Appeal Division is allowed to consider that the sponsored spouse had tried to come to Canada before: *Khera, supra* footnote 14. In *Akhlaq, Afshan v. M.C.I.* (IAD VA4-01933), Boscariol, June 16, 2005, the panel noted that the mere fact that the applicant had made an effort to leave Pakistan in the past and had possibly made a false refugee claim in France did not preclude him from entering into a genuine relationship with the appellant. In *Aujla (Sidhu), Jagwinder Kaur v. M.C.I.* (IAD VA5-02812), Shahriari, April 17, 2007, no negative inference was drawn from the applicant's previous unsuccessful attempt to come to Canada as an adopted child.

[46] *Maire, Beata Jolanta v. M.C.I.* (F.C.T.D., no. IMM-5420-98), Sharlow, July 28, 1999.

C) Previous marriages

Evidence of a prior marriage for immigration purposes, in and of itself, does not generally provide a sufficient evidentiary basis for finding that a subsequent marriage is likewise one for immigration purposes.[47]

D) Arranged marriages

The practice of arranged marriages does not in itself call into question the good faith of the spouses as long as the practice is customary in their culture.[48]

E) Cultural Context

The Immigration Appeal Division in assessing the *bona fides* of a marriage must take into consideration the cultural context within which the marriage took place.[49] In *Dhaliwal*,[50] the Court held that the Immigration Appeal Division did take into consideration the cultural context and found that the arranged marriage did not conform to Sikh tradition. The main explanation for the marriage was destiny, with no evidence being provided as to the role of destiny in Sikh culture. In *Khan*,[51] the Court noted that the genuineness of a spousal relationship must be examined through the eyes of the parties themselves against the cultural backdrop in which they have lived.[52]

F) Mutual Interest

i) Knowledge about the other

One of the basic indicators of mutual interest between a sponsor and applicant is knowledge about each other. However, the application of this criterion tends to vary according to the nature of the marriage, that is, whether or not the marriage was arranged by the families of

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[47] *Devia, Zarish Norris v. M.C.I.* (IAD T94-05862), Band, April 23, 1996. See also *Martin, Juliee v. M.C.I.* (IAD V95-00961), Lam, October 18, 1996. The Appeal Division's decision was upheld on judicial review in *M.C.I. v. Martin, Juliee Ida* (F.C.T.D., no. IMM-4068-96), Heald, August 13, 1997. In *Martin*, the applicant had been married twice before to Canadian women who had sponsored, but had later withdrawn, their sponsorship of his application.

[48] *Brar, Baljit Kaur v. M.C.I.* (IAD V93-02983), Clark, July 7,1995. Reported: *Brar v. Canada (Minister of Citzenship and Immigration)* (1995), 29 Imm. L.R. (2d) 186 (IAD). See also *Cheng, Shawn v. M.C.I.* (IAD V96-02631), Boscariol, April 27, 1998 (even though marriage arranged by sponsor's mother had probably been for pragmatic reasons, it did not necessarily follow it was for immigration purposes). Contrast *Cant, Bant Singh v. M.C.I.* (IAD V97-02643), Boscariol, January 12, 2000, where the arranged marriage defied important societal norms.

[49] *Froment, Danielle Marie v. M.C.I.* (F.C. no. IMM-475-06), Shore, August 24, 2006; 2006 FC 1002.

[50] *Dhaliwal, Jaswinder v. M.C.I.* (F.C. no. IMM-1314-07), de Montigny, October 15, 2007; 2007 FC 1051.

[51] *Khan, Mohammed Farid v. M.C.I.* (F.C. no. IMM-2971-06), Hughes, December 13, 2006; 2006 FC 1490.

[52] See also, *Siev, Samuth v. M.C.I.* (F.C. no. IMM-2472-04), Rouleau, May 24, 2005; 2005 FC 736 where the Court noted that case law has established that the evidence is not to be scrutinized and that North American reasoning should not be applied to the sponsor's conduct.

the couple.[53] In *Froment*,[54] the Court found that the Immigration Appeal Division's conclusion that the sponsored spouse knew little about his wife's activities was justified, and the Immigration Appeal Division had the right to take this lack of knowledge into consideration.

ii) Contact between the couple

Of relevance in ascertaining intention is evidence suggesting that a sponsor and applicant keep in touch and avail themselves of opportunities to spend time together. This includes evidence of communication by telephone and mail; visits; cohabitation; consummation of the marriage; the sponsor's willingness to emigrate to the applicant's country in the event of an unsuccessful appeal; and expressions of love and affection.[55]

iii) Family ties

Depending on the cultural or religious context, the Immigration Appeal Division will consider evidence regarding family ties, contact between the couple and their respective in-laws[56] and the presence of members of both families at engagement and marriage ceremonies.[57]

However, as noted by the Court in *Ouk*,[58] the focus of the examination under section 4 of the IRP Regulations "is on the relation between the couple. While family connections may be seen as a consideration to be weighed, the genuineness of the marriage should be a separate question from the concerns about family connections."

iv) Financial support and exchange of gifts

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[53] *Sandhu v. Canada (Minister of Employment and Immigration)*, 4 Imm.L.R. (2d) 39; *Bhangal, Baljit Singh v. M.E.I.* (IAD W90-00173), Goodspeed, December 6, 1991. In *Basi, Navjot Singh v. M.C.I.* (IAD V95-00664), Lam, July 4, 1996, an adverse inference was drawn from the applicant's lack of knowledge of the sponsor's education on the basis that in arranged marriages, the educational level of prospective spouses is an important criterion of compatibility.

[54] *Froment, supra,* footnote 49.

[55] In *Coolen, Andrea Van v. M.E.I.* (I.A.B. 84-9741), D. Davey, Benedetti, Petryshyn, October 2, 1985, in ascertaining whether or not there was an intention to reside permanently with the other spouse, the panel took into consideration that neither the sponsor nor her spouse spent vacation or holiday time together. The panel in *Chaikosky, Marianne v. M.E.I.* (I.A.B. 84-4156), Petryshyn, Hlady, Voorhees, June 7, 1985, took into account whether or not the sponsor would be willing to emigrate to join the applicant in the event of an unsuccessful sponsorship. See also *Jassar, Surjit Singh v. M.C.I.* (IAD V94-01705), Lam, May 14, 1996 (sponsor at no time expressed any love or affection for the applicant).

[56] *Sandhu, Corazon Dalmacio Campos, supra*, footnote 44.

[57] *Chaikosky, supra*, footnote 55, where the panel noted that there were no members from either side of the family at the civil marriage ceremony even though some of them lived in the same city where the ceremony had taken place.

