Chapter Ten

Discretionary Jurisdiction

GENERALLY[1]

The statutory provision for the determination of discretionary relief in sponsorship appeals under the *Immigration and Refugee Protection Act* (IRPA) is found in s. 67. It is open to the Appeal Division to allow an appeal on both legal grounds and on the ground that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. Generally, however, special relief is granted after a refusal is found to be valid in law.

Statutory Provisions

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) *other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. (*emphasis added)

Paragraph 3(1) of the IRPA provides the following as some of the objectives of the Act with respect to immigration:

3.(1) The objectives of this Act with respect to immigration are

(d) to see that families are reunited in Canada;

(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

Paragraph 3(3)(f) of the IRPA provides the following:

(3) This Act is to be construed and applied in a manner that

[1] Reference may be made to other chapters which discuss discretionary jurisdiction for more on the subject.

(f) complies with international human rights instruments to which Canada is signatory.

Exercise of Discretionary Jurisdiction

In *Dimacali-Victoria*[2], the Federal Court, discussing the Appeal Division's discretionary jurisdiction under the former *Immigration Act*, said the following:

> […] the decision of the IAD [on compassionate or humanitarian considerations] does involve what I am satisfied is a discretionary grant of an exemption from the ordinary requirements of the *Immigration Act* […] I am satisfied that the determination of the IAD under paragraph 77(3)(b) is, like the decision in question in *Shah*,[3] "[…] wholly a matter of judgment and discretion and the law gives […] no right to any particular outcome." [It has to exercise] its discretion in accordance with well established legal principles, that is to say in a *bona fide* manner, uninfluenced by irrelevant considerations and not arbitrarily or illegally.

The Supreme Court of Canada has held that discretion must be exercised in accordance with the boundaries imposed by law, fundamental Canadian values and the *Canadian Charter of Rights and Freedoms*.[4]

In *Lutchman*,[5] the Immigration Appeal Board described its discretionary jurisdiction in these terms:

> In its wisdom, Parliament saw fit to include such provision to mitigate the rigidity of the law by enabling the Board to dispose of an appeal favourably when the strict application of the law would not permit such a determination, but the circumstances demand a fair and just solution. […] Clearly, this jurisdiction is discretionary in nature and, as such, it must be exercised with caution. Its application must be based on objective elements, the evaluation of which must not be vitiated by subjective feelings, sentimental propensities,

---

2 *Dimacali-Victoria, April Grace Mary* v. *M.C.I.* (F.C.T.D., no. IMM-3323-96), Gibson, August 29, 1997. See *Budhu, Pooran Deonaraine* v. *M.C.I.* (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998, where stereotyping and irrelevant considerations led the Federal Court – Trial Division to set aside the Appeal Division's decision.

3 *Shah, Syed* v. *M.E.I.* (F.C.A, no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994.

4 *Baker* v. *Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817. In the context of an immigration officer's decision involving the exercise of discretion on compassionate or humanitarian grounds, the Court found that the officer's comments gave rise to a reasonable apprehension of bias as they did not disclose the existence of an open mind or the weighing of the particular circumstances of the case free from stereotypes. The officer's comments regarding the applicant's being a strain on the welfare system were based on the fact that the applicant had been diagnosed with a psychiatric illness and was a single mother with several children.

5 *Lutchman, Umintra* v. *M.E.I.* (I.A.B. 88-35755), Ariemma, Townshend, Bell, January 10, 1989. Reported: *Lutchman* v. *Canada (Minister of Employment and Immigration)* (1989), 12 Imm. L.R. (2d) 224 (I.A.B.).

> or biased outlooks. What are these objective elements, and what weight each carries, can only be determined by the facts of each case. [6]

In many decisions the Federal Court of Appeal sanctioned consideration of the legal impediment in the exercise of the Appeal Division's discretion.[7] The approach taken by the Immigration Appeal Division is reflected in the following statement:

> […] [T]his jurisdiction is exercised to overcome a legal obstacle which originated from the fact that an applicant was found to be inadmissible […] [T]he question is: how compelling must the evidence be to overcome such an obstacle and to warrant the granting of special relief? Objectivity and fairness require that the evaluation of evidence be carried out in some consistent fashion and, while it is not possible to establish an absolute scale of values against which to measure the weight of the evidence, it is clear that such scale must be commensurate with the magnitude of the obstacle to be overcome. Therefore, in the case where at the time of the hearing the impediment which gave rise to the refusal no longer exists, the compelling force of the evidence need not be great to overcome what, in effect, is only a legal technicality.[8]

