Chapter Seven

Relationship

Generally

A Canadian citizen[1] or a permanent resident[2] may sponsor the application for permanent residence of a foreign national[3] who is a member of the family class.[4] A sponsorship application must precede or accompany the application for permanent residence.[5] The application for permanent residence is considered to be an application made for the principal applicant and his/her accompanying family members.[6]

The visa shall be issued if the officer is satisfied that the foreign national is not inadmissible[7] and meets the requirements of the Act.[8] A foreign national is inadmissible for failing to comply with the Act through an act or omission that contravenes, directly or indirectly, a provision of the Act.[9] A foreign national is inadmissible on the grounds of an inadmissible accompanying family member and in prescribed circumstances, an inadmissible non-accompanying family member.[10]

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1 Section 2 of the *IRPR* defines "Canadian citizen" as a citizen referred to in subsection 3(1) of the *Citizenship Act*.

2 Section 2(1) of the *IRPA* defines "permanent resident" as a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

3 Section 2(1) of the *IRPA* defines "foreign national" as a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

4 Section 13(1) of the *IRPA*. See Chapter 1 for a discussion of the requirements of a sponsor.

5 Section 10(4) of the *IRPR*. Section 10 sets out the form and content of the application. Information regarding all family members, whether accompanying or not, must be provided. All family members are examined except in the circumstances outlined in section 23 of the IRPR. Unexamined family members are not members of the family class pursuant to section 117(9)(d) of the *IRPR*. Sections 352 to 355 of the *IRPR* contain the transitional provisions for applications that were made under the former Act.

6 Section 10(3) of the *IRPR*. "Family member" is defined in section 1(3) of the *IRPR* as:

(a) The spouse or common law partner of the person;
(b) A dependent child of the person or of the person's spouse or common-law partner; and
(c) A dependent child of a dependent child referred to in paragraph (b).

7 Sections 33 to 43 of the *IRPA* deal with inadmissibility.

8 Section 11 of the *IRPA*. The sponsor must also meet the requirements of the Act, see again see Chapter 2. Section 25(1) of the *IRPA* gives the Minister humanitarian and compassionate jurisdiction where the requirements cannot be met. See also sections 66, 67 and 69 of the *IRPR*.

9 Section 41 of the *IRPR*.

10 Section 42 of the *IRPA* and Section 23 of the *IRPR*.

Membership in the family class is determined by the relationship of the applicant to the sponsor[11].

The sponsor has the right to appeal against a decision not to issue the foreign national a permanent resident visa.[12]

Not a member of the Family Class[13]

The Definition

(1) A foreign national is a member of the family class if, with respect to the sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;

(b) a dependent child of the sponsor;

(c) the sponsor's mother[14] or father;

(d) the mother or father of the sponsor's mother or father;

(e) ….[15]

(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

(i) a child of the sponsor's mother or father,

(ii) a child of a child of the sponsor's mother or father, or

(iii) a child of the sponsor's child;

(g) a person under 18 years of age whom the sponsor intends to adopt in Canada, if

(i) the adoption is not primarily for the purpose of acquiring any privilege or status under the Act,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

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[11] Section 12(1) of the *IRPA*. See also section 117 of the *IRPR*.

[12] Section 63(1) of the *IRPA*. The right of appeal is restricted by section 64 of the *IRPA*.

[13] Section 117 of the *IRPR*. For a full discussion of adoptions and guardianships, see Chapter 4. For foreign marriages, common-law partners and conjugal partners, see Chapter 5. For bad faith family relationships, see Chapter 6.

[14] The term 'mother' (in the English version) and "parents" (in the French version) of the Regulations does not include "step-parents" as members of the family class. *M.C.I.* v. *Vong, Chan Cam* (F.C., no. IMM-1737-04), Heneghan, June 15, 2005; 2005 FC 855.

[15] Repealed, SOR/2005-61, s. 3.