[58] *Ouk, supra*, footnote 12.

In relation to certain cultural contexts, the exchange of gifts[59] and financial support[60] have been viewed favourably by the Immigration Appeal Division as indicators of a genuine relationship.

v) Delay in submission of sponsorship application

Delay in submitting a sponsorship application may not be a significant factor in repudiating the genuineness of a spousal relationship because if the marriage was for immigration purposes, "the parties would not wish to delay the sponsorship application unduly, the ultimate aim presumably, in both instances, being to get the applicant into Canada as soon as possible."[61] However, if there is no satisfactory explanation for the delay, it may be significant.[62]

vi) Persistence in pursuing appeal

A sponsor's persistence in pursuing an appeal from a spouse's refusal has been taken into account in considering the genuineness of their marriage.[63]

v) Birth of a child

In *Mansro*,[64] the Immigration Appeal Division panel held that while typically the birth of a child is an important factor in considering whether a marriage is genuine, the existence of a child is not determinative, and in that appeal the lack of credible evidence from the appellant and applicant was so striking that it overwhelmed the fact that there was a child of the marriage. In *Aujla (Sidhu)*[65] the panel found that absent exceptional circumstances, a reasonable person accepts the existence of a child as proof of a genuine spousal relationship.

G) "Compatibility"

The Immigration Appeal Division has been critical of some visa officers' practice of stereotyping a spousal relationship, as it is normally understood, based on the compatibility of two persons as marital partners. As the Immigration Appeal Division has stated:[66]

> It almost goes without saying that individuals with differences in religious beliefs and backgrounds regularly marry in Canada, and are not normally deemed, by virtue of that factor alone, to be incompatible as a married

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[59] *Sandhu, Corazon Dalmacio Campos, supra*, footnote 44.

[60] *Virk, Raspal Singh v. M.E.I.* (I.A.B. 86-9145), Fatsis, Arkin, Suppa, December 18, 1986. Reported: *Virk v. Canada (Minister of Employment and Immigration)* (1988), 2 Imm. L.R. (2d) 127 (I.A.B.).

[61] *Sandhu, supra*, footnote 53 at 7-8.

[62] *Johal, Surinder Singh v. M.E.I.* (IAD V87-6546), Wlodyka, Singh, Verma, February 15, 1989.

[63] *Bahal, Vijay Kumar v. M.C.I.* (IAD T97-02759), Townshend, August 4, 1998.

[64] *Mansro, Gurmel Singh v. M.C.I.* (IAD VA6-00931), Miller, July 18, 2007.

[65] *Aujla (Sidhu), supra*, footnote 45.

[66] *Sandhu, Corazon Dalmacio Campos, supra*, footnote 44 at 5-6.

> couple. The conclusion reached by the visa officer that a permanent marital relationship was not contemplated appears to have been based solely on his questionable definition of a normal spousal relationship.

In deciding upon the validity of refusals where incompatibility has been alleged, differences in religion,[67] education and language,[68] and age[69] have been examined. In *Froment,*[70] the Court held that the Immigration Appeal Division could consider factors such as age and differences in customs or language. It is not contrary to the *Canadian Charter of Rights and Freedoms* to consider differences in age, education and marital status of the parties.[71]

H) Summary

The case-law indicates that no single criterion is decisive. It is the interplay of several factors that leads the Immigration Appeal Division in any given case to make its finding as to the genuineness, the purpose for, and intentions in respect of, a marital relationship or a relationship between common law or conjugal partners.[72]

Timing

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[67] See, for example, *Sandhu, Corazon Dalmacio Campos, supra*, footnote 44, where the panel took into consideration evidence that the sponsor and applicant did not perceive differences in their religions to be problematic as they respected each other's religion and attended each other's place of worship together.

[68] See, for example, *Dhillon, Gurprit Singh v. M.E.I.* (I.A.B. 89-00571), Sherman, Ariemma, Tisshaw, August 8, 1989, where the panel acknowledged that incompatibility in education and language alone were generally insufficient to found a refusal, but took them into consideration, together with other factors such as the sponsor's lack of knowledge about his spouse's background, to conclude that the marriage was for immigration purposes.

[69] See, for example, *Dhaliwal, Rup Singh v. M.C.I.* (IAD V96-00458), Jackson, September 5, 1997, where the panel accepted the evidence of the visa officer that an age difference of two to five years is considered reasonable for purposes of compatibility in an arranged marriage and concluded that the 14-year age gap between the sponsor and applicant was not reasonable. In *Glaw, Gerhard Franz v. M.C.I.* (IAD T97-02268), Townshend, July 21, 1998 but for the 40-year age difference between the sponsor and applicant, the panel would have had no difficulty in concluding the relationship to be genuine. The panel concluded that the age difference ought not to change the panel's view as it was not for the panel to judge whether or not a man in his 60s should marry a woman in her late 20s, a matter of individual choice. In *Sangha (Mand), Narinder Kaur v. M.C.I.* (IAD V97-01626), Carver, September 21, 1998, the sponsor's astrological attributes were more important to the applicant than differences in age and marital background. In *Judge, Mansoor Ali v. M.C.I. (IAD TA3-20841),* Leonoff, July 25, 2005, the panel noted that while there was a considerable age difference between the parties; a finding of a bad faith relationship could not be based on the age disparity alone.

[70] *Froment, supra,* footnote 49.

[71] *Parmar, Charanjit Singh v. M.C.I.* (IAD V98-04542), Boscariol, November 23, 1999.

[72] See, for example, *Sidhu, Gurdip Singh v. M.E.I.* (IAD W90-00023), Goodspeed, Arpin, Rayburn, September 12, 1990, where the panel gave little or no weight to evidence of differences in age and education in view of evidence of other important factors in arranging a traditional Sikh marriage.

Under the former Regulations, intention was considered as at the date of the marriage, engagement or adoption.

Regarding the timing of the assessment of "genuineness', section 4 inquires into whether or not the relationship *is* genuine or *was* entered into primarily to acquire status under IRPA. With respect to the "genuineness" prong of the test, the inquiry is phrased in the present tense "suggesting an on-going inquiry, not necessary fixed at the time of marriage."[73] This would appear to require an assessment of the "genuineness" of the relationship as at the date of the hearing.[74]

The Court in *Donkar* noted that section 4 does not state that the time of the marriage is the time at which the genuineness of the relationship is to be assessed. The section "speaks in the present tense for a determination of the genuineness of the relationship and in the past tense for assessing the purpose for which it was created. This appears to be consistent with the practice followed by Immigration Officers in assessing spousal sponsorship applications. It appears, from the cases the Court has seen, that in interviews with claimants (sic) and their putative spouses the officers focus on whether there is a continuing relationship."[75] In applying the second prong of the test, the time of assessment should be the date of entry of the relationship.[76]

It may be necessary to consider the impact of section 121 of the IRP Regulations and whether or not that section requires that the relationship be genuine from the date of application to the final determination of the application.