In *Dhaliwal*,[9] a case decided under the *Immigration and Refugee Protection Act*, the applicant argued that the Board erred in conducting a weighing exercise of the humanitarian and compassionate considerations against countervailing factors. The Court noted that *Kirpal*[10] was decided under paragraph 77(3)(b) of the *Immigration Act*, and that Justice Gibson in *Kirpal* had explicitly concluded that the tribunal could not consider the countervailing factors on the basis that the phrase "having regard to all the circumstances" was absent from the enactment. Those words were subsequently added by Parliament to the former Statute and are contained in IRPA paragraph 67(1)(c). The Court concluded that it was open to the Board to consider other matters in weighing the humanitarian and compassionate factors.

Jugpall[11] re-states the traditional approach:

> The Appeal Division has long held that the exercise of its statutory discretion is a function of the context created by a determination of inadmissibility. […] [T]he relief in question is relief from the determination of inadmissibility […].

---

6 *Ibid.*, at 4-5.

7 These decisions are canvassed in *Chauhan, Gurpreet K.* v. *M.C.I.* (IAD T95-06533), Townshend, June 11, 1997.

8 *Lutchman, supra,* footnote 5, at 5.

9 *Dhaliwal, Resham Singh* v. *M.C.I.* (F.C., no. IMM-8123-04), Mosley, June 15, 2005; 2005 FC 869.

10 *Kirpal* v. *Canada (Minister of Citizenship and Immigration),* [1997] 1 F.C. 352 (T.D.).

11 *Jugpall, Sukhjeewan Singh* v. *M.C.I.* (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999, at 9-11; 17-18. See too *M.C.I.* v. *Dang, Thi Kim Anh* (F.C.T.D., no. IMM-3113-99), Dawson, July 20, 2000, where the panel adopted the reasoning in *Jugpall* and the Court found that the panel did not err in law when it allowed the appeal on H&C grounds.

[…]

> The need to establish the context in which an appeal pursuant to s. 77(3)(b) is to be considered can be understood as a practical and purposive approach to the administration of the Act. If the purpose of the Act is to facilitate rather than frustrate immigration, then one of the aims of the Act in granting a right of appeal pursuant to s. 77(3)(b) is to make available a remedy where the strict application of the law produces harsh results. This aim can be realised by measuring the compassionate or humanitarian aspects of an individual's case in relation to the legal obstacles to admissibility.
>
> […]
>
> The Appeal Division has consistently applied an approach which requires the degree of compelling circumstances to be commensurate with the legal obstacle to admissibility in order to justify granting discretionary relief. Thus, in cases where changes in the circumstances of the case by the time it gets to appeal are such that the original basis for a finding of inadmissibility has been overcome, a mildly compelling case may be sufficient to warrant granting discretionary relief. […] [A] complete surmounting of the substance of the original ground of inadmissibility weighs very heavily in the Appeal Division's assessment of the compassionate or humanitarian circumstances of the case.
>
> […]
>
> In the context of cases where Parliament's concerns with admissibility have been met, it may not be necessary to look for overwhelming circumstances in order to grant special relief. The values of quick and fair adjudication would not be served by forcing the appellant to start the sponsorship process all over again […].

Where the obstacle to admissibility has been overcome, particularly with respect to medical and financial inadmissibility, there must be positive factors present over and above the ability of the sponsor to surmount the obstacle to admissibility in order for the Appeal Division to grant special relief:

> There must be positive factors independent of [the obstacle to admissibility] which move the decision-maker to conclude that it would be unfair to require the appellant to start the whole sponsorship process all over again.[12]
>
> As well, there should be no negative factors which would undermine any justification for granting special relief.[13]

The *Chirwa*[14] standard applies where the initial ground of inadmissibility has not in substance been overcome. The following definitions of "compassionate or humanitarian considerations" were given in *Chirwa*:

---

[12] *Ibid.*, at 18.

[13] *Ibid.*

[14] *Chirwa* v. *Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.), at 350.

> [...] "compassion" [is defined] as "sorrow or pity excited by the distress or misfortunes of another, sympathy" [...] "compassionate considerations" must [...] be taken to be those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes "warrant the granting of special relief" from the effect of the provisions of the *Immigration Act*.
>
> [...]
>
> [...] "humanitarianism" [is defined] as "regard for the interests of mankind, benevolence."

