Immigration and Refugee Board of Canada
Commission de l'immigration et du statut de réfugié du Canada

Immigration Appeal Division

SPONSORSHIP APPEALS *IMMIGRATION AND REFUGEE PROTECTION ACT*

Legal Services
Immigration and Refugee Board of Canada

January 1, 2008

Canada

TABLE OF CONTENTS

Introduction

Introduction

This paper deals with the sponsorship provisions of the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRP Regulations) as they pertain to the Immigration Appeal Division.

The paper, within the sponsorship context, outlines the legislative purpose of the IRPA and discusses how the IRPA has been interpreted by the courts.

This paper does not constitute legal opinion and should not be taken to represent the views of the Immigration and Refugee Board and its members.

General

A sponsorship appeal to the Immigration Appeal Division is a hearing *de novo* in a broad sense.[1] It is open to the Immigration Appeal Division to consider issues which were not before the visa officer.[2] The Immigration Appeal Division is not bound by legal or technical rules of evidence and it may receive and base its decision on any evidence considered necessary and credible or trustworthy.[3]

The Immigration Appeal Division is bound by the common law duty of fairness. A participant at a hearing must have sufficient knowledge of what is at issue to afford her an opportunity to participate in the hearing in a meaningful way.[4]

The Immigration Appeal Division may allow or dismiss a sponsorship appeal. It may allow in law or by granting special relief, or both. The Immigration Appeal Division must give

---

1 *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.). The Immigration Appeal Division may make use of newly created evidence in sponsorship cases: *Valdez, Enrico Villanueva v. M.C.I.* (F.C.T.D., no. IMM-5430-97), Reed, March 12, 1999; *Nadon, Claude v. M.C.I.* (F.C., no. IMM-2932-06), Beaudry, January 22, 2007; 2007 FC 59; *Khera, Amarjit v. M.C.I.* (F.C., no. IMM-6375-06), Martineau, June 13, 2007; 2007 FC 632.

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

3 See section 175(1) of the IRPA.

4 *David, Solomon v. M.C.I.* (F.C., no. IMM-5599-06), Martineau, May 24, 2007; 2007 FC 546; *M.C.I. v. Dang, Thi Kim Anh* (F.C.T.D., no. IMM-3113-99), Dawson, July 20, 2000. [Judicial review of IAD T98-03773, MacAdam, June 4, 1999]. Thus where the sponsor indicated she was not putting into issue the correctness of the visa officer's decision, the Appeal Division came under an obligation to clearly advise the Minister of its decision to nevertheless inquire into the adequacy of that decision.

reasons for its decision.[5] If the Immigration Appeal Division allows an appeal by a sponsor, the matter goes back for further processing and an assessment of whether the requirements of the IRPA and the IRP Regulations, other than those requirements upon which the decision of the Immigration Appeal Division has been given, are met.[6]

If the Immigration Appeal Division dismisses an appeal and a new application for a permanent resident visa is filed, refused on the same ground and appealed again, and if no new evidence is adduced at the second appeal, the appeal may be dismissed as an abuse of process;[7] if new evidence is adduced, the second appeal may be dismissed using the doctrine of *res judicata* unless special circumstances apply.[8] A decision allowing the appeal on compassionate or humanitarian grounds has the effect of blanketing the ground of refusal that was appealed and that particular refusal ground cannot be used again[9] unless new material facts come to the attention of the visa officer.[10]

---

[5] See section 54 of the *Immigration Appeal Division Rules*, and section 169(b) of the IRPA.

[6] See section 70 of the IRPA. However, a visa officer is not precluded from refusing a sponsored application on the same statutory basis as was relieved against by the Appeal Division when new material facts arising after the Appeal Division hearing or discovered after the Appeal Division hearing and not before the Appeal Division, come to the attention of the visa officer: *Au, Shu Foo v. M.C.I.* [2002] F.C. 257 (C.A.).

[7] *Kaloti, Yaspal Singh v. M.C.I.* (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000. *Li, Wei Min v. M.C.I.* (F.C., no. IMM-5040-05), Lemieux, June 14, 2006; 2006 FC 757. See too *Dhaliwal, Baljit Kaur v. M.C.I.* (F.C.T.D., no. IMM-1760-01), Campbell, December 21, 2001 where the Court found that evidence of continuing commitment was new and relevant evidence with respect to the parties' intention at the time of marriage and thus the Immigration Appeal Division erred in finding abuse of process. See *Rahman, Azizur v. M.C.I.* (F.C., no. IMM-1642-06), Noël, November 2, 2006; 2006 FC 1321 where *Dhaliwal* was distinguished.

[8] *Danyluk v. Ainsworth Technologies Inc*. [2001] 2 S.C.R. 460; 2001 SCC 44. See *Kaloti, Yaspal Singh v. M.C.I.* (F.C.T.D., no. IMM-4932-97), Dubé, September 8, 1998; *Bath, Ragbir Singh v. M.C.I.* (IAD V95-01993), Lam, December 8, 1997 (appeal dismissed on grounds of *res judicata* where ground of refusal, parties, law and factual matter to be determined were the same as on the first appeal); and *Singh, Ahmar v. The Queen* (F.C.T.D., no. T-1495-95), Muldoon, December 2, 1996; affirmed in *Singh, Ahmar v. The Queen* (F.C.A., no. A-1014-96), Strayer, Isaac, Linden, November 5, 1998. (*res judicata* applied regarding a challenge to the validity of regulations). For a contrary position, see *Jhammat, Harjinder Kaur v. M.E.I.* (F.C.T.D., no. T-1669-88), Muldoon, October 13, 1988, where *res judicata* was held to be inapplicable in public law, allowing the Minister to question the validity of a marriage on appeal from a second refusal despite having conceded the validity of the marriage in the appeal from the first refusal. A court order quashing a refusal on a limited basis does not have the effect of rendering the whole ground of refusal *res judicata*: *Wong, Chun Fai v. M.E.I.* (F.C.T.D., no. T-2871-90), Jerome, February 26, 1991. See also the in-depth discussion of *res judicata* and abuse of process at chapter 6, section 6.7 "Repeat Appeals".

The Immigration Appeal Division must allow the sponsor to present the alleged new evidence before deciding the abuse of process/*res judicata* issues: *Kular, Jasmail v. M.C. I.* (F.C.T.D., no., IMM-4990-99), Nadon, August 30, 2000. [Judicial review of IAD T98-00523, Maziarz, September 20, 1999.] But the Appeal Division is under no obligation to grant a full oral hearing, new evidence by way of affidavit is acceptable: *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.

[9] *Mangat, Parminder Singh v. M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985. However, if a new ground of refusal is subsequently discovered, nothing would preclude a second refusal/appeal.

[10] *Au, supra*, footnote 6.

A decision of the Immigration Appeal Division may be challenged by way of judicial review to the Federal Court with leave of the Court.[11]

Sponsor

Whether or not one qualifies as a "sponsor" is covered in Chapter 1.

Member of the Family Class

The issue of who is a "member of the family class" and thus can be sponsored is covered in Chapter 7. Topics that are discussed in greater detail within this issue include: adoptions (see Chapter 4), foreign marriages, common-law partners and conjugal partners (see Chapter 5), and bad faith family relationships (see Chapter 6).

Grounds of Refusal

A permanent resident visa may be refused for various reasons including: financial (see Chapter 1), criminality (see Chapter 2), health grounds (see Chapter 3), misrepresentations (see Chapter 8), and non-compliance with the Act including not an immigrant (see Chapter 9).

Discretionary Relief (special relief)

The Immigration Appeal Division has the power to allow an appeal using its discretionary jurisdiction (s. 67(1)(c) of the IRPA). This issue is discussed in detail in Chapter 10.

Transitional Provisions

The transitional provisions of IRPA and IRP Regulations that govern sponsorship appeals pending before the IAD are covered in Tab “T”.

[11] See section 72(1) of the IRPA.

CASES

Chapter One

Financial Refusals and Requirements for the Sponsor

Introduction

A Canadian citizen or permanent resident may sponsor a foreign national who is a member of the family class [*IRPA*, s. 13(1)].

General

An undertaking is binding on the sponsor [*IRPA*, s. 13(3)].

The Act authorizes regulations on "sponsorships, undertakings, and penalties for failure to comply with undertakings" [*IRPA*, s. 14(2)(e)].

An officer is to apply the regulations on sponsorship in accordance with any instructions made by the Minister [*IRPA*, s. 13(4)].

Appeal Rights

Sponsors who have filed an application to sponsor in the prescribed manner have a right to appeal a decision not to issue a member of the family class a permanent resident visa [*IRPA*, s. 63(1)].[1] A sponsorship application that is not in accordance with section 10(1) of the *Immigration and Refugee Protection Regulations* [IRP Regulations] is not "filed in the prescribed manner" [IRP Regulations, s. 10(6)].

Discretionary Jurisdiction

The IAD cannot consider humanitarian and compassionate considerations on an appeal unless the sponsor is "a sponsor within the meaning of the regulations" [*IRPA*, s. 65]. "A sponsor within the meaning of the regulations" means as described in section 130 of the IRP Regulations.

[1] *Khera, Ramandeep Kaur v. M.C.I.* (IAD VA6-01433), Workun, May 9, 2007 (wife of deceased sponsor could not continue appeal in his place).

It is assumed that a sponsor is "a sponsor within the meaning of the regulations" unless a decision not to issue a permanent resident visa is made on this basis or the issue is raised on the evidence adduced by the parties at the hearing.[2]

Applications

An application by a foreign national as a member of the family class must be preceded or accompanied by a sponsorship application [IRP Regulations, s. 10(4)].

A sponsor cannot file more than one sponsorship application in respect of the same member of the family class if a final decision has not been made on the other application [IRP Regulations, s. 10(5)].

The application must:

(a) be made in writing using the form provided by the Department, if any;
(b) be signed by the applicant;
(c) include all information and documents required by the Regulations, as well as any other evidence required by the Act;
(d) be accompanied by evidence of payment of the applicable fee, if any, set out in the Regulations;
(e) if applicable, identify who is the principal applicant and who is the accompanying spouse or common-law partner [IRP Regulations, s. 10(1)].

A sponsorship application not made in accordance with section 10(1) of the IRP Regulations is considered not filed in the prescribed manner for purposes of an appeal to the IAD under section 63(1) of *IRPA* [IRP Regulations, s. 10(6)].

If the requirements of sections 10 and 11 of the IRP Regulations are not met, the application and all documents submitted in support shall be returned to the applicant [IRP Regulations, s. 12].

According to a CIC Instruction on "Minimal Necessary Requirements for a Submission to be Considered an Application" (RIM-02-032 dated June 27, 2002), very limited information is required for a submission to be considered an application satisfactory for section 10(1) of the IRP Regulations. Furthermore, the decision is to be taken up front and before any processing has begun. Once an application has been accepted, it is not to be returned for re-submission; rather, any missing information is to be requested during case processing. It would appear unlikely that the Immigration Appeal Division (IAD) will have before it applications that have not been filed as prescribed for these would have been returned by CIC for re-submission per section 12. As a result, the IAD will not be faced with the issue of whether to dismiss an appeal for lack of

[2] *Nandra, Rajwinder Kaur v. M.C.I.* (IAD VA3-00771), Borst, May 28, 2004.

jurisdiction if the application was not filed as prescribed or to allow the sponsor to correct a minor deficiency in the application.

A decision shall not be made on an application for a permanent resident visa by a member of the family class if the sponsor withdraws their sponsorship application [IRP Regulations, s. 119].

Sponsor

A sponsor must be a Canadian citizen or permanent resident who is at least 18 years of age; resides in Canada; and has filed a sponsorship application in accordance with section 10 of the IRP Regulations [IRP Regulations, s. 130(1)]. An exception is provided where the sponsor is a Canadian citizen and does not reside in Canada: they may sponsor their spouse, common-law partner, conjugal partner or dependent child who has no dependent children if the sponsor will reside in Canada when the applicant becomes a permanent resident [IRP Regulations, s. 130(2)].

A sponsor must satisfy section 130 of the IRP Regulations from the time of initiation of the sponsorship application until a decision is made on the application otherwise they will not be considered a sponsor.[3]

"Resides in Canada" for section 130(1)(b) of the Regulations can be established by evidence of presence on Canadian soil and involvement in day-to-day activities not requiring absence abroad.[4] Physical absence from Canada may not constitute an interruption of residence in Canada.[5] The question is whether a sponsor has centralized their mode of living in Canada.[6]

Humanitarian and compassionate consideration is not possible where the sponsor is less than 18 years of age as they are not a sponsor within the meaning of the regulations.[7]

For a sponsor who is a Canadian citizen not residing in Canada, a mere expression of intent to return and reside in Canada is insufficient to satisfy section 130(2) of the IRP Regulations.[8] A change in intent subsequent to the officer's decision on the application is irrelevant.[9]

---

[3] See section 133(1)(a) of the IRP Regulations.

[4] *Cook, Donald Charles v. M.C.I.* (IAD MA5-01579), Hudon, August 10, 2006.

[5] *Gritsan, Serguei v. M.C.I.* (IAD TA3-10556), D'Ignazio, October 5, 2004.

[6] *Zhang, Tieshi v. M.C.I.* (IAD MA3-02491), Patry, September 20, 2004.

[7] *Chan, May Yee v. M.C.I.* (IAD VA4-01434), Boscariol, March 23, 2005.

[8] *Law, Peter Koi v. M.C.I.* (IAD TA3-11031), D'Ignazio, May 19, 2004 (reasons signed June 2, 2004).

[9] *Cook, Donald Charles v. M.C.I.* (IAD MA5-01579), Hudon, August 10, 2006. Compare *Bobocel, Norman Dean v. M.C.I.* (IAD WA5-00008), Munro, October 21, 2005 (reasons signed November 30, 2005) where a sponsor who misapprehended the legitimacy of his sponsorship was held to satisfy section 130(2).

Undertaking

The undertaking is given to the Minister or the competent authority of the province if the province has entered into an agreement referred to in section 8(1) of the *IRPA* [IRP Regulations, s. 131].

The undertaking obliges the sponsor to reimburse Canada or a province for every benefit provided as social assistance to the sponsored foreign national and their family members during the period beginning on the day the foreign national becomes a permanent resident. The undertaking ends in 10 years subject to exceptions: for a spouse, common-law or conjugal partner, three years; for a dependent child[10] less than 22 when they become a permanent resident, 10 years later or when they reach 25, whichever is earlier; and for a dependent child 22 or older when they become a permanent resident, three years [IRP Regulations, s. 132(1)]. There are separate rules for undertakings to a province [IRP Regulations, s. 132(2), (3)].

A permanent resident visa shall not be issued to an applicant unless the sponsorship undertaking in respect of the applicant is in effect (i.e. has not been withdrawn) [IRP Regulations, s. 120(a)].

Agreement

The sponsor, co-signer if any and member of the family class who is at least 22 or if less than 22 is the sponsor's spouse, common-law or conjugal partner must enter into a written agreement that includes: a statement to provide for the basic requirements of the member of the family class and their accompanying family members for the period of the undertaking; a declaration by the sponsor and co-signer that their financial obligations do not prevent them from honouring the agreement and undertaking; and a statement by the member of the family class that they will make every reasonable effort to provide for their and their accompanying family members' basic requirements [IRP Regulations, s. 132(4)].

Co-signers

The sponsor's spouse or common-law partner may co-sign the undertaking if they are a permanent resident or Canadian citizen at least 18 years of age and residing in Canada and they meet the requirements for sponsoring in section 133(1) of the IRP Regulations (excluding section 133(1)(a)). A co-signer is jointly and severally or solidarily liable for a breach of the undertaking [IRP Regulations, s. 132(5)]. A co-signer may continue an appeal following the death of the sponsor if the evidence indicates a joint sponsorship.[11]

---

[10] For a full description see section 132(1)(b)(ii) of the IRP Regulations.

[11] *Annor, Gladys v. M.C.I.* (IAD TA4-04677), Whist, September 28, 2005.

Requirements for the Sponsor

A sponsorship application shall only be approved by an officer if from the day the application was filed until a decision is made with respect to the application, the sponsor meets the requirements set out in section 133(1) of the IRP Regulations. These requirements are that the sponsor:

(a) is a sponsor as described in section 130;
(b) intends to fulfil the obligations in the undertaking;
(c) is not subject to a removal order;
(d) is not detained in a penitentiary, jail, reformatory or prison;
(e) has not been convicted of an offence of a sexual nature against any person or an offence that results in bodily harm to a relative of the sponsor including a dependent child or other family member[12], a relative of the sponsor's spouse, common-law or conjugal partner (unless acquitted or pardoned or at least 5 years have elapsed since completion of the sentence[13]);[14]
(f) has not been convicted outside Canada of an equivalent offence to (e) (unless acquitted or 5 years have elapsed since sentence and rehabilitation is shown)[15];
(g) is not in default of any undertaking or any support payment obligations ordered by a court;
(h) is not in default of repayment of a debt referred to in section 145(1) of the IRPA;
(i) is not an undischarged bankrupt;
(j) the sponsor's total income is at least equal to the minimum necessary income but this requirement does not apply if the sponsored person is the sponsor's spouse, common-law or conjugal partner with no dependent children; or with a dependent child who has no dependent children; or is a dependent child of the sponsor who has no dependent children or a person referred to in section 117(1)(e) or (g) of the IRP Regulations[16];
(k) the sponsor is not in receipt of social assistance other than for a disability[17].

---

[12] "Family member" includes a person who was the sponsor's wife at the time the offence was committed although they were divorced when the sponsor was convicted: *Joshi, Ajay v. M.C.I.* (IAD WA3-00046), Wiebe, December 19, 2003.

[13] Section 133(2) of the IRP Regulations.

[14] This provision is not to be taken lightly: *Gill, Amarjeet Singh v. M.C.I.* (IAD VA3-02834), Borst, August 10, 2004.

[15] Section 133(3) of the IRP Regulations.

[16] Section 133(4) of the IRP Regulations. See *Chekole, Awoke v. M.C.I.* (IAD WA2-00099), Wiebe, April 25, 2003 (reasons signed June 5, 2003) where the sponsor of a dependent child was not required to meet the MNI.

[17] Section 133(1)(k) is not contrary to section 15 of the Charter: *Velasquez Guzman, Neila Rosa v. M.C.I.* (F.C., no. IMM-184-06), Noël, September 28, 2006; 2006 FC 1134 (appeal to FCA dismissed for mootness: *Velasquez Guzman, Neila Rosa v. M.C.I.* (F.C.A., no. A-467-06), Linden, Evans, Sharlow, November 5, 2007; 2007 FCA 358.

All the above requirements may be overcome by special relief[18] except for (a), "is a sponsor as described in section 130" since section 65 of the *IRPA* precludes an appeal on humanitarian and compassionate considerations if the sponsor is not a sponsor within the meaning of the regulations.

An officer can approve a sponsorship application only if the sponsor satisfies the requirements continuously from the day the application was filed until the officer makes a decision on the application.

If the officer made no error in concluding that a requirement of section 133(1) of the IRP Regulations was not met at any time between the filing of the application and the making of the decision on the application, the IAD must uphold the officer's decision in law, even if the facts at the time of the hearing are such that the particular requirement is now met.[19]

There is a specified time frame for the minimum necessary income requirement whereby the income is calculated on the taxation year preceding the date of filing of the sponsorship application [IRP Regulations, s. 134(1)]. The IAD will make its determination using the same time period. Therefore if a sponsor meets the minimum necessary income at the time of the hearing before the IAD, that fact will be relevant to the discretionary jurisdiction of the IAD only. In these circumstances, a lower threshold for granting special relief will be appropriate given that the obstacle to admissibility has been overcome.[20]

The sponsor has to meet the requirements of section 133 of the IRP Regulations (section 137 if in Quebec) up until the time the family members become permanent residents [IRP Regulations, s. 120(b)]. If a sponsor dies before that time the IAD may not consider humanitarian and compassionate considerations for the applicants.[21]

A sponsor who was adopted and whose adoption has been revoked may sponsor an application by a member of the family class provided the revocation was not obtained for the purpose of sponsoring the application [IRP Regulations, s. 133(5)].

Income Calculation Rules/Minimum Necessary Income

The sponsor's income is to be calculated on the last notice of assessment or equivalent document issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application [IRP Regulations, s. 134(1)(a)]. The income calculation may be made solely from these source documents. If a sponsor proposes a

[18] *Effat, Mansoora v. M.C.I.* (IAD TA2-20734), Hoare, June 24, 2004.

[19] *Ganidagli, Mustafa Serhat v. M.C.I.* (IAD TA3-11913), Whist, February 16, 2004.

[20] *Jugpall, Sukhjeewan Singh v. M.C.I.* (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999.

[21] *Rahman, Mohammed Ataur v. M.C.I.* (IAD TA4-12830), Whist, May 24, 2006.

different methodology and reliance on other source documents, the sponsor carries the burden of establishing the reliability of that evidence and how it applies to the calculation.[22]

The income is income earned as reported in that document less any provincial allowance for instruction or training; any social assistance[23] or financial assistance under a resettlement program; employment insurance, other than special benefits; *Old Age Security Act* income; and any child tax benefit [IRP Regulations, s. 134(1)(c)]. If there is a co-signer, their income as calculated in the same manner is included in the sponsor's income [IRP Regulations, s. 134(1)(d)].

If the sponsor does not produce a notice of assessment or equivalent document or if their income is less than the minimum necessary income, the sponsor's Canadian income for the 12 month period preceding the filing of the sponsorship application is the income earned by the sponsor not including the amounts mentioned in the preceding paragraph.

In the case of business income, the relevant amount is net income (gross income less deductions).[24] Net income is to be calculated under section 134(1)(c) without deducting depreciation and amortization (which may have been deducted for tax purposes).[25]

If an officer receives information that a sponsor is no longer able to fulfil the undertaking, the Canadian income of the sponsor is calculated on the basis of the 12 month period preceding the day the officer receives the information rather than the 12 month period preceding the date of filing of the undertaking [IRP Regulations, s. 134(2)].

"Minimum necessary income" is defined in section 2 of the IRP Regulations. It is the low income cut-off figure published by Statistics Canada for urban areas of 500,000 or more. The number of persons includes the sponsor and their family members[26]; the sponsored foreign national, their family members whether accompanying or not; and every other person and their family members in respect of whom the sponsor has given or co-signed an undertaking still in effect and in respect of whom the sponsor's spouse or common-law partner has given or co-signed an undertaking still in effect, if the sponsor's spouse or common-law partner has co-signed with the sponsor the undertaking in respect of the foreign national.

Default in Undertaking

[22] *Singh Chahal, Balwinder v. M.C.I.* (F.C., no. IMM-1423-07), Barnes, September 24, 2007; 2007 FC 953.

[23] As defined in section 2 of the IRP Regulations.

[24] *Warraich, Harpreet Kaur v. M.C.I.* (IAD TA6-12398), Ahlfeld, October 12, 2007.

[25] *Braafhart, Gerrit v. M.C.I.* (IAD TA4-04251), Waters, January 31, 2005.

[26] As defined in section 1(3) of the IRP Regulations. "Family member" includes a separated spouse and the spouse's dependent children: *Boyd, Isabella Seabra v. M.C.I.* (IAD VA6-01833), Miller, October 30, 2007.

Default begins when the government makes a payment that the sponsor promised to repay in the undertaking or an obligation in the undertaking is breached and it ends when the sponsor reimburses the government in full or in accordance with an agreement with the government[27] or ceases to be in breach of the obligation [IRP Regulations, s. 135]. A sponsor's conduct in regard to the outstanding debt is relevant to the exercise of discretionary relief.[28]

Suspension of Processing of Sponsorship Application

If certain proceedings are brought against a sponsor or co-signer, the sponsorship application shall not be processed until final determination of the proceedings [IRP Regulations, s. 136].[29] In a proceeding initiated by a report under section 44(1) of the *IRPA*, there is a final determination when the IAD stays the removal order.[30]

Province of Quebec

A different scheme applies in the Province of Quebec [IRP Regulations, s. 137]. Under the agreement with the Province of Quebec, the initial selection falls under the responsibility of the Quebec authorities and consequently the financial evaluation is made by them. This division of responsibilities does not preclude CIC from refusing a foreign national under section 39 of the Act. An appeal of the Quebec refusal is possible before the TAQ (Tribunal administratif du Québec). An appeal before the IAD based on the Quebec refusal is limited to humanitarian and compassionate considerations.

Inadmissibility for Financial Reasons

A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and they have not satisfied an officer that adequate arrangements for care and support other than those that involve social assistance have been made [*IRPA*, s. 39]. Section 39 of the *IRPA* may be used where the sponsor is on social assistance for a disability and is therefore not caught by section 133(1)(k) of the IRP Regulations.[31] The low-income cutoff figures can be used as a guide to determine if adequate arrangements have been made.[32]

---

[27] This provision is more favourable to a sponsor than the former comparable provision: *Aryan, Miajan v. M.C.I.* (FC, no. IMM-6676-02), Lemieux, February 20, 2004; 2004 FC 254.

[28] *Brar, Charanjit Kaur v. M.C.I.* (IAD VA5-00400), Workun, March 30, 2006.

[29] Section 136 of the IRP Regulations. Proceedings are revocation of citizenship; report under s. 44(1) of the IRPA; charges re an offence punishable by at least 10 years imprisonment.