Evidence

Under the former Regulations, evidence on the first prong of the test of whether the relationship was primarily for immigration purposes for marriages and engagements could be used in connection with the second prong of that test[77] with the analysis of most panels being directed at the primary purpose of the marriage or engagement.

In *Gavino,* the Court could not see why the evidence examined by the Immigration Appeal Division panel to decide the marriage was not genuine would not also have relevance when the panel turned its mind to motivation."[78] There appears to be no reason why evidence from one prong of the new test cannot be used in any analysis of the second prong.

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

[74] *Gill, Ranjit Singh v. M.C.I.* (IAD VA2-03074), Kang, November 12, 2003.

[75] *Donkar, supra,* footnote 11, at paragraph 18.

[76] *Donkar, supra* ,footnote 11.

[77] *Bisla, supra,* footnote 29.

[78] *Gavino, supra,* footnote 26.

An issue that often arises in a section 4 appeal hearing is whether or not the applicant must testify, and if the applicant does not testify whether a negative inference should be drawn.

In *Mann*,[79] a negative inference was not drawn by the Immigration Appeal Division from the applicant's failure to testify as the testimony of the appellant, combined with the documentary evidence, was sufficiently persuasive for the panel to decline to draw a negative inference from the failure of the applicant to testify. The panel noted that with respect to the second prong of the test under section 4 of the IRP Regulations, the intentions of the applicant are still important, as it is the applicant who typically has the most to gain from an immigration perspective. However, with respect to the first prong of the test - whether the marriage is genuine - it is the intentions of both the appellant and applicant that are significant. By focusing the inquiry on the broad question of whether the marriage is genuine, Parliament intended a shift away from a narrow focus on the applicant's intentions at the time of the marriage. The panel held that the testimony of the appellant alone can suffice to persuade the panel of the bona fides of the parties' intentions.

The panel in *Mann*[80] went on to note that there are cases in which the testimony of the applicant will be necessary to successfully discharge the evidentiary burden. Appeals in which it might be advisable or even necessary to call the applicant as a witness include circumstances such as the following:

Where there are specific and significant inconsistencies in the record – as between the appellant and the applicant or within the applicant's own answers;

Where the applicant has a questionable immigration history;

Where there is an obvious reason to question the motivation of the applicant, such as where there is persuasive evidence that the applicant is using the appellant to acquire status in Canada;

Where there is minimal or inadequate documentary evidence to corroborate the testimony of the appellant.

The panel noted that: "these circumstances are not exhaustive. Nor are they mutually exclusive. However, in some cases, even where the above problems exist, the appellant alone may be able to persuasively explain the problem. The decision whether to call the applicant as a witness is individual to each appeal and in the view of the panel, should be based on the quality of the available other evidence in its entirety. As noted above, even where one of the above circumstances exists, the testimony of the appellant alone may suffice to discharge the evidentiary burden. In some appeals, it may be sufficient for the applicant to provide evidence via sworn Affidavit."[81]

The Immigration Appeal Division has commented in another case as follows where the sponsored spouse was not called to testify by the appellant whom the panel had found to have provided credible testimony: "The appellant made a judgment decision in this regard and he

[79] *Mann, Jagdeep Kaur v. M.C.I.* (IAD TA3-19094), Stein, August 5, 2005.

[80] *Mann, supra,* footnote 79 at paragraph 14.

[81] *Mann, supra,* footnote 79 at paragraph 15.

concluded that the applicant was not needed, and that the panel had all the evidence it needed to make its decision, I draw no adverse inference from the applicant not giving her evidence at the hearing. Her evidence in detail was given to the visa officer and is contained on the CAIPS notes. Some of it is accurate and some of it is not, but on balance, the panel finds that the applicant's evidence with respect to the core issues, where it overlaps with the appellant's evidence, does confirm and corroborate the same." [82]

CHANGE IN MARITAL STATUS

Where a common law or conjugal partner marries a sponsor at some time during the processing of an application for permanent residence, the issue arises whether or not to continue to treat the application as that of a common law or conjugal partner.[83]

A) Marriage after filing of undertaking of assistance, but before filing of application for permanent residence

The relevant date for determining marital status is the date an applicant swears to the truth of the contents of the application for permanent residence.[84]

B) Marriage after filing of undertaking of assistance and application for permanent residence, but before refusal of application

The Federal Court has held that a marriage post-dating an application for permanent residence of a fiancé(e) is irrelevant in dealing with the application.[85] The Court added that any form of marriage must be considered a positive factor in resolving the issue of the sincerity of a sponsor and applicant to be married if the applicant is admitted to Canada.

C) Marriage after refusal, but before hearing of appeal

The general approach, based on *Kaur*,[86] a case involving a fiancé(e) application under the former Regulations, is that the initial application by the applicant is to be dealt with entirely without reference to a subsequent marriage.[87]

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[82] *Mann, Pitter Ali Ram v. M.C.I.* (IAD TA6-13395), Band, December 21, 2007 at paragraphs 15 and 16.

[83] In a case involving a fiancé under the former Regulations, the visa office may treat an intervening marriage as indicative of a new application: *Kaur, Amarjit v. M.C.I.* (IAD T97-03654), Buchanan, June 24, 1999.

[84] *Owens, Christine Janet v. M.E.I.* (F.C.A., no. A-615-83), Urie, Le Dain, Marceau, March 27, 1984. Thus where a sponsor married her fiancé after the undertaking of assistance was filed but before the filing of the application for permanent residence, the application ought to have been assessed as a spousal one: *Gill, Balbir Kaur v. M.E.I.* (I.A.B. 88-00074), Wlodyka, MacLeod, Verma, February 7, 1989. As previously noted, under the IRP Regulations a fiancé(e) is not a member of the family class unless the applicant is within the definition as a common law or conjugal partner.

[85] *Kaur, Gurmit v. C.E.I.C.* (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985. *Kaur* was followed in *Dhaliwal, Charanjit Kaur v. M.E.I.* (I.A.B. 85-6194), Ariemma, Mawani, Singh, May 7, 1987.

[86] *Kaur*, *supra*, footnote 85.