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in the country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or[16]

(h) a relative[17] of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father

(i) who is a Canadian citizen, Indian or permanent resident, or

(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor

(2) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of that adoption unless it was in the best interests of the child within the meaning of the Hague Convention on Adoption.[18]

(3) ….[19]

(4) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was 18 years of age or older shall not be considered a member of the family class by virtue of that adoption unless it took place under the following circumstances:

(a) the adoption was in accordance with the laws of the place where the adoption took place and, if the sponsor resided in Canada at the time of the adoption, the adoption was in accordance with the laws of the province where the sponsor then resided;

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[16] See Chapter 4.

[17] "Relative" is defined in section 2 of the *IRPR* as "a person who is related to another person by blood or adoption". This term was not defined under the former Act and Regulations and the Immigration Appeal Division had previously found that it should be broadly defined to include relatives by marriage. For example, see *Dudecz, Ewa v. M.C.I.* (IAD TA02446), Whist, December 6, 2002. That broad interpretation is no longer valid. However, the Immigration Appeal Division also considered the same section of the former Regulations in *Sarmiento, Laura Victoria v. M.C.I.* (IAD TA1-28226), Whist, November 1, 2002 and held that while sponsors can only sponsor one relative under a given sponsorship, it was open to sponsor a further relative on another occasion as long as the other conditions of the section were met at that specific time. "One" relative did not mean only one relative could ever be sponsored as the parliamentary intent of the section was to assist persons isolated in Canada without family. See also, *supra*, footnote 14 regarding the interpretation of "mother".

[18] See Chapter 4.

[19] Defines "best interests of the child". See Chapter 4.

(b) a genuine parent-child relationship exists at the time of the adoption and existed before the child reached the age of 18; and
(c) the adoption is not primarily for the purpose of acquiring a status or privilege under the Act.[20]

(5) ….[21]

(6) ….[22]

(7) ….[23]

(8) ….[24]

(9) No foreign national may be considered a member of the family class by virtue of their relationship to a sponsor if
(a) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age;
(b) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended;
(c) the foreign national is the sponsor's spouse and
(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or
(ii) the sponsor has lived separate and apart from the foreign national for at least one year and
(A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or
(B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor, or
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member or a former spouse or common-law partner of the sponsor and was not examined.[25]

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[20] See Chapter 4.

[21] Repealed, SOR/2005-61, s. 3.

[22] Repealed, SOR/2005-61, s. 3.

[23] Deals with written statements of competent authority from province of intended destination.

[24] Deals with new evidence received after the written statement.

[25] See also sections 4 and 5 of the *IRPR*. Excluded family relationships and bad faith family relationships are dealt with fully in Chapter 6.

(10) Subject to subsection (11), paragraph (9)(d) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

(11) Paragraph (9)(d) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,

(a) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or

(b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

(12) In subsection (10), "former Act" has the same meaning as in section 187 of the Act.

Section 117(9)(d) has been the subject of intense judicial scrutiny.

The scope of the Regulation is not limited to deliberate or fraudulent non-disclosure, but to any non-disclosure which may prevent examination of a dependent. Non-disclosed, non-accompanying family members cannot be admitted as members of the family class.[26] Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class.[27]

The *Act* and *Regulations* do not create a distinction between deliberate misrepresentations and innocent misrepresentations, including those made on faulty legal advice.[28]

"At the time of that application" in paragraph 117(9)(d) of the Regulations contemplates the life of the application from the time when it was initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry.[29]

Paragraph 117(9)(d) is constitutionally valid. In *De Guzman*[30] the Federal Court of Appeal answered the following certified question in the negative:

"Is paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations* invalid or inoperative because it is unconstitutional as it deprives the applicant of her right to liberty

[26] *Adjani, Joshua Taiwo* v. *M.C.I.* (F.C., no. IMM-2033-07), Blanchard, January 10, 2008; 2008 FC 32.

[27] *Chen, Hong Mei* v. *M.C.I.* (F.C., no. IMM-8979-04), Mosley, May 12, 2005; 2005 FC 678; see also *De Guzman, Josephine Soliven* v. *M.C.I.* (F.C.A., no. A-558-04), Desjardins,Evans, Malone, December 20, 2005; 2005 FCA 436.

[28] *Chen, supra*, footnote 27.