[30] *Dhillon, Rajbir Singh v. M.C.I.* (IAD TA3-19586), Hoare, April 11, 2006.

[31] *Amir, Shafqat v. M.C.I.* (IAD MA6-08358), Gaetani, September 27, 2007.

[32] *Debara, Sara v. M.C.I.* (IAD TA2-27021), D'Ignazio, November 13, 2003.

Transitional Issues

The transitional provisions of the IRP Regulations provide at section 351(1) that an undertaking under the former Act is governed by *IRPA*. However, there is an exception made to allow for recovery of social assistance payments as a result of a breach of an undertaking given under the former legislation [IRP Regulations, s. 351(2)]. Also the duration of an undertaking given under the former Act is not affected [IRP Regulations, s. 351(3)][33].

Under section 320(8) of the IRP Regulations, a person is inadmissible for financial reasons if they had been determined to be inadmissible under section 19(1)(b) of the former Act.

[33] *Sharma: M.C.I. v. Sharma, Ashok Kumar* (F.C., no. IMM-6517-03), von Finckenstein, August 18, 2004; 2004 FC 1144.

CASES

Chapter Two

Criminal Refusals

Introduction

An application for permanent residence made by a member of the family class can be refused if the member of the family class or a dependant is inadmissible to Canada on any of the following grounds related to matters of criminality:

- "serious criminality" – *IRPA,* s. 36(1)
- "criminality" – *IRPA,* s. 36(2)
- "organized criminality" – *IRPA,* s. 37
- "security" – *IRPA,* s. 34
- "human or international rights violations" – *IRPA,* s. 35

Section 64(1) and (2) of *IRPA* provides that no appeal may be made to Immigration Appeal Division (IAD), by either a foreign national or their sponsor, if the foreign national has been found to be inadmissible on the following grounds:

- "serious criminality", where the offence was punished in Canada by a term of imprisonment of at least two years – *IRPA,* s. 36(1)
- "organized criminality" – *IRPA,* s. 37
- "security" – *IRPA,* s. 34
- "human or international rights violations" – *IRPA,* s. 35

The Federal Court has held that the IAD has no jurisdiction to entertain appeals in such cases. The appeal must be dismissed for lack of jurisdiction if the visa officer has determined the foreign national to be inadmissible on one of the enumerated grounds; the IAD is not empowered to determine whether the foreign national is in fact inadmissible.[1]

[1] *Kang, Sarabjeet Kaur v. M.C.I.* (F.C., no. IMM-2445-04), Mactavish, February 25, 2005; 2005 FC 297. The case in question also considered the effect of section 196 of the Transitional Provisions, which provides for the discontinuation of an appeal if the appeal could not have been made because of section 64 of *IRPA.*

This chapter will therefore deal only with the grounds of serious criminality and criminality, as both of these can constitute proper grounds for the IAD to refuse a sponsorship appeal on the merits.

The relevant sections of *IRPA* dealing with serious criminality and criminality can be broken down as follows:[2]

- "serious criminality" – conviction in Canada; punishable by maximum prison term of 10 years or more *or* where a prison term of more than 6 months was imposed – *IRPA*, s. 36(1)(*a*)

- "serious criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*b*)

- "serious criminality" – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*c*)

- "criminality" – conviction in Canada; punishable by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*a*)

- "criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*b*)

- criminality – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(1)(*c*)

- "criminality" – two summary convictions in Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*a*)

- "criminality" – equivalent of two summary convictions outside Canada (not arising out of a single occurrence) outside Canada – *IRPA*, s. 36(2)(*b*)

The common point of reference for the grounds of serious criminality and criminality, whether for a Canadian conviction or a foreign conviction or crime, is that the underlying offence is or is equivalent to "an offence under an Act of Parliament", that is an offence found in a Canadian federal statute.

The most common basis for inadmissibility is the visa officer's conclusion that the applicant for permanent residence or a dependant has been convicted of or has committed an offence outside Canada that, if committed in Canada, would constitute an offence in Canada. This ground of inadmissibility raises issues known as equivalency of foreign offences to Canadian ones.

[2] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act.*

Standard of Proof

Section 33 of *IRPA* provides that inadmissibility under section 36 includes facts arising from omissions and may be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

The meaning of the term "reasonable grounds to believe", which was found as well in the former *Immigration Act*, was considered in *Mugesera*,[3] where the Supreme Court of Canada endorsed the following statements of the law:

> [114] The first issue raised by s. 19(1)(*j*) of the *Immigration Act* [i.e., the predecessor of *IRPA*, s. 35(1)(*a*)] is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

The Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact:

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 311.

Thus the "reasonable grounds to believe" standard does not apply to conclusions of law, which are decided on the balance of probability and reviewed by the Federal Court on the correctness standard.[4] When dealing with a foreign conviction or crime outside Canada, it is a question of law whether the conviction or crime satisfies the requirements of an offence under an Act of Parliament, i.e., whether equivalency is established.

Canadian convictions

A foreign national applying for permanent residence may be inadmissible for having been convicted of a criminal offence during a previous period of residence or stay in Canada. Only

---

[3] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, at para. 114; 2005 SCC 40.

[4] Ibid., para 37.

convictions under Canadian federal laws ("an offence under an Act of Parliament") render a person inadmissible on grounds of serious criminality or criminality.[5]

Whether a Canadian conviction will render the person inadmissible on the ground of serious criminality or criminality depends on the nature of the offence, the possible punishment based on the maximum term of imprisonment the offence carries under law, and the actual sentence that was imposed on conviction for the offence. Inadmissibility on the grounds of serious criminality or criminality cannot be based on offences alleged to have been committed in Canada for which there has been no conviction registered by the courts.

The relevant sections of *IRPA* dealing with serious criminality and criminality based on Canadian convictions can be broken down as follows:[6]

- "serious criminality" – conviction in Canada; punishable by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*a*)

- "criminality" – conviction in Canada; punishable by maximum prison term of less than 10 years (indictable or hybrid offence) – *IRPA*, s. 36(2)(*a*)

- "criminality" – two summary convictions in Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*a*)

Criminal offences are either indictable or summary conviction, depending on their seriousness. Certain criminal offences, known as "hybrid offences", can be prosecuted either by way of indictment or summary conviction, at the election of the Crown. By virtue of paragraph 34(1)(*a*) of the *Interpretation Act*, hybrid offences are indictable until the prosecution elects to proceed by summary conviction. However, section 36(3) of *IRPA* provides that for the purposes of *IRPA*, a "hybrid offence" is deemed to be indictable, even if it has been prosecuted summarily.[7]

Where an offence is prosecuted by way of summary conviction, section 787(1) of the *Criminal Code* states that the maximum term of imprisonment is six months, unless otherwise provided. The maximum possible sentence for an indictable offence is five years, unless otherwise specified (see section 743 of the *Criminal Code*).

The validity of a Canadian conviction on the merits cannot be put in issue at a hearing before the IAD. A conviction under a wrong name is nonetheless a conviction.[8] Offences

---

[5] This was underscored in *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000, where the Court held that someone convicted of criminal contempt of court, an uncodified common law offence would not be caught.

[6] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act.*

[7] This provision was applied in *Derbas, Rachid v. M.C.I.* (F.C., no. IMM-1923-07), Shore, November 15, 2007; 2007 FC 1194, where the person was found described in section 36(2)(*a*) despite the fact that he was found guilty of a "hybrid" offence that was punished on summary conviction.

[8] *Lampros, Michael George v. M.C.I.* (F.C., no. IMM-434-05), Lemieux, February 18, 2005; 2005 FC 267.

designated as contraventions under the *Contraventions Act* cannot be the basis for inadmissibility for serious criminality or criminality (see section 36(3)(*e*)).

The words "term of imprisonment … imposed" found in section 36(1)(*a*) refer to the sentence imposed by the court and not the actual time served in prison.[9] The Federal Court has held that time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of section 64(2) of *IRPA*.[10] The same rationale would apply to section 36(1)(*a*).

The IAD has ruled that a conditional sentence constitutes a "term of imprisonment" under section 32(1)(*a*) of *IRPA.* The rationale is that a conditional sentence is not an alternative to imprisonment; it is a term of imprisonment served in the community.[11] This appears to be consistent with the dicta of the Supreme Court of Canada.[12]

The words "not arising out of a single occurrence" found in section 36(2)(*a*) were interpreted in two Federal Court cases decided in relation to the predecessor provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and "incident" and not with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[13]

---

[9] Compare *Martin, Claudette v. M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25 2005; 2005 FCA 347, where the Court interpreted the word "punished" used in section 64(2) of *IRPA* with respect to a term of imprisonment.

[10] *M.C.I. v. Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004; 2004 FC 7; *Cheddesingh (Jones), Nadine Karen v. M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124. However, in *R. v. Mathieu*, 2008 SCC 21, the Supreme Court of Canada held that "the term of imprisonment in each case is the term of imposed by the judge at the time of sentence. The offender's prior detention is merely one factor taken into account by the judge in determining that sentence." The Court also stated: "Although it is possible, on an exceptional basis, to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence — in the context of a minimum sentence, for example, or of a conditional sentence — these are exceptions that prove the rule. As to minimum sentences, see *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18; regarding conditional sentences, see *R. v. Fice*, [2005] 1 S.C.R. 742, 2005 SCC 32."

[11] *Meerza, Rizwan Mohamed v. M.C.I.* (IAD TA2-21315), Hoare, September 15, 2003. An adjudicator came to the same conclusion with respect to a person described in section 27(1)(*d*) of the *Immigration Act.* See *M.C.I. v. Santizo, Marco Antonio* (Adjudication A1-00471), Nupponen, September 27, 2001. A member of the Immigration Division held to the contrary: *M.C.I. v. Sahota, Ranjit Singh* (ID A3-02512), Iozzo, March 11, 2004.

[12] In *R. v. Fice*, 2005 SCC 32, Justice Bastarache, writing for the majority, stated at para 17: "in enacting s. 742.1 [of the *Criminal Code* – Imposing of Conditional Sentence], Parliament intended to cast a small net and only capture conduct serious enough to attract a sentence of incarceration but not so severe as to warrant a penitentiary term." (emphasis added).

[13] *Alouache, Samir v. M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir v. M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant was convicted of three offences that occurred on different dates. The applicant argued that these convictions arose out of a single occurrence, namely a marital dispute. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence. Compare with *Libby, Tena Dianna v. M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18,

The Canadian criminal law provisions in place at the time of the appeal to the IAD are used to determine the criminal admissibility of the foreign national. Thus persons may become inadmissible or may no longer be inadmissible by virtue of changes to the *Criminal Code* or other statute occurring after a conviction.[14]

The use of the word "convicted" in section 36 of *IRPA* means a conviction that has not been expunged.[15]

Section 36(3)(*b*) of *IRPA* provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which there has been a final determination of acquittal, for example, on appeal to a higher court.

If a person pleads guilty to, or is found guilty of, an offence in Canada and is granted a conditional or absolute discharge, this will not constitute a conviction for the purposes of *IRPA.*[16] Section 730(3) of the *Criminal Code*, which establishes the effect of conditional and absolute discharges, provides that, in such cases as are specified, "the offender shall be deemed not to have been convicted of the offence", subject to certain exceptions.

Section 36(3)(*b*) of *IRPA* provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which a pardon has been granted, and that pardon has not ceased to have effect or been revoked under the *Criminal Records Act.* Section 3 of the *Criminal Records Act* provides that a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament can apply to the National Parole Board for a pardon of that offence.

Generally, the concept of rehabilitation applies only to persons who have been convicted of or who committed crimes outside Canada. Section 18.1 of the *Immigration and Refugee Protection Regulations*, however, provides for the possibility of deemed rehabilitation for persons inadmissible solely on the basis of having been convicted in Canada of two or more

---

1988. Reported: *Libby v. Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.), where the Court held that the applicant's original charge of theft and his failure to report for fingerprinting in connection with that charge arose out of the same occurrence.

[14] *Robertson v. Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 197 (C.A.); *Ward, Patrick Francis v. M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. Reported: *Ward v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102. The facts at the time of the offence must be assessed based on the Canadian law as it reads at the time of the admissibility hearing or appeal to the IAD.

[15] *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.).

[16] See *Lew v. Canada (Minister of Manpower and Immigration)*, [1974] 2 F.C. 700 (C.A.), where the appellant successfully appealed the conviction, and was granted an absolute discharge after he had been ordered deported, but before the matter was determined on appeal to the Immigration Appeal Board. The Court held that the Board ought to have considered the appeal in light of the circumstances existing at the time of the appeal (i.e., the absolute discharge). In *Kalicharan v. Canada (Minister of Manpower and Immigration)*, [1976] 2 F.C. 123 (T.D.), the Court held that a person convicted at trial is a convicted person notwithstanding that he may have an unexhausted right of appeal. However, when a court of appeal substitutes a conditional discharge for a sentence imposed by a trial court, then the conviction is deemed never to have been passed and the basis for making the removal order not only no longer exists in fact, but it is deemed, not to have existed at all.

offences that may only be prosecuted summarily, as a prescribed class for the application of 36(2)(*a*) of *IRPA*, provided that at least five years have elapsed since the completion of the imposed sentence. (See the section dealing with Rehabilitation below.)

Section 36(3)(*e*) of *IRPA* provides that offences under the *Young Offenders Act* are not a basis for inadmissibility on the grounds of serious criminality or criminality. (A young offender is someone who is 12 years of age or older but less than 18 years of age.) However, if the proceedings were transferred to adult court, they may render the person inadmissible.[17] The *Young Offenders Act* was repealed on April 1, 2003 and replaced with the *Youth Criminal Justice Act, 2002.* However, *IRPA* has not been amended accordingly. Bill C-3 (An Act to amend the *Immigration and Refugee Protection Act* (certificate and special advocate) and to make a consequential amendment to another Act), in clause 3, updates the reference to the *Young Offenders Act* in section 36(3)(*e*) of *IRPA* with a new reference to the *Youth Criminal Justice Act*. Under the *Youth Criminal Justice Act*, the transfer provision is eliminated. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, the youth court may impose an adult sentence. Citizenship and Immigration Canada has publicly taken the position that a young offender convicted under the *Youth Criminal Justice Act* is not inadmissible, unless he or she received an adult sentence.[18] The *Youth Criminal Justice Act* is presently under legislative review.

Foreign convictions and crimes

A person may be inadmissible on the grounds of serious criminality or criminality either because of a conviction for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament or for having committed an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament. These grounds of inadmissibility raise issues known as equivalency of foreign offences to Canadian ones, a concept that is discussed in detail below.

The relevant sections of *IRPA* dealing with serious criminality and criminality for foreign convictions or crimes committed outside Canada can be broken down as follows:[19]

---

[17] In *Tessma (Ayele), Letwled Kasahun v. M.C.I.* (F.C., no. IMM-5652-02), Kelen, October 2, 2003; 2003 FC 1126, the Court held that proceedings transferred from youth court to ordinary court under section 16 of the *Young Offenders Act* are not covered by the exemption in section 36(3)(e) of *IRPA*. Section 16(7) of the *Young Offenders Act*, provided that, after the youth court judge made an order transferring the proceedings to ordinary court, the proceedings under that Act were discontinued, and the proceedings with respect to the criminal charges were taken before the ordinary court.

[18] Citizenship and Immigration Canada website, Internet: <http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp>.

[19] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act.*

- "serious criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*b*)

- "serious criminality" – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*c*)

- "criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*b*)

- criminality – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(1)(*c*)

- "criminality" – equivalent of two summary convictions outside Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*b*)

Foreign convictions

Foreign dispositions in criminal matters may take forms unknown under Canadian law and their effect will have to be determined by the IAD.[20] The use of the word "convicted" in section 36 of *IRPA* means a conviction that has not been expunged.[21] Foreign convictions can also be expunged.

In the case of a foreign jurisdiction, the legislation providing for the expunging of a conviction should be accorded respect where the laws and the legal system are similar to Canada's.[22] The Federal Court of Appeal in *Saini*,[23] endorsed the following statement of the law with respect to the effect to be given to a foreign discharge or pardon:

---

[20] See, for example, *Drake, Michael Lawrence v. M.C.I.* (F.C.T.D., no. IMM-4050-98), Tremblay-Lamer, March 11, 1999. Reported: *Drake v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 218 (F.C.T.D.), which considered the effect of an "Alford plea" in the State of Washington.

[21] *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.).

[22] *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] 3 F.C. 44 (C.A.). The Court had to consider the application to the definition of "convicted" in the former *Immigration Act* of the United Kingdom *Powers of Criminal Courts Act, 1973*, which legislation provided that a person who was convicted of an offence (like Burgon's offence) and received a probation order was deemed not to be convicted of the offence. In the Court's view, Burgon was not considered convicted under United Kingdom law; therefore, because the United Kingdom and Canadian legal systems were so similar, there was no conviction for purposes of the *Immigration Act*. See also *Barnett, John v. M.C.I.* (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: *Barnett v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.). The Court considered another piece of legislation, the United Kingdom *Rehabilitation of Offenders Act, 1974*, which provided that, where a person was convicted and sentenced for certain offences and was then rehabilitated, the conviction was expunged. The Court applied the rationale in *Burgon* and found that, although there were differences in the two pieces of legislation, the effect was the same: under both statutes, the person could not be said to have been convicted. Therefore, Barnett was not considered to have been convicted in the United Kingdom and he was not convicted for purposes of the *Immigration Act*.

> [24] To summarize, our jurisprudence requires that three elements must be established before a foreign discharge or pardon may be recognized: (1) the foreign legal system as a whole must be similar to that of Canada; (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and (3) there must be no valid reason not to recognize the effect of the foreign law.

The Court in *Saini* also held that in the absence of evidence as to the motivating considerations which led to the grant of a pardon by another state jurisdiction, the Board is not bound by the pardon.

The Federal Court had considered the application of these principles in several cases.[24] In one case, the Federal Court held that an acquittal based solely on a pardon by the victim of a crime is not similar to that of Canadian law and should not be recognized in Canada.[25]

The applicability of section 36(3)(*e*) of *IRPA*, dealing with the *Young Offenders Act*, to foreign convictions is not entirely clear.[26]

Equivalency of foreign convictions or crimes

Paragraphs 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) of *IRPA* contain the equivalency provisions. Equivalencing is the equating of a foreign conviction or crime, whether an act or omission to a Canadian offence.

---

[23] *M.C.I. v. Saini, Parminder Singh* (F.C.A., no. A-121-00), Linden, Sharlow, Malone, October 19, 2001; 2001 FCA 311. Reported: *Canada (Minister of Citizenship and Immigration) v. Saini*, [2002] 1 F.C. 200 (F.C.A.). The Court also held that the crime in question, hijacking, is so serious that it provided a solid rationale to depart from the principle that a pardon granted by another jurisdiction, whose laws are based on a similar foundation as in Canada, should be recognized in Canada.

[24] See, for example: *Sicuro, Fortunato v. M.C.I.* (F.C., no. IMM-695-02), Mosley, March 25, 2004; 2004 FC 461; *S.A. v. M.C.I.* (F.C., no. IMM-3512-05), Gibson, April 27, 2006; 2006 FC 515.

[25] *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397.

[26] In a decision which considered the applicability of the former *Immigration Act*, where there was no provision dealing specifically with young offenders, the Court held that since the person convicted abroad for crimes committed as a minor was tried in adult court, that constituted a conviction under that Act: *M.C.I. v. Dinaburgsky, Yuri* (F.C., no. T-234-04), Kelen, September 29, 2006; 2006 FC 1161. For a different interpretation which made specific reference to the provisions of the *Young Offenders Act*, see *Wong, Yuk Ying v. M.C.I.* (F.C.T.D., no. IMM-4464-98), Campbell, February 22, 2000.

According to information posted on the Citizenship and Immigration Canada website, Internet: <http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp>, a young offender is not inadmissible if he or she was treated as a young offender in a country which has special provisions for young offenders, or was convicted in a country which does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would not have received an adult sentence in Canada. However, a young offender would be inadmissible if he or she was convicted in adult court in a country that has special provisions for young offenders, or was convicted was convicted in a country that does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would have been treated as an adult in Canada.

There is a distinction between paragraphs (*b*) and (*c*) in both sections 26 and 37. Paragraph (*b*) is used where there has been a conviction outside Canada, whereas paragraph (*c*) is used where it is alleged that the person has "committed" an offence. While the latter provision has been applied in cases where the person fled justice after being charged but before being tried or has never been charged in the jurisdiction where the crime was committed, it is not clear whether the provision was intended to apply to persons who were convicted for the crime committed in the foreign jurisdiction[27] or who were tried in that jurisdiction but court chose not to enter a conviction.[28] The Immigration Division has applied it in the former case, and the Federal Court appears to have accepted that it can apply in the latter case.

To satisfy paragraph (*b*), there must have been a conviction outside Canada and this conviction must then be compared to a Canadian offence. Under section 36(1)(*b*), the determination to be made is whether the offence outside Canada would, if it had been committed in Canada, be an offence punishable by a maximum term of imprisonment of at least 10 years. Under section 36(2)(*b*), the determination to be made is whether the offence outside Canada would, if it had been committed in Canada, be an indictable offence (which includes "hybrid" offences) punishable by a maximum term of imprisonment of less than 10 years, or whether, in the case of two offences not arising out of a single occurrence, those offences would, if committed in Canada, be federal offences.

To satisfy paragraph (*c*) in sections 36(1) and 36(2) the focus is on the commission of an offence. The first determination which must be made is whether the person has committed an act or omission which would be an offence in the place where it occurred. Once this determination has been made, there must be a determination as to whether that act or omission, if committed in Canada, would be an offence in Canada.[29] Under section 36(1)(*c*), the relevant Canadian offence must be punishable by a maximum term of imprisonment of at least 10 years. Under section

---

[27] In *M.P.S.E.P v. Watson, Malcolm* (ID A6-00450), Lasowski, December 18, 2006 (reasons signed January 22, 2007), the subject of the admissibility hearing was convicted in New York State of the offences of sexual abuse in the third degree and endangering the welfare of a child. The Immigration Division found that the offence of sexual abuse in the third degree is equivalent to the offence of sexual exploitation under section 153 of the Canadian *Criminal Code*. The foreign offence is broader than the Canadian offence, as the latter contains the essential element that the accused be in a position of trust or authority towards the victim. Since the subject of the proceeding was the victim's ninth grade English teacher, he was in a position of trust with respect to the victim. He was therefore found to be a person described in section 36(1)(*b*) of *IRPA.* He was also found to be described in section 36(1)(*c*) of the Act based on the same facts.

[28] In *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397, the Court in the Philippines found that although the applicant's spouse had committed an offence, since the victim pardoned her aggressor, no conviction resulted. An immigration officer found the offence equivalent to sexual assault in Canada and gave no effect to the pardon. The Court held that the immigration officer was correct in not giving effect to the pardon and finding inadmissibility under s. 36(1)(*c*) of *IRPA*, since there was no need to prove a conviction; rather, certain acts must have been committed that render the person inadmissible.

[29] This approach was followed in decisions such as *M.C.I. v. Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Canada (Minister of Citizenship and Immigration) v. Legault* (1997), 42 Imm. L.R. (2d) 192 (F.C.A.) and *Zeon, Kyong-U v. M.C.I.* (F.C., no. IMM-7766-04), Campbell, September 29, 2005; 2005 FC 1338. However, in *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756, the Court suggested that the essential elements of the foreign and Canadian offences must be compared to ascertain whether or not the evidence adduced was sufficient to establish equivalency.

36(2)(*c*), the relevant Canadian offence must be an indictable offence (which includes "hybrid" offences) punishable by a maximum term of imprisonment of less than 10 years.

As mentioned earlier, there is the requirement that the offence be punishable in Canada "under an Act of Parliament". This requirement is not met where the offence is punishable through the inherent jurisdiction of the court rather than through federal legislation.[30]

The standard of proof for the serious criminality and criminality provisions, including equivalency, is "reasonable grounds to believe," which is less than a balance of probabilities. In determining whether there are "reasonable grounds to believe" a person has committed an offence abroad, the IAD should examine evidence pertaining to the offence.[31] In *Legault*, the Federal Court – Trial Division held that the contents of the warrant for arrest and the indictment did not constitute evidence of the commission of alleged criminal offences.[32] The Federal Court of Appeal overturned this decision and determined that the warrant for arrest and the indictment were appropriate pieces of evidence to consider.[33]

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.[34] However, there is no obligation to consider the constitutionality of foreign criminal law.[35]

The principles to be followed when determining equivalency have been set out in several Federal Court of Appeal decisions.

In *Brannson,*[36] the Court said:

> Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential

---

[30] There is sentencing jurisdiction under the common law and under the *Criminal Code*. In *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000, the Court found that the powers available to a judge in imposing punishment for contempt of court was inherent from common law. Thus, the offence, criminal contempt, was not one "that may be punishable under any Act of Parliament."

[31] *Legault, Alexander Henri v. S.S.C.* (F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995. Reported: *Legault v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).

[32] See *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: *Kiani v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.), which distinguishes *Legault* on its facts because in *Kiani* the adjudicator made an independent determination on the basis of the evidence adduced.

[33] *Legault* (F.C.A.), *supra*, footnote 31.