D) Marriage after commencement, but before completion of hearing of appeal

Where an applicant marries a sponsor after the commencement of the appeal hearing, the appeal is heard as a common law partner or conjugal partner appeal.[88]

E) Summary of change in status

The Immigration Appeal Division typically views the critical time for determining the status of an applicant (i.e. spouse, common law or conjugal partner) to be the date of the swearing of the application for permanent residence, takes as determinative the applicant's status at that point in time, and considers a subsequent marriage as evidence in favour of the genuineness of the relationship if consistent with other evidence.[89]

As summarized by the Immigration Appeal Division in relation to a former Regulations fiancée appeal:[90]

> [...] in the Board's opinion, the decision in *Kahlon*[91] does not, without more, have the effect of converting the application from one of a fiancée to one of a spouse, nor consequently have the effect of automatically converting an appeal from a fiancée refusal to one from a spousal refusal. What it does is to enable the Board to take into account the subsequent marriage of the parties and the circumstances surrounding it and any other evidence which exists at the time of the hearing in reaching its decision. The issue nevertheless remains the inadmissibility of the applicant as a fiancée.

F) Converting spousal application to a conjugal or common law partner application

In unique circumstances,[92] and sometimes with the consent of counsel for the Minister (or on the panel's own application), the Immigration Appeal Division has "converted" a spousal

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87 *Khella, Kulwinder Kaur v. M.E.I.* (IAD V89-00179), Singh, Angé, Verma, June 29, 1989. See also *Bhandhal, Amanpreet Kaur v. M.E.I.* (IAD T89-06326), Bell, Tisshaw, Townshend, April 4, 1990; and *Su, Khang San v. S.S.C.* (IAD T93-12061), Aterman, June 1, 1994.

88 In a fiancé appeal under the former Regulations: *Chow, Wing Ken v. M.E.I.* (I.A.B. 86-9800), Tisshaw, Jew, Bell (dissenting), July 8, 1988. Reported: *Chow v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 97 (I.A.B.).

89 See, for example, *Mann, Paramjit Kaur v. M.E.I.* (IAD V89-00516), Chambers, Gillanders, Verma, March 20, 1990; *Bhandhal, supra*, footnote 87; *Ta, Suy Khuong v. M.C.I.* (IAD W99-00121), D'Ignazio, November 21, 2000.

90 *Gill, Manjeet Singh v. M.E.I.* (IAD V87-6408), Mawani, MacLeod, Verma, August 16, 1989, at 3.

91 *Kahlon, supra*, footnote 30, where it was held that a hearing of an appeal by the Immigration Appeal Board is a hearing *de novo* in a broad sense.

92 Usually where a sponsor and applicant genuinely believe they are validly married but later discover there is a defect in regard to the marriage including an invalid proxy marriage. Under the former Immigration Regulations the conversion was to the status of a fiancé(e).

application to that of a conjugal or common law partner.[93] By treating an applicant as a conjugal or common law partner, the applicant continues to be a member of the family class and the sponsor is not required to recommence the immigration process with a new application. The Immigration Appeal Division panel in *Tabesh*[94] concluded that if a person applies as a member of the family class as a spouse and the refusal is based on the formal validity of the marriage, it is incumbent on the visa officer to consider as well whether the person could be either a conjugal or common-law partner. A failure to do so could give rise to multiple refusals and appeals on essentially the same facts. The determination of all categories within the one class of marital, conjugal or common-law partners could be made by the Immigration Appeal Division even in the absence of an application by a party to amend the grounds of refusal.

REPEAT APPEALS – RES JUDICATA AND ISSUE ESTOPPEL

A) Introduction

IRPA contemplates that there may be re-applications in immigration matters and hence the possibility of repeat appeals to the Immigration Appeal Division.

In some repeat appeals, for example, from financial or medical refusals, it is acknowledged that circumstances may change following the first appeal, and the Immigration Appeal Division may evaluate evidence of improved fiscal or physical health on a repeat appeal from a second refusal.

However, in marriage and adoption applications, there is limited 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 legislation. In repeat appeals from marriage or 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. Repeat appeals from these refusals require a more restrictive approach.

Two tools are available to the Immigration Appeal Division to deal with attempts to relitigate unsuccessful appeals: the doctrines of *res judicata* and abuse of process. The former has specific criteria which must be met before it can be applied, while the latter has developed as a more flexible doctrine meant to encompass situations that may not meet the stricter *res judicata* criteria. While *res judicata* will be the most appropriate doctrine to apply in most marriage and adoption repeat appeals, abuse of process is available in appropriate cases and may be used instead of, or in conjunction with, a finding of *res judicata*.

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[93] *Tabesh, Rita v. M.C.I.* (IAD VA3-00941), Wiebe, January 7, 2004; See also, *Ur-Rahman, Mohammed v. M.C.I.* (IAD TA3-04308), Collins, January 13, 2005.

[94] *ibid*

B) Doctrine of *Res Judicata*

Res Judicata has two forms: issue estoppel and cause of action estoppel. The form that is relevant to repeat appeals is issue estoppel and it is often referred to generically as *res judicata*.

There are three requirements for issue estoppel/*res judicata* to apply;

i. that the same question has been decided

ii. that the judicial decision which is said to have created the estoppel was final; and

iii. that the parties to the judicial decision or their privies[95] were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[96]

The doctrine avoids the potential to have inconsistent decisions in which a previous decision is undermined by a finding on a repeat appeal.

> Issue estoppel is a common law rule of public policy that balances the right of a plaintiff to litigate an issue against the court's concern as to duplication of process, use of its limited facilities, concern for conflicting findings of fact, and for achieving justice between litigants.[97]

In the context of appeals before the Immigration Appeal Division, *res judicata* is always appropriate for consideration. This is because in the majority of repeat appeals all three criteria set out above are present. In the usual scenario the appellant has commenced a new sponsorship application following the dismissal of his first appeal. An immigration officer has refused the application and the appellant appeals the new refusal to the Immigration Appeal Division. The decision made by the Immigration Appeal Division on the first appeal was final and the parties (applicant, appellant and Minister) are the same. Most of the time, the remaining criterion – same question to be decided - is also met: for example, the immigration intention of the parties at the time of the marriage, the genuineness of the marriage or the genuineness of a parent/child relationship in an adoption.[98]

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[95] Black's Law Dictionary defines *privy* as one who has acquired an interest in the subject matter affected by the judgment through or under one of the parties.

[96] *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555-56. See also, *The Doctrine of Res Judicata in Canada*, Donald J. Lange, (Butterworths, Toronto, 2000) at 23.