[29] *Dela Fuente, Cleotilde* v. *M.C.I.* (F.C.A., no. A-446-05), Noel, Sharlow, Malone, May 18, 2006; 2006 FCA 186.

[30] *De Guzman, supra*, footnote 27.

and/or her right to security of person, in a manner not in accordance with the principle of fundamental justice, contrary to section 7 of the Charter?"

Further, in *Adjani*[31] The Federal Court held that the paragraph does not infringe an applicant's section 15 Charter rights as there is no deferential treatment as between a child born out of wedlock[32] versus legitimate children. In *Azizi*[33] the Federal Court of Appeal found the paragraph not to be *ultra vires* the IRPA as a bar to family reunification. The paragraph simply provides that non-accompanying family members who have not been examined for a reason other than a decision by a visa officer[34] will not be admitted as members of the family class.

Jurisdiction

The Immigration Appeal Division is the competent Division of the Immigration and Refugee Board to hear appeals by a sponsor against a decision not to issue a permanent resident visa.[35] It has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, in proceedings brought before it.[36]

The sponsor's right of appeal is limited where the foreign national has been found to be inadmissible on the grounds of security, violating human or international rights, serious criminality or organized criminality.[37] Where the refusal is based on a finding of misrepresentation, there is no right of appeal unless the foreign national is the sponsor's spouse, common-law partner or child.[38] The new provision dealing with inadmissibility for misrepresentation is very broad in scope.[39] It applies to both applicants and sponsors and there is seemingly no requirement that the misrepresentation actually impacted on the application. The Immigration Appeal Division may not consider humanitarian and compassionate considerations

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[31] *Adjani*, *supra*, footnote 26.

[32] *Woldeselassie, Tesfalem Mekonen* v. *M.C.I.* (F.C., no. IMM-3084-06), Beaudry, December 21, 2006; 2006 FC 1540 was a case of innocent non-disclosure which should be limited to the facts of that particular decision. In that case the Court held that the visa officer erred when he said the appellant was caught by the paragraph because he did not include an allegedly "unknown" child in his application for permanent residence filed prior to the birth of the child (an impossibility).

[33] *Azizi, Ahmed Salem* v. *M.C.I.* (F.C.A., no. A-151-05), Rothstein, Linden, Pelletier, December 5, 2005; 2005 FCA 406.

[34] See paragraphs 117(10) and (11). Note that it is the officer who must make the decision not to examine.

[35] See sections 62 and 63(1) of the *IRPA*.

[36] Section 162(1) of the *IRPA*.

[37] Section 64 (1) and (2) of the *IRPA*.

[38] Section 64(3) of the *IRPA*.

[39] Section 40 of the IRPA provides that a permanent resident or foreign national is inadmissible for a two year period for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. A permanent resident or foreign national can also be inadmissible for being sponsored or having been sponsored by someone determined to be inadmissible for misrepresentation if the Minister is satisfied that the facts of the case justify the inadmissibility. For a full discussion, see Chapter 8, Misrepresentation.

unless it has decided that the foreign national is a member of the family class and their sponsor is a sponsor as defined.[40]

When a sponsored person is determined by the officer not eligible as a member of the family class, that person is split from the processing of the application: visas are issued to the principal applicant and other eligible family members.[41] There is no right of appeal to the Immigration Appeal Division as there is no family class refusal.

In *Pandhi*, [42] the application for permanent residence of the appellant's parents and two brothers was refused pursuant to sections 11(1) and 42(a) of the IRPA as false birth certificates had been provided for the brothers. The principal applicant was inadmissible for serious criminality and this rendered the other applicants inadmissible as well. As well, the son whose age was misrepresented did not fall within the definition of a "dependent child" and was therefore not a member of the family class. The other purported son was also not a member of the family class, as he did not have the necessary relationship. Neither of the sons was entitled to consideration of humanitarian or compassionate factors as a result. The parents were entitled to consideration but insufficient factors existed to warrant special relief.