[34] *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.). The Federal Court – Trial Division, in *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996, stated that the IAD does not have the jurisdiction to rule on the constitutionality of any legislation other than the *Immigration Act* (since replaced by *IRPA*). Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the IAD, must be brought in another forum.

[35] *Li, Ronald Fook Shiu v. M.C.I.* (F.C.A., no. A-329-95), Strayer, Robertson, Chevalier, August 7, 1996. Reported: *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (C.A.). Affirming in part, *Li, Ronald Fook Shiu v. M.C.I.* (F.C.T.D., no. IMM-4210-94), Cullen, May 11, 1995.

[36] *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141 (C.A.), at 152-153.

> elements correspond. One must, of course expect differences in the wording of statutory offences in different countries.

After *Brannson*, the Court in *Hill*[37] provided some further guidance and said that there were three ways to establish equivalency:

> 1. by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;
>
> 2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and
>
> 3. by a combination of paragraph one and two.

In *Li*,[38] the Court stated that the fundamental test of equivalency is whether the acts committed abroad and punished there would have been punishable in Canada?

The visa officer is required to establish a *prima facie* case for equating the offence with a provision of the Canadian criminal law.[39] The visa officer, not a legal expert, must be satisfied that all the elements set out in the relevant provision have been met.[40] The onus, however, is always on the sponsor to show that the visa officer erred in determining that the applicant is criminally inadmissible to Canada.

To determine equivalency between a foreign and a Canadian offence, it is not necessary for the Minister to present evidence of the criminal statutes of the foreign state; however, proof of foreign law ought to be made if the foreign statutory provisions exist.[41] Where there is no evidence of the foreign law, the evidence before the panel must be examined to determine whether the essential ingredients of the Canadian offence had to have been proven to have secured the foreign conviction.[42]

In some cases where the law of the foreign jurisdiction has not been adduced in evidence, use has been made of the legal concept of *malum in se*. *Black's Law Dictionary* (6th edition) defines *malum in se* as follows (in part):

---

[37] *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie (concurring), MacGuigan, January 29, 1987. Reported: *Hill v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), at 9.

[38] *Li, Ronald Fook Shiu* (F.C.A.), *supra*, footnote **35**, 249.

[39] *Tsang, Sau Lin v. M.E.I.* (I.A.B. 85-9587), D. Davey, Chu, Ahara, January 8, 1988.

[40] *Choi, Min Su v. M.C.I.* (F.C.T.D., no. IMM-975-99), Denault, May 8, 2000.

[41] *Dayan v. Canada (Minister of Employment and Immigration),* [1987] 2 F.C. 569 (C.A.).

[42] *Ibid.*

> An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

In *Dayan*, the concept of *malum in se* was used because there was no proof of the foreign law for the purposes of equivalencing. Justice Urie said the following about the use of this doctrine:

> Reliance on the concept of offences as *malum in se* to prove equivalency with provisions of our *Criminal Code*, is a device which should be resorted to by immigration authorities only when for very good reason, established to the Adjudicator's satisfaction, proof of foreign law has been difficult to make and then only when the foreign law is that of a non-common law country. It is a concept to which resort need not be had in the case of common law countries.[43]

If the scope of the Canadian offence is narrower than the scope of the foreign offence, then it is necessary to ascertain the particulars of the offence of which the applicant was convicted.[44] It is necessary to "go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings."[45]

If the scope of the Canadian offence is wider than the scope of the foreign offence, it is not necessary to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings.[46]

There is no legal requirement to find the equivalent that is "most similar" and make the decision with respect to that provision only.[47]

Where neither a Canadian equivalent offence nor the essential ingredients of the foreign offence are identified in the record, it may be impossible to conclude that the visa officer had made a comparison between an offence under Canadian law and the foreign offence.[48]

---

[43] *Ibid.*, at 578. See also *M.C.I. v. Obaseki, Eghe* (IAD T99-07461), Kalvin, November 15, 2000, where the IAD noted that the doctrine of *malum in se* is to be used only where there is a very good reason why the foreign law was not adduced in evidence. Moreover, it held that it is not appropriate to extend the doctrine of *malum in se* to a case in which, not only was the law of the foreign jurisdiction not adduced, but the person concerned was not convicted of an offence.

[44] *Brannson, supra*, footnote **36.**

[45] *Lei, Alberto v. S.G.C.* (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994. Reported: *Lei v. Canada (Solicitor General)* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.).

[46] *Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 16, 1995.

[47] *M.C.I. v. Brar, Pinder* Singh (F.C.T.D., no. IMM-6313-98), Campbell, November 23, 1999.

[48] *Jeworski, Dorothy Sau Yun v. M.E.I.* (I.A.B. W86-4070), Eglington, Goodspeed, Vidal, September 17, 1986. Reported: *Jeworski v. Canada (Minister of Employment and Immigration)* (1986), 1 Imm. L.R. (2d) 59 (I.A.B.).

In a judicial review from a visa officer's refusal based on section 19(2)(*b*)(ii) of the *Immigration Act* [i.e., the equivalent of two Canadian summary convictions, now *IRPA*, s. 36(2)(*a*)], the applicant argued that the offences for which he was convicted were equivalent to municipal by-law infractions and not *Criminal Code* offences. The visa officer had no oral or documentary evidence as to the circumstances of the commission of the offences. In allowing the application, the Court noted that in order for an offence to be equivalent to a *Criminal Code* offence, it usually consists of the *actus reus* and *mens rea*. The Court held:

> In general, the essential elements of an offence are those components of an offence usually consisting of the *actus reus* and *mens rea*, which must be proven for a finding of guilt.[49]

An issue which has arisen on many occasions concerns the availability of defences and how defences fit into the evaluation of the essential elements of the offence for the purpose of equivalencing. The Federal Court of Appeal dealt with this issue in the case of *Li.*[50] In that case, the Federal Court – Trial Division had found that the availability of defences is not an essential element of the equivalency test.[51] The Court of Appeal disagreed and said as follows:

> A comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences.[52]

In addition, the Court of Appeal concluded that the procedural or evidentiary rules of the two jurisdictions should not be compared, even if the Canadian rules are mandated by the Charter. The issue to be resolved in any equivalencing case is not whether the person would have been convicted in Canada, but whether there is a Canadian equivalent for the offence of which the person was convicted outside Canada.

The Federal Court of Appeal has held that the validity of a foreign conviction on the merits cannot be put in issue.[53] However, in a decision of the Federal Court, it was held that the Adjudicator was required to consider the applicant's allegation that the statements he made to the police that resulted in his conviction in India were given under torture.[54]

---

[49] *Popic, Bojan v. M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000. The Court held that the visa officer erred by importing into the analysis considerations which are not relevant to a determination of the essential elements of an offence, namely that like all residents of Germany, the applicant knew he must pay for public transit and that being caught three times is quite exceptional

[50] *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35.**

[51] *Li, Ronald Fook Shiu* (F.C.T.D.), *supra,* footnote **35**. *Li* (F.C.T.D.) distinguished *Steward, Charles Chadwick v. M.E.I.* (F.C.A., no. A-962-87), Heald, Marceau, Lacombe, April 15, 1988. Reported: *Steward v. Canada (Minister of Employment and Immigration),* [1988] 3 F.C. 487 (C.A.) on the basis that "colour of right" in the *Steward* offence was an essential element of the offence and not a defence.

[52] *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35**, at 258.

[53] *Brannson, supra,* footnote 36, at 145; *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35**, at 256.

[54] *Sian, Jasvir Singh v. M.C.I.* (F.C., no. IMM-1673-02), O'Keefe, September 3, 2003; 2003 FC 1022.

Equivalency decisions have been overturned because of inadequate analysis of the relevant statutes, the essential elements of the offences, and the evidence.[55] For a more detailed discussion of equivalency please see Chapter 8 of the Removal Order Appeals paper.

Rehabilitation

Section 36(3)(*c*) of *IRPA* provides that sections 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) – i.e., foreign convictions and crimes committed outside Canada – do not constitute inadmissibility for permanent residents or foreign nationals, if they:

(i) satisfy the Minister that they have been rehabilitated after the *prescribed period* (5 years after the completion of the sentence imposed or the commission of the offence), in accordance with section 17 of the *Immigration and Refugee Protection Regulations*; or

(ii) are a member of a *prescribed class* that are deemed to have been rehabilitated, in accordance with section 18 of the Regulations.

Section 17 of the Regulations provides that, after a period of 5 years from the completion of any sentence imposed or from the commission of an offence, a person will no longer be inadmissible if the person is able to satisfy the Minister that he or she has been rehabilitated, provided that the person has not been convicted of a subsequent offence other than a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Deemed rehabilitation under section 18 of the Regulations is triggered by the passage of a period of time after the completion of a sentence or the commission of an offence, as the case may be, without having to apply to the Minister. Deemed rehabilitation does not apply to persons who are inadmissible on the ground of serious criminality. Persons inadmissible on the ground of serious criminality, as well as others who do not qualify for deemed rehabilitation, can apply to the Minister for individual rehabilitation under Regulation 17.

Section 18 of the Regulations sets out three prescribed classes of persons who can qualify for deemed rehabilitation:

(a) persons convicted outside Canada of only one offence that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence) punishable in Canada by a sentence of less than 10 years, and they meet the following requirements:
   - at least 10 years have elapsed since the completion of their sentence
   - they have not been convicted in Canada of an indictable offence
   - they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)

[55] *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756.

- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not committed an act described in section 36(2)(*c*)

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences, and they meet the following requirements:
- at least 5 years have elapsed since completion of their sentences
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of a federal offence in the last 5 years (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 5 years before that been convicted in Canada of more than one summary conviction offences (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 5 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have been convicted outside Canada of an offence referred to in s. 36(2)(*b*) that, if committed in Canada, would constitute an indictable offence
- they have not committed an act described in section 36(2)(*c*)

(c) persons who have committed only one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence), punishable in Canada by a maximum sentence of less than 10, and they meet the following requirements:
- at least 10 years have elapsed since the commission of the offence
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence

There is very little jurisprudence from the Federal Court interpreting the legislation providing for deemed rehabilitation.[56] Unlike individual rehabilitation (section 18 of the

[56] See, for example, *Driessen, Kenneth Leroy v. M.C.I.* (F.C., no. IMM-9044-04), Snider, November 1, 2005; 2005 FC 1480.

Regulations), which is at the discretion of the Minister, it is arguable that the deemed rehabilitation provisions can be applied by the IAD.

As under section 17 and 18 of the Regulations, one of the criteria for rehabilitation in the predecessor sections 19(1)(*c.1*) and 19(2)(*a.1*) of the *Immigration Act*, was that at least five years have elapsed "since the expiration of any sentence imposed for the offence." For immigration purposes, the IAD held that "any sentence imposed" would include any period of incarceration, probation or the suspension of a privilege.[57]

The Minister of Public Safety and Emergency Preparedness must decide the question of rehabilitation. Reasons are required to be provided for decisions of this nature.[58] The IAD held, with respect to the predecessor section 19(1)(*c.1*) or 19(2)(*a.1*) of the *Immigration Act*, that it did not have jurisdiction to determine whether a person has or has not been rehabilitated.[59] The same would appear to hold true for section 17 of the Regulations, which specifies that it is the Minister who must be satisfied. Rehabilitation is, however, a factor which the IAD can consider in the exercise of its discretionary jurisdiction.[60]

The Minister can delegate the power to determine rehabilitation.[61] The Court held, however, that the visa officer has no duty to question the reasonableness of the Minister's decision on rehabilitation even where, on the face of the record, the decision may be unreasonable.[62] Conversely, the Court held that it is not necessary for the visa officer to consider pardons obtained under foreign legislation; rather the pardon could be one of the Minister's considerations when determining whether or not the person has been rehabilitated.[63]

An issue which has arisen is whether there is a duty on the visa officer to inform the applicant of the existence of the rehabilitation provisions. The Federal Court has only dealt with this issue as it relates to earlier legislation which required, in the case of section 19(1)(*c*) of the *Immigration Act*, for the Governor in Council to be satisfied as to rehabilitation. In *Wong,*[64] the

---

[57] *Shergill, Ram Singh v. M.E.I.* (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991.

[58] *Thamber, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001, in *obiter*, citing *Baker v. M.C.I.*, [1999] 2 S.C.R. 817 (S.C.C.). The Court held that the Minister erred by not considering relevant evidence (the fact that the applicant had not reoffended for a period of ten years) and by coming to an unreasonable conclusion, given the totality of evidence.

[59] *Crawford, Haslyn Boderick v. M.E.I.* (I.A.B. T86-9309), Suppa, Arkin, Townshend (dissenting), May 29, 1987. Reported: *Crawford v. Canada (Minister of Employment and Immigration) (*1987), 3 Imm. L.R. (2d) 12 (I.A.B.).

[60] See chapter 9, Compassionate or Humanitarian Considerations, for a more detailed discussion.

[61] See section 6(2) of *IRPA.* This power was also found in section 121 of the former *Immigration Act*.

[62] In *Leung, Chi Wah Anthony v. M.C.I.* (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998, the Court certified the question: "Is a visa officer under a duty to question the reasonableness of the Minister's decision made pursuant to section 19(1)(*c.1*)(i) of the *Immigration* Act where on the face of the record the decision may be unreasonable?" The Federal Court of Appeal answered in the negative: *Leung, Chi Wah Anthony v. M.C.I.* (F.C.A., no. A-283-98), Stone, Evans, Malone, May 3, 2000.

[63] *Kan, Chow Cheung v. M.C.I.* (F.C.T.D., no. IMM-728-00), Rouleau, November 21, 2000.

[64] *Wong, Yuen-Lun v. M.C.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995.

applicant provided material to establish his rehabilitation to the visa officer instead of to the Governor in Council. The Court found it "unfortunate" that the visa officer did not assist the applicant in getting the material to the proper place, but did not find this to be a reviewable error as the burden to show that the Governor in Council was satisfied as to rehabilitation rests with the applicant. In addition, the cases of *Mohammed*,[65] *Gill*,[66] and *Dance*[67] indicated that the responsibility of the visa officer is to be satisfied that no decision by the Governor in Council has been made.

The issue which has not been resolved is whether this applies to the situation where the Minister (rather than the Governor in Council) makes the decision as to rehabilitation, given the proximity of the visa officer to the Minister. Is there an obligation of fairness on the visa officer to advise the applicant about the rehabilitation provisions?[68] In a case involving an application for permanent residence within Canada on humanitarian and compassionate grounds, the Court held that since section 36(3)(*c*) of *IRPA* places the onus on the applicant to satisfy the Minister that she has been rehabilitated, it follows that she must be given an opportunity to discharge the onus by making submissions concerning the particular facts of her case which favour such a finding.[69]

Right of appeal – pre-sentence custody

The IAD has no jurisdiction to entertain a sponsorship appeal (on the merits) based on refusal on the ground of serious criminality where the offence was punished in Canada by a term of at least two years.

---

[65] *Mohammed v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.).

[66] *M.E.I. v. Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991. *Gill* was applied in *Dhaliwal, Jagdish Kaur v. M.E.I.* (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993.

[67] *Dance, Neal John v. M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995.

[68] In *Crawford, supra,* footnote 59 at 3, the majority of the Immigration Appeal Board found that when the Minister was to determine rehabilitation, a duty existed to advise the applicant of the possibility of coming within the exception. The majority stated as follows:

> … the visa officer is responsible to act as a representative of the Minister on the issue of rehabilitation. Once the prohibition has been established under paragraph 19(2)(*a*) the visa officer has an obligation to inform the applicant of the possibility of coming within the exception from the general rule of criminal inadmissibility by showing rehabilitation to the Minister.

[69] *Aviles, Martha Alcadia Gonzales v. M.C.I.* (F.C., no. IMM-1036-05), Rouleau, October 7, 2005; 2005 FC 1369. The Court was perplexed why the applicant's counsel's letter, which set out all the factors demonstrating that the applicant has been rehabilitated, was not treated as an application for rehabilitation. Moreover, if it was not an application for rehabilitation, the applicant should be given an opportunity to make the application. For a related decision on an application for permanent residence abroad see *Shum, Mei Wing v. M.C.I.* (F.C., no. IMM-5527-06), Lutfy, July 5, 2007; 2007 FC 710, where the Court held that the applicant or spouse should have been given effective notice of the legal issues in play.

The words "punished" found in section 64(2) refers to the sentence imposed by the court and not the actual time served in prison.[70]

Time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of section 64(2) of *IRPA*.[71]

Compassionate or humanitarian considerations

For a complete discussion of this subject in sponsorship appeals, see chapter 9, "Compassionate or Humanitarian Considerations".

Where the refusal is valid in law, the IAD may consider whether or not compassionate or humanitarian considerations exist to warrant the granting of special relief pursuant to section 67(1)(*c*) of *IRPA*.

In the situation of criminal refusals, the fact that the Minister is not satisfied that the applicant has been rehabilitated or that the five-year period has expired does not prevent a consideration of the applicant's rehabilitation under compassionate or humanitarian considerations.[72]

[70] *Martin, Claudette v. M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25 2005; 2005 FCA 347.

[71] *Cheddesingh (Jones), Nadine Karen v. M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124.

[72] *Perry, Ivelaw Barrington v. M.C.I.* (IAD V94-01575), Ho, November 1, 1995.

CASES

Chapter Three

Health Grounds - Medical Inadmissibility
Section 38 of the *Immigration and Refugee Protection Act*

Introduction

The *Immigration and Refugee Protection Act* (IRPA) has changed the wording of the medical inadmissibility provision from that in the *Immigration Act* and has provided additional definitions of key terms such as "excessive demands" in the Regulations (IRPR) to the new Act. It has retained a requirement for medical examinations for all sponsored immigrants and their dependents. IRPA has however provided an exemption for prescribed close family members from the excessive demands part of the medical inadmissibility definition. Lastly IRPA preserves a discretionary power for members of the IAD to offer special relief from this ground of inadmissibility.

A. LEGISLATIVE PROVISIONS

Medical Inadmissibility - Definition

Section 38 of IRPA sets out the basis on which a foreign national may be determined to be inadmissible on medical grounds:

> s. 38 A foreign national is inadmissible on health grounds if their health condition
> (a) is likely to be a danger to public health;
> (b) is likely to be a danger to public safety; or
> (c) might reasonably be expected to cause excessive demand on health or social services.

As the cases prior to IRPA are based on the *Immigration Act*, (now repealed), the medical inadmissibility provision is included below for comparative purposes:

> s. 19.(l) No person shall be granted admission who is a member of any of the following classes:
> (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
> (i) they are or are likely to be a danger to public health or to public safety, or

(ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

Definitions – foreign national

A “foreign national” means a person who is not a Canadian Citizen or a permanent resident and includes a stateless person.[1]

Definition of “excessive demand”

The term "excessive demand" means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these regulations, unless there is evidence that significant costs are likely to be incurred beyond that period in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of the denial or delay in the provision of those services to Canadian citizens or permanent residents. [2]

Definition of Health Services

The term "health services" means any health services for which the majority of the funds are contributed by governments, including the services of a family physicians, medical specialists, nurses, chiropractors, and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.[3]

Definition of Social Services

The term "social services" means any social service, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

---

1 S. 2(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

2 S. 1(1) of the *Immigration and Refugee Protection Regulations* (IRPR), SOR/2002-227.

3 S. 1(1) IRPR.

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically, or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.[4]

IRPA - Health Condition

Note that IRPA no longer makes reference to "disease, disorder, disability or other health impairment" contained in the former *Immigration Act* and uses "health condition" instead.

Means of proof

The former means of proof was "in the opinion of a medical officer concurred in by at least one other medical officer". In s. 20 of the IRPR, it sets out that one officer designated to do that task must now make that assessment:

> s. 20 An officer shall determine that a foreign national is inadmissible on health grounds if an assessment of their health condition has been made by an officer who is responsible for the application of s. 29 to 34 and who concluded that the foreign national's health condition is likely to be a danger to public health or public safety or might reasonably be expected to cause excessive demand.

It should be noted that under IRPA there continues to be two decisions on medical inadmissibility that take place for an application for permanent residence: the "medical" opinion and the visa officer's assessment of that opinion.

Factors to be considered

The terms "excessive demands", "health services" and "social services" are used in Regulations 31, 33 and 34 respectively which states that "before concluding whether a foreign national's health condition (a) is likely to be a danger to public health or (b) is likely to be a danger to public safety or (c) might reasonably be expected to cause excessive demand" the officer **shall consider**

(a) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and
(b) in the case of excessive demand, "any condition identified by the medical examination"
(c) in the case of public health, "the communicability of any disease that the foreign national is affected by or carries",

[4] S. 1(1) IRPR.

(d) in the case of public safety, "the risk of a sudden incapacity or of unpredictable or violent behavior of the foreign national that would create a danger to the health or safety of persons living in Canada."

All Immigrants must undergo a medical examination

All applicants for permanent resident status (and non-accompanying dependants) are required to undergo a medical examination.[5] When a holder of a permanent Resident visa seeks to enter Canada as an immigrant he or she must also hold a valid medical certificate indicating they are not medically inadmissible based on a medical examination within the prior 12 months.[6] It should be noted that a failure to undergo a medical examination can form the basis for a refusal based on a separate ground of inadmissibility, i.e. non-compliance with the Act or Regulations, as per s. 41(a) of IRPA. Although an appeal can be granted to overcome this ground the applicant must still undergo a medical for further visa processing to continue.

Classes of persons exempt from "excessive demands"

Section 38(2) of the IRPA specifically states

s. 38(2) (excessive demands) does not apply in the case of a foreign national who

(a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
(b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
(c) is a protected person; or
(d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

It should be noted that the exemption set out above only applies to the ground of "excessive demand" and not to the inadmissibility based on "danger to public health" or "danger to public safety". The IRPA objective in s. 3(1)(h) of protecting the public from infectious diseases is not compromised by the family-based exemptions.

See also s. 24 of the IRPR which provides an exemption for a "conjugal partner" and dependent child from the excessive demand inadmissibility.

This exemption applies only to a "nuclear" family member and does not extend to parents of a sponsor or their dependent children or other sponsorable members of the family class. In

[5] . 30(1)(a) of IRPR.

[6] S. 30(4) of IRPR.

those cases, the discretionary relief provision is available. See the reference below for more comment on that special relief.

B. APPLICATION OF PROVISIONS IN A SPONSORSHIP APPEAL HEARING

The vast majority of appeals at the IAD respecting medical inadmissibility are restricted solely to a request for discretionary relief. Should a member of the IAD be called on to assess whether a foreign national is inadmissible on health grounds, i.e. whether the refusal is valid in law, there will continue to be a requirement to determine if the officer has reached the conclusion properly.

Legal validity of the refusal

Historically the IAD and the Federal Court have framed many challenges to the refusal to issue permanent resident visas to family class applicants as a failure to follow proper prescribed procedure or a failure to employ proper technical language. Often there is an underlying but unstated breach of natural justice which has led to the decision being found to be unreasonable. Often these early cases involved a breach of the duty to act fairly or in a manner which would allow the applicant an opportunity to know the case to be met on appeal. Lastly, there can be an overlap of purely "technical defects" and natural justice issues.

Technical defects

Early decisions of the IAD which allowed appeals in law in medical refusal cases, and especially those which followed the Federal Court's decision in *Hiramen*,[7] tended to do so on purely technical grounds based on deficiencies in the refusal letter or the Medical Notification form. However, later decisions of the Court generally emphasized a less technical and more purposive approach which looked at whether the sponsor was informed of the case to be met and whether there was an expression of the opinion required under the *Immigration Act.*

The disadvantage to the sponsor of winning an appeal based on a technical defect is that the visa officer may again refuse the application on the medical ground, as the substantive ground did not form the basis for the IAD's decision.[8] For example, where the appeal was allowed

[7] *Hiramen, Sandra Cecilia v. M.E.I.* (F.C.A., no. A-956-84), MacGuigan, Thurlow, Stone, February 4, 1986. In *Hiramen,* the Court held that the entries in the Medical Notification form were inconsistent to the point of incoherence. Refer to page 6, "Medical Notification Form," for further details.

[8] Section 77(5) of the *Immigration Act* provides that where an appeal has been allowed by the IAD, processing of the application is to be resumed, and the visa officer is to approve the application, if "the requirements of [the] Act and regulations, other than those requirements on which the decision of the Appeal Division has been given," have been met.

because the medical reports had expired before the visa officer rejected the application, the visa officer could again consider the medical condition, as the Board's decision did not relate to the medical condition.[9] Likewise, where the appeal was allowed because the reasons for refusal did not adequately inform the sponsor of the case to be met, the application could again be refused on the same ground, but this time with the reasons for the refusal adequately expressed.[10] The effect of section 77(5) of the *Immigration Act* was examined by the Federal Court in *King*.[11] The Court held that the applicant still had to establish her medical admissibility. The only issue that was *res judicata* was the medical issue found to be erroneous by the IAD.[12]

Defective Refusal Letter

Pursuant to section 77(l) of the *Immigration Act*, the visa officer was required to inform the sponsor of the reasons for the refusal of the sponsored application for permanent residence. The purpose of this provision was to ensure that the sponsor was aware of the case that has to be met on appeal.