[97] *Machin et al v. Tomlison* (2000), 51 OR (3d) (OCA) 566 at 571.

[98] Sometimes the issue may be characterized as different on a second appeal, but it is really the same issue as in the first appeal because it involves an analysis of the same facts. What may be phrased as a separate issue may in fact be different facets of the same issue based on the same basic underlying facts. For example, a finding that the intention on an adoption was for immigration purposes cannot really be separated from a finding on the genuineness of the parent child relationship. The underlying facts are intertwined. Please see *M.C.I. v. Sekhon, Amrik Singh* (IAD T99-05069), Sangmuah, March 30, 2001, at 17, where the Immigration Appeal Division stated; "In my view, short of refusing an application or dismissing an appeal on the ground that the adoption did not comply with the laws of the jurisdiction in which it took place, a decision-maker cannot avoid an inquiry into the intent behind the adoption. A finding that it was entered into primarily for immigration purposes essentially determines the application against the applicant or the appeal against the appellant."

The rules governing *res judicata* should not be mechanically applied. Once a determination is made that the criteria for *res judicata* are met the Immigration Appeal Division must still consider whether as a matter of discretion *res judicata* ought to be applied.[99] The Supreme Court of Canada in *Danyluk*[100] listed factors which may be considered in the exercise of that discretion. The factor relevant to the Appeal Division's exercise of discretion in *res judicata* motions would be the potential for injustice if the doctrine is applied. In this regard the Immigration Appeal Division will balance the public interest in the finality of litigation with the public interest in ensuring that justice is done.

C) Abuse of Process

Even though repeat appeals at the Immigration Appeal Division will, due to the nature of the process, almost always meet the criteria for *res judicata*, in some cases the Appeal Division may find it more appropriate to consider applying the doctrine of abuse of process instead of or in addition to *res judicata.*

Unlike *res judicata*, which requires that the same parties or their privies be involved in the earlier decision, abuse of process is not constrained by such formalities. It requires only that the same question be decided previously.

> Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy.[101]

In particular, it can be used to prevent the abuse of tribunal procedures by applicants who would otherwise re-apply *ad infinitum.*[102]

> Rearguing a case in appeal for the sake of reargument offends public interest. It is well recognized that superior courts have the inherent jurisdiction to prevent an abuse of their process and there is some suggestion that administrative tribunals do too. …Clearly, therefore the Appeal Division has jurisdiction to control its process and to prevent its abuse.[103]

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[99] *Chadha, Neena v. M.C.I.* (IAD VA0-01981), Boscariol, March 26, 2002; *Bhinder, Satinder Kaur v. M.C.I.* (IAD TA0-20537), MacAdam, June 13, 2002.

[100] *Danyluk v. Ainsworth Technologies Inc*. [2001] S.C.J. No.46, Q.L. The Supreme Court noted that the underlying purpose of *res judicata* is to balance the public interest in the finality of litigation with the public interest in ensuring that justice be done on the facts of a particular case. It set out a non-exhaustive list of factors that a court may consider in deciding whether to exercise its discretion to apply *res judicata*. The factors are: the wording of the statute, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision-maker, the circumstances giving rise to the prior administrative proceedings and the potential injustice. Of all theses factors, it would seem the last (potential for injustice) is the one that would be most relevant for the Immigration Appeal Division to consider before finding that an appeal is *res judicata*. See also *Pillai, Rajkumar Vadugaiyah v. M.C.I.*, (F.C.T.D., Imm-6124-00), Gibson, December 21, 2001.

[101] *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (O.C.A.).

[102] *O'Brien v. Canada* (1993), 153 N.R. 313 (FCA).

[103] *Kaloti v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 390 (C.A.).

Abuse of process is a particularly powerful tool for preserving tribunal resources and for upholding the integrity of the process by avoiding inconsistent results.[104] It has been held that exposing a court to the risk of inconsistent decisions is an abuse of process.[105]

The doctrine may be applied, out of a concern for the integrity of the process, even in the absence of inappropriate behaviour by the parties.[106] The use of abuse of process ought to be reserved for cases where there is an additional serious element present, beyond the mere fact of relitigation, justifying the application of abuse of process[107].

D) Special Circumstances Exception to *Res Judicata* and Abuse of Process

Even where all the criteria for the application of *res judicata* are met (same question, same parties, final decision) a repeat appeal can only be *res judicata* if there exist no special circumstances that would bring the appeal within the exception to the doctrine.[108]

The exception of special circumstances applies where in the previous proceedings there was fraud or other misconduct that raises natural justice issues.[109] In addition, the exception extends to decisive new evidence that could not have been discovered by exercise of reasonable diligence in the first proceeding. It also applies to changes in the law and public policy considerations.[110]

> …subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing. The exceptions to the forgoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence.[111]

Even though the exception of special circumstances developed from the case law on *res judicata*, it also applies to abuse of process and each repeat appeal must be examined to ascertain if there exist special circumstances that would preclude the application of either *res judicata* or abuse of process.

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[104] Lange text, *supra*, footnote 96 at 348.

[105] *R. v. Duhamel* (1984), 57 A.R. 204 (S.C.C.).

[106] *Abacus Cities Ltd. (Bankrupt) v. Bank of Montreal* (1987), 80 A.R 254 (C.A.) at 259.

[107] *Dhaliwal, Baljit Kaur v. M.C.I.*, (F.C.T.D., IMM-1760-01), Campbell, December 21, 2001.

[108] The case law is clear that the existence of special circumstances such as fraud or new evidence are an exception to res judicata. See *Cobb v. Holding Lumber Co*. (1977), 79 D.L.R. (3d) 332 (B.C.S.C.) at 334.

[109] In *Tut, Sukhbir Singh v. M.C.I.* (IAD V98-03881), Mattu, March 7, 2002 the panel found that the incompetence of previous counsel resulted in a denial of natural justice as the sponsor had been denied a full and fair hearing.

[110] Lange text, *supra*, footnote 96 at 205.

[111] *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1998), 47 D.L.R. (4th) 431 at 438.

E) Are there Special Circumstances? Procedure for Assessment of Evidence in Repeat Claims

The burden of proof rests upon the person alleging that special circumstances exist.[112] Therefore the appellant would have to establish that the evidence proffered falls within the meaning of decisive new evidence or one of the other exceptions to the doctrines.