In *Kang*,[43] the Immigration Appeal Division considered the scope of its jurisdiction under section 64 of the IRPA, that is, whether it is to determine if a finding described in the provision has been made or whether it is required to conduct a *de novo* hearing to determine whether the finding made is correct. The panel looked at the similar wording used in section 70(5) in the former Act that the Courts have interpreted to mean there was no right of appeal to the Immigration Appeal Division. Given the wording of section 64(1), it is logical that the Immigration Appeal Division would simply determine whether the relevant finding has been made rather than contest the correctness of the finding. This interpretation is consistent with the objectives of the IRPA, one of which is to streamline the immigration appeal system to avoid lengthy litigation.

Timing

Since the processing of applications for permanent residence can take years, the relevant definitions must be ascertained.

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[40] Section 65 of the IRPA. For a full discussion of whether the refusal is jurisdictional or non-jurisdictional, see Chapter 6, Bad Faith Family Relationships.

[41] Immigration Manuals, Overseas Processing (OP), Chapter OP 2 at page 50.

[42] *Pandhi, Harinder Kaur v. M.C.I.* (IAD VA2-02813), Clark, June 27, 2003.

[43] *Kang, Sarabjeet Kaur v. M.C.I.* (IAD TA1-13555), Sangmuah, February 24, 2004. In particular, see paragraph 25:

> Given the wording of section 64(1), it is logical that the IAD would simply determine whether the relevant finding has been made and it is open to the appellant to dispute that no such finding has been made, as opposed to contesting the correctness of the finding. The appellant may dispute the correctness of the finding in another forum: the Federal Court.

The transitional provisions[44] of the Act provide that if the notice of appeal has been filed with the Immigration Appeal Division before June 28, 2002, the appeal shall continue under the former Act, and therefore, the former definitions apply.[45]

In *Sinkovits*,[46] the panel considered the effect of the transitional provisions contained in sections 355, 352 and section 117(9)(d) of the IRPR and their effect on section 192 of the IRPA. It held that those provisions covered applicants who were refused under the former Act because they were over 19 years of age and therefore not dependent sons or daughters but are under 22 years of age and now fit within the new definition of dependent child in the IRPR. No exception was created to the application of section 192.

In *Noun*,[47] the panel considered whether to apply the definition of orphan in the former Act or the IRPR. The appellant argued that at the time the undertaking was submitted in May of 2002, the applicant was under 19 years of age and acquired the right to be assessed under the former definition. The visa officer did not assess her application for permanent residence until after June 28, 2002 and applied the current definition. The panel held the only determination that was made before the IRPA came into force was that the appellant met the requirements for a sponsor and the undertaking would be forwarded for further processing. Therefore section 190 did apply and there are no other transitional provisions that apply in these circumstances. The intent of the legislature is clear and unequivocal and the appellant cannot rely on accrued or vested rights.

The Immigration Appeal Division has also had the opportunity to consider the effect of sections 196 and 64 of the IRPA and their applicability to sponsorship appeals.

In *Williams*,[48] the appeal from the refusal of the sponsored application for permanent residence was filed on November 6, 2001. The Minister sought to have the appeal discontinued under section 196 of the IRPA. The two conditions precedent to the discontinuance are that the appellant has not been granted a stay under the former Act and that the appeal could not have been made because of section 64 of the IRPA. The panel was greatly influenced by the fact that section 196 refers to section 64 which on its face applies to sponsorship appeals. Looking at the

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[44] For a full discussion of the transitional provisions, see Chapter T.

[45] Section 192 of the *IRPA.*

[46] S*inkovits, Zoltan v. M.C.I.* (IAD TA1-20320), Whist, August 29, 2002.

[47] *Noun, Pho v. M.C.I.* (IAD TA3-03260), MacPherson, August 27, 2003.

[48] *Williams, Sophia Laverne v. M.C.I.* (IAD TA1-21446), Wales, November 29, 2002. In particular, see paragraph 40:

> In reviewing section 196 in its ordinary and grammatical sense, and in a manner to blend harmoniously with the scheme of the Act, the object of Parliament, and the intention of Parliament, I am satisfied the scope of section 196 is broad enough to include sponsorship appeals. If it were not, then Parliament's intention, as set out in the guide distributed to the Parliamentary Committee, would not be achieved.