It has been held that the nature of the medical condition must be disclosed where the refusal is based on medical inadmissibility.[13] However, the refusal letter should not be looked at in isolation from the record.[14] Section 77(1) of the *Immigration Act* can be complied with by setting out intelligible reasons in the record.[15]

Medical Notification Form

After assessing an applicant's medical condition, the medical officers prepare a Medical Notification form to notify the visa officer of their diagnosis, opinions, and the applicant's medical profile. The visa officer relies on this information to determine the applicant's admissibility. The Medical Notification form must contain an expression of the opinion required by section 19(1)(a) of the *Immigration Act* in order to support a refusal. Once there is a clear

---

[9] *Mangat, Parminder Singh v. M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985. Nor had the Board taken a "[…] decision that the medical problem in question was to be ignored, e.g. on compassionate grounds." (at 2).

[10] *Dhami, Gurnam Singh v. M.E.I.* (I.A.B. 84-6036), Chambers, Tremblay, Howard, January 8, 1987.

[11] *King, Garvin v. M.C.I.* (F.C.T.D., no. IMM-2623-95), Dubé, May 23, 1996.

[12] The IAD had found the Medical Notification form unreasonable because it was unclear as to whether the mass in question was in the lung or mediastinum. The appeal was allowed in law as a result. The appeal on compassionate or humanitarian grounds was dismissed.

[13] *Shepherd, Tam Yue Philomena v. M.E.I.* (I.A.B. 82-6093), Davey, Benedetti, Suppa, November 18, 1982.

[14] *M.E.I. v. Singh, Pal* (F.C.A., no. A-197-85), Lacombe, Urie, Stone, February 4, 1987. Reported*: Canada (Minister of Employment and Immigration) v. Singh* (1987), 35 D.L.R. (4th) 680 (F.C.A.).

[15] *Tung, Nirmal Singh v. M.E.I.* (I.A.B. 86-6021), Mawani, Singh, Anderson (dissenting), June 30, 1987.

expression of the medical opinion required by section 19(1)(a), the evidentiary burden of proof shifts to the sponsor to show that the medical officers failed to take into consideration relevant factors, or took into consideration irrelevant factors in forming their opinion.[16]

Where the information in the Medical Notification form is inconsistent to the point of incoherence and is couched in terms of "possibility," rather than "probability" as is required by section 19(1)(a)(ii) of the *Immigration Act*, the refusal based on that form is not valid.[17] However, in assessing the Medical Notification form, the IAD should consider the form as a whole, to see if it contains on its face a clear expression of the medical opinion required.[18] Further, the IAD should not find the refusal invalid because the word "possibility" rather than "probability" was used in the form without considering the rest of the document.[19] Nevertheless, where a probability regarding treatment was deduced from a mere possibility of health deterioration, the Federal Court has found the Medical Notification form to be defective.[20] In addition, the Federal Court has upheld the Immigration Appeal Board's decision that the Medical Notification form only expressed a possibility of excessive demands, rather than a probability, where the medical officers indicated that the progression and prognosis were unknown.[21]

Some examples of situations in which the Medical Notification form has been found to be defective include notifications in which the concurring medical officer's signature is missing;[22] the date and name of the medical officers are not filled in and in which neither box is ticked off to indicate which subparagraph of section 19(1)(a) is being relied on.[23]

A refusal based on an expired Medical Notification form is invalid,[24] but Medical Notification forms with the "valid until" space left blank (as is usually the case in appeals before the IAD) have been held not to be subject to challenge.[25]

---

[16] *M.E.I. v. Chong Alvarez, Maria Del Refugio* (IAD V90-01411), Wlodyka, April 10, 1991. This case was a section 71 appeal by the Minister from the decision of an adjudicator not to issue a removal order. The onus of proof in a section 71 appeal and at an inquiry under section 27 of the *Immigration Act* lies with the Minister.

[17] *Hiramen, supra*, footnote 7.

[18] *Parmar, Jaipal Singh v. M.E.I.* (F.C.A., no. A-836-87), Heald, Urie, Stone, May 16, 1988; *M.E.I. v. Pattar, Sita Kaur* (F.C.A., no. A-710-87), Marceau, Desjardins, Pratte (dissenting), October 28, 1988. Reported: *Pattar v. Canada (Minister of Employment and Immigration)* (1988), 8 Imm. L.R. (2d) 79 (F.C.A.); *M.E.I. v. Sihota, Sukhminder Kaur* (F.C.A., no. A-76-87), Mahoney, Stone, MacGuigan, January 25, 1989; *Bola, Lakhvir Singh v. M.E.I.* (F.C.A., no. A-417-88), Marceau, Stone, Desjardins (dissenting), May 18, 1990. Reported: *Bola v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 14 (F.C.A.).

[19] *Bola*, *ibid*.

[20] *Badwal, Tripta v. M.E.I.* (F.C.A., no. A-1193-88), MacGuigan, Urie, Mahoney, November 14, 1989. Reported: *Badwal v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 85; 64 D.L.R. (4th) 561 (F.C.A.).

[21] *M.E.I. v. Sidhu, Satinder Singh* (F.C.A., no. A-1250-88), Desjardins, Heald, Mahoney, January 12, 1990.

[22] *Tang, Lai Keng v. M.E.I.* (I.A.B. 79-6093), Campbell, Glogowski, Loiselle, September 20, 1979.

[23] *Khan, Mary Angela v. M.E.I.* (I.A.B. 85-9043), Tisshaw, Blumer, Ahara, October 6, 1986. See also *Mohamed, Liaquat Ali v. M.E.I.* (I.A.B. 85-9648), Sherman, Chu, Eglington (dissenting), July 27, 1987, where the panel reached the opposite conclusion, relying on the narrative statement on the form.

[24] *Jean Jacques, Soutien v. M.E.I.* (I.A.B. 80-1187), Scott, Houle, Tremblay, May 20, 1981.

Where the Medical Notification form indicates that the condition is one of "unknown pathology," the inability to determine the exact cause of the disorder or illness does not result in the Medical Notification form being deficient.[26]

Where the Medical Notification form outlines several health conditions, but does not indicate which medical profile category applies to which condition, the notification is not deficient where it contains enough information for the sponsor to know the case to be met.[27] Further, as criteria in the Immigration Manual are mere guidelines, the failure to comply with these guidelines is not fatal where there is other evidence to support the opinion.[28] Similarly, where multiple health conditions are listed in the Medical Notification form, it is not always essential to identify which conditions form the basis of the medical opinion.[29]

Where the narrative on a Medical Notification form contained an erroneous and highly probative fact, and a reasonable possibility existed that conclusions reached in the narrative were based on this fact, the refusal was invalid as a result.[30]

Duty of fairness owed by Visa and Medical Officers

There is a duty upon immigration officials to act fairly and to ensure that the medical officers' opinion is reasonable.[31] What is necessary to comply with the duty of fairness will depend on the circumstances of each case.

The Federal Court has recognized an immigration officer's duty to act fairly. This duty of fairness was breached when an applicant was not given a fair opportunity to make submissions before the decision was made to refuse his son on medical grounds.[32] An immigration officer

---

[25] *Fung, Alfred Wai To v. M.E.I.* (I.A.B. 83-6205), Hlady, Glogowski, Petryshyn, December 14, 1984; *Shanker, Gurdev Singh v. M.E.I.* (F.C.A., no. A-535-86), Mahoney, Pratte, Heald, June 25, 1987.

[26] *Pattar, supra*, footnote 18.

[27] *Parmar, supra*, footnote 18.

[28] *Ibid.*

[29] *Sihota, supra*, footnote 18.

[30] *Mahey, Gulshan v. M.C.I.* (IAD V96-02119), Clark, July 20, 1998; upheld in *M.C.I. v. Mahey, Gulshan* (F.C.T.D., no. IMM-3989-98), Campbell, May 11, 1999. The narrative in question stated that the applicant, who suffered from coronary heart disease, was 42 years old when in fact he was 52.

[31] *Gingiovvenanu, Marcel v. M.E.I.* (F.C.T.D., no. IMM-3875-93), Simpson, October 30, 1995. Reported: *Gingiovvenanu v. Canada (Minister of Employment and Immigration)* (1995), 31 Imm. L.R. (2d) 55 (F.C.T.D.); *Ismaili, Zafar Iqbal v. M.C.I.* (F.C.T.D., no. IMM-3430-94), Cullen, August 17, 1995. Reported: *Ismaili v. Canada (Minister of Citizenship and Immigration)* (1995), 29 Imm. L.R. (2d) 1 (F.C.T.D.); *Jaferi, Ali v. M.C.I.* (F.C.T.D., no. IMM-4039-93), Simpson, October 24, 1995. Reported*: Jaferi v. Canada (Minister of Citizenship and Immigration)* (1995), 35 Imm. L.R. (2d) 140 (F.C.T.D.).

[32] *Gao, Yude v. M.E.I.* (F.C.T.D., no. T-980-92), Dubé, February 8, 1993. Reported: *Gao v. Canada (Minister of Employment and Immigration)* (1993), 18 Imm. L.R. (2d) 306 (F.C.T.D.). Citizenship and Immigration Canada Manual OP 15 – Medical Procedures , dated 2007 – 04 - 23, requires visa officers to advise applicants

may also be under a duty to undertake further investigation or call for an updated medical examination.[33]

Visa officers routinely send a "fairness letter" inviting further medical evidence from applicants before a final decision on medical admissibility is made.[34] The Federal Court has been critical of the wording of some of the letters[35] and has found in their use a breach of procedural fairness. For example, in one case, the letter did not disclose the criteria used by the medical officers in forming their opinion or the nature of the excessive demands.[36] Where the fairness letter was mistakenly sent to the applicant's husband in the Philippines instead of to the applicant in Canada, she was denied an opportunity to respond to the medical inadmissibility finding respecting her son.[37]

Non-disclosure of information requested by an applicant's counsel concerning the basis on which a medical opinion has been rendered is a breach of fairness.[38]

Where the medical officers requested a medical report and received it within two weeks, the Federal Court held that the medical officers had a duty to consider the report in forming their opinions.[39] The duty to consider the new medical evidence has been characterized by the Immigration Appeal Division as a legitimate expectation of the sponsor.[40]

---

of the medical officers' opinion and give them an opportunity to present further medical evidence before refusing the application. Where such evidence is presented, medical officers are instructed to clearly state, in their statutory declarations, that they have considered such evidence.

[33] *Ibid.* See also *Boateng, Dora Amoah v. M.C.I.* (F.C.T.D., no. IMM-2700-97), Lutfy, September 28, 1998 to the same effect.

[34] See the discussion in chapter 11, "Fairness and Natural Justice under the IRPA", "Knowing Case to be Met and Opportunity to Respond." Earlier case-law established that the duty of fairness did not oblige an immigration officer to communicate relevant medical information to an applicant before making a decision: *Stefanska, Alicja Tunikowska v. M.E.I.* (F.C.T.D., no. T-1738-87), Pinard, February 17, 1988. Reported: *Stefanska v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 66 (F.C.T.D.). However, this case may be of doubtful authority in view of the current practices of immigration and medical officers.

[35] *Fei, Wan Chen v. M.C.I.* (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997. See however *Ma, Chiu Ming v. M.C.I.* (F.C.T.D., no. IMM-812-97), Wetston, January 15, 1998.

[36] *Li, Leung Lun v. M.C.I.* (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998.

[37] *Acosta, Mercedes v. M.C.I.* (F.C.T.D., no. IMM-4790-97), Reed, January 7, 1999.

[38] *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-3366-96), Reed, January 14, 1998. The Court subsequently ordered the medical officers to respond by a specified date to counsel's questions: *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-3366-96), Reed, November 27, 1998.

[39] *Lee, Sing v. M.E.I.* (F.C.T.D., no. T-2459-85), Martin, May 1, 1986.

[40] *Shah, Nikita v. M.C.I.* (IAD T96-02633), D'Ignazio, June 23, 1998, followed in *Singh, Narinder Pal v. M.C.I.* (IAD T97-04679), D'Ignazio, September 27, 1999.

The failure to avail oneself of the opportunity to make submissions (when given two months to do so) is not a breach of procedural fairness.[41]

The Federal Court in *Parmar*[42] held that its intervention was not warranted where the medical officers had failed to comply strictly with all the guidelines set out in the Immigration Manual and the non-compliance was minimal and non-prejudicial. It further held: "It is essential for those officials both in Canada and abroad to be meticulous in ensuring that applicants for admission to this country be made aware of the basis for refusing their application for admission to Canada."

Use of expert medical reports by IAD

A member may receive expert reports as to the health condition of the foreign national but they must be assessed in conformity with the guidelines below and **may not be used to disprove the diagnosis of the officer.** They may however be useful in assessing the present condition as it impacts the issue of discretionary relief.

What follows is a synopsis of the case law that developed under the *Immigration Act* respecting the medical officer's decision (medical notification) as well as the visa officer's consideration of that decision and the process by which such decisions are reached.

The Diagnosis and Prognosis

The Federal Court's statement in *Mohamed* [43] that the applicant must have been suffering from the medical condition diagnosed by the medical officers may seem to indicate that the IAD is to consider the correctness of the medical diagnosis made by the medical officers. Likewise, the Federal Court's statement in *Uppal* [44] that whether a diagnosis is correct is a question of fact on which the parties may lead evidence may have led to the same conclusion. However, in neither of these cases was the issue directly before the Court. In *Mohamed*, the issue was the reasonableness of the medical officers' opinions and in *Uppal*, the issue was whether the diagnosis was vague. However, in *Jiwanpuri*,[45] the issue was squarely raised before the Federal Court. The IAD had found that the diagnosis was erroneous, based on the evidence before it. The Federal Court held that the IAD cannot question the **correctness** of a medical diagnosis as it does not have the necessary expertise to do so and should not do so even with the help of expert medical evidence.

---

[41] *Hussain,Amin v. M.C.I.* (F.C.T.D., no. IMM-3419-95) Noël, September 26, 1996. Reported: *Hussain v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 86 (F.C.T.D.)

[42] *Parmar, supra*, footnote 18, at 7.

[43] *Mohamed, infra*, footnote 51.

[44] *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565.

[45] *Jiwanpuri, infra*, footnote 73.

The IAD has interpreted the Federal Court cases as still allowing the IAD to determine whether or not the diagnosis is vague, ambiguous, uncertain or insufficient. If there has not been a definite diagnosis, it cannot support the opinion reached by the medical officers;[46] if there has been a definite diagnosis, its correctness cannot be challenged.

Whether a diagnosis is vague, insufficient, uncertain or ambiguous is a question of fact rather than law that must be determined after examining the evidence presented.[47]

Certainty in prognosis is not required. The use of "long term" and "short term" in the prognosis is not vague.[48]

The medical officers must base their diagnosis and opinion on medical evidence. A diagnosis cannot be based only on an admission of a charge of conspiring to supply controlled drugs and of past drug addiction.[49]

Reasonableness of Medical Officers' Opinion

The IAD must decide whether the opinion expressed by the medical officers pursuant to section 19(1)(a) of the *Immigration Act* regarding danger to public health or safety or excessive demands is reasonable based on the circumstances of the particular case.[50]

In *Mohamed*,[51] the Federal Court set out the general rule as follows:

---

[46] *Nijjar, Ranjit Singh v. M.E.I.* (IAD V89-00964), Wlodyka, Chambers, Verma, January 9, 1991.

[47] *Uppal, supra*, footnote 44; *Shanker, supra*, footnote 25.

[48] *M.C.I. v. Ram, Venkat* (F.C.T.D., no. IMM-3381-95), McKeown, May 31, 1996. See also *Pattar, supra*, footnote 18, where a condition of "unknown pathology" did not render the Medical Notification form deficient. In *Litt, Mohinder Kaur v. M.C.I.* (IAD V95-01928), Jackson, June 11, 1998, the medical officer used "mild chronic renal failure" and "chronic renal failure" interchangeably and the medical report was not found to be inconsistent or vague. But in *Phan, Hat v. M.C.I.* (IAD W93-00090), Wiebe, September 4, 1996, the IAD found a diagnosis of "respiratory insufficiency" so vague as to be meaningless where the report cited no time-frames as to deterioration and there was no reference to functional disabilities that might impair the applicant. In *Singh, Balbir Kaur v. M.C.I.* (IAD V97-01550), Carver, May 8, 1998, the prognosis of deterioration was found to be not speculative merely because coronary angiogram procedures were not available (in Fiji) or used in forming the diagnosis of coronary artery disease.

[49] *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.). See also *D'Costa Correia, Savio John v. M.C.I.* (IAD T96-03318), Maziarz, February 27, 1998, in which the IAD held that the applicant's admission, which he later denied, that he drank half a bottle of alcohol per day did not constitute a proper basis for a diagnosis of "chronic alcohol abuse" where the Medical Notification form did not mention the type of alcohol consumed or the medical consequences, if any, of such consumption.

[50] *Ahir v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 1098 (C.A.).

> It is therefore open to an appellant to show that the medical officers' opinion was unreasonable and this may be done by the production of evidence from medical witnesses other than "medical officers". However, evidence that simply tends to show that the person concerned is no longer suffering from the medical condition which formed the basis of the medical officers' opinion is clearly not enough; the medical officers may well have been wrong in their prognosis but so long as the person concerned was suffering from the medical condition and their opinion as to its consequences was reasonable at the time it was given and relied on by the visa officer, the latter's refusal of the sponsored application was well founded.[52]

Reasonableness is a question of fact; thus it is incumbent on a sponsor to establish an evidentiary foundation to any such challenge.[53]

The IAD should not assume that the medical officers' opinion is reasonable based only on an agreement that the medical condition exists.[54]

In assessing reasonableness, the IAD should consider whether the medical officers applied the correct criteria in assessing an applicant.[55] Medical officers may rely on the guidelines in the Medical Officer's Handbook in making their assessment, but they must be flexible and look at individual circumstances. The guidelines are based on generally accepted medical experience.[56] The Handbook may be given a great deal of weight as it is similar to medical journals and textbooks. The issue is whether the medical officers fettered their discretion.[57]

"Tests of admissibility must be relevant to the purpose and duration for which admission is sought."[58] It is unreasonable for the medical officers to assess a visitor based on the same criteria used to assess an immigrant.[59] Likewise, an applicant who is included in the principal applicant's application as a dependant should not be assessed as an independent applicant and required to establish self-sufficiency.[60] The IAD has applied this reasoning in a number of

---

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

[52] *Ibid*., at 98.

[53] *Takhar, Manjit Singh v. M.E.I.* (IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991.

[54] *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.).

[55] *Ibid.*

[56] *Ajanee, Gulbanoo Sadruddin v. M.C.I.* (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported*: Ajanee v. Canada (Minister of Citizenship and Immigration*)(1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.).

[57] *Ludwig, James Bruce v. M.C.I.* (F.C.T.D., no. IMM-1135-95), Nadon, April 9, 1996. Reported: *Ludwig v. Canada (Minister of Citizenship and Immigration*) (1996) 33 Imm. L.R. (2d) 213 (F.C.T.D.).

[58] Adjudicator Leckie, quoted with approval by the Federal Court in *Ahir, supra*, footnote 50, at 1101. See also *Deol, supra*, footnote 54; *Ng, Kam Fai Andrew v. M.C.I.* (F.C.T.D., no. IMM-2903-94), Jerome, January 16, 1996; and *Chu, Raymond Tak Wah v. M.C.I.* (F.C.T.D., no. IMM-272-94), Jerome, January 16, 1996.

[59] *Ahir, ibid.*

cases.[61] In *Wong*,[62] the Federal Court clarified the factors to be considered in the case of an applicant who was a dependant:

> The assessment of probable demands is to involve an analysis of whether, on the balance of probabilities having regard to all the circumstances, including, but not limited to, the severity of her condition, the degree and effectiveness of the support promised by her family, and her prospects for economic and personal physical self sufficiency, [she] will be cared for in her family home into the future. [63]

The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence[64] and failure to consider the factors stipulated in section 22 of the *Immigration Regulations*.[65] Note, however, that the failure to consider the section 22 factors only applies to section 19(1)(a)(i) of the *Immigration Act,* not to section 19(1)(a)(ii).[66]

The duty to look at the reasonableness of the opinion arises where the notice is manifestly in error, e.g. where it relates to the wrong party or an irrelevant disease or if not all relevant medical reports had been considered.[67] The visa officer has no authority to review the diagnostic assessment made by the medical officers. Where the issue of reasonableness arises on the evidence before the visa officer, the officer may elect to seek further medical evidence. Where no such issue arises, the visa officer must rely on the opinion. The visa officer has no discretion but to refuse if the opinion is that the person is inadmissible.[68]

The IAD has held that where there are two different and contradictory medical notifications on file concerning an applicant the visa officer has a duty to forward them to the

---

[60] *Ng, supra*, footnote 58; *Chu, supra*, footnote 58. See also *Deol, supra*, footnote 54, where the IAD failed to consider that the medical officers appeared to have assessed the applicant as a "new worker" instead of a sponsored dependant. See also *Chun, Lam v. M.C.I.* (F.C.T.D., no. IMM-5208-97), Teitelbaum, October 29, 1998, where the medical officers' assessment should not have been limited to economic factors given that the applicant's daughter was a dependant who was not expected to become independent in the immediate future.

[61] *Tejobunarto, Lianggono v. M.C.I.* (IAD T97-00565), Boire, July 28, 1998; *Grewal, Parminder Singh v. M.C.I.* (IAD V95-01266), Boscariol, November 21, 1997; *Kaila, Harmandeep Kaur v. M.C.I.* (IAD V95-02830), McIsaac, October 2, 1997; *Nagra, Ajaib Singh v. M.C.I.* (IAD V94-00245), Bartley, July 14, 1997.

[62] *Wong, Chan Shuk King v. M.C.I.* (F.C.T.D., no. IMM-2359-95), Simpson, May 24, 1996. Reported: *Wong v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 18 (F.C.T.D.).

[63] *Ibid.*, at 2-3.

[64] *Ismaili, supra*, footnote 31.

[65] *Gao, supra*, footnote 32.

[66] See discussion of *Ismaili, supra*, footnote 31.

[67] *Hussain, Amin v. M.C.I.* (F.C.T.D., no. IMM-3419-95), Noël, September 26, 1996. Reported: *Hussain v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 86 (F.C.T.D.).

[68] *Ajanee, Gulbanoo Sadruddin v. M.C.I.* (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported: *Ajanee v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.). See also *Ludwig, James Bruce v. M.C.I.* (F.C.T.D., no. IMM-1135-95), Nadon, April 9, 1996. Reported: *Ludwig v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 213 (F.C.T.D.); and *Tong, Kwan Wah v. M.C.I.* (F.C.T.D., no. IMM-2565-96), Heald, October 31, 1997.

medical officer to re-consider. This situation should have raised a doubt in the mind of the visa officer as to the reasonableness of the medical notification.[69]

In a recent case decided under IRPA, *Kim*, a psychologist's report had been filed detailing the extent of the applicant's son's disability and considering some aspects of long-term prognosis and care. The Respondent admitted that it had never been reviewed by the officer deciding this matter. It was sent to Ottawa's Medical Services who sent a report that was in the record. Justice Phelan held that it is not sufficient for the officer to ignore the psychologist's report on the basis that someone else (e.g. Medical Services) would deal or had dealt with it.[70]

The medical officers' opinion that the applicant was not likely to respond to treatment was not unreasonable in light of the medical reports, one indicating the condition was likely to improve and two suggesting a potential for improvement.[71]

Where the medical officers ignore a report, indicating significant improvements in the abilities of the applicant's dependant children in one year and only a need for some educational support, their opinion is unreasonable.[72]

Following cases like *Jiwanpuri*,[73] it appears that the IAD can consider evidence other than strictly medical evidence to question the reasonableness of the medical opinion.

Excessive demands

"Excessive Demands" is now defined in section 1 of the IRPR.

Where there is a lack of evidence before the medical officers as to the likelihood of the *particular* applicant's recourse to social services, the particular social services likely required should such recourse be required, the expense of such services (adjusting for any set-offs), and the quality of family support available, their conclusion as to excessive demands lacks an sufficient evidentiary basis. The medical officers have a duty to assess the circumstances of each individual that comes before them in his or her uniqueness.[74] This direction arose in the context

---

[69] *Syal-Bharadwa, Bela v. M.C.I.* (IAD V97-02011), Borst, November 30, 1999.

[70] *Kim, Shin Ki v. M.C.I.* (F.C., no. IMM-345-07), Phelan, January 29, 2008; 2008 FC 116.

[71] *Hussain, supra*, footnote 67.

[72] *Ten, Luisa v. M.C.I.* (F.C.T.D., no. IMM-1606-97), Tremblay-Lamer, June 26, 1998.

[73] *Jiwanpuri, Jasvir Kaur v. M.E.I.* (F.C.A., no. A-333-89), Marceau, Stone, MacGuigan, May 17, 1990. Reported: *Jiwanpuri v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm. L.R. (2d) 241 (F.C.A.).