A decision on whether either doctrine is applicable to a repeat appeal should be made without an oral hearing into the merits of the appeal.[113] Since the concept behind *res judicata* and abuse of process is to protect the limited resources of courts and tribunals and to prevent re-litigation of issues already decided by a tribunal member, it would defeat that purpose if a full hearing were held on a repeat appeal just to determine if *res judicata* or abuse of process applies.[114] The Immigration Appeal Division therefore, should, by way of motion, review the evidence submitted in support of the second appeal and dismiss the appeal summarily if there exist no special circumstances.[115]

Only if special circumstances are found, and therefore *res judicata* and abuse of process do not apply, should the matter proceed to a full hearing where the decisive new evidence would be considered in the context of all the evidence.

> …the Appeal Division has jurisdiction to control its process and to prevent its abuse. It may entertain, as it did in this case, preliminary motions to summarily dispose of an appeal which is but an abusive attempt to re-litigate what had been litigated in a previous appeal. A full hearing on the merits of the appeal is not necessary.[116]

Submissions in writing from the Minister and the Appellant, together with supporting affidavits and other material, may be entertained on such a motion. The Immigration Appeal Division should be presented with a summary of the new evidence that the appellant feels supports a second appeal.[117]

The evaluation of the purported new evidence will be key on such motions. The nature of the evidence will determine whether, barring special circumstances, the repeat appeal should be considered *res judicata*, abuse of process, or both.

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[112] Lange text, *supra*, footnote 96 at 208.

[113] *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D. IMM-1982-01), McKeown, December 12, 2001. The Federal Court approved the Immigration Appeal Division's practice of considering evidence in writing, without an oral hearing, on *res judicata* motions. (The application for judicial review in the *Sekhon* case was allowed on other grounds.)

[114] *Sekhon*, *supra*, footnote 98, at 19.

[115] *Sekhon*, *supra*, footnote 98. See *also, Kaloti* , *supra*, footnote 103.

[116] *Kaloti*, *supra*, footnote 103, at 5.

[117] *Sekhon*, *supra*, footnote 98.

F) Using *Res Judicata* and Abuse of Process

Recent case law appears to minimize the clear delineation that once existed between the doctrines *of res judicata* and abuse of process. Lange, in his text, *The Doctrine of Res Judicata in Canada*, makes the following statement with respect to the overlap between *res judicata* and abuse of process;

> The courts have stated that abuse of process is res judicata in the wider sense or a form of res judicata, and that abuse of process arguments are res judicata arguments in another form. To seek to litigate an issue that is barred by cause of action estoppel or issue estoppel is an abuse of process. The requirements of issue estoppel apply by analogy to the application of abuse of process and where the requirements of issue estoppel are met, it is an abuse of process by relitigation.[118]

It is open to the Immigration Appeal Division to apply either or both doctrines in appropriate cases.[119] In *Kaloti*, the Court acknowledged that *res judicata* may have been applicable, but on the particular facts of the case, where no new evidence was proffered to support the second appeal, the Court preferred to make a finding of abuse of process.

The Court in *Kaloti* cautioned however, that one should remain aware of the distinction to be made between *res judicata* and abuse of process.[120]

The Court in *Dhaliwal*[121] offers some guidance in this area. It held that it is inappropriate to make a finding of abuse of process where new evidence exists which might be relevant to the intention of the applicant at the time of the marriage or adoption. It cautions that abuse of process ought to be used only in the exceptional cases.

There are examples where courts have used the doctrine of abuse of process as a concurrent ground with *res judicata*[122] and situations where courts have declined to commit to the use of one over the other.

> I decline to decide whether the forgoing conclusion represents the application of a species of estoppel by res judicata or abuse of process as the result is the same.[123]

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[118] Lange text, *supra*, footnote 96 at 344-5.

[119] *Sekhon*, *supra*, footnote 98.

[120] In *Kaloti, supra*, footnote 103, the Court quoted from the judgment of Auld L.J. in *Bradford & Bigley Society v. Seddon*, [1999] 1 W.L.R. 1482 at 1490 (C.A.): *In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the above dictum, The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances" […] The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.*

[121] *Dhaliwal*, *supra*, footnote 69.

[122] Lange text, *supra*, footnote 96 at 345.

It is suggested that the nature of the purported new evidence put forward to support a repeat appeal will determine whether one or both of the doctrines should be applied. Where there is no new evidence proffered or the evidence is spurious, abuse of process may be applicable and appropriate.[124] In all other situations where new evidence is proffered that may not meet the standard of decisive new evidence, *res judicata* is the appropriate doctrine to apply.

In all but exceptional circumstances,[125] the panel on the motion will not be able to make credibility assessments on the new evidence put forward to support a repeat appeal. In the absence of an opportunity to examine a witness on his or her statements, the statements must be assumed to be true.

G) Evidentiary framework for the application of either *res judicata* or abuse of process: Examination of Decisive New Evidence

Decisive new evidence has been described as evidence "demonstrably capable of altering the result"[126] of the first proceeding.

1. Evidence that existed at the first appeal but was not reasonably available

Where the appellant presents purported new evidence, the evidence must be examined to discern if it could not reasonably have been adduced at the first appeal.[127] If it passes this test it must be further examined to see if it is decisive new evidence.

> Following *Kular*, in order to justify a hearing of the merits of the second appeal, there must be evidence which is material to the matters in issue which was not heard at the first appeal. But it must also be evidence which could not have been available using due diligence at the time of the first hearing. In short more evidence does not necessarily justify a new hearing. It is

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[123] *Saskatoon Credit, supra*, footnote 111 at 438.

[124] *Litt, Gurdev Singh v. M.C.I.* (V99-03351), Baker, December 18, 2000 where a child was purportedly born to the applicant after the first hearing but where no DNA evidence was submitted, the panel held that there was no new evidence given that the panel in the first appeal did not consider the evidence of the pregnancy credible. Further, the panel found that the failure to submit DNA evidence when an adjournment was granted for the purpose was in itself an abuse of process.

[125] In *Melo, Eduardo Manuel v. M.C.I.* (IAD T94-07953), Hoare, February 7, 2001, the panel found, on a motion to reopen, that statements in the applicant's affidavit were not persuasive as they asserted facts on an issue on which the previous panel had made negative credibility findings. See too *Nijjar (Mann), Gurtejpal Kaur v. M.C.I.* (IAD V98-03483), Borst, December 8, 2000 where the panel found the new evidence not to be credible, the medical tests did not prove that the couple tried to conceive. In *Bassi, Viyay Kamal Lata v. M.C.I.* (IAD V99-02989), Borst, October 17, 2000 the panel found the evidence concerning the pregnancy and its termination manufactured. Where the applicant made no mention of the pregnancy at his interview, despite being asked for new evidence relating to the spousal relationship, the panel found the evidence of the pregnancy not credible: *Sahota, Paramjit Kaur v. M.C.I.* (IAD VA0-00929), Baker, October 31, 2000.