Some Immigration Appeal Division panels have articulated their understanding of the test for discretionary relief pursuant to the *Immigration and Refugee Protection Act* in the context of sponsorship appeals.

In *Menon*,[15] the panel opined that *Chirwa* remains a sound guide for the Immigration Appeal Division in exercising its discretion, but that the test for discretionary relief is broader than that under the *Immigration Act*.

Another panel, in *Chang*,[16] expressed the view that the case law as it developed in the area of discretionary relief in relationship to sponsorship appeals under the former Act continues to be relevant given the similar wording between the former and current Acts.

In the opinion of the panel in *Chang* the requirement under the IRPA that the humanitarian or compassionate considerations be "sufficient" is a legislative recognition that, in most appeals of this nature, there will be some humanitarian and compassionate considerations present. The panel noted that in all appeals involving family class sponsorships the issue of family re-unification is present to a greater or lesser degree. The inclusion of "sufficient" along with the requirement that humanitarian and compassionate considerations warranting relief be assessed "in light of all the circumstances of the case" suggests that a balancing or weighing process must take place.

Member Workun in *Chang* concluded that the phrase "in light of all the circumstances of the case" in the context of a sponsorship appeal does not have the specialized meaning which was formerly attributed to the phrase in the context of removal order appeals. She expressed the view, however, that certain *Ribic*[17] factors could be relevant considerations, depending on the facts of the case. In the case of criminality outside of Canada, for example, the seriousness of the offence leading to the inadmissibility, possibility of re-offence, evidence of rehabilitation, and degree of family and community support are relevant considerations.

---

[15] *Menon, Romola Gia* v. *M.C.I.* (IAD TA3-01956), D'Ignazio, January 15, 2004.

[16] *Chang, Hea Soon* v. *M.C.I.* (IAD VA2-02703), Workun, July 15, 2003.

[17] *Ribic,Marida* v. *M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

Along with these considerations the Immigration Appeal Division must assess the humanitarian and compassionate considerations present and within the context of all other relevant circumstances. The overall circumstances of the appellant and applicant, including those supportive of special relief and those non-supportive of such relief, must be considered. The panel's considerations must also include a consideration of the legal obstacle to admission and a weighing exercise must then be done.

In *Khan*[18] the panel addressed the test for discretionary relief in the *Immigration and Refugee Protection Act.* In Member Stein's view, the often cited test in *Chirwa* touches on one important basis – a desire to relieve misfortune – for exercising discretionary relief. However, over the years, IAD jurisprudence has expanded to consider a much wider range of factors in deciding whether to grant special relief. Section 67(1)(c) of IRPA grants an extremely broad power including a requirement to consider the best interests of a child directly affected by the decision, and whether there are sufficient humanitarian and compassionate considerations in light of all the circumstances of the case. In the panel's view, this jurisdiction is not limited to an assessment of whether exercising discretionary relief would alleviate misfortune.

Who May Benefit From Special Relief

Special relief may only be granted in respect of members of the family class.[19] The applicants must first be determined to come within the definition of a member of the family class or to qualify as dependants of the member of the family class.[20]

In *Kirpal*, the Federal Court – Trial Division indicated that "[…] nothing on the face of the Act and Regulations […] requires a uniform result from the Tribunal in the exercise of its equitable jurisdiction, in respect of each of the […] family members of the applicant […]".[21] The Appeal Division generally does not undertake an individual assessment of compassionate or humanitarian factors for each applicant. Where the Appeal Division does engage in such

---

[18] *Khan, Khalid* v. *M.C.I.*(IAD TA4-08639), Stein, November 1, 2005.

[19] s.65 of IRPA

> **65.** 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.

[20] 117(1) of the IRP Regulations defines the members of the family class.

[21] *Kirpal*, *supra*, footnote 10, at 365-366. In one case, it was argued, following *Kirpal*, that the Appeal Division could grant special relief with respect to some of the applicants, thereby allowing the sponsor to fulfil her undertaking. The Appeal Division concluded that *Kirpal* cannot be interpreted so as to allow sponsors to circumvent the admissibility requirements of the Act and Regulations: *Dosanjh, Balbir Kaur* v. *M.C.I.* (IAD V95-00550), McIsaac, July 31, 1997.

individual assessments,[22] it usually comes to a uniform conclusion for all applicants on the question of whether special relief is warranted.[23]

When a sponsored person is determined by an immigration officer to be 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.[24] There is no right of appeal to the Immigration Appeal Division as there is no family class refusal.