[74] *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997. Applied in *Ho, Nam Van v. M.C.I.* (IAD C97-00009), Wiebe, January 13, 2000.

of a mental disability, but it may be applicable to other areas of medical refusals as well and has recently been found to be applicable to cases of physical disability.[75]

"Excessive demands" was held in *Jim*[76] to mean "more than what is normal or necessary." The Federal Court accepted "excessive demands" as meaning "unreasonable" or "beyond what the system reasonably provides to everyone."[77] The Federal Court applied this definition in *Ludwig*,[78] holding that

> […] the necessity of monitoring the applicant's health situation over a five-year period, the probability that the applicant's cancer would recur, and the applicant's reduced chances of a cure, would cause or might reasonably be expected to cause, demands on Canada's health or social services that would be more than "normal or necessary".[79]

There should be some evidentiary basis for determining that an applicant's admission would cause or might reasonably be expected to cause excessive demands.[80] The fact that an applicant was found unfit, by reason of insanity, to stand trial for murder and had since, at all material times, been detained under a Lieutenant Governor's warrant did not automatically support the conclusion that the applicant's admission might reasonably be expected to cause excessive demands on health or social services.[81] Neither does the fact that someone had been

---

[75] *Cabaldon Jr., Antonio Quindipan v. M.C.I.* (F.C.T.D., no. IMM-3675-96), Wetston, January 15, 1998..

[76] *Jim, Yun Jing v. S.G.C.* (F.C.T.D., no. T-1977-92), Gibson, October 25, 1993. Reported: *Jim v. Canada (Solicitor General)* (1993), 22 Imm. L.R. (2d) 261 (F.C.T.D.). Cited with approval in *Choi, Hon Man v. M.C.I.* (F.C.T.D., no. IMM-4399-94), Teitelbaum, July 18, 1995. Reported: *Choi v. Canada (Minister of Citizenship and Immigration*) (1995), 29 Imm. L.R. (2d) 85 (F.C.T.D.).

[77] *Jim, ibid.* In *Gill, Gurpal Kaur v. M.C.I.* (F.C.T.D., no. IMM-3082-98), Evans, July 16, 1999, the Court noted in *obiter dicta* that the fact that many Canadians of the applicant's age require a particular operation (knee replacement) cannot justify in law a finding that the admission of a person who also needs this operation will impose excessive demands on the health system. In this situation, any "excessive demand" is caused by the devotion of resources that are inadequate to meet the demand from the present population, not by the admission of an otherwise qualified applicant for a visa. The IAD on the re-hearing of this appeal declined to follow this *obiter dicta: Gill, Gurpal Kaur v. M.C.I.* (IAD T97-02345), Whist, January 21, 2000.

[78] *Ludwig, supra*, footnote 57, at 14.

[79] See also *Ajanee, supra*, footnote 56, where the finding of excessive demands was also upheld. There was evidence that the applicant had undergone a mastectomy; there was no evidence of recurrence of the cancer after two years; and her examining physician indicated that her prognosis was excellent. However, relying on the medical guidelines, the medical officers were of the opinion that the applicant's admission might cause excessive demands because a five-year period had not yet elapsed; it was probable she would suffer a significant recurrence; and there was only a 70 per cent chance of survival over a five-year period.

[80] Citizenship and Immigration Canada instructions OP 96-10, IP 96-13, EC 96-02, dated May 9, 1996, instruct medical officers to prepare statutory declarations routinely to support their opinions of excessive demands. The declarations are to refer to all medical evidence considered; any experts consulted and their qualifications; the reasons for forming their opinion; and the costs of required health or social services. It should be noted that the Appeal Division has rarely seen these statutory declarations in appeals. Please note: 2007 OP 15 has no reference to such a Stat Dec. See also *Kumar, Varinder v. M.C.I.* (IAD V97-03366), Boscariol, December 30, 1998 where the panel comments on the sufficiency of the respondent's evidence.

[81] *Seyoum, Zerom v. M.E.I.* (F.C.A., no. A-412-90), Mahoney, Stone, Décary, November 15, 1990.

addicted to drugs automatically bring the person within section 19(1)(a)(ii) of the *Immigration Act*.[82]

The IAD has dealt with an applicant's physical disability and its impact on the validity of a refusal. In *Rai*,[83] the applicant suffered from post-polio paraparesis of her lower limbs. The applicant produced medical evidence that she had adapted remarkably to her infirmity and intended to forego recommended medical treatment to prevent deterioration of the condition. The panel found that the applicant's willingness to forego recommended medical treatment did not go towards showing the unreasonableness of the opinion regarding excessive demands. The panel also held that eligibility for provincial income assistance programs for persons with disabilities did not constitute excessive demands. In *Wahid*,[84] the applicant who suffered from quadriplegia was entitled to attendant care services, but never used them as he preferred to be independent. The IAD considered the evidence that the sponsor had made his house physically accessible and that the applicant had the determination and the resources to ensure that he would not place excessive demands on services to conclude that the refusal was not valid in law.

A Federal Court decision, has indirectly dealt with the notions of scarcity of services and cost. In *Rabang*[85], a case involving an applicant with developmental delay with cerebral palsy, the Court found that a determination as to the reasonableness of the opinion of the medical officers with regard to excessive demands could not be made without evidence that the services in question are publicly funded and evidence as to availability, scarcity or cost of those services. The Court was not ready to accept that this was a matter within the special knowledge or expertise of the medical officer, nor was the Court ready to accept the argument that requiring such evidence would pose an undue administrative burden. The services in question were special education, physical therapy, occupational therapy, and speech therapy as well as ongoing specialist care. The Court was also not willing to accept that the onus is on the appellant to satisfy the medical officer that the applicant's demands on publicly funded health and social services would not be excessive. The Court stated that this was not the fundamental problem in the case, the problem being that the record disclosed no evidence at all on the critical question of excessive demand.

Post-*Hilewitz* Law

Since the Supreme Court of Canada decision in *Hilewitz*[86] the legal landscape has dramatically shifted for medical inadmissibility visa refusals based on excessive demands. It is important therefore to consider what changed and any potential impact those changes may have for appeals at the IAD.

---

[82] *Burgon, supra*, footnote 49; *D'Costa Correia, supra*, footnote 49.

[83] *Rai, Paramninder Singh v. M.C.I.* (IAD V97-00279), Carver, April 20, 1998.

[84] *Wahid, Gurbax Singh v. M.C.I.* (IAD T96-04717), Kitchener, January 21, 1998.

[85] *Rabang, Ricardo Pablo v M.C.I.* (F.C.T.D., no. IMM-4576-98), Sharlow, November 29, 1999.

[86] *Hilewitz v. Canada (M.C.I.*) and *De Jong v. Canada (M.C.I.)* were joined in *Hilewitz and De Jong v. Canada* [2005] SCC 57, [2005] 2 S.C.R. 706, decided October 21, 2005.

Hilewitz and *De Jong* applied separately for permanent resident visas in the investor and self-employed categories respectively. Visa officers refused the applications, despite the applicant's substantial financial resources, because the applicants' children suffered from a intellectual disability, and were found to be medically inadmissible under the former *Immigration Act*, s. 19(1)(a)(ii). The officers concluded that they would require a variety of social services, e.g., special schooling, vocational training, etc., far in excess of the social services required by an average Canadian resident of his age. Their admission would cause excessive demands on social services. The issues in both of these cases are: of what relevance were the financial circumstances of the prospective immigrants? How should one view their willingness and ability to pay for social services once they reach Canada?

The Supreme Court joined the two appeals and held that the term "excessive demands" is inherently evaluative and comparative so medical officers must assess likely demands on social services, not mere eligibility for them. They must necessarily take into account both medical and non-medical factors. This requires individualized assessments. The Court explained that the medical officer cannot ignore the very assets that qualify the applicant for admission to Canada when determining the admissibility of his disabled son. Given their financial resources, the applicants would likely be required to contribute substantially, if not entirely, to any costs for social services provided by the province of Ontario, where they wish to settle.

How has this landmark decision been interpreted by the Federal Court and the IAD? Kelen J. held in both *Airapetyan*[87] and *Ching-Chu*[88] that one's ability or intention to pay for social services should not be restricted to applicants in business immigration categories. The IAD has reached the same conclusion as well[89]. In *Colaco*[90], the Court of Appeal held, in an application for permanent residence by a "skilled worker" class, that the Minister erred in not considering the applicant's financial willingness and commitment to pay for social services for their mildly mentally retarded child.

Of course "excessive demands" can apply to both social services as well as "medical services". Campbell J. made this distinction in *Lee* where an applicant is the "entrepreneur category was refused for excessive demands as a result of his polycystic kidney disease. The Court held:

> (1) Although the Applicant is an entrepreneur with considerable net worth, the Officer did not err by failing to consider the Applicant's ability to pay for his own health care for the following reasons: (i) *Hilewitz* (SCC) dealt specifically with "social services" and not "health services"; (ii) a permanent resident automatically has health insurance in Canada; (iii) paying for health care is contrary to Canadian public policy; (iv) charging patients for

---

87 *Airapetyan, Lidiya v. M.C.I.* (F.C., no. IMM-2570-06), Kelen, January 17, 2007; 2007 FC 42.

88 *Ching-Chu, Lai v. M.C.I.* (F.C., no. IMM-694-07), Kelen, August 28, 2007; 2007 FC 855.

89 *Zhang, Jiang v. M.C.I.* (IAD TA4-10174), Tumir, February 7, 2006.

90 *Colaco, Peter Anthony v. M.C.I.* (F.C.A., no. A-366-06), Linden, Létourneau, Sexton, September 12, 2007; 2007 FCA 282.

insured health services is expressly prohibited under the *Canada Health Act*. Based upon how Canada disseminates health services to permanent residents, a person's financial ability to pay for health services would be irrelevant (*Deol*); and (v) excessive demands on health care are more than just financial demands, e.g., using up finite places in waiting lists (*Gilani*).

(2) The Officer breached procedural fairness by not also considering the Applicant's request for a temporary resident permit.

In *Kirec*[91] the applicant's daughter suffers from Althetoid Cerebral Palsy. The visa officer found she was medically inadmissible for excessive demand based on her need for social services. The applicant argued that he did not know the contents of the medical file and did not know the criteria applied to assess his daughter's condition and therefore the fairness letter process was flawed. The Court disagreed as the fairness letter included the medical findings in the medical notification. The letter indicated the applicant's daughter was non-verbal, completely dependent for all activities of self care, utilizes the services of occupational and speech therapy, physiotherapy and assistive technology for communication. Although there was not a dollar figure on the services utilized by the applicant's daughter through the publicly funded Vancouver School Board, there was evidence that she required a full time special education assistant - this alone constitutes an excessive demand on social service as it clearly exceeds the threshold of $4, 057. In addition, she required the services of physiotherapists, occupational therapists, speech language therapists and had utilized public funds for a wheelchair. It was reasonable for the visa officer to trust the findings of the medical officer that she would continue to use those services on return to Canada. The applicant failed to make any submissions regarding how family support would offset the excessive demands other than an expressed intention to utilize private services. The visa officer properly took into account the applicant's daughter's personal circumstances including her long history of using social services while in Canada.

There have been some specific situations that have arisen worth noting. The Court commented[92] that the medical officer should compare the applicant's situation to the average cost for Canadian citizens of **the same age group**. It should be noted that this interpretation is at odds with the actual definition of "excessive demands" in IRPA. The visa officer cannot be faulted for failing to conduct an individualized assessment when no plan for the daughter's care in Canada and no submissions are put forward for consideration[93].

Intellectual Disability Cases

Special mention must be made of cases involving intellectual disability or "mental retardation". The concept of mental retardation cannot be used as a stereotype. The degree and

[91] *Kirec, Babur v. M.C.I.* (F.C., no. IMM-6272-05), Blais, June 23, 2006; 2006 FC 800

[92] *Hossain, Ishtiaq v. M.C.I.* (F.C., no. IMM-4132-05), Gauthier, April 11, 2006; 2006 FC 475.

[93] *Gau, Hui-Chun v. M.C.I.* (F.C., no. IMM-7127-05), Mactavish, October 23, 2006; 2006 FC 1258.

probable consequences of the degree of mental retardation for excessive demands must be assessed by the IAD. It is an error for a medical officer to fail to specify the degree of mental retardation, thus making it difficult to assess the reasonableness of the finding.[94] The degree of mental retardation must be indicated by the medical officers, as there may be a higher level of proof required to establish excessive demands in the case of mild mental retardation.[95]

If a finding of excessive demands is based not on the medical condition as such, but on the potential failure of family support, there must be evidence as to the probability of such failure.[96]

The Federal Court set aside a visa officer's refusal where the record did not contain an estimation of the actual amount of specialized education required by the applicant's daughter or any documentation concerning the availability of, or current access to, that specialized education.[97]

An opinion based on the need for special schooling, training and indefinite home care and supervision was found to be reasonable in *Choi*.[98] In *Jaferi*,[99] the daughter of an applicant was found to be developmentally handicapped and special schooling would cost 260 per cent more than schooling for a healthy child. The Federal Court found that the medical officers' finding was not unreasonable. However, in *Ismaili*,[100] the Federal Court found that the visa officer did not properly consider the issue of excessive demands as the evidence was that the applicant's son required a vitamin supplement at a cost of $12 per month and there was no waiting list at the special school he required. The cost of the special schooling was not canvassed as in *Jaferi*.[101]

In *Ma*,[102] it was held to be well established that specialized education is a "social service" within the meaning of the Act. In *Sabater*,[103] the Federal Court held that services provided by schools to the handicapped may be considered as social services. The Federal Court of Appeal in

---

[94] *Deol, supra*, footnote 54; *Sabater, Llamado D. Jr. v. M.C.I.* (F.C.T.D., no. IMM-2519-93), McKeown, October 13, 1995. Reported: *Sabater v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 59 (F.C.T.D.); *Nagra, supra*, footnote 61.

[95] *Sabater, supra*, footnote 94. See also *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997; *Fei, supra*, footnote 35; and *Lau, Hing To v. M.C.I.* (F.C.T.D., no. IMM-4361-96), Pinard, April 17, 1998.

[96] *Litt, Jasmail Singh v. M.C.I.* (F.C.T.D., no. IMM-2296-94), Rothstein, February 17, 1995. Reported: *Litt v. Canada (Minister of Citizenship and Immigration)* (1995), 26 Imm. L.R. (2d) 153 (F.C.T.D.). See also *Truong, Lien Phuong v. M.C.I.* (IAD T96-00900), Kitchener, Bartley, Boire, April 7, 1997.

[97] *Cabaldon Jr.*, supra, footnote 75.

[98] *Choi, supra*, footnote 76.

[99] *Jaferi, supra*, footnote 31.

[100] *Ismaili, supra*, footnote 31.

[101] *Jaferi, supra*, footnote 31.

[102] *Ma, supra*, footnote 35.

[103] *Sabater, supra*, footnote 94.

Thangarajan[104] and in *Yogeswaran*[105] indicated that the education of mentally challenged students within the publicly funded provincial school system does constitute a "social service" within the meaning of section 19(1)(a)(ii) of the Act. The Court explained that since institutionalization of the mentally retarded is a social service, a substitute more modern program, special education, is also a social service.

In deciding whether to exercise its discretionary jurisdiction the Appeal Division would fetter its discretion by not considering all factors relevant to its determination. For example, in *Deol*,[106] the Appeal Division focused on the refusal of the family to acknowledge the mental retardation of one of its members and the successful functioning of the two households. At the same time, the Appeal Division failed to consider, particularly, the nature of the medical condition of mental retardation, "the psychological dependencies it engenders and the close bonds of affection that may arise in such a family, all in light of the objective [...] of the *Immigration Act* of facilitating the reunion of close relatives in Canada."[107] The Federal Court has observed that the Appeal Division should not use stereotyping or irrelevant considerations in deciding whether to grant special relief.[108]

Timing

Generally, the reasonableness of a medical opinion is to be assessed at the time it was given and relied on by a visa officer.[109] Nevertheless, in making that assessment, the IAD may rely on any relevant evidence adduced before it.[110] Further, where the IAD is presented with a new opinion of a medical officer, concurred in by another medical officer, it is the reasonableness of that opinion that must be assessed.[111]

Evidence as to an applicant's condition subsequent to the refusal has limited relevance to the legal validity of the refusal. In *Shanker*,[112] the Federal Court held that evidence of an applicant's medical condition subsequent to the refusal is not relevant to the legality of the refusal. However, it may still be relevant to the extent that it can demonstrate that the medical

---

[104] *M.C.I. v. Thangarajan, Rajadurai Samuel* (F.C.A., no. A-486-98), Létourneau, Rothstein, McDonald, June 24, 1999; reversing *Thangarajan, Rajadurai Samuel v. M.C.I.* (F.C.T.D., no. IMM-3789-97), Reed, August 5, 1998.

[105] *Yogeswaran, Thiyagaraja v. M.C.I.* (F.C.T.D., no. IMM-1505-96), McKeown, April 17, 1997.

[106] *Deol*, *supra*, footnote 54.

[107] *Ibid.*, at 7.

[108] *Budhu, Pooran Deonaraine v. M.C.I.* (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998.

[109] See, for example, *Jiwanpuri*, *supra*, footnote 73; *Gao*, *supra*, footnote 32; and *Mohamed*, *supra*, footnote 51.

[110] *Jiwanpuri*, *supra*, footnote 73.

[111] *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.)

[112] *Shanker*, *supra*, footnote 25.

officer's opinion was unreasonable at the time it was given and relied on by the visa officer.[113] It is not enough to simply show that the applicant is no longer suffering from the medical condition.[114]

Discretionary Jurisdiction to grant special relief

The IAD continues to have the power to grant relief to those sponsored members of the family class who are medically inadmissible. The member may grant their appeal if they are satisfied that at the time the appeal is disposed of "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"[115].

Of particular relevance when considering compassionate or humanitarian factors within the context of medical inadmissibility is evidence of an applicant's current state of health.[116] Improvement will be considered in favour of the sponsor (although a decision to grant special relief probably should not turn solely on this criterion),[117] while evidence that the condition is stable or has deteriorated may be considered against the sponsor.[118]

In *Szulikowski*,[119] the IAD allowed the appeal on discretionary grounds although the cost of open-heart surgery would exceed $25,000, given there was no waiting list in Alberta and appropriate post-operative care was not available in the Ukraine for the applicant, who was the sponsor's adopted son.

In *Rai*,[120] the efforts of a family to provide specialized transport and to adapt their house for wheelchair accessibility were positive humanitarian and compassionate factors to be considered.

---

[113] *Jiwanpuri, supra*, footnote 73.

[114] *Mohamed, supra*, footnote 51.

[115] S. 67(1)(c) IRPA.

[116] *Kirpal* is a now a historic footnote: Kirpal no longer applicable in the IRPA context. According to one decision of the Federal Court, the IAD errs if it "weighs" the legal impediment to admissibility against the strength of the humanitarian or compassionate factors present in an appeal: *Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.). Further, the Court in *Kirpal* held that the IAD should consider separately whether the granting of special relief is warranted with respect to each applicant. However, as canvassed in *Chauhan, Gurpreet K. v. M.C.I.* (IAD T95-06533), Townshend, June 11, 1997, in decisions that pre-date *Kirpal*, the Federal Court of Appeal has sanctioned consideration of the legal impediment in the exercise of the IAD's discretionary jurisdiction. In *Chauhan*, the panel also articulated its disagreement with the holding in *Kirpal* regarding the separate consideration of special relief for each applicant.

[117] *Choi, Tommy Yuen Hung v. M.E.I.* (I.A.B. 84-9134), Weisdorf, Suppa, Teitelbaum, September 2, 1986.

[118] *Zheng, Bi Quing v. M.E.I.* (IAD T91-01428), Sherman, Weisdorf, Tisshaw, January 3, 1992; *Tonnie v. M.E.I.* (IAD T91-00202), Bell, Fatsis, Singh, March 30, 1992; *Moledina, Narjis v. M.E.I.* (IAD T91-02516), Ahara, Chu, Fatsis, May 8, 1992.

[119] *Szulikowski, Myron Joseph (Mike) v. M.C.I.* (IAD V97-03154), Nee, August 13, 1998.

[120] *Rai, supra*, footnote 83.

IRPA now sets out the impact of an allowed appeal on the sponsorship process: "An officer, in examining a permanent resident or foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of a foreign national."[121]

[121] S. 70(1) IRPA.

CASES

Chapter Four

Adoptions

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

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

Adoption of minors

IRP Regulations

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

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

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

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

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

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

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

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

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

Genuine Parent-Child Relationship

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

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

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

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

---

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

[5] *Ibid.*, at 5.

[6] *Ibid*., at 6.

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

Determining the Legal Validity of the Adoption

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

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

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

Foreign Law

Glossary of terms

The following terms are used in reference to foreign law:

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

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

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

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

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

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

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

Proof of foreign law

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

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

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

---

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

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

[19] *Ibid.*

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

Declaratory judgments and deeds

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

[36] *Ibid.*, at 14.

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

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

[39] *Ibid.*, at 10.

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

[41] *Atwal, ibid.*

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

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

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

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

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

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

Presumption of Validity under Foreign Law

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

---

[42] *Ibid.*, at 4.

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

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

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

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

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

[48] Section 16 of HAMA provides that:

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

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

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

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

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

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

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

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

---

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

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

[52] *Ibid*., at 44.

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

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

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

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

Parent and child relationship created by operation of law

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

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

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

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

Power of attorney

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

---

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

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

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

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

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

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

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

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

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

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

Revocation of adoption

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

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

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

---

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

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

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

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

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

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

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

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

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

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

Bad faith relationships

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

---

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

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

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

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

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

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

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

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

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

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

---

[72] *Ibid*., paragraph 14.

[73] *Ibid*., paragraph 17.

[74] *Ibid*., paragraph 18.

[75] *Ibid*., paragraph 19.

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

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

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

---

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

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

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

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

Adult Adoptions

IRP Regulations

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

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

Intent to adopt provisions

Statutory Provision

IRP Regulations

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

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

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

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

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

---

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

[81] This provision reads as follows:

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

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

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

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

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

Canadian Charter of Rights and Freedoms

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

93 *Rai, supra,* footnote 60.

94 *Chandler, supra*, footnote 83.

Repeat Appeals

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

CASES

Chapter Five

Spouses, Common-Law Partners and Conjugal Partners

Introduction

The *Immigration and Refugee Protection Act* ("IRPA")[1] and the *Immigration and Refugee Protection Regulations* ("IRP Regulations")[2] expanded the family class to include common-law partners and conjugal partners as well as spouses.[3] In addition, common-law partners are family members of members of the family class.[4] These changes, brought about by the implementation of the IRPA in 2002, are part of a legislative framework which sets out, for the first time, specific rules concerning the sponsorship of common-law partners and conjugal partners of the same or opposite sex as the sponsor.[5]

Modifications were also brought to the definition of "marriage."[6] The IRP Regulations now require that a foreign marriage be valid under Canadian law. Furthermore, contrary to the former *Immigration Regulations, 1978*, the IRPA and IRP Regulations do not define "spouse."

The discussion that follows addresses the definitions of "common-law partner," "conjugal partner," and "marriage." It also deals with excluded and bad faith relationships which disqualify

---

1 S.C. 2001, c. 27, entered into force on June 28, 2002 as amended.

2 SOR/202-227, June 11, 2002 as amended.

3 S. 12(1) of the IRPA and s. 116 and s. 117(1)(a) of the *Immigration and Refugee Protection Regulations* ("IRP Regulations"). "Common-law partner" is defined at s. 1(1) of the IRP Regulations as: "…in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year." "Conjugal partner" is defined at s. 2 of the IRP Regulations as: "…in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year."

4 S. 1(3)(a) of the IRP Regulations states:

> For the purposes of the Act, other than s. 12 and paragraph 38(2)(d), and these Regulations, "family member" in respect of a person means
>
> (a) the spouse or common-law partner of the person;

5 Prior to the coming into force of the IRPA, common-law partners of Canadian citizens or permanent residents who wished to apply for permanent resident status to reunite with their partner were considered on humanitarian and compassionate grounds under s. 114(2) of the former *Immigration Act, R.S.C. 1985, c. I-2.*.

6 S. 2 of the IRP Regulations defines "marriage" as:

> …in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law.

a foreign national from being considered a spouse, common-law partner, conjugal partner or member of the family class.

Background to the Legislative Changes concerning Common-law Partners and Conjugal Partners

Under the IRPA, common-law partners have a status equal to that of spouses. The relevant provisions of the IRPA and the IRP Regulations are intended to grant common-law partners the same benefits and obligations granted to spouses.[7] The provisions of the IRPA as they relate to common-law partners take into account case law such as *Miron v. Trudel*[8] and *M. v. H.*[9] in which the Supreme Court found that legislative provisions excluding same and opposite sex common-law partners from benefits afforded to married partners were discriminatory and violated the right to equality guaranteed by s. 15 of the *Charter of Rights and Freedoms.*[10] In addition, the provisions of the IRPA keep in step with the *Modernization of Benefits and Obligations Act*,[11] which amended other federal acts following the decision in *M. v. H.*[12] in order to extend to same-sex partners the benefits and obligations afforded married and opposite-sex partners.

Conjugal partners have a different status than that of spouses and common-law partners under the IRPA. The definition of "conjugal partner" is found in the IRP Regulations. The recognition of conjugal partners under the IRPA was meant to acknowledge the particular circumstances of the sponsorship context that are generally not present where partners reside in the same country. Hence, "conjugal partner" refers only to a person in a conjugal relationship with the sponsor for a period of at least one year. Whereas spouses and common-law partners are eligible for permanent residence by virtue of their relationship with the sponsor (qualifying them as members of the family class) or by virtue of their relationship with a member of the family class (qualifying them as a family members of a member of the family class), conjugal partners are only eligible for permanent residence by virtue of their relationship with the sponsor (qualifying them as a member of the family class) and not with any other person. A conjugal partner is therefore not a family member of a member of the family class.[13]

---

7 See to this effect the comments concerning the changes to the family class in the Regulatory Impact and Analysis Statement ("RIAS") published with the IRP Regulations.