An application for judicial review was dismissed: (F.C., no. IMM-6479-02), Phelan, May 6, 2004; 2004 FC 662.

scheme of the Act and the intention of Parliament, section 196 is broad enough to include sponsorship appeals.

However, in *Sohal*,[49] the panel considered the same conditions precedent to the application of section 196. The panel found that if the intention of Parliament was to extinguish the appellant's appeal rights under section 77(3) of the former Act, the language of section 196 fails to do so. The section does not expressly state this intention and the reference to a stay makes no sense in the context of an appellant who, as a Canadian citizen, cannot be made subject to any proceedings that could lead to an immigration stay. It held that sections 196 and 197 are restricted to removal order appeals under the former Act.

Specific Relationships

"Dependent child"

The Definition

The definitions of "dependent son" and "dependent daughter" have been replaced with the single definition of "dependent child". There is no definition of "child". Dependent child is defined in section 2 of the Regulations as:

> "dependent child", in respect of a parent, means a child who
>
> (a) has one of the following relationships with the parent, namely,
>
> (i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or
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> (ii) is the adopted child[50] of the parent; and
>
> (b) is in one of the following situations of dependency, namely,
>
> (i) is less than 22 years of age and not a spouse or common-law partner,
>
> (ii) has depended substantially on the financial support of the parent since before the age of 22 - or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner – and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student
>
> (A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and
>
> (B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or
>
> (iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

[49] *Sohal, Manjit Kaur v. M.C.I.* (IAD TA1-28054), MacPherson, November 29, 2002. An application for judicial review by the Minister was dismissed: (F.C., no.IMM-6292-02), Lutfy, May 6, 2004; 2004 FC 660.

[50] For a full discussion see Chapter 4, Adoptions.

The current definition refers to the biological child of the parent, rather than using the former term "issue". This is not a change in substance as the Federal Court has held that "issue" required the children be biologically linked to their parents to come within the former definition of "daughter" or "son". [51]

To come within the definition, the child has to establish dependency either by showing he or she is under 22 years of age and not a spouse or a common-law partner,[52] or by showing he or she is financially dependent due to student status or a physical or mental condition.

Timing

Section 121 of the Regulations sets at what time the requirements must be met:

> 121. The requirements with respect to a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following;
>
> (a) the person is a family member of the applicant or of the sponsor both at the time the application is made and, without taking into account whether the person has attained 22 years of age, at the time of the determination of the application; and
>
> (b) ….[53]

Section 67(1) of the Act makes reference to the Immigration Appeal Division being satisfied at "the time that the appeal is disposed of". Unfortunately, this does not seem to clarify whether the Immigration Appeal Division should consider the situation as at the time of the refusal or the date of the hearing.

Under paragraph (b)(i), the child must be under 22 years of age and not a spouse or common-law partner when the application is made and without taking into account their age, they must continue not to be a spouse or a common-law partner when the visa is issued. Becoming a spouse or common law partner after turning 22 is a disqualifying characteristic.[54]

Under paragraph (b)(ii), the child must, since before the age of 22 or since becoming a spouse or common-law partner, be financially dependent and continuously enrolled, in attendance

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[51] *M.A.O. v. M.C.I.* (F.C.T.D., no IMM-459-02), Heneghan, December 12, 2003; 2003 FC 1406.

[52] *CIC Immigration Manual*, OP 2 page 16, s.5.13 states that "[a] dependent child who is single, divorced, widowed, or whose marriage has been annulled is not a spouse. Similarly, if the dependent child was involved in a common-law relationship but that relationship no longer exists, they may be considered to meet the definition."

[53] Repealed, SOR/2004-167, s. 42.