A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if their accompanying family member, or in prescribed circumstances, their non-accompanying family member, is inadmissible.[25] A foreign national, other than a protected person, is inadmissible if they are an accompanying family member of an inadmissible person.[26]

Effect of Allowing an Appeal Pursuant to s. 67(1)(c) of IRPA

A decision in the sponsor's favour on compassionate or humanitarian grounds blankets and thus overcomes the ground of inadmissibility.[27] The blanketing effect is in relation to the particular ground that was before the Immigration Appeal Division. This means that when the application is returned to the officer to be further processed, if the officer discovers another reason for refusing the application, there is nothing to preclude a second refusal. The Division's earlier decision granting special relief relates only to the matter that was before it at the time. Thus the Division may, on a subsequent appeal, on the facts then existing, decide that the granting of special relief is not warranted.[28] The earlier decision granting special relief may be revisited and the doctrine of *res judicata* does not apply.

---

[22] See, however, *Chauhan, supra*, footnote 7, where the panel articulated its disagreement with *Kirpal* in this respect.

[23] One of the rare instances where discretionary relief was "split" in respect of the applicants was in *Jagpal, Sawandeep Kaur* v. *M.C.I.* (IAD V96-00243), Singh, June 15, 1998, where the panel, citing *Kirpal*, found discretionary relief was warranted for the sponsor's parents but not for her brother.

[24] Immigration Manuals, Overseas Processing (OP), Chapter OP2 at 50.

[25] s.42(a) of IRPA and IRP Regulation 23.

[26] s.42(b) of IPRA; "family member" is defined in IRP Regulation 1(3).

[27] *Mangat, Parminder Singh* v. *M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985.

[28] *Wong, Kam* v. *M.E.I.* (I.A.B. 83-6438), Davey, Hlady, Howard, March 7, 1984.

EVIDENCE

Burden of Proof

Before a decision favourable to a sponsor may be given on compassionate or humanitarian grounds, the sponsor has the burden of adducing evidence sufficient to attract this jurisdiction.

Evidence existing at the time of the Appeal

An appeal on humanitarian or compassionate grounds is decided on the facts existing at the time the Immigration Appeal Division makes its decision. In *Gill*,[29] the Federal Court of Appeal stated:

> It is noteworthy to observe that the jurisprudence of this Court has established that a hearing of this nature is a hearing *de novo* in a broad sense, and at such a hearing the Board is entitled to consider contemporary matters which necessarily involve a consideration of changed circumstances when exercising its equitable jurisdiction.

GENERAL PRINCIPLES

It has been held that the sponsor's circumstances are at least as important as those of the applicants, if not paramount,[30] on an appeal on humanitarian and compassionate grounds.

The policy objective set out in section 3(1)(d) of the *Immigration and Refugee Protection Act*, to see that families are reunited in Canada, informs the exercise of discretionary relief. However, since it is the basis for all sponsorship applications, it is not, without more, sufficient to warrant special relief.[31] Marriage to a Canadian citizen does not, in itself, create any entitlement to special relief.[32]

---

[29] *M.E.I.* v. *Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991, at 6-7.

[30] *Johl, Baljinder Kaur* v. *M.E.I.* (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987.

[31] *Hylton, Claudine Ruth* v. *M.E.I.* (I.A.B. 86-9807), Arkin, Suppa, Ariemma, March 17, 1987; see also *Valdes, Juan Gonzalo Lasa* v. *M.E.I.* (IAD V90-01517), Wlodyka, Chambers, Gillanders, January 21, 1992. In one case of the Federal Court of Appeal, Justice Mahoney at page 6 of his concurring reasons stated, although in *obiter*: "The circumstances in which the Board may exercise its discretion under s. 77(3)(b) need not be extraordinary.": *M.E.I.* v. *Burgon, David Ross* (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: *Canada (Minister of Employment and Immigration)* v. *Burgon* (1991), 13 Imm. L.R. (2d) 102 (F.C.A.). This case was commented on in *Sotoodeh, Isheo* v. *M.E.I.* (IAD T91-00153), Fatsis, Chu (concurring), Bell (dissenting), July 22, 1991. The *obiter* statement in *Burgon* was relied on in granting special relief in *Kadri, Darwish Mohamad* v. *M.C.I.* (IAD V97-02769), Boscariol, August 4, 1998, the panel stating at page 5 that "compassionate considerations need not be extraordinary but can be as simple as the love between a husband and wife and their desire to be together". However, in *Taghizadeh-Barazande, Parviz* v. *M.C.I.* (IAD T97-00073), D'Ignazio, January 20, 1998, although separation of a husband and wife was causing them some distress, this alone was held insufficient to warrant special relief. In *Brar, Charanjit Kaur v. M.C.I.* (IAD VA5-00400), Workun, March 30, 2006, the sponsored application for permanent residence of the appellant's husband was refused on the basis that the appellant was in default of