8 [1995] 2 S.C.R. 418.

9 [1999] 2 S.C.R. 3.

10 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

11 S.C. 2000, c.12, as amended. The definition of "common-law partner" in the *Modernization of Benefits and Obligations Act* is essentially the same as that in the IRP Regulations. It states: "common-law partner," in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year."

12 *Supra*, footnote 9. See to this effect the comments on the changes to the family class in the RIAS.

13 See the definition of "conjugal partner" at s. 2 of the IRP Regulations as well as s. 117(1)(a) and the definition of "family member" at s. 1(3) of the IRP Regulations.

Relevant Legislative Provisions

The relevant provisions are:

- Section 11(1) of the IRPA provides that before entering Canada, a foreign national must apply for a visa which shall be issued if the officer is satisfied that the foreign national is not inadmissible and meets the requirement of the IRPA;
- Section 6 of the IRP Regulations indicates that a foreign national may not enter and remain in Canada on a permanent basis without first obtaining a permanent resident visa;
- Section 70 of the IRP Regulations sets out the requirements that must be met for a permanent resident visa to be issued to a member of an eligible class and to the accompanying family member of such a member;
- Section 12(1) of the IRPA provides that a foreign national may be selected as a member of the family class on the basis of their relationship with a Canadian citizen or a permanent resident as a spouse, a common-law partner or other prescribed family member;[14]
- Section 13(1) of the IRPA provides that a Canadian citizen or permanent resident may sponsor a member of the family class;
- Section 116 of the IRP Regulations prescribes the family class as a class of persons that may become permanent residents;
- Section 117(1)(a) of the IRP Regulations indicates that a foreign national who is the sponsor's spouse, common-law partner or conjugal partner is a member of the family class;
- Sections 1(1) and 1(2) of the IRP Regulations set out respectively the definition of "common-law partner" and the exception to the requirement of cohabitation;
- Section 2 of the IRP Regulations provides the definition for "marriage" and "conjugal partner;"
- Section 1(3) of the IRP Regulations defines "family member," other than for the purposes of s. 12 and s. 38(2)(d) of the IRPA;
- Sections 5(a) and 5(b) of the IRP Regulations list circumstances in which a foreign national is not considered a "spouse" or "common-law partner;"
- Sections 117(9)(a) to (d) of the IRP Regulations list circumstances in which a spouse, common-law partner or conjugal partner are not considered members of the family class. Sections 117(10) and (11), read together, create an exception to the exclusionary provision of section 117(9)(d).
- Section 4 of the IRP Regulations indicates that a foreign national shall not be considered a spouse, common-law partner or conjugal partner if the marriage, common-law partnership or conjugal partnership is a bad faith relationship – that is,

[14] The expression "prescribed family member" in s. 12 of the IRPA appears to refer to the members of the family class that are prescribed in s. 117(1) of the IRP Regulations. The definition of "family member" at s. 1(3) of the IRP Regulations specifically states that it is not applicable to s. 12 of the IRPA.

the relationship is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the IRPA or IRP Regulations;

- Section 4.1 of the IRP Regulations indicates that a foreign national shall not be considered a spouse, common-law partner or 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 relationship 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.
- Section 121 of the IRP Regulations requires a member of the family class or family member of a member of the family class to be a family member of the applicant or sponsor at the time the application is made, and without taking into account whether the person has attained the age of 22 years, at the time of the determination of the application.
- Section 122 of the IRP Regulations states that a foreign national who is an accompanying family member of a member of the family class shall become a permanent resident if the person who made the application becomes a permanent resident and the accompanying family member is not inadmissible.

REQUIREMENTS FOR THE ISSUANCE OF A PERMANENT RESIDENT VISA TO A SPOUSE, COMMON-LAW PARTNER AND A CONJUGAL PARTNER IN THE CONTEXT OF FAMILY CLASS SPONSORSHIPS

A foreign national is issued a permanent resident visa if he or she meets the requirements of the IRPA including those pertaining to a member of the family class and is not inadmissible.[15] A spouse, common-law partner or conjugal partner of a Canadian citizen or permanent resident is a member of the family class.[16]

Similarly, a foreign national accompanying a member of the family class who is issued a permanent resident visa shall in turn be issued a permanent resident visa where he or she meets the definition of "family member" and is not inadmissible.[17] A spouse or common-law partner of a member of the family class is a "family member." Note, however, that a conjugal partner is not a "family member."[18]

Spouse

[15] S. 11 of the IRPA and s. 70(1) and (2) of the IRP Regulations.

[16] S. 12(1) of the IRPA and s. 116 and s. 117(1)(a) of the IRP Regulations.

[17] S. 11 of the IRPA and s. 122 and s. 70(4) and (5) of the IRP Regulations.

[18] S. 1(3)(a) of the IRP Regulations.

In order for a foreign national applying as a "spouse" to be considered a member of the family class or a family member, the foreign national's marriage must meet the definition of marriage set out in s. 2 of the IRP Regulations and the marital relationship must not be excluded by virtue of s. 4, s. 4.1, or s. 5 of the IRP Regulations. In addition, a foreign national applying as a spouse and member of the family class must not be in an excluded relationship mentioned in s. 117(9) of the IRP Regulations.

The term spouse is not defined in the IRPA or the IRP Regulations. While in common usage, the term spouse may sometimes refer to common-law or conjugal partners, under the IRPA, it refers exclusively to individuals who are married. "Common-law partner" and "conjugal partner" are defined separately.

Definition of Marriage

The definition of marriage set out in s. 2[19] of the IRP Regulations requires that a foreign marriage be valid both under the law of the jurisdiction where it took place and under Canadian law.

Prior to 2005, the definition of marriage was recognized as "the voluntary union for life of one man and one woman to the exclusion of all others."[20] This created some debate regarding whether same-sex couples who were legally married could be recognized as a spouse for the purpose of family class sponsorship. This question was settled with the passage of the *Civil Marriage Act.*[21] Section 2 of that Act defines marriage, for civil purposes, as "the lawful union of two persons to the exclusion of all others." This definition is gender neutral and is further clarified by section 4 which stipulates that "for greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex." Presently the number of jurisdictions that allow same-sex marriage is small,[22] so the issue has not arisen before the IAD; however, it can be expected that over time the number of jurisdictions where same-sex couples can legally marry will increase as will the number of sponsorship applications from same-sex, married couples.

Validity of the Marriage in the Jurisdiction Where it Took Place

---

[19] S.2 "marriage", in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law. ("marriage")

[20] Payne, M. A., *Canadian Family Law (2001)*, Ch. 2; *Modernization of Benefits Act*, S.C. 2000, c. 12, s. 1.1 [this section repealed S.C. 2005, c. 33, s. 15].

[21] S.C. 2005, c. 33.

[22] For example, as at January 1, 2008, the Citizenship and Immigration Canada website lists five jurisdictions outside of Canada where same-sex partners can legally marry: Belgium, the Netherlands, South Africa, Spain, and the State of Massachusetts.

The validity of a marriage in the jurisdiction where it took place is established by demonstrating that the formal and essential requirements of marriage have been respected. The formal validity refers to the formal requirements of the ceremony while essential validity refers to the state of being married and is concerned with such things as prohibited degrees of relationships as prescribed by law, fraud, duress, and capacity.[23]

Formal Validity

In general, formal validity includes the nature of, and prerequisites for, a ceremony.[24] Formal validity is determined in accordance with the law of the place where the marriage was celebrated. Where the law of the place is foreign law, it must be proved as any other fact by the party who is relying on it.[25] Therefore, when it is alleged, for example, that a marriage has not been duly solemnized, local marriage law applies and it must be decided whether the marriage in question complies with the formal requirements of that law. If it does not, then the effect of this defect must also be decided in accordance with that same law.[26] In the absence of evidence to the contrary, it must be presumed that the foreign law purports to be exhaustive as to the defects that invalidate a marriage.[27] Depending on the applicable law, as proved, the absence of a ceremony may[28] or may not invalidate the marriage.[29] If it is not proven that the marriage is valid, the applicant is not a "spouse" for purposes of the IRPA and therefore not a member of the family class.

There are situations where what the appellant tries to establish is that a marriage is not valid. For example, an appellant may argue that a sibling who is included in the parents' sponsorship application is not married (even though the person appears to have gone through a marriage ceremony) and still a dependant, or an appellant in an appeal involving

---

[23] *Virk, Sukhpal Kaur v. M.E.I.* (IAD V91-01246), Wlodyka, Gillanders, Verma, February 9, 1993.

[24] McLeod, James G., *The Conflict of Laws* (Calgary: Carswell, 1983), at 253.

[25] *Lit, Jaswant Singh v. M.E.I.* (I.A.B. 76-6003), Scott, Benedetti, Legaré, May 30, 1978. For example, in *El Salfiti, Dina Khalil Abdel Karim v. M.E.I.* (IAD M93-08586), Durand, January 24, 1994, the Appeal Division found that the "marriage contract" was in fact a "preliminary" engagement contract under Kuwati law. For a discussion of whether marriages by telephone are valid, see *Shaheen, Shahnaz v. M.C.I.* (IAD T95-00090), Wright, February 20, 1997; *Sobhan, Rumana v. M.C.I.* (IAD T95-07352), Boire, February 3, 1998; *Patel, Allarakha v. M.C.I.* (IAD TA3-24341), Sangmuah, May 5, 2005; *Mahamat, Ali Saleh v. M.C.I.* (IAD TA4-04059), Sangmuah, April 13, 2005; *Akhtar, Waseem v M.C.I.* (IAD VA6-00938), Ostrowski, June 5, 2007; and *Sasani, Sam v. M.C.I.* (IAD VA6-00727), Shahriari, September 5, 2007.

[26] *Grewal, Ravinder v. M.C.I.* (IAD MA3-00637), Beauchemin, May 4, 2004.

[27] *Mann, Harnek Singh v. M.E.I.* (I.A.B. 85-6199), Wlodyka, June 5, 1987.

[28] See, for example, *Mann, ibid.;* and *Chiem, My Lien v. M.C.I.* (F.C.T.D., no. IMM-838-98), Rothstein, January 11, 1999.

[29] *Mann, Kirpal Singh v. M.E.I.* (I.A.B. 86-6008), Mawani, Gillanders, Wlodyka, April 14, 1987; *Oucherif, Ichrak v. M.C.I.* (IAD MA4-03183), Barazi, October 27, 2005.

misrepresentation may argue that he or she was not married at the time of landing as a single dependant.[30]

Essential Validity

Essential validity includes matters relating to consent to marry, existing prior marriage,[31] prohibited degrees of relationship,[32] non-consummation of the marriage,[33] fraud, and duress.

In cases that raise an issue of essential validity, there is conflicting authority regarding the law that governs the circumstances; that is, whether it is the foreign law (the law of prenuptial domicile of the purported spouses) or Canadian domestic law (the law of their intended matrimonial home).

While the Federal Court of Appeal sanctioned the application of the law of the intended matrimonial home in *Narwal,*[34] it subsequently clarified that decision in *Kaur,*[35] indicating that the law of the intended matrimonial home is to be applied exceptionally, only in "very special circumstances" such as those that existed in *Narwal*, that is, where the marriage had been celebrated in a third country, there was no doubt about the good faith of the spouses, and the spouses had a "clear and indefeasible" intention "to live in Canada immediately and definitely." The Court in *Kaur* was not prepared to apply the law of the intended matrimonial home where the marriage had been celebrated in India, the visa officer did not believe the marriage was *bona fide*, and no effect could be given to the intention of the spouses to live in Canada because the applicant had been previously deported and was prohibited from coming into Canada without a Minister's permit. The law of the prenuptial domicile was the proper law to apply to such facts.[36]

---

[30] *Ramdai, Miss v. M.C.I.* (IAD T95-01280), Townshend, October 22. 1997 (sponsored application of son); *Li, Bing Qian v. M.C.I.* (F.C.T.D., no. IMM-4138-96), Reed, January 8, 1998 (misrepresentation); and *Tran, My Ha v. M.C.I.* (IAD V95-01139), Singh, March 9, 1998 (misrepresentation).

[31] For example, see *Savehilaghi, Hasan v. M.C.I.* (IAD T97-02047), Kalvin, June 4, 1998, which dealt with the issue of whether a Mullah in Iran is authorized to effect a divorce; *Ratnasabapathy, Jeyarajan v. M.C.I.* (F.C.T.D., no. IMM-382-98), Blais, September 27, 1999, where the Court noted that if the IAD concludes that the first marriage is still valid, it should not go on to consider the validity of a second marriage; and *Nadesapillai, Sritharan v. M.C.I.* (IAD T99-11883), Hoare, August 1, 2001, where the panel did not accept as credible the evidence regarding the applicant's alleged belief that her first husband was dead. The applicant failed to establish that her first marriage was either invalid or dissolved.

[32] For example, see *Grewal, Inderpal Singh v. M.C.I.* (IAD T91-04831), Muzzi, Aterman, Leousis, February 23, 1995; *Badhan, Lyle Kishori v. M.C.I.* (IAD V95-00432), Boscariol, September 3, 1997; and *Saini, Jaswinder Kaur v. M.C.I.* (IAD T89-07659), D'Ignazio, August 26, 1999. These cases dealt with the issue of whether a woman can marry her husband's brother under the *Hindu Marriage Act, 1955*.

[33] *McLeod, supra*, footnote 24, at 256.

[34] *M.E.I. v. Narwal, Surinder Kaur* (F.C.A., no. A-63-89), Stone, Marceau, MacGuigan, April 6, 1990.

[35] *Kaur, Narinder v. M.E.I.* (F.C.A., no. A-405-89), Marceau, Desjardins, Linden, October 11, 1990, at 5. Reported: *Kaur v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 1 (F.C.A.).

The Immigration Appeal Division has generally applied the reasoning of *Kaur* to questions of the legality of a marriage,[37] although at least one decision has applied the reasoning in *Narwal*.[38]

Evidentiary Issues – foreign marriages

Where the validity of a marriage is in issue and the marriage has been registered, it must be determined what effect registration has on the validity of the marriage. Registration creates a presumption that a marriage has met the requirements for formal validity.[39] In other words, registration constitutes *prima facie* evidence of the marriage and of the validity of the marriage[40] until a court of competent jurisdiction rules otherwise[41] or "until compelling evidence is adduced to show that the marriage was not duly solemnized prior to its registration."[42] Therefore, even if a marriage has been registered and a certificate presented, if other evidence on the record indicates that the persons are not validly married, it may be found that the sponsor has failed to prove that a valid marriage took place.[43]

---

[36] *Ibid.* See also *Donoso Palma, Sergio v. M.C.I.* (IAD MA1-03349), di Pietro, July 9, 2002 where the panel applied the law of the country in which the first marriage was contracted (Chile) and held that there was "no proof" that the first marriage had been dissolved in accordance with Chilean laws, notwithstanding that it had been dissolved by a Canadian judgment.

[37] In *Virk, supra*, footnote 23, the appellant married her first husband's brother in India, which was prohibited by Indian law but was not one of the prohibited relationships in Canadian law. The panel determined that the proper law to be applied was Indian law since the marriage took place in India. It rejected the submission that the essential validity of the marriage should be determined only based on Canadian law, as the definition of marriage as found in the former *Immigration Act* was clear that it applied to the place of marriage. The panel noted that this definition had not been considered in either *Narwal* or *Kaur*. In *Khan v. M.C.I.* (IAD) V93-02590), Lam, July 4, 1995, the panel distinguished *Narwal* on the basis that in *Narwal* the couple had been married in a third country. In *Brar, Karen Kaur v. M.C.I.* (IAD VA0-02573), Workun, December 4, 2001, the panel applied the law of the prenuptial domicile. It found that the circumstances were distinguishable from those in *Narwal* as the parties in this case married in India notwithstanding that, as first cousins, the relationship came within the degrees of prohibited relationship under the *Hindu Marriage Act, 1955*. In *Singh, Harpreet v. M.C.I.* (IAD TA4-01365), Stein, May 10, 2006 the panel examined the law of the place of marriage, India.

[38] In *Xu, Yuan Fei v. M.C.I.* (IAD M99-04636), Sivak, June 5, 2000 the panel applied the law of the parties' intended matrimonial home (Canada). The sponsor and his wife were first cousins and the Chinese marriage law prohibited marriage between collateral relatives by blood up to the third degree of kinship. Therefore, the marriage was not valid in China. The panel allowed the appeal finding that the degrees of consanguinity which were a bar to the lawful solemnization of marriage in Ontario did not include first cousins.

[39] In *Tran, supra*, footnote 30, the evidence showed that in Vietnam, the recognition and recording of a marriage by the People's Committee is required for the marriage to be legally binding.

[40] *Parmar, Ramesh Kumar v. M.E.I.* (I.A.B. 85-9772), Eglington, Weisdorf, Ahara, September 12, 1986.

[41] *Kaur, Gurmit v. C.E.I.C.* (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985.

[42] *Parmar, supra*, footnote 40; *Pye, Helen Leona v. M.C.I.* (IAD MA5-00247), Beauchemin, September 21, 2006.

[43] *Lotay, Harjit Kaur v. M.E.I.* (I.A.D. T89-03205), Ariemma, Townshend, Bell, April 18, 1990*; Bakridi, Faizal Abbas v. M.C.I.* (IAD V99-03930), Baker, January 9, 2001.

Little weight may be given to an *ex parte* judgment *in personam*[44] purporting to establish the marriage in question where the record shows that the evidence before the issuing court was incomplete and where the evidence on appeal indicates that the sponsor was married to another person and therefore lacked the capacity to marry his purported wife.[45]

Little weight may also be given to a declaratory judgment by a court where the judgment fails to refer to the date and place of the marriage in question and where the judgment is obtained after the applicant has received the letter of refusal.[46]

However, caution must be exercised in concluding that a marriage is not valid in the face of what appears to be a valid Court order.[47]

The appellant has the duty of providing objective evidence of a customary law of marriage. International, national or even customary law are not within the general knowledge of the Appeal Division. It is not the sort of information that the Appeal Division can be expected to know or take judicial notice of.[48]

In cases involving the application of foreign law such as the *Hindu Marriage Act, 1955,* it may be alleged that custom or usage exempts the purported spouses, who fall within the prohibited degrees of relationship, from strict compliance with that *Act*. However, where the sponsor claims to be the spouse of the applicant by reason of an exemption to the law based on custom or usage, the sponsor has the onus of clearly proving its existence.[49] A declaratory *in personam* judgment, which rules on the existence of the custom or usage in issue, may be considered to be evidence of its existence.[50] The testimony of an expert witness,[51] even a transcript of the testimony of an expert witness in another hearing,[52] may be accepted as establishing the existence of a custom.

Validity of the Marriage under Canadian Law

---

[44] An *in personam* judgment is one that binds only the two persons to an action.

[45] *Gill, Sakinder Singh v. M.E.I.* (IAD V89-01124), Gillanders, Verma, Wlodyka, July 16, 1990.

[46] *Burmi, Joginder Singh v. M.E.I.* (I.A.B. 88-35,651), Sherman, Arkin, Weisdorf, February 14, 1989.

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

[48] *Quao, Daniel Essel v. M.C.I.* (F.C.T.D., no. IMM-5240-99), Blais, August 15, 2000.

[49] *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576 (C.A.); *Buttar, Amrit Kaur v. M.C.I.* (F.C. no. IMM-1669-06), Blais, October 25, 2006; 2006 FC 1281; *Patel, Sunil Jayantibhai v. M.C.I.* (IAD TA3-19443), Band, September 28, 2006. For an in-depth analysis regarding the proof of the validity of a marriage between a Christian and a Hindu in India, see *Pye, supra*, footnote 42.

[50] *Taggar, Ibid.*

[51] *Atwal, Jaswinder Kaur v. M.E.I.* (I.A.B. 85-4204), Petryshyn, Wright, Rayburn, January 30, 1989.

[52] *Bhullar, Sawarnjit Kaur v. M.E.I.* (IAD W89-00375), Goodspeed, Rayburn, Arpin (concurring), November 19, 1991.

The validity of the marriage "under Canadian law" is established by demonstrating that the foreign marriage is valid under the applicable Canadian law. The expression "Canadian law" may refer to Canadian rules pertaining to the conflict of laws[53] applicable to foreign marriages, to rules concerning the formal and essential validity of a marriage concluded in Canada and to federal legislation regulating certain aspects of marriage, namely the *Marriage (Prohibited Degrees) Act*[54] which prohibits marriage between certain individuals and the *Criminal Code*[55] which criminalizes bigamy and polygamy.

The issue that arises is whether all three sets of rules (common-law rules concerning conflict of laws, provincial rules pertaining to formal validity of marriage and the federal rules concerning essential validity of a marriage and those regulating certain aspects of marriage) should be applied when determining if a foreign marriage is valid "under Canadian law." It would seem that only rules respecting essential aspects of marriage and federal legislation regulating certain aspects of marriage were intended to be applicable.

The rules concerning conflict of laws in cases of foreign marriages applicable in Canada refer back to the rules of the place where the marriage was celebrated for questions of formal validity and to the rules of the spouses' domicile prior to marriage for questions of essential validity. If these rules are applied, the result is the same as that obtained in applying the first part of the definition of "marriage"[56] thus making the second part of the definition of marriage in IRPA redundant.

In Canada, the rules concerning the formal validity of marriage are a matter under provincial jurisdiction and vary from province to province. It is suggested that these rules were not intended to be applied in the context of the validity of a foreign "marriage" under the IRPA. It is difficult to see the merit, for immigration purposes, in requiring that foreign marriages accord with provincial rules concerning the solemnization of marriages.[57]

On the other hand, rules concerning the essential validity of marriage in Canada fall under federal jurisdiction and are relevant because they govern the substantial aspects of marriage. The same can be said of provisions in the *Marriage (Prohibited Degrees) Act*[58] and those concerning

---

[53] "Conflict of laws" generally refers to a situation where the laws of more than one jurisdiction may apply to the legal issue to be determined. For instance, in determining the validity of a foreign marriage, the laws of the jurisdiction where the partners celebrated their marriage, of their domicile prior to marriage as well as those of Canada may, at least initially, all appear applicable. In such cases, there are legal rules and common-law principles that assist in sorting out which jurisdiction's rules actually apply.

[54] S.C. 1990, c. 46 as amended.

[55] R.S.C. 1985, c. C-46 as amended.

[56] Castel, J.-G., *Canadian Conflict of Laws* (Toronto: Butterworths, 1986).

[57] Note that the age at which a person may contract marriage in Canada is of provincial jurisdiction. This issue is addressed in the immigration context in s. 5(a) and s. 117(9)(a) of the IRP Regulations.

[58] *Supra*, footnote 54.

bigamy and polygamy in the *Criminal Code*.[59] These rules are interrelated with the definition of marriage as it is understood and applied in Canada. It is arguable therefore that interpreting the expression "under Canadian law" to refer to both the rules of essential validity of a marriage in Canada and to federal legislation regulating certain aspects of marriage best conforms to the intended purpose of the definition of marriage in the IRP Regulations.

The rules concerning essential validity[60] of marriage and the provisions of federal legislation concerning certain aspects of marriage are as follows:[61]

➢ The Parties Must have the Capacity to Consent to Marriage

The parties must have the capacity to consent freely to the marriage, understanding the nature and consequences of the act.

➢ The Marriage must not be one Prohibited by Degrees of Consanguinity

An individual may not marry a person to whom he or she is related lineally (for instance, grandfather, father, and daughter) or as the brother, sister, half-brother or half-sister, including by adoption.[62] Such marriages, if contracted, are void.[63]

Note that s. 155 of the *Criminal Code*,[64] concerning the offence of incest closely mirrors s. 2(2) of the *Marriage (Prohibited Degrees) Act*,[65] except for the specific provision in the latter concerning adoption.

➢ The Marriage must be Monogamous

Marriage is defined by the common-law[66] and by s. 2 of the *Civil Marriage Act*[67] as an exclusive relationship. In addition, bigamy and polygamy are considered criminal offences.[68]

---

[59] *Supra*, footnote 55.

[60] Conditions of essential validity that may be raised only by the spouses themselves are not considered here given that the sponsorship appeal process does not oppose one spouse against the other.

[61] Davies, C., *Family Law in Canada* (Calgary: Carswell Legal Publications, 1984).

[62] S. 2(2) of the *Marriage (Prohibited Degrees) Act*, *supra*, footnote 54 states: "no person shall marry another person if they are related lineally, or as the brother or sister or half-brother or half-sister, including by adoption."

[63] S. 3(2) of the *Marriage (Prohibited Degrees) Act*, *supra*, footnote 54.

[64] S. 155(1) of the *Criminal Code*, *supra*, footnote 55 states:

> Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

S. 155(4) of the *Criminal Code* states: In this section, "brother" and "sister" respectively include half-brother and half-sister.

[65] *Supra*, footnote 54.

[66] See introduction.

[67] *Supra*, footnote 21

A prior marriage is dissolved by divorce, annulment or by the death of one of the parties to the marriage.[69] The rules concerning the recognition of foreign divorce judgments in Canada are provided by the case law and s. 22 of the *Divorce Act*.