[54] *Dehar, Rupinder Kaur* v. *M.C.I.* (F.C., no. IMM-2281-06), de Montigny, May 28, 2007; 2007 FC 558.

and actively pursuing a course of study at an accredited post-secondary school, both at the time the application is made and the visa issued.[55]

Under paragraph (b)(iii), the child must, since before the age of 22, have been financially dependent due to a physical or mental condition when the application was made and that dependency must continue at the date the visa is issued.[56]

Student Status

Paragraph (b)(ii) of the definition of "dependent child" still has two requirements: one relates to student status, the other to financial dependency and both must be met to satisfy the definition. No substantive change has been made to the financial dependency requirement. Some of the older cases dealing with financial dependency are as follows:

In *Szikora-Rehak*,[57] the Appeal Division considered whether sums collected by the applicant through employment associated with practicum assignments would be sufficient to finance studies or cover daily expenses and found the applicant continued to be financially dependent.

The Appeal Division held in another decision,[58] when considering the issue of financial dependency, that the degree of financial support is to be determined by looking at the entire income of the applicant to see from where that income is derived. In that case, the applicant was married and her spouse was employed. The panel determined, on a balance of probabilities, the greater part of the applicant's income was provided by the sponsor and the applicant was, therefore, a dependent.

In *Tiri*,[59] the applicant worked from time to time as a nurse during the day and attended school at night. The applicant continued to attend school during the times he was not working and received regular financial assistance from the sponsor. The applicant was held to be a dependent.

In *Huang*,[60] the applicant received his mother's pension, lived rent free in the family home and occasionally received cash from his mother (the sponsor). His brother provided free meals and occasional pocket money. The Minister argued that since the sponsor was then dependent on her daughter, the applicant could not be dependent on the sponsor. The panel found the source of the sponsor's income was irrelevant, subject to any evidence that this was merely a ruse to hide that the applicant had an independent source of income.

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[55] *Hamid; M.C.I.* v. *Hamid, Ali* (F.C.A., no. A-632-05), Nadon, Sexton, Evans, June 12, 2006; 2006 FCA 217.

[56] See *Gilani, infra,* footnote 72

[57] *Szikora-Rehak, Terezia* v. *M.C.I.* (IAD V97-01559), Jackson, April 24, 1998.

[58] *Popov, Oleg Zinovevich* v. *M.C.I.* (IAD T97-05162), Aterman, November 26, 1998.

[59] *Tiri, Felicitas* v. *M.C.I* . (IAD T96-021480, Hoare, April 22, 1998.

[60] *Huang, Su-Juan* v. *M.C.I.* (IAD V97-02369), Carver, August 21, 1998.

In *Bains*,[61] the issue was whether the sponsor's brother was the dependent son of their father. The brother was a part-time farmer and received financial support from his parents. The sponsor testified that since his arrival in Canada, he was the sole financial support of the brother. The panel found the applicant was not wholly or substantially supported by his parents.

Requirements to be "continuously enrolled in and attending" and "actively pursuing a course"

There is no longer any provision dealing with interruptions in studies. Regular school vacation breaks should still be considered part of the course of studies and should not impact on the requirement to be "continuously enrolled and attending". There may now be no way to give relief from situations where the failure to enroll or attend is due to a situation beyond the control of the applicant.

Both enrolment and attendance must still be established. The change in wording of the definition has arguably maintained the qualitative and quantitative elements of "attending"[62] (*Sandhu*). The wording used in the definition of "dependent child" in the Regulations expresses the intent to codify the test articulated by the Court of Appeal in *Sandhu.* Sub-part (A) of the definition carries forward the requirement of full-time enrolment and attendance in an educational program, while sub-part (B) articulates the requirement for a mental presence in the educational program in the form of a genuine, *bona fide* effort on the part of the student.[63] The burden is on the applicants to establish that they made a *bona fide* attempt to assimilate the material of the subjects in which they were enrolled for each year of academic study.[64]

In *Sandhu* the Court enumerated the following factors which should be considered in making such a determination and cautioned that this list may not be exhaustive. First is the record of the student's actual attendance. Second is the grades the student achieved. Third is whether the student can discuss the subjects studied in, at the very least, a rudimentary fashion. Fourth is whether the student is progressing satisfactorily in an academic program. Fifth is whether the student has made a genuine and meaningful effort to assimilate the knowledge in the courses being studied. The factors might perhaps be summed up by asking whether the person is a *bona fide* student.[65] While one could be a *bona fide* student and still have a poor academic performance, in such cases visa officers ought to satisfy themselves that, students have made a genuine effort in their studies.