There is a distinction between achieving family unification and facilitating the reunion of the sponsor with close relatives from abroad.[33] Generally speaking, the concern is not with maintaining the unification of all relatives abroad. As a general rule, the fact that a relative abroad does not wish or is ineligible to come to Canada is not relevant to the granting of relief to permit the sponsor to be reunited with other relatives.[34]

Where there is more than one ground of refusal, different considerations go to the discretionary jurisdiction with respect to each ground.[35]

An argument may be presented that an applicant's opportunities in Canada would be far more attractive than in the applicant's home country. This has been characterized as an economic argument and is generally not accepted as a humanitarian and compassionate factor.[36]

The policy objective set out in section 3(1)(h) of the *Immigration and Refugee Protection Act*, to protect the health and safety of Canadians and to maintain the security of Canadian society, can guide discretion.[37]

The Immigration Appeal Division has considered the exercise of special relief to alleviate an anomaly in the law.[38]

---

sponsorship obligations under a previous undertaking signed on behalf of her former husband. Her conduct vis-à-vis the outstanding debt was a highly negative feature of the case. Notwithstanding the spousal nature of the sponsorship and the fact that the appellant and applicant now had a child, there were insufficient humanitarian and compassionate considerations to warrant granting special relief.

[32] *Singh, Rosina* v. *M.E.I.* (I.A.B. 83-6483), Anderson, Chambers, Voorhees, December 31, 1984.

[33] *Mohamed* v. *Canada (Minister of Employment and Immigration),* [1986] 3 F.C. 90 (C.A.).

[34] *Ibid.* In *Ahmed, Muhammad Jamail* v. *M.E.I.* (I.A.B. 85-6238), Anderson, November 18, 1986, the panel held irrelevant the fact that if the applicants were granted permanent residence in Canada, their grandchildren in Pakistan would be deprived of their love and affection. In *Rupert, Constance Elizabeth* v. *M.E.I.* (I.A.B. 85-6191), Mawani, Singh, Ariemma, May 22, 1987, the sponsor's willingness to join her husband abroad was held to be irrelevant since it is reunion in Canada that is an express objective of the Act. In *Bagri, Sharinder Singh* v. *M.C.I.* (IAD V96-02022), Borst, May 9, 1999, the fact that the applicant would be leaving behind an adult son who was dependent on him was irrelevant to the exercise of special relief.

[35] *Khan, Roshina* v. *M.C.I.* (IAD V97-03369), Carver, November 13, 1998. In *Khan*, in relation to the criminality ground of refusal, rehabilitation and remorse together with the sponsor's emotional attachment warranted special relief; but in relation to the financial ground, the same considerations did not apply and should not be transferred over to this ground. Humanitarian and compassionate considerations regarding the financial ground were insufficient to warrant special relief.

[36] *Judge, Mahan Singh* v. *M.E.I.* (I.A.B. 80-6239), Campbell, Hlady, Howard, March 13, 1981. However, in *Doan, Hop Duc* v. *M.E.I.* (I.A.B. 86-4145), Eglington, Goodspeed, Vidal, September 15, 1986, the proposition that money considerations could never be humanitarian and compassionate considerations was rejected.

[37] *Lai, Gia Hung* v. *M.E.I.* (IAD V92-01455), Wlodyka, Singh (dissenting in part), Verma, November 12, 1993. It is especially relevant in medical inadmissibility cases such as *Lai*.

[38] *Mtanios, Johnny Kaissar* v. *M.C.I.* (IAD T95-02534), Townshend, May 8, 1996. The anomaly deprived one set of Convention refugees from sponsoring their dependants.