COMMON-LAW PARTNER

In order for a foreign national applying as a common-law partner to be considered a member of the family class or a family member, the foreign national must meet the definition of "common-law partner" set out in s. 1(1) as interpreted by s. 1(2) of the IRP Regulations, and the relationship must not be excluded by virtue of s. 4, s. 4.1, or s. 5 of the IRP Regulations. In addition, a foreign national applying as a common-law partner and member of the family class must not be in an excluded relationship mentioned at s. 117(9) of the IRP Regulations.

Definition of "Common-law Partner"

"Common-law partner" is defined at s. 1(1) of the IRP Regulations as:

> … in relation to a person, an individual who is cohabiting with the person, in a conjugal relationship, having so cohabited for a period of at least one year.

Section 1(2) of the IRP Regulations complements the definition. It provides a rule of interpretation which states:

> For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law partner of the person.

The definition of common-law partner refers to "…in relation to a person, an individual who is cohabiting with the person, in a conjugal relationship…" without limiting the relationship to one between a male partner and a female partner. The definition is therefore gender-neutral[70] and as such includes relationships between same-sex and opposite-sex partners.

The evidence must establish that all the elements of the definition are met in order for a foreign national to be considered a "common-law partner." The elements of the definition of "common-law partner" are discussed below.

---

[68] S. 290(1) and s. 293 of the *Criminal Code*, *supra* footnote 55, respectively.

[69] For a more detailed discussion regarding the dissolution of a prior marriage, see the discussion regarding Regulation 117(9)(c)(i) later in this chapter.

[70] In comparison, the definition of "spouse" in s. 2(1) of the former *Immigration Regulations, 1978* stated:

> "…means the party of the opposite sex to whom the person is joined in marriage."

Conjugal Relationship

As stated above, to be a common-law partner within the definition in IRPA, the couple must be in a conjugal relationship. Although the IRPA and IRP Regulations do not define "conjugal relationship," the term conjugal is ordinarily defined[71] and interpreted in the case law as referring to a "marriage-like relationship."[72] The jurisprudence has established several criteria that are useful in determining whether a conjugal relationship exists. The principal case is *M. v. H.*,[73] wherein the Supreme Court of Canada stated the following in relation to a conjugal relationship:

> *[59]* Molodowich v. Penttinen *(1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognised that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".*
>
> [60] Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.

In the immigration context, the court has stated that "it is clear that a conjugal relationship is one of some permanence, where individuals are interdependent – financially, socially, emotionally, and physically – where they share household and related responsibilities, and where they have made a serious commitment to one another.[74]

---

[71] Conjugal is defined as "consort, spouse, to join together, join in marriage, of or relating to marriage, matrimonial." *The Oxford Concise Dictionary*, 7th ed. (Oxford: Oxford University Press).

[72] For instance, *M. v. H., supra,* footnote 9.

[73] *Supra*, footnote 9.

[74] *Siev, Samuth v. M.C.I.* (F.C., no. IMM-2472-04), Rouleau, May 24, 2005; 2005 FC 736.

The criteria enunciated in *M. v. H.*[75] have been refined and expanded in subsequent case law. The following factors have been considered when examining the issue of the existence of a conjugal relationship in the context of family class sponsorship applications.[76]

- **Shelter**: Whether the partners live together in the same home as a couple and whether there is evidence they intend to co-exist as a single family unit upon reunification in Canada.[77]

- **Sexual and personal behavior**: How the partners met, evidence of the development of their relationship, and whether the partners' relationship is exclusive, committed, loving, intimate and evidenced by emotional, intellectual and physical interaction. Sexual relations are not an absolute requirement[78] although a conjugal relationship does imply that the couple has met face to face[79] and has engaged in a physical relationship.[80] The relationship should also be viewed as long-term and on-going. Note, also, that in *Singh*[81], the court recognized that it is possible to have a valid common-law relationship while being legally married to another person, provided neither one of the legally married spouses continues the marital relationship.

- **Services**: Whether household and other family–type responsibilities are shared and whether there is evidence of mutual assistance especially in time of need.

- **Social activities**: Whether the partners share time together or participate in leisure activity together - Whether they have relationships or interaction with each other's respective family.

- **Economic support**: Whether the partners are financially interdependent or dependent; Whether the partners have joined, to some extent, their financial affairs (for instance, as in

---

75 S*upra,* footnote 9.

76 See, for example, *Siev, supra,* footnote 74; *Porteous, Robert William v. M.C.I.* (IAD TA3-22804), Hoare, October 27, 2004; *McCullough, Robert Edmund v. M.C.I.* (IAD WA3-00043), Boscariol, February 5, 2004; *Kumar, Monika v. M.C.I.* (IAD TA4-10172), MacDonald, May 8, 2006; *Dunham Audrey Pearl v. M.C.I.* (IAD TA4-00144), Néron, August 24, 2004; *Stephen, Ferdinand v. M.C.I.* (IAD TA5-09330), MacLean, October 12, 2007.

77 This factor is replaced by the requirement to cohabit in the definition of "common-law partner."

78 *Stephen, supra,* footnote 76.

79 *Dunham, supra* footnote 76; *Naidu, Kamleshni Kanta v. M.C.I.* (IAD VA5-00244), Sealy, February 1, 2006.

80 *Ursua, Erlinda Arellano v. M.C.I.* (IAD TA4-08587), Boire, September 12, 2005.

81 *Singh, Amarjit v. M.C.I.* (F.C., no. IMM-5641-02), Snider, May 4, 2006; 2006 FC 565. In that case the court accepted that a valid common-law relationship could exist even though the appellant was legally married to another woman in his country, but rejected that such a situation existed on the facts because there was evidence that the appellant had been sending money to his wife in India and that, if he returned to India, his wife would expect him to return to her. See also *Cantin, Edmond v. M.C.I.* (IAD MA4-06892), Néron, August 1, 2005 wherein the panel found that the appellant had a genuine conjugal relationship with the applicant despite the fact that the appellant was still married, provided for his wife financially, and occasionally visited her. The appellant's wife had had Alzheimer's disease for several years and was in an advanced vegetative state in a special care facility. The panel was critical of the visa officer's "restrictive definition" of the concept of exclusivity given the unique and unfortunate circumstances of the case.

joint-ownership) or arranged them to reflect their ongoing relationship (for instance, naming the other partner beneficiary in an insurance policy or will).

- **Children**: The existence of children and the partners' attitude and conduct towards children in the context of their relationship.

- **Societal perception**: Whether the partners are treated or perceived by the community as a couple.

- **Capacity to consent:** The partners must be capable of freely consenting to a conjugal relationship as well as understand its nature and consequences.

- **Not prohibited by degrees of consanguinity:** The relationship must not be one which falls within the prohibited degrees of marriage set out in s. 2(2) of the *Marriage (Prohibited Degrees) Act.*[82]

- **The relationship must not be a "precursor" to a conjugal relationship:** Where the relationship may be described as a precursor to a "marriage-like" relationship, it will not be considered a conjugal relationship. For instance, persons whose marriage has been arranged but who have not met each other or persons who are dating but have not established a marriage-like relationship, are not in a conjugal relationship. Note that fiancés are no longer members of the family class but may nevertheless be considered common-law partners or conjugal partners if they meet the requirements of the applicable definition including, being at the time of the application, in a marriage-like relationship.[83]

The interplay of these factors in the context of family class sponsorships has been considered in several cases. The jurisprudence clearly indicates that the importance of any of these characteristics will vary with the context and it is not necessary that all of them be present before a conjugal relationship is found to exist. The goal is to determine whether the relationship is conjugal and the criteria must be applied only insofar as they may assist in this determination.[84]

---

[82] *Supra*, footnote 54.

[83] S. 121(a) of the IRP Regulations. According to the RIAS, *supra*, footnote 7:

> The Regulations as pre-published have been modified to remove fiancés and intended common-law partners. The number of people who have been seeking permanent residence as fiancés has been steadily declining. With respect to the "intended common-law partners," the assessment of the intention of couples to cohabit goes beyond the scope of a normal immigration assessment and would be extremely difficult to administer. The conjugal partner category is a more workable approach to accommodate persons in a conjugal relationship unable to cohabit.

[84] *Lavoie v. Canada (Minister of National Revenue)*, [2000] F.C.J. No. 2124 (F.C.A.), (QL) at para. 13 (the dissenting reasons of Justice Décary) wherein it is mentioned:

> I would add, for the purposes of the rehearing, that the factors set out in *Milot* [case citing the factors in *Molodowich* v. *Penttinen*]… do not have absolute value. They are useful to be sure, but they must be adapted to the context in which they are used. If we look too closely at the trees, we may not see the forest. In this case the forest is the conjugal relationship, a concept that

The question is essentially whether the evidence establishes a marriage-like relationship between the partners.

When determining whether a conjugal relationship exists, it is important to consider the cultural realities of the relationship. This is particularly important in the immigration context where one or both of the partners often are coming from a cultural background quite different than the Canadian milieu. In *Siev*, the Federal Court stated that "…the case law indicates to us that the evidence should not be minutely scrutinized and that one should refrain from applying North American reasoning to an applicant's conduct."[85] Cultural factors are often particularly relevant in same-sex relationships. In *Leroux*,[86] the court stated that "it seems to me to be important to keep in mind the restrictions which apply because the partners live in different countries, some of which have different moral standards and customs which may have an impact on the degree of tolerance for conjugal relationships, especially where same-sex partners are concerned. Nevertheless, the alleged conjugal relationship must have a sufficient number of features of a marriage to show that it is more than just a means of entering Canada as a member of the family class."[87]

Cohabitation

The definition of common-law partner requires that an individual "… is cohabiting …in a conjugal relationship, having so cohabited for a period of at least one year." The partners must therefore be cohabiting and have cohabited conjugally and for at least one year. It is necessary, therefore, to determine when the partners were cohabitating.

In addition to being one of the factors indicative of a conjugal relationship, cohabitation is a mandatory requirement of the definition of common-law partner. Hence, for the purposes of the definition of common-law partner, the "shelter" criterion, which serves in the case law to establish whether the relationship is marriage-like, is replaced by the legislative requirement to cohabit in a conjugal relationship for at least one year.

---

evokes a common life, which presupposes that the couple are involved with each other, together and in a lasting way on the personal, sexual, family, social and financial levels."

For some other cases that have applied the criteria originally listed in *Molodowich v. Penttinen*, see the following: *Baird v. Iaci*, [1997] B.C.J. No. 1789 (S.C.)(QL); *Roberts v. Clough*, [2002] P.E.I.J. No. 37 (S.C. (T.D.)), (QL); *Fraser v. Canadien National*, [1999] J.Q. no. 2286, (S.C.)(QL) and *Spracklin v. Kichton*, [2000] A.J. No. 1329 (Q.B.), (QL). For recent cases from the IAD see: *McCullough, supra,* footnote 76; *Macapagal, Rodolfo v. M.C.I.* (IAD TA2-25810), D'Ignazio, February 18, 2004.

[85] *Siev, supra*, footnote 74 at paragraph 16. See also *McCullough, supra*, footnote 76.

[86] *Leroux, Jean-Stéphane* v. M.C.I. (F.C. no. IM-2819-06), Tremblay-Lamer, April 17, 2007; 2007 FC 403 at paragraph 23.

[87] *Ibid.*

Cohabitation is not defined in the IRPA or the IRP Regulations but has been interpreted in the common law to mean "living together as husband and wife."[88] The IAD has adopted this definition as well.[89] Case law interpreting the term cohabitation in the family law context indicates that it refers to persons living under the same roof in a conjugal relationship and also indicates that partners are not required to be divorced or legally separated from a former partner to cohabit.[90] Further, the common-law partners do not have to necessarily physically reside at the same location without interruption.[91] In the context of family and estate law, the courts have held that in certain circumstances, usually in cases involving shared custody arrangements or work related obligations, cohabitation is established even though the parties do not physically live together at the "conjugal home" throughout the week or for a period of the year.[92]

However, it is not clear whether the time the partners spend apart (not cohabiting conjugally) is automatically to be taken into account in calculating the one-year period of cohabitation. For instance, where a partner has cohabited in a conjugal relationship for nine months and, although the relationship is ongoing, he or she spends the remaining three months out of the one-year period in another city (away from his or her partner), will the partner be considered to have cohabited in a conjugal relationship for one year or for nine months? In calculating the period of cohabitation, it appears relevant to consider the reasons for which the partners were not residing together.

Cohabitation does not come to an end if the partners live separately during a "cooling-off period" or during a time of reassessment; it ends when "either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this state of mind is a settled one."[93]

Cohabitation alone does not necessarily signify a common-law relationship. There must also be a "mutual commitment to a shared life."[94]

Exception to the Requirement to Cohabit

---

[88] Cohabitation: To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations. *Black's Law Dictionary*, 6th ed. (St. Paul, West Publishing Co.).

[89] *Do, Thi Thanh Thuy* (IAD TA3-17390), D'Ignazio, September 3, 2004.

[90] *Sullivan v. Letnik* (1997), 27 R.F.L. (4th) 79 (Ont. C.A.).

[91] *Do, supra*, footnote 89. In this case, the applicant had been travelling back and forth to Vietnam over a period of 11 years, living with his partner during the times he was in Vietnam, and they had had a child together. The panel found that a common-law relationship existed.

[92] *Thauvette v. Malyon* [1996] O.J. No. 1356 (Gen. Div.)(QL), mentioned in: *McCrea* v. *Bain Estate*, [2004] B.C.J. No.290 (QL); See also *Hazlewood v. Kent*, [2000] O.J. No. 5263 (Sup. Ct.)(QL) and *Craddock v. Glover Estate* [2000] O.J. No. 680 (S.C.)(QL).

[93] *Sanderson v. Russell* (1979), 24 O.R. (2d) 429, (C.A.) and *Feehan v. Attwells* (1979), 24 O.R. (2d) 248 (Co. Ct).

[94] *Cai, Changbin v. M.C.I.* (F.C. no. IMM-6729-06), Kelen, August 3, 2007; 2007 FC 816.

Section 1(2) of the IRP Regulations states:

> For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law partner of the person.

This provision sets out the circumstances under which an individual in a conjugal relationship with another person for at least one year will be considered a common-law partner of that person even though the requirement of cohabitation in the definition of "common-law partner" has not been met.

According to s. 1(2) of the IRP Regulations, a partner is excused from fulfilling the cohabitation requirement where he or she is unable to cohabit with the other due to persecution or any form of penal control. The comments on this provision in the RIAS suggest that the intent of this section is that the persecution or penal control must be due to the partners' conjugal relationship.[95]

The IRPA and the IRP Regulations do not define persecution or penal control. Persecution has been characterized in Canadian case law pertaining to the Convention refugee definition as referring to repeated or systemic infliction of serious harm[96] or treatment which compromises or denies basic human rights.[97] Discrimination is not persecution but cumulative acts of discrimination may amount to persecution.[98]

Penal control is a form of punishment usually inflicted or sanctioned by the state. Given the use of the expression "due to … any for of penal control" in s. 1(2) of the IRP Regulations, "penal control" is arguably not limited to incarceration or detention but may include corporal punishment, house arrest and other significant measure taken to punish an individual.[99] Such control may be the result of civil or criminal action and may be extra-judicial.

---

[95] See the comments at p. 261 of the RIAS, *supra*, footnote 7:

> It was suggested to expand the factors excusing common-law partners from cohabiting to include discrimination in addition to "persecution" and "penal control". Considering that "persecution" or "any form of penal control" can mean strong social sanctions which result in ostracism, loss of employment, inability to find shelter or other forms of persecution as a result of the relationship, no change has been made to the pre-published provisions."

[96] *Rajudeen v. Canada (Minister of Employment and Immigration)*, (1984), 55 N.R. 129 (F.C.A.).

[97] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593. For instance, the following mistreatment has been considered to be persecution: torture, beatings, rape, death threats, trumped-up charges, arbitrary detention and denial of the right to work. See in general Chapter 3 entitled "Persecution" of the RPD Interpretation of the Convention Refugee Definition in the Case Law Paper, December 31, 2005.

[98] See the jurisprudence listed in section 3.1.2. of the Refugee Protection Division, *Interpretation of the Convention Refugee Definition in the Case Law* Paper, December 31, 2005.

[99] For instance, a same-sex conjugal relationship may be considered illegal and the partners subject to imprisonment or lashings.

The persecution or penal control must be such that an individual is unable to cohabit with another. In cases where an individual may obtain relief from persecution or penal control, it may be relevant to assess whether such relief was sought so as to enable one partner to cohabit with the other.

CONJUGAL PARTNER[100]

In order for a foreign national applying as a conjugal partner to be considered a member of the family class, the foreign national must meet the definition of "conjugal partner" at s. 2 of the IRP Regulations and the relationship must not be excluded by virtue of s. 4, s. 4.1 or by s. 117(9) of the IRP Regulations.

Definition of "Conjugal Partner"

Conjugal partner is defined at s. 2 of the IRP Regulations as:

> … in relation to a sponsor, a foreign national residing outside of Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

The definition of conjugal partner refers to "…in relation to a sponsor, a foreign national … who is in a conjugal relationship…" without limiting the relationship to one between a male partner and a female partner. The definition is therefore considered gender-neutral and as such includes relationships between same-sex and opposite-sex partners. This has been confirmed by the Federal Court in *Leroux*.[101]

The elements of the definition of "conjugal partner" are considered below.

Conjugal Relationship

Subject to the following discussion, the comments earlier in this chapter concerning "conjugal relationship" in the context of the definition of "common-law partner" apply to the definition of "conjugal partner" because both definitions require that the partners be in a conjugal relationship. Although cohabitation is not required by the definition of "conjugal partner," where the partners allege to have cohabited, the comments concerning cohabitation may be helpful. Given that cohabitation is one of the characteristics of a conjugal relationship according to the case law, the applicant and the sponsor may reasonably be required to indicate why they have not cohabited.

---

[100] Many of the concepts applicable to common-law partners are also applicable to conjugal partnerships, and are not repeated in this section. Please refer to the section on common-law partners.

[101] *Leroux*, *supra*, footnote 86.

The relationship of "conjugal partners" may not be as developed as that of "common-law partners" because they may not have cohabited. The partners may not have the same depth of knowledge of one another. However, this does not change the fact that their relationship is required to be a conjugal one and not simply one that is anticipated to become conjugal. While there is no cohabitation requirement, in one case the IAD stated that in the context of a relationship that developed over the internet over a three-year period of time, it would have been expected that the partners met in person.[102] In another case the IAD panel stated that "persons whose marriage has been arranged but who have not met each other and have not established a marriage-like relationship are not in a conjugal relationship."[103] Finally, in *Ursua*[104] the panel dismissed an appeal on the basis that the relationship had not been established within the one-year requirement. In that case, the appellant indicated that the conjugal relationship had started when they had made love on the phone. The panel, however, rejected this argument indicating that a conjugal relationship implies a physical relationship.

Conjugal partners may be reasonably asked to establish whether they intend to marry or live in a common-law relationship once reunited with their sponsor. "Conjugal partner" is not a legally recognized status in Canada. Conjugal partners do not have the same rights and benefits as spouses and common-law partners under Canadian law. It is therefore reasonable to expect that partners will convert their ongoing conjugal relationship to a common-law relationship or they will marry. However, prior to making the sponsorship application, the partners do not have to be married or live in a common-law relationship, even if that would have been possible.[105]

Duration of the Conjugal Relationship

As when assessing common-law relationships, it is important to determine when the conjugal relationship began. Partners are required to be and to have been in a conjugal relationship for at least one year.[106] Although it is not necessary to determine the exact date on which the conjugal relationship began, evidence should establish that it began before the one-year requirement.[107] There is no indication that the one-year relationship must necessarily have

---

[102] *Dunham, supra*, footnote 76.

[103] *Naidu, supra*, footnote 79.

[104] *Ursua, supra*, footnote 80.

[105] In *Chartrand, Rita Malvina v. M.C.I.* (IAD TA4-18146), Collins, February 20, 2006, the visa officer had rejected the sponsorship application because "if couples can marry or cohabit, they are expected to do so before the immigration process takes place." The panel rejected this notion, indicating that couples have a right to choose the type of relationship that suits them best as well as the right time to marry. The IAD found that there was no requirement to marry before the immigration process started even if the couple could have done so.

[106] See, for example, *Bui, Binh Cong v. M.C.I.* (IAD TA3-18557), Whist, August 19, 2005 wherein the panel assessed the criteria for the existence of a conjugal relationship and concluded that while the partners may have been in a conjugal relationship at the time they made their sponsorship application, the indicia did not indicate that it had begun one year before the application was made.

[107] See, for example, *Laforge, Robert v. M.C.I.* (IAD MA3-08755), Beauchemin, July 20, 2004 wherein the panel stated that the conjugal relationship started in July **or** August 2002, but in any event it was within the one-year requirement.

taken place in the year immediately preceding the application for permanent residence. However, the partners are required to be in a conjugal relationship at the time of the application and may be reasonably requested to explain the break in their conjugal relationship. The partnership between the partners may be said to begin when the characteristics of a conjugal relationship were first present and to end when such characteristics are no longer present.[108]

EXCLUDED RELATIONSHIPS

Section 5 of the IRP Regulations[109]

A foreign national is not considered a spouse or a common-law partner where the foreign national is in an excluded relationship mentioned in s. 5 of the IRP Regulations.

The excluded relationships are described below.

> **<u>Section 5(a)</u>: A foreign national shall not be considered the spouse or the common-law partner of a person if the foreign national is under the age of 16 years; or**

A foreign national must be 16 years of age or older to be considered a spouse or common-law partner. The foreign national must meet the age requirement at the time the application for a permanent resident visa is made.[110] While this section applies only to spouses and common-law partners, note that IRP Regulation 117(9)(a) contains a similar restriction that applies to spouses, common-law partners, and conjugal partners who are being sponsored.

Section 5(a) of the IRP Regulations does not impede a foreign national from marrying or cohabiting in a conjugal relationship prior to the age of 16 years. Consequently, it appears that a foreign national may cohabit in a conjugal relationship prior to the age of 16 years in order to fulfill the one-year requirement to so cohabit contained in the definition of "common-law partner" and thereby be in a position to apply for a permanent resident visa upon turning 16 years old.

Note, however, that local legislation may regulate or prohibit marriage or common-law relationships where either or both parties are under a certain age. If the act of engaging in sexual activity with a minor under a certain age is considered an offence under local legislation and is

---

[108] See the case law concerning the duration of cohabitation, *supra*, footnote 93, which applies the same approach in determining the end of cohabitation.

[109] There is substantial overlap between section 5 of the IRP Regulations and section 117(9). Please refer to the discussion later in this chapter regarding regulation 117(9) for further discussion regarding some of these concepts.

[110] S. 121(a) of the IRP Regulations requires that the person be a family member (in this case, spouse or common-law partner) of the applicant or of the sponsor at the time the application is made.

also considered an offence under Canadian law, the foreign national may be inadmissible for serious criminality or criminality by virtue of s. 36 of the IRPA.

> **Section 5(b)(i): A foreign national shall not be considered the spouse of a person if the foreign national or the person was, at the time of their marriage, the spouse of another person; or**

The foreign national will not be considered a spouse where, at the time the foreign national and the sponsor or the member of the family class married, either or both, were the spouse of another person.

The effect of this provision is to exclude foreign nationals in bigamous and polygamous relationships from being considered spouses. The marriage will not be considered an excluded relationship if it is a first marriage for both parties or, if it is not their first marriage, at the time they married, all prior marriages had been dissolved.

> **Section 5(b)(ii): A foreign national shall not be considered the spouse of a person if the person has lived separate and apart from the foreign national for at least one year and is the common-law partner of another person.**

The foreign national will not be considered a spouse where the following two elements are present: first, the foreign national and the person have lived separate and apart for at least one year and second, the person is the common-law partner of another person.

- **"Separate and Apart"**: This expression is used in the context of family law and more particularly in s. 8(2)(a) of the *Divorce Act*, to refer to spouses who are no longer in a conjugal relationship and are leading separate lives.[111] In cases where the spouses continue to live under the same roof, they are considered to be living separate and apart if they are not cohabiting in a conjugal manner.

- **Involvement with a common-law partner**: The sponsor or the member of the family class must be involved in a common-law partnership with another person. In order to meet the definition of common-law partner, the parties must have been cohabiting in a conjugal relationship for at least one year. Where the sponsor or the member of the family class and the spouse have not been living separate and apart for a year, the relationship with the partner will not be considered a common-law relationship. These rules preclude a sponsor from sponsoring his spouse while at the same time having his or her relationship with another person qualify as a common-law partnership. Similarly, a member of the family class will not be able to name his or her spouse as an accompanying family member and have a relationship with another person qualify as a common-law partnership.

[111] *Supra*, footnote 61.

Section 5(b)(ii) probably does not apply in the following situations because one or more of the elements of the provision is not met and the foreign national is considered a "spouse:"

- The foreign national (spouse) and the person (sponsor or member of the family class) have been living separate and apart and the person is not the common-law partner of another person;[112]

- The foreign national (spouse) and the person (sponsor or member of the family class) have been living separate and apart for less than one year and the sponsor or the member of the family class is involved in a relationship of a conjugal nature. The relationship of a conjugal nature would not qualify as a common-law relationship because the partners have not cohabited in an exclusive conjugal relationship for at least one year. The person has lived in a marital relationship with the foreign national for part of the year. Hence, the sponsor or member of the family class is precluded from establishing a common-law relationship if he or she has not been living separate and apart from the foreign national for at least one year.