[126] *Lundrigan Group Ltd. v. Pilgrim* (1989), 75 Nfld. & P.E.I.R. 217 (Nfld. C.A.) at 223.

[127] In *Alzaim (Sekala), Khadija v. M.C.I.* (IAD TA1-05412), Sangmuah, April 23, 2002 the panel found statements from the applicant, the sponsor's son and various friends and family members could have been adduced in the previous proceedings by the exercise of due diligence.

> evidence justifying a new hearing if and only if it is material evidence which was not available at the time of the first hearing and could not have been obtained by due diligence at that time.[128]

If this new evidence is found to be capable of altering the result in the first appeal (i.e. "decisive"), *res judicata* and abuse of process do not apply. The matter then goes to a full hearing where the Immigration Appeal Division will determine if the evidence found to be capable of altering the result does in fact produce a different disposition.[129]

2. Evidence that came into existence following the first appeal

Within the context of a repeat appeal, it will be rare that new evidence will surface that existed at the time of the first appeal, but was not reasonably available. The more likely scenario will involve evidence that relates specifically to activities that occurred in the time period between the dismissal of the first appeal and the repeat appeal.

Such evidence is clearly new evidence in the sense that it did not exist at the time of the first hearing.[130] However, it does not fall within the special circumstances exception to *res judicata* and abuse of process unless it is decisive new evidence.

Decisive new evidence is at a minimum that which would be probative to the intention fixed in time by the relevant definition in the legislation. For example, the Court in *Kaloti* set out that since under section 4(3) of the former Regulations the intention of an applicant in a marriage is fixed in time and cannot be changed, a new application would have to be based on new evidence pertaining to that point in time.[131] Evidence that stems from the period of time between the two appeals ought to be further examined.[132] The Immigration Appeal Division must differentiate between that which is **decisive** fresh evidence and that which is merely **additional**

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[128] *M.C.I v. Nirwan, Malkiat Singh* (IAD VA0-01903), Clark, April 24, 2001, at 5. In *Hamid, Abdul v. M.C.I.* (F.C., no. IMM-872-06), Martineau, February 26, 2007; 2007 FC 220, the Court held that the subsequent birth of a child does not, on its own, suffice as special circumstances. In *Anttal, Narinder Kaur v. M.C.I.* (F.C., no. IMM-2179-07), Snider, January 9, 2008; 2008 FC 30 the pregnancy of the sponsored spouses was found not to be decisive new evidence.

[129] See *Sukhchain, Singh v. M.C.I.* (IAD TA5-14717), MacLean, November 15, 2007 for a discussion at paragraphs 31 and 32 on how the panel proceeded to deal with the repeat appeal after the preliminary ruling by another member that *res judicata* did not apply to the repeat appeal.

[130] While courts may only consider new evidence that was in existence at the time of the previous court decision, the Immigration Appeal Division is in a unique position. Under the former Immigration Act, a person may reapply so we may look at completely new evidence that did not exist at the time of the first appeal, however that new evidence must pass several tests including its relevance to the intention of an applicant at a fixed point in time in marriages and adoptions.

[131] *Kaloti, supra*, footnote 103 at 4. Also see *Sekhon, supra*, footnote 98, at 12, where the Immigration Appeal Division discusses the fixed point in time for determining the *bona fides* of a parent /child relationship.

[132] *Dhillon, Manohar Singh v. M.C.I.* (IAD VA0-01782), Boscariol, June 29, 2001. The panel allowed the appeal in finding that the new evidence of continuing communication between the appellant and the applicant confirmed a consistent pattern of regular telephone calls made since the marriage; whereas, in *Alzaim, supra*, footnote 127, the panel noted the evidence of contact between the appellant and the applicant after the first appeal was new but not decisive given the totality of the evidence.

evidence. The latter is evidence, which if brought at the first appeal, may have been given significant weight, but coming after the dismissal has less probative value. Decisive fresh evidence should genuinely affect an evaluation of the intention of the parties at the time the applicant purports to become a member of the family class while additional evidence simply tries to bolster or create the intention.

In both cases a *res judicata* analysis is applied. In the former, where it is decisive new evidence capable of altering the result, special circumstances may be established and the matter goes on to a full oral hearing on the merits. [133] In the latter, where it is merely additional new evidence, the Immigration Appeal Division may find the appeal is *res judicata.*[134] In addition to a finding of *res judicata*, the Immigration Appeal Division may find that the second appeal is an abuse of process if the nature of the additional new evidence was spurious or without much merit/substance.

There may also be new evidence that indicates a genuine relationship at the time of the second appeal but does not establish that the intention existed at the time the applicant purported to become a member of the family class. While the evidence shows that a relationship may have developed after the first appeal was dismissed, the matter may still be *res judicata* as the time requirement for establishing the intention was not met. In these circumstances the matter would be *res judicata*, however a finding of abuse of process is not recommended.

3. No new evidence proffered to support the appeal

Where the appellant presents no new evidence to support a second appeal, the attempt to re-litigate the issue may properly be characterized as an abuse of process without resorting to a *res judicata* analysis. This was the situation in *Kaloti* and the Court was clear that it was not necessary in that case to apply the doctrine of *res judicata*.

H) Res Judicata under IRPA

The case law that has developed with respect to the application of *res judicata* and issue estoppel is based on the timing determination under the former Regulations.

An issue that arose with the new legislation 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*[135] the

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[133] Where the new evidence confirmed a continuing relationship after the first refusal and the conception of a child out of that relationship, the panel did not apply the doctrine of *res judicata*: *Parmar, Kuljit Kaur v. M.C.I.* (IAD VA1-03015), Boscariol, May 13, 2002; *Samra, Sukhwinder Kaur v. M.C.I.* (IAD VA1-01988), Boscariol, December 14, 2001. Similarly, in *Sandhu, Randeep Kaur v. M.C.I.* (IAD VA0-04145), Boscariol, December 14, 2001 and in *Gill, Harjinder Singh v. M.C.I.* (IAD VA1-00462), Boscariol, February 8, 2002 the birth of a child is held to be "decisive new evidence".

[134] *Samra, Kulwinder Kaur v. M.C.I.* (IAD VA0-01995), Baker, June 27, 2001; *Chand, Rekha v. M.C.I.* (V99-04372), Mattu, December 4, 2001; *Dhaliwal, Kulwinder Kaur Nijjar v. M.C.I.* (IAD V99-04535), Cochran, October 10, 2000 (reasons signed on October 31, 2000).