The Immigration Appeal Division has held that the doctrine of *res judicata* applies to a decision regarding humanitarian and compassionate considerations.[39]

Evidence of country conditions and hardship to the applicant in that country is admissible in assessing humanitarian and compassionate considerations in sponsorship appeals.[40]

BEST INTERESTS OF THE CHILD

The Supreme Court of Canada decision in *Baker*[41] held that decision-makers, when considering an application for landing on humanitarian and compassionate grounds, must take into account the best interests of the applicant's children. Since the 1999 *Baker* judgment, the Immigration Appeal Division has been citing *Baker* as authority for the proposition that in the exercise of the Division's discretionary jurisdiction, children's best interests must be considered and given substantial weight. The Supreme Court of Canada arrived at the following conclusion with respect to the certified question that was before the Federal Court of Appeal.

> [para75] The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

.

As a result of the IRPA, the Immigration Appeal Division has a statutory mandate to consider best interests as part of the exercise of its discretionary jurisdiction. However, the analysis of the principle pursuant to the statute does not differ appreciably from the analysis that would have been undertaken before the IRPA. The best interests of any child directly affected by the decision of the Immigration Appeal Division must be considered and given substantial weight. While a child's best interests must be considered, it is unlikely that this individual factor will be determinative of an appeal.

There have been a number of Federal Court decisions with respect to the application of *Baker*. While some Court decisions concern Immigration Appeal Division cases, most of the decisions are in relation to refused applications for permanent residence from within Canada

---

[39] *Nyame, Daniel* v. *M.C.I.* (IAD T98-09032), Buchanan, December 31, 1999.

[40] *Alaguthrai, Suboshini* v. *M.C.I.* (IAD T97-01964), Kelley, December 8, 1999.

[41] *Baker* v. *Canada (M.C.I.)*, [1999] 2 S.C.R. 817.

based on humanitarian and compassionate considerations ("H&C applications") or in relation to applications for a stay of removal. These decisions provide the Immigration Appeal Division with general guidance on this issue.

In *Legault*,[42] a case involving an H&C application, the Federal Court of Appeal held that "the mere mention of the children is not sufficient. The interests of the children is a factor that must be examined with care and weighed with other factors. To mention is not to examine and weigh."

The Court went on to consider another question: Did *Baker* create a *prima facie* presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds? It answered that question in the negative and concluded that the children's interests are not superior to other factors that must be considered.

The Federal Court of Appeal in *Owusu*[43] held that if there is no evidence adduced by an applicant with respect to the best interests of the child, an immigration officer is under no obligation to inquire further about their best interests.

It appears that the Immigration Appeal Division will need to consider the best interests of a child directly affected by a decision who does not reside in Canada. The Supreme Court of Canada in *Baker* did not address this issue. In *Irimie*,[44] however, Pelletier, J. decided that the principles in *Baker* should apply to all of the children of the individual in question, both Canadian and foreign children. This should be contrasted with the Federal Court of Appeal decision in *Owusu*[45] where in dismissing the appeal the Court stated "we must not be taken to have affirmed the Applications Judge's view that an immigration officer's duty to consider the best interests of an H&C applicant's children is engaged when the children in question are not in, and have never been to, Canada. This interesting issue does not arise for decision on the facts of this case and must await a case in which the facts require it to be decided." The Court went on to note that in *Baker* the Supreme Court of Canada made no mention of Ms. Baker's four other children residing in Jamaica, nor did it comment on any consideration that the immigration officer gave or failed to give to the best interests of the children who did not reside in Canada.

---

[42] *M.C.I.* v. *Legault, Alexander Henri* (F.C.A., no. A-255-01), Richard, Décary, Nöel, March 28, 2002; 2002 FCA 125.

[43] *Owusu, Samuel Kwabena* v. *M.C.I.* (F.C., no. A-114-03), Evans, Strayer, Sexton, January 26, 2004; 2004 FCA 38.

[44] *Irimie, Mircea Sorin* v. *M.C.I.* (F.C.T.D., no. IMM-427-00), Pelletier, November 22, 2000. In paragraph 20 of the judgment, the Court stated "that 'attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision' must be read to include all of the children of the individuals in question, both Canadian and foreign. To hold otherwise is to say that the humanitarian and compassionate needs of Canadian children of particular parents are more worthy of consideration than those of the non-Canadian children of the same parents. It is understandable that distinctions be drawn between those children for legal purposes: it would be 'inconsistent with Canada's humanitarian and compassionate tradition' to suggest that there are humanitarian distinctions to be drawn between them based upon citizenship."

[45] *Owusu*, *supra*, footnote 43.