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[61] *Bains, Sohan Singh* v. *M.C.I.* (IAD V95-01233), Singh, April 14, 1997.

[62] *M.C.I. v. Sandhu, Jagwinder Singh* (F.C.A., no. A-63-01), Sexton, Strayer, Sharlow, February 28, 2002; 2002 FCA 79.

[63] *Lee, Kuo Hsiung* v. *M.C.I.* (F.C., no. IMM-5273-03), Dawson, July 21, 2004; 2004 FC 1012.

[64] *Dhillon, Jhalman Singh* v. *M.C.I.* (F.C., IMM-2234-06), Lutfy, November 24, 2006; 2006 FC 1430.

[65] See too *Sharma, Sukh Rajni* v. *M.C.I.* (F.C.T.D., no. IMM-388-01), Rothstein, August 23, 2002; 2002 FCT 906 where the Court followed *Sandhu* to identify the issue as whether the applicant was a full-time student in a genuine, meaningful and *bona fide* respect.

Credibility can be an issue in assessing such cases as well. In one case, the Appeal Division held that it was not plausible that it took the applicant 20 years to reach grade 10.[66] In another,[67] the applicant had taken the same course and failed the exam for six years. The applicant was found to be a student in name only.

The Educational Institution

The institution attended must be a post-secondary one that is accredited by the relevant government authority.[68]

In *Ahmed*[69], the Court considered if an institution was a post-secondary institution, in the context of a visa officer's assessment of educational qualifications in an application for permanent residence. It held the question is whether or not the institution offers programs of study requiring a high school diploma as a condition of admission. In *Shah*[70] the Court adopted the Shorter Oxford English Dictionary definition of "accredited" as meaning "furnished with credentials; authoritatively sanctioned." "It does not equate to "recognized" in some informal sense."

Physical or Mental Condition

It is important to note the change of wording in the provision from "disability" to "condition". It remains to be seen how this change will be interpreted though there appears to be no reason why the previous jurisprudence relating to what a "disability" is should be rejected. If anything, "condition" should be seen as broader than "disability."

It is more difficult to comment on the removal of the requirement of the former Act that a medical officer make a determination. Given the provisions dealing with medical examinations[71], this may be a matter of drafting, rather than substance.

The relevant portions of the definition "dependent child" do not require that an applicant demonstrate that a "physical or mental" condition causing an applicant child to be unable to be financially self-supporting, has existed at all times since the applicant became twenty-two (22) years of age and that the condition was diagnosed before the applicant reached that age. Whether

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66 *Ali, Akram* v. *M.C.I.* (IAD T93-12274) Teitelbaum, June 2, 1994.

67 *Sangha, Jaswinder Kaur* v. *M.C.I.* (IAD V95-02919), Singh, February 24, 1998.

68 *Supra*, footnote 52 sets out guidelines for officers where there is no relevant government authority or accreditation is in question. Some unlicensed institutions may be acceptable under the definition. Examples of institutions that do not fall within the definition are "on the job training", "correspondence courses" and sham institutions.

69 *Ahmed, Syed Anjum v. M.C.I.* (F.C.T.D., no. IMM-4027-01), Hansen, July 30, 2003; 2003 FC 937.

70 *Shah,Mayuri Rameshchandra* v. *M.C.I.* (F.C., no. IMM-1461-06), Gibson, September 22, 2006; 2006 FC 1131.

71 For a full discussion of medical refusals, see Chapter 3.

or not the condition was diagnosed before the age of twenty-two (22) is irrelevant. A careful reading of subparagraph (b)(iii) of the definition "dependent child" discloses that an applicant must establish that "… he has depended substantially on the financial support of a parent since before the age of twenty-two (22) and that he is "… unable to be financially self-supporting due to a physical or mental condition."[72]

Social dependence by the applicant child on his parents, which is to say continuous dependence on his parents for parenting support, is irrelevant.[73]

Lastly, it should also be noted that the spouse, common-law partner or child of a sponsor who has been determined to be a member of the family class is exempted from the application of inadmissibility on the ground of excessive demand on health and social services.[74]

Some of the older cases dealing with "physical or mental disability" are noted below.