[135] *Vuong, supra*, footnote 73.

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. In *Lu*[136] the panel adopted a different position and concluded that *res judicata* does not apply as while the intent and nature of the inquiry into the genuineness of the relationship may be substantially the same as under the former Regulations, the broader language of section 4 of the IRP Regulations requires the decision-maker to decide a different question.

The Federal Court has now ruled in a number of cases[137] 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.

In *Rahman*, the Court noted that by definition, *res judicata* is a pre-hearing matter that, if applied, precludes a full hearing. The Immigration Appeal Division has the authority to summarily dismiss an appeal when the appellant seeks to re-litigate on essentially the same evidence and was not required to grant him an oral hearing.[138]

I) Summary

Repeat appeals should not proceed to a full hearing until the evidence supporting the second appeal has been evaluated, in summary proceedings, to determine if *res judicata* or abuse of process do not apply.

Unless the appellant can establish that there is evidence to bring the appeal within the special circumstances exception mentioned above, there will likely be no hearing on the merits.

In most repeat appeals there will be new evidence presented in support of the second appeal that stems from the period of time between the first appeal and the second appeal. This additional evidence will usually not be decisive new evidence as it comes after a dismissal and therefore does not have as much probative value as evidence presented at the first appeal. In these situations *res judicata* may be applied. Where the new evidence appears to be spurious a finding of abuse of process in addition *to res judicata* may be made. However, where the panel finds that decisive new evidence has been presented, then the repeat appeal will go to a full hearing.

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[136] *Lu, Hung Xuong (Roy) v. M.C.I.* (IAD VA2-02237), Workun, March 24, 2004.

[137] See *Mohammed, Amina v. M.C.I.* (F.C. no. IMM-1436-05), Shore, October 27, 2005; 2005 FC 1442.; *Li v. M.C.I.* (F.C. no. IMM-5040-05), Lemieux, June 14, 2006; 2006 FC 757; *Deuk, Chy v. M.C.I.* (F.C. no. IMM-1541-06), Pinard, December 19, 2006; 2006 FC 1495; *Rahman, Azizur v. M.C.I.* (F.C. no. IMM-1642-06), Noel, November 2, 2006; 2006 FC 1321.

[138] *Rahman* was applied in *Hamid, Abdul v. M.C.I.* (F.C., no. IMM-872-06), Martineau, February 26, 2007; 2007 FC 220. For examples of Immigration Appeal Division cases which deal with res judicata see *Klair, Paramjit v. M.C.I.* (IAD TA4-09098), Sangmuah, February 22, 2006; *Singh, Amrik v. M.C.I.* (IAD TA3-14292), Waters, September 21, 2005; *Bui, Ham Hung v. M.C.I.* (IAD TA5-03192), Whist, September 1, 2005; *Dhaliwal, Iqbal Singh v. M.C.I.* (IAD VA4-01638), Workun, April 1, 2005.

Where no additional evidence is brought to support a repeat appeal, a finding of abuse of process is appropriate without the need to address *res judicata*.

Prior Relationship Dissolved Primarily for Immigration Purposes – section 4.1

As noted above, in 2004 a new provision, Section 4.1, was added to the IRP Regulations to cover the situation of a new relationship where a prior relationship was dissolved primarily for immigration purpose.

In *Mariano,*[139] the appellant divorced her spouse who was medically inadmissible and removed him from her application for permanent residence. After becoming a Canadian citizen she remarried her spouse and sponsored him. The Immigration Appeal Division held that section 4.1 applied as the panel found that the divorce was obtained solely to remove the applicant from the appellant's application so that she could acquire permanent residence. The panel concluded that section 4.1 was enacted to prevent couples from dissolving their relationship to gain admission to Canada and then resuming it. In *Wen,*[140] the panel in examining the reasons for a divorce and subsequent remarriage after one spouse became a permanent resident came to an opposite conclusion as the panel accepted the explanations for the breakdown of the first and second marriages as well as the explanation for the appellant's reconciliation and remarriage to her first husband.

In *Harripersaud,*[141] the panel found that Section 4.1 applied in a situation where the appellant and applicant remarried after a separation of eight years. The panel rejected counsel's argument that section 4.1 did not apply because the appellant would not have planned such a long separation from the applicant and held that: "The simple answer to this argument is that the immigration process takes time and even more time, where, as in this case, it involves, marriage, divorce, and a subsequent marriage." In *Zheng,*[142] the panel found that section 4.1 applied even though there was an intervening marriage between the first marriage to the applicant and the marriage which facilitated the appellant's immigration to Canada. The panel came to this conclusion as otherwise the intention of Parliament would be thwarted if the effect of section 4.1 could be avoided by inserting an intervening marriage in the chain of causality.

Prohibited Relationships

Section 117(9) includes a number of family relationships that if applicable result in the foreign national not being considered a member of the family class by virtue of that relationship. There is some overlap with section 5 of the IRP Regulations that applies to all applications and

[139] *Mariano, Edita Palacio v. M.C.I.* (IAD WA5-00122), Lamont, September 20, 2006.

[140] *Wen, Chu Xiu v. M.C.I.* (IAD TA5-14563), MacLean, May 29, 2007.

[141] *Harripersaud, Janet Rameena v. M.C.I.* (IAD TA3-11611), Sangmuah, June 30, 2005.

[142] *Zheng, Wei Rong v. M.C.I.* (IAD TA4-16616), MacLean, August 23, 2007.

not just applications by foreign nationals who are members of the family class. This provision is discussed in detail in chapter 5 of this paper.

Transition Provisions

There is a transition provision for spousal and fiancée sponsorships that were refused under the former Act and Regulations for being relationships for immigration purposes. Generally these sponsorships were refused as the applicant was determined to be a member of an inadmissible class under section 19(2)(d) of the former Act. Section 320(10) of the IRP Regulations provides that:

> A person is inadmissible under the *Immigration and Refugee Protection Act* for failing to comply with that Act if, on the coming into force of this section, the person had been determined to be a member of an inadmissible class described in paragraph 19(1)(h) or (i) or 2(c) or (d) of the former Act,…

There is a transition provision for sponsorship applications of fiancées made before June 28, 2002. Section 356 of the IRP Regulations provides that:

> If a person referred to in paragraph (f) of the definition "member of the family class" in subsection 2(1) of the former Regulations made an application under those Regulations for a permanent resident visa before the day on which this section comes into force, the application is governed by the former Act.

CASES