Given the open ended language of subsection 67(1) of the IRPA, and the jurisprudence of the Federal Court - Trial Division, it appears that a restrictive interpretation is not warranted - the best interests of **any** child directly affected by the appeal must be considered in assessing whether or not to exercise discretionary relief.[46] In an appeal from the refusal of a sponsored application for permanent residence by the appellant's parents in Punjab, the member turned her mind to the question of the best interests of the three grandchildren in Canada and the grandchildren who lived in India.[47] She concluded that while it might be in the best interests of the appellant's children for the applicants to come to Canada, it could not be concluded that it was not also in the best interests of the many grandchildren in Punjab for their grandparents to remain in India with them.

In *Momcilovic*,[48] at issue was the interpretation to be given to the words "child directly affected". The Court found that Nadja, a motherless teenaged girl for whom the applicant for permanent residence was the primary caregiver, was a "child directly affected" such that her best interests had to be properly assessed. The Court opined that "[a] plain reading of subsection 25(1) is broader than the best interests of a parent's own child. The section does not use wording such as 'child of the marriage' or 'the applicant's child'. It refers to the best interests of a 'child directly affected'.[49]

CONSIDERATIONS FOR SPECIAL RELIEF

Generally Applicable

- the objective in section 3(1)(d) of the *Immigration and Refugee Protection Act*, to see that families are reunited in Canada
- nature and degree of legal impediment
- the relationship of the sponsor to the applicant(s)
- the reason(s) for the sponsorship
- the strength of the relationship between the applicant(s) and the sponsor[50]
- the situation of the sponsor in Canada[51]
- the past conduct of the sponsor[52]

---

[46] It must be noted that "best interests" cannot be used to overcome a legal barrier such as the failure of the appellant to have legally adopted the applicant.

[47] *Bhatwa, Paramjit* v. *M.C.I.* (IAD TA3-23671), Stein, April 19, 2005 (reasons signed May 18, 2005).

[48] *Momcilovic, Kosanka* v. *M.C.I.* (F.C., no. IMM-5601-03), O'Keefe, January 20, 2005; 2005 FC 79.

[49] *Ibid*., at paragraph 45.

[50] *Wong, Philip Sai Chak* v. *M.E.I.* (IAD T91-05637), Chu, Fatsis, Ahara, November 5, 1992.

[51] *Jean, Marie Béatrice* v. *M.E.I.* (IAD M93-05594), Durand, September 9, 1993. For example, whether the applicant could help the sponsor by babysitting the children while the sponsor goes to work.

[52] *Laii, supra*, footnote 37. For example, the fact that the sponsor has been on social assistance. In *Lawler, Valerie Ann* v. *M.C.I.* (IAD T95-03411), Band, February 23, 1996, the Appeal Division distinguished

- the situation of the applicant(s) abroad, including hardship[53]
- the ease of travel for the sponsor/applicant(s)
- the existence of family or other support for the applicant(s) abroad[54]
- the existence of family or other support for the sponsor in Canada
- the existence of cultural duties to one another[55]
- the financial burden on the sponsor from having the applicant(s) abroad
- the financial dependency of the applicant(s) on the sponsor
- the best interests of the child[56]

Medical Inadmissibility[57]

- whether there is evidence of an improved medical condition at the time of the appeal[58]and current status of same if not an improvement
- whether there are likely to be excessive demands on Canadian services (health/social)[59]

Tzemanakis v. *M.E.I.* (1970), 8 I.A.C. 156 (I.A.B.), which the Minister relied on in support of the proposition that persons who knowingly enter into a relationship (in this case marriage to a person in an inadmissible class) must abide by the reasonable consequences of their actions. The approach taken in *Tzemanakis*, which indicated that "equity" is an exception to the letter of the law and that the right to benefit from special relief is predicated on good faith and the honest and responsible attitude of whoever seeks equity, is irrelevant. The Appeal Division must exercise its discretionary powers, not as an exception to some other jurisdiction it has, but as a separate and distinct power, standing alone.

[53] *Dutt, John Ravindra* v. *M.E.I.* (IAD V90-01637), Chu, Wlodyka, Tisshaw, July 22, 1991. See also *Parel, Belinda* v. *M.C.I.* (IAD W97-00112), Boire, June 23, 1999, where the sons of the applicant, the sponsor's mother, provided her with little or no support, her life was in some danger and there was a close bond between her and the sponsor warranting special relief; and *Saskin, Atif* v. *M.C.I.* (IAD T96-03348), Maziarz, January 30, 1998, where traumatic past events and pending deportation to Bosnia led to the granting of special relief.