"Physical disability" includes a hearing disability.[75] Amputation of the left leg below the knee following a motor vehicle accident is a physical disability.[76]

The question is whether the applicant is able to support herself in the country in which she is currently residing, not whether she would become self-supporting in Canada. In this case, the applicant, who resided in Egypt, was found to be a dependent daughter. She suffered from mild mental retardation and epilepsy.[77]

In *Khan,*[78] the applicant was a deaf mute. The Appeal Division held that the applicant was required to meet the requirements of the definition of a "dependent daughter" during the entire period of processing the application for permanent residence. The applicant does not need to establish that she will be incapable of supporting herself in the future. The evidence established the applicant's disability was an essential, determinative factor in her incapacity to support herself, though it may not have been the only factor. Not every physical or mental disability of dependants will lead to the result of medical inadmissibility.

In contrast, in *Arastehpour,*[79] the principal applicant had asked that a medically inadmissible, 29 year old son be deleted from the application for permanent residence. The son suffered from muscular dystrophy and there was ample evidence to conclude he could not support himself. The visa officer was not required to consider the son's future prospects in

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[72] *Gilani, Harakhji Zaver* v. *M.C.I.* (F.C., no. IMM-9214-04), Gibson, November 9, 2005; 2005 FC 1522.

[73] *Gilani, supra,* footnote 72.

[74] Section 38(2)(a) of the *IRPA* and section 24 of the *IRPR.*

[75] *Haroun,Stanley* v. *M.C.I.* (IAD V94-00129), Singh, August 29, 1994.

[76] *Huang, Wing Dang* v. *M.C.I.* (IAD V97-03836), Baker, June 4, 1999.

[77] *Arafat, Khaled* v. *M.C.I.* (IAD T94-02413), Hopkins, January 17, 1995.

[78] *Khan, Seema Aziz* v. *M.C.I.* (IAD M97-03209), Lamarche, June 4, 1999.

[79] *Arastehpour, Mohammad Ali* v. *M.C.I.* (F.C.T.D., no. IMM-4328-98), MacKay, August 31, 1999.

Canada where no such evidence was provided to the officer. A dependant at the time an application is made may no longer be so as a result of changed circumstances before the application is determined. Here, the fact that he would be left to live with an aunt did not mean he was no longer a dependent son. It should be noted that if the matter had been an appeal before the Appeal Division. It would have been open to lead evidence regarding the son's prospects in Canada.

In *Huang,*[80] the applicant, an amputee, was responsible for farming the family's government plot. He was unable to do the physical labour and hired people to do the farm work. After expenses, there was little, if any, money for the applicant's support and the requirement of financial dependency was met. While willing to work, the documentary evidence establishes his physical disability limits his opportunities. Considering all the evidence, the Appeal Division held that the applicant was incapable of supporting himself due to his disability.

In *Teja,*[81] the panel found the sponsor not to be credible. Medical evidence of epilepsy and dementia was before the panel but had not been provided to the visa officer. There was no evidence that a medical officer had determined that the applicant was suffering from a physical or mental disability. The applicant did not qualify as a dependent son.

In *Ramdhanie,*[82] there was evidence that the applicants were suffering from post-traumatic stress disorder. The panel was prepared to conclude that a medical officer had made the necessary determination of a medical disability. The determination by an immigration officer as to whether the applicants were incapable of supporting themselves by reason of that disability was subject to a *de novo* review. The panel found the disability severely impaired the applicant's ability to earn a living. They were reliant on the sponsor for financial support and were dependent daughters.

[80] *Huang, Wing Dang* v. *M.C.I.*. (IAD V97-03836), Baker, June 4, 1999.

[81] *Teja, Ajit Singh* v. *M.C.I.* (IAD V94-01205), Singh, June 30, 1997.

[82] *Ramdhanie (Dipchand), Asha* v. *M.C.I.* (IAD T95-06314), Townshend, September 18, 1998.

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