[54] *Baldwin, Ellen* v. *M.E.I.* (IAD T91-01664), Chu, Arpin, Fatsis, June 30, 1992.

[55] *Sotoodeh, supra*, footnote 31.

[56] *Zaraket, Zahra* v. *M.C.I.* (IAD M99-06909), Fortin, October 10, 2000. An officer deciding a section 25 humanitarian and compassionate application must consider when deciding on the "best interests of the child", language difficulties. In *Kim, Shin Ki* v. *M.C.I.* (F.C., no. IMM-345-07), Phelan, January 29, 2008; 2008 FC 116, the Court found that the applicant, who had lived most of his life in Canada, if returned to South Korea would have an insufficient grasp of Korean to enter university or to obtain a job other than manual or menial labour. In *Arulraj, Rasalingam* v. *M.C.I.* (F.C., no. IMM-4137-05), Barnes, April 27, 2006; 2006 FC 529, also a s. 25 application, the Court found the decision was unreasonable in its treatment of the best interests of the children. The officer felt that, in considering best interests of the children it was necessary to find that they would be irreparably harmed by their father's "temporary" removal from Canada. There is simply no legal basis for incorporating a burden of irreparable harm into the consideration of the best interests of the children. The benefit to the children from the continuing presence of a parent and all other relevant factors, as well as the potential harm caused by removal, must all be weighed.

[57] See Chapter 3 for full discussion of Medical Refusals.

[58] *Hu, Jenkin Ching-Kim* v. *M.C.I.* (IAD V92-01452), Ho, March 30, 1995.

[59] *Sooknanan, Lochan* v. *M.C.I.* (F.C.T.D., no. IMM-1213-97), Gibson, February 27, 1998; *Dutt, supra*, footnote 53.

- the relative availability of health services to the applicant(s), in Canada and abroad[60]
- the cost of treatment of the medical condition[61]
- the availability of family support in Canada[62]
- the psychological dependencies of the applicant(s) on the sponsor[63]
- the objective in section 3(1)(h) of the Act, to protect the health, safety of Canadians and to maintain the security of Canadian society

Criminal Inadmissibility

- whether there is evidence of rehabilitation[64]
- whether there is evidence of remorse[65]
- the seriousness of the offences[66]
- evidence of good character[67]
- the length of time since the offence(s) and absence of further trouble with the law[68]
- evidence of criminal history, future prospects and risk of future danger to the public[69]
- hardship to the applicant in the home country[70]

---

[60] *Dutt, ibid.*

[61] *Valdes, supra*, footnote 31; *Che Tse, David Kwai* v. *S.S.C.* (F.C.T.D., no. IMM-2645-93), McKeown, December 15, 1993.

[62] *Luong, Chinh Van* v. *M.E.I.* (IAD V92-01963), Clark, July 5, 1994; *Lakhdar, Ahmed* v. *M.C.I.* (IAD M96-13690), Lamarche, February 13, 1998; *Colterjohn, David Ian* v. *M.C.I.* (IAD V96-00808), Jackson, March 11, 1998.

[63] *Deol, Daljeet Singh* v. *M.E.I.* (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992. Reported: *Deol* v. *Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L.R. (2d) 1 (F.C.A.). In *Parmar, Hargurjodh* v. *M.E.I.* (IAD T92-03914), Townshend, September 16, 1993, the panel distinguished *Deol* because the sponsor's conduct did not show the psychological dependency or bonds of affection mentioned in *Deol*.

[64] *Perry, Ivelaw Barrington* v. *M.C.I.* (IAD V94-01575), Ho, November 1, 1995. *Thamber, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001. *Ramirez, Roberto* v. *M.C.I.* (IAD VA4-00578), Kang, May 12, 2005 (reasons signed May 30, 2005).

[65] *Ramirez, ibid*.

[66] *Khan, supra*, footnote 35.

[67] *Ibid.*

[68] *Au, Chui Wan Fanny* v. *M.C.I.* (IAD T94-05868), Muzzi, March 13, 1996; *Fu, Chun-Fai William* v. *M.C.I.* (IAD T94-04088), Townshend, March 19, 1996.

[69] *Nagularajah,Sathiyascelam* v. *M.C.I.* (F.C.T.D., no. IMM-3732-98), Sharlow, July 7, 1999. This decision arose in the context of a removal order appeal so may not exactly fit the sponsorship context.

[70] *Alaguthrai, supra,* footnote 40.

Financial Refusals

Please see Chapter 1, “Financial Refusals”.

CASES