Section 117(9) of the IRP Regulations

Section 117(9) of the IRP Regulations provides that a foreign national is not considered a member of the family class by virtue of his or her relationship to the sponsor where the relationship is described in one or more of the provisions at s. 117(9)(a) to (d).

The excluded relationships are discussed below.

Section 117(9)(a): The foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age; or

A foreign national applying for permanent residence as a sponsor's spouse, common-law partner or conjugal partner must be 16 years of age or older to be considered a member of the family class. The foreign national must meet the age requirement at the time the application for a permanent resident visa is made.[113]

Section 117(9)(a) of the IRP Regulations does not impede a foreign national from marrying or entering into a conjugal relationship prior to the age of 16 years. Consequently, it appears that a foreign national may cohabit in a conjugal relationship prior to the age of 16 years in order to fulfill the one-year requirement to so cohabit contained in the definition of "common-law partner" and be in a position to apply for a permanent resident visa upon turning 16 years old. Similarly, a foreign national may enter into a conjugal relationship prior to the age of 16 years in order to fulfill the requirement of being in a conjugal relationship for at least one year contained in the definition of "conjugal partner" and apply for a permanent resident visa at 16 years old.

[112] Note, however, that s. 4 of the IRP Regulations (provision concerning bad faith relationships) may apply.

[113] *Supra*, footnote 110.

Note, however, that local legislation may regulate or prohibit marriage, common-law relationships or conjugal relationships where either or both parties are under a certain age. If the act of engaging in sexual activity with a minor under a certain age is considered an offence under local legislation and is also considered an offence under Canadian law, the foreign national may be inadmissible for serious criminality or criminality by virtue of s. 36 of the IRPA.

In addition, a foreign national applying as a sponsor's spouse or common-law partner is not considered a "spouse" or a "common-law partner" prior to age 16 pursuant to s. 5(a) of the IRP Regulations and is consequently not a member of the family class. The purpose served by s. 117(9)(a) in the case of a foreign national applying as a sponsor's spouse or common-law partner is redundant. Section 117(9)(a) may serve to explicitly remove a foreign national applying as a sponsor's spouse or common-law partner from the family class.

> **<u>Section 117(9)(b):</u> 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; or**

A spouse, common-law partner or conjugal partner is not considered a member of the family class where the sponsor's previous undertaking with respect to a spouse, common-law partner or conjugal partner has not come to an end. In the case of a family class sponsorship, an undertaking begins, in accordance with s. 132(1)(a)(iii) of the IRP Regulations, on the day on which the foreign national becomes a permanent resident and ends pursuant to s. 132(1)(b)(i), on the last day of a period of three (3) years from the first day. Where the sponsor resides in a province which has entered into an agreement referred to in s. 8(1) of the IRPA, s. 132(3) sets the duration of the undertaking at ten (10) years unless a shorter duration[114] is provided by provincial legislation. In Quebec, s. 23(a)(i) of the *Regulation respecting the selection of foreign nationals*,[115] sets the duration of an undertaking in the case of the sponsorship of a spouse, *de facto* spouse and conjugal partner at three (3) years.

For transitional cases, s. 351(3) of the IRP Regulations specifically provides that the duration of undertakings given under s. 118 the former *Immigration Act*, which include undertakings for sponsorships of members of the family class given before June 28th 2002, is not affected by the IRP Regulations. The duration of an undertaking for the sponsorship of a spouse was ten (10) years pursuant to the definition of undertaking in s. 2(1) and s. 5(2) of the *Immigration Regulations, 1978*. For undertakings given by Quebec residents, s. 23(a)(i) of the *Regulation respecting the selection of foreign nationals*[116] provided that in the case of spouses, the duration of the undertaking was three (3) years.

---

[114] S. 132(3) of the IRP Regulations.

[115] R.R.Q., 1981, c. M-23.1, r. 2 as amended.

[116] *Ibid.*

<u>Section 117(9)(c)(i):</u> The foreign national is the sponsor's spouse and the sponsor or the foreign national was, at the time of their marriage, the spouse of another person; or

The foreign national will not be considered a member of the family class where at the time the foreign national and the sponsor married, either or both, were the spouse of another person.

There is some overlap between this regulation and s. 5(b)(i) of the IRP Regulations which stipulates that a foreign national is not to be considered the spouse of a person if either the foreign national or the spouse was, at the time of their marriage, the spouse of another person. The marriage will not be considered an excluded relationship if it is a first marriage for both parties or, if it is not their first marriage, at the time they married, all prior marriages had been dissolved. Note that this provision does not apply to common-law partners or conjugal partners.

A prior marriage is dissolved by divorce, annulment or by the death of one of the parties to the marriage. Section 117(9)(c)(i) of the regulations is most commonly at issue when the validity of a previous divorce of either of the spouses is in question.[117] The rules concerning the recognition of foreign divorce judgments in Canada are provided by the case law and s. 22 of the *Divorce Act*.[118]

Section 22(1) of the *Divorce Act* stipulates that for a divorce to be recognized in Canada, one of the spouses must have been "ordinarily resident" in the place where the divorce was granted for at least a year before the divorce was granted. Ordinarily resident has been interpreted to carry "a restricted significance" and to mean "residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to the question of its application."[119]

---

[117] In this regard, the discussion earlier in this chapter regarding evidentiary issues of foreign marriages may be helpful.

[118] 22. (1) A divorce granted, on or after the coming into force of this Act [editor's note: this was July 1, 1986], pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.

(2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.

(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

[119] *Thomson v. M.N.R.*, [1946] S.C.R. 209 per Rand J. See also *MacPherson v. MacPherson* (1977), 13 O.R. (2d) 233 (C.A.) at paragraph 8 per Evans J. dissenting in part, but not on this point.

Note also that subsection 22(3) of the *Divorce Act* preserves the common-law with respect to the recognition of divorces. There were several common-law rules developed prior to the adoption of divorce legislation in Canada which are succinctly summarized in *El Qaoud,*[120] quoting *Payne on Divorce, 4th ed. :*

> . . . Section 22(3) of the *Divorce Act* expressly preserves pre-existing judge made rules of law pertaining to the recognition of foreign divorces. It may be appropriate to summarize these rules. Canadian courts will recognize a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties; (iii) where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.

Thus, in *Bhatti,*[121] the applicant was refused an immigrant visa and the issue in the appeal was the validity of the appellant's marriage to the applicant. The appellant had obtained a religious divorce in Pakistan. The panel recognized the divorce and allowed the appeal finding that the appellant had a real and substantial connection to Pakistan. However in *Ghosn,*[122] the panel rejected the argument that the appellant had legally divorced in Canada when he went through a form of religious divorce.

> **<u>Section 117(9)(c)(ii):</u> The foreign national is the sponsor's spouse and 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**

The foreign national will not be considered a member of the family class where the following two elements are present: first, the sponsor and the foreign national must have been living separate and apart for at least one year <u>and</u> second, the sponsor is involved in a common-law partnership with another person or a conjugal partnership with another foreign national or the

---

[120] *Orabi v. Qaoud*, 2005 NSCA 28 at paragraph 14.

[121] *Bhatti, Mukhtar Ahmad* (IAD TA2-11254), MacPherson, July 10, 2003 followed in *Amjad, Ali Saud v. M.C.I.* (IAD TA3-09455), Hoare, February 11, 2005.

[122] *Ghosn, Kassem Ata v. M.C.I.* (IAD VA4-02673), Rozdilsky, March 27, 2006.

foreign national is involved in a common-law partnership with another person or in a conjugal partnership with another sponsor.

- **"Separate and Apart"**: This expression is used in the context of family law and more particularly in s. 8(2)(a) of the *Divorce Act*, to refer to spouses who are no longer in a conjugal relationship and are leading separate lives.[123] In cases where the spouses continue to live under the same roof, they are considered to be living separate and apart if they are not cohabiting in a conjugal manner.

- **Involvement with a common-law partner or conjugal partner**: Where the sponsor and the spouse have not been living separate and apart for a year, the sponsor's or the foreign national's relationship with another partner will not be considered a common-law or conjugal relationship because the relationship has not been exclusive and ongoing for one year. These rules preclude a sponsor from sponsoring his spouse and having his or her relationship with another individual, or the spouse's relationship with another individual, qualify as a common-law partnership or conjugal partnership.

Note that s. 5(b)(ii) of the IRP Regulations may also apply to disqualify a foreign national from being considered a spouse or a common-law partner and hence a member of the family class.

> **Section 117(9)(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 of the sponsor and was not examined.**

This provision, which was amended in 2004[124] to its current form, excludes foreign nationals who, at the time the sponsor applied for permanent residence, were non-accompanying family members of the sponsor and were not examined.

Sections 117(10) and (11) of the regulations were also added in 2004. Section 117(10) creates an exception to the exclusionary rule. It stipulates that regulation 117(9)(d) does not apply when the foreign national was not examined because an officer had determined that they were not required by the Act or the former Act to be examined. This exception is narrowed somewhat in subsection (11) which stipulates that the exception in subsection (10) does not apply if an officer determines that (a) the sponsor was informed that the foreign national could be examined and the sponsor was able to the make the foreign national available for examination but did not do so or the foreign national did not appear for the examination, or (b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

[123] *Supra*, footnote 61.

[124] SOR/2004-167, July 22, 2004.

The constitutionality of s. 117(9)(d) has been confirmed by the Federal Court of Appeal.[125] Further, the Court of Appeal has interpreted the phrase "at the time of the application" in section 117(9)(d) to mean the life of the application from the time when it is initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry.[126] Therefore, a foreign national who makes an application for permanent residence is under an obligation to disclose all non-accompanying family members at the time they make the application and the obligation continues up to the time they are granted landing at the port of entry. A foreign national will not be considered a member of the family class if they were a non-accompanying family member who was not declared by the sponsor at the time of the application even if the sponsor had not been aware of the foreign national's existence at that time.[127]

Transitional Issues

For transitional cases, the IRP Regulations provide as follows:

Section 352: A person is not required to include in an application a non-accompanying common-law partner if the application was made under the former *Immigration Act*;

Section 353: Section 70(1)(e) of the IRP Regulations, which requires that non-accompanying family members not be inadmissible in order for a permanent resident visa to be issued to a foreign national, is not applicable where the non-accompanying family member is a common-law partner and the application was made under the former *Immigration Act*;

Section 354: The non-accompanying common-law partner of a person who made an application before June 28th 2002 shall not be considered an inadmissible non-accompanying family member under s. 42(a) of the IRPA, shall not be subject to a medical examination under s. 30(1)(a) of the IRP Regulations and will not be required to establish that they meet the requirements of the IRPA and the IRP Regulations upon examination at the port of entry in accordance with s. 51(b) of the IRP Regulations.

Section 355: If a person who made an application under the former Act before June 28, 2002 sponsors a non-accompanying dependent child, referred to in section 352, who makes an application as a member of the family class or the spouse or common-law partner in Canada class, or sponsors a non-accompanying common-law partner who makes such an application, paragraph 117(9)(d) does not apply in respect of that dependent child or common-law partner.

---

[125] *De Guzman, Josephine Soliven v. M.C.I.* (F.C.A., no. A-558-04), Evans, Desjardins, Malone, December 20, 2005; 2005 FCA 436, leave to appeal to the SCC rejected with costs June 22, 2006 (*De Guzman v. M.C.I.*, 2006 S.C.C.A. No. 70 (Q.L.)).

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

[127] *Adjani, Joshua Taiwo v. M.C.I.* (F.C., no. IMM-2033-07), Blanchard, January 10, 2008; 2008 FC 32. [this case included in this paper despite the publishing deadline of January 1, 2008]

Thus, in *Kong*[128] the IAD allowed an appeal where the appellant had immigrated to Canada with his then spouse and children. At the time, he had a girlfriend with whom he had a son. Neither the girlfriend nor son had been disclosed at the time of his first application. He later attempted to sponsor them after his marriage broke down and he had subsequently married his girlfriend. The IAD found that the transitional provision in section 352 applied to his new wife as there were no provisions to sponsor common-law partners under the former *Immigration Act*. Further, the IAD found that the transitional provision in section 355 applied to the son as he was being sponsored as a dependent child of his wife and not directly by the appellant.

RELATIONSHIPS FOR THE PURPOSE OF ACQUIRING A STATUS OR PRIVILEGE UNDER THE ACT

Bad Faith – Section 4 of the IRP Regulations

Section 4 of the IRP Regulations states:

> 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 and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

In order for a foreign national to be considered a spouse, common-law partner or conjugal partner, the evidence must establish that the relationship in question, namely the marriage, the common-law partnership or the conjugal partnership, is not a bad faith relationship. The burden of establishing the *bona fides* of the marriage is on the appellant at the IAD[129] but the evidence should not be minutely scrutinized nor should North American reasoning necessarily be applied to partners coming from another culture.[130] Genuineness of a relationship should be examined through the eyes of the parties themselves against the cultural background in which they have lived.[131]

---

[128] *Kong, Wai Keung Michael v. M.C.I.* (IAD TA6-08094), Ahlfeld, January 31, 2008.

[129] *Morris, Lawrence v. M.C.I.* (F.C. no. IMM-5045-04), Pinard, March 18, 2005; 2005 FC 369.

[130] *Siev, supra*, footnote 74.

[131] Therefore, in *Khan, Mohammad Farid v. M.C.I.* (F.C. no. IMM-2971-06), Hughes, December 13, 2006; 2006 FC 1490 the court allowed an application for judicial review of an IAD decision wherein it had been found that the marriage between the appellant and the sister of his deceased brother was not genuine. Although the evidence indicated that the marriage was entered into to preserve the honour of the family, there was no reason why such a marriage cannot be genuine given the cultural factors. See also *Owusu, Margaret v. M.C.I.* (F.C. no. IMM-1402-06), Harrington, October 6, 2006; 2006 FC 1195.

According to s. 4 of the IRP Regulations, a bad faith relationship is one for which it is established (1) the relationship is not genuine and (2) the relationship was entered into primarily for the purpose of acquiring any status or privilege under the Act.[132] To succeed in an appeal, the appellant must only demonstrate that one of the two prongs does not apply to the relationship.[133] Some of the factors helpful in assessing the intention of and genuineness of the relationship are: the length of the relationship, whether it was an arranged marriage, the age difference, the partners' former marital or civil status, their respective financial situation, their employment, their family background, their knowledge of one another's histories, their language, their respective interests, and their immigration histories.[134] However, these factors are only useful guidelines that must be adapted to fit the circumstances.[135]

The genuineness branch of the bad faith test in s. 4 uses the present tense; therefore, the focus is on whether there is a continuing genuine relationship at the time of assessment.[136] Also, a relationship will not be considered genuine if, at the time of the hearing of the appeal, the evidence establishes that the partners do not intend to continue their relationship.[137] In assessing the genuineness of the relationship, it is not just the intention of the sponsored spouse, common-law partner, or conjugal partner that is relevant. The focus is on the overall genuineness of the relationship and its primary purpose, for which the evidence of both spouses is relevant.[138] When determining if a marriage is caught by the first prong of the test in section 4 of the IRP Regulations, genuine does not equate to legal. The test in section 4 is only applied to what has already been determined to be a legal marriage under section 2.[139]

A relationship that was entered into primarily for the purpose of acquiring any status or privilege under the IRPA is one that was entered into in order to obtain permanent residence in Canada or some other status or privilege. In the case of a marriage, the time at which the relationship was entered into refers to the date of the marriage. In the case of a common-law partnership, it refers to the date on which the partners began to cohabit in a conjugal relationship and in the case of a conjugal partnership, it refers to the date on which the foreign national and the sponsor began a conjugal relationship. While the focus of this branch of the test is the

---

[132] *Sanichara, Omeshwar v. M.C.I.* (F.C. no. IMM-5233-04), Beaudry, July 25, 2005; 2005 FC 1015*; Froment, Danielle Marie v. M.C.I.* (F.C. no. IMM-475-06), Shore, August 24, 2006; 2006 FC 1002.

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

[134] See, for example, *Khera, Amarjit v. M.C.I.* (F.C. no. IMM-6375-06), Martineau, June 13, 2007; 2007 FC 632 and *Owusu, supra,* footnote 131.

[135] *Owusu, supra,* footnote 131.

[136] *Donkor, Sumaila v. M.C.I.* (F.C. no. IMM-654-06), Mosley, September 12, 2006; 2006 FC 1089. The Court also recognized that s. 4 of the IRP Regulations may leave open the possibility that a relationship that was originally entered into for the purpose of acquiring a status or privilege under the Act may become genuine and therefore not be excluded by the regulation.

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

[138] *Gavino, Edwin Dorol v. M.C.I.* (F.C. no. IMM-3249-05), Russell, March 9, 2006; 2006 FC 308; *Mann, Jagdeep Kaur v. M.C.I.* (IAD TA3-19094), Stein, August 5, 2005.

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

intention of the partners at the time they entered into the relationship, the IAD is entitled to examine the conduct of the couple after the relationship began in order to determine what their intention was when they entered into the relationship.[140] Only one of the partners in the relationship need have as their primary purpose the acquisition of any status or privilege under the Act.[141] Finally, the appeal may be allowed if immigration is a factor in the relationship, provided it is not the primary factor.[142]

The relationship need not be entered into for the purpose of acquiring a status or privilege for the sponsored foreign national. The relationship will be caught by the second prong of section 4 so long as the relationship was entered into primarily to ensure that some privilege under the Act would be conveyed to someone. Therefore, in *Gavino,*[143] the court held that even if the privilege accrued from the marriage would be conveyed to the appellant's children, the second prong of the branch was satisfied.

While many of the factors relevant in determining if a common-law or conjugal partnership exist are the same as the factors relevant in determining good faith, it is still a distinct two-step process wherein first the validity of the relationship is established, and then whether section 4 of the IRP regulations applies.[144]

New Relationships – Section 4.1 of the IRP Regulations

The IRP Regulations were amended in 2004 with the addition of section 4.1[145] which added a new category of bad faith relationships. 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.

The intent of section 4.1 has been stated to be "to prevent persons in a conjugal relationship from dissolving the relationship to free them to gain admission to Canada only to

[140] *Mohamed, Rodal Houssein v. M.C.I.* (F.C. no. IMM-6790-05), Beaudry, May 24, 2006; 2006 FC 696.

[141] See, for example, *Brunelle, Sherry Lynn v. M.C.I.* (IAD VA4-00937), Munro, January 28, 2005.

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

[143] *Gavino, supra,* footnote 138.

[144] *Macapagal, supra,* footnote 84.

[145] SOR/2004-167, s. 4.

turn around and resume their previous relationship.[146] Section 4.1 will apply even if the partners originally dissolved their relationship with the intent of facilitating their admission to another country, only to change their plans and come to Canada.[147]

In *Wen*,[148] the IAD set out a list of non-exhaustive factors to consider when assessing the applicability of section 4.1 of the Regulations. They are: when the relationship was dissolved, the reason for the dissolution of the relationship, the temporal relationship between the ending of the relationship and the forming of a new relationship with the subsequent partner, evidence that the former spouses or partners did not separate or end contact with each other, the intent of the spouses or partners upon reestablishing their relationship, the length of the subsequent relationship, the temporal connection between the dissolving of the subsequent relationship and the re-establishment of a new relationship with the previous spouse or partner, and the intentions of the parties to the new relationship in respect of immigration.

TIMING – Section 121(a) of IRP Regulations

Section 121(a) of the IRP Regulations requires that a person who makes an application for a permanent resident visa as a member of the family class or as a family member must be a family member of the applicant or of the sponsor both at the time of the application and at the time of its determination. Hence, the foreign national must be a spouse or meet the definition of common-law partner or of conjugal partner and not be in an excluded relationship or bad faith relationship both at the time of the application for a permanent residence visa and at the time a determination is made by the officer.

It is arguable that a foreign national must also be a member of the family class or a family member at the time of the filing of the appeal and at the time of the hearing before the IAD since their interest in obtaining a permanent resident visa is premised on their continuing relationship with the sponsor or the applicant. Section 67(1)(a) of the IRPA[149] may be relied upon as support for this position.

---

[146] *Harripersaud, Janet Rameena v. M.C.I.* (IAD TA3-11611), Sangmuah, June 30, 2005. See also *Mariano, Edita Palacio v. M.C.I.* (IAD WA5-00122), Lamont, September 20, 2006.

[147] *Harripersaud, ibid.*

[148] *Wen, Chun Xiu v. M.C.I.* (IAD TA5-14563), MacLean, May 29, 2007. See also *Zheng, Wei Rong v. M.C.I.* (IAD TA4-16616), MacLean, August 23, 2007.

[149] S. 67(1)(a) of the IRPA states: To allow an appeal, the Immigration Appeal Division must be satisfied that, <u>at the time that the appeal is disposed of</u>, the decision appealed is wrong in law or fact or mixed law and fact. [emphasis added]

In some cases, where an application for permanent residence was based on marriage and the IAD has found that marriage not to be valid, they have examined whether or not the appeal could be allowed based upon a common-law or conjugal partnership.[150]

DISMISSAL IN LAW OF THE SPONSORSHIP APPEAL

Where the IAD dismisses an appeal because the applicant is not a spouse or does not meet the definition of "common-law partner" or "conjugal partner" or due to the application of s. 4, s. 4.1, s. 5 or s.117(9) of the IRP Regulations, the dismissal of the appeal is arguably based in law and not on a lack of jurisdiction, given the wording in s. 63(1) and s. 65 of the IRPA. Contrary to the former *Immigration Act*, the IRPA specifically provides in s. 65 of the IRPA that humanitarian and compassionate grounds may only be considered where the foreign national is a member of the family class. The absence of such a specific provision in the former *Immigration Act* was the basis, along with the wording in s. 77 of the former Act, for the jurisdictional dismissal of the appeal.

[150] *Tabesh* v. *M.C.I.* (IAD VA3-00941), Wiebe, January 7, 2004 followed in *Ur-Rahman, Mohammed Ishtiaq v. M.C.I.* (IAD TA3-04308), Collins, January 13, 2005. It must be noted that it is not common practice for the Immigration Appeal Division to amend refusal grounds without application from a party.

CASES

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:

---

[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

---

[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

---

[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:

---

[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

---

[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

---

[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]

---

[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]

---

[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

---

[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

---

[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

---

[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

---

[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.

---

[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]

---

[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

---

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*.

---

[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]

---

[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]

---

[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.

---

[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.

---

[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]

---

[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

---

[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**

---

[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

---

[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.

---

[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

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]

---

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

---

[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;

---

[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]

---

[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

---

[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.

---

[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

---

[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
>
> (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

---

[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.

---

[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.

---

[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

---

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

---

[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.

CASES

Chapter Eight

Misrepresentation

Introduction

The misrepresentation provisions under the old *Immigration Act* provide that a permanent resident, where granted landing by reason of a false or improperly obtained passport, visa or other document pertaining to the person's admission, or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by that person or any other person, may be subject to the initiation of removal proceedings under s.27(1)(e) of the *Immigration Act*.

The materiality of misrepresentations under the *Immigration Act* has been the subject of numerous court decisions including the decision of the Supreme Court of Canada in *Canada (Minister of Manpower and Immigration) v. Brooks*, [1974] S.C.R. 850. *Brooks* held, among other things, that *mens rea*, or intention, was not an essential element for the misrepresentation. Chapter 5 of the Removal Order Appeals paper discusses the impact of the *Brooks* decision and misrepresentations in general.

The purpose of the misrepresentation provisions is to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada.[1]

The misrepresentation provisions under the *Immigration and Refugee Protection Act (IRPA)* can lead to a finding of **inadmissibility** (s.40) whether the person is inside Canada or abroad. An inadmissibility report prepared with respect to a permanent resident, may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. (s.44(1) & s.44(2)).

Inadmissibility for Misrepresentation

The misrepresentation provisions under the *IRPA* can lead to a finding of inadmissibility of a permanent resident (leading to a removal order) or a foreign national being refused sponsorship. Section 40 reads, in part, as follows:

> 40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation
>
> (a) 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 this Act;

[1] Immigration Manuals, ENF 2, Evaluating Inadmissibility, section 9.

(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

If a person is found to be inadmissible pursuant to section 40, that permanent resident or foreign national continues to be inadmissible for misrepresentation for a period of two years following a final determination of inadmissibility in a refused sponsorship, or the date the removal order is enforced for a determination in Canada.[2] A person who pursues their appeal rights following a determination in Canada will, in effect, extend the two-year period because the removal order would not be enforced until a later date.

A foreign national subject to the two-year period of continued inadmissibility must obtain the written authorization of an officer under Regulation 225(3)[3] in order to return to Canada within the two-year period.

A further qualification to section 40(1)(b) is found in section 40(2)(b). It provides that "paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case **justify** the inadmissibility" (emphasis added). It is not known at present how the Minister will exercise this "justification".

Possible Legal and Evidentiary Issues

Specific wording contained in section 40 of the *IRPA* will likely give rise to legal and evidentiary issues. For example, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "… *directly or indirectly misrepresenting or withholding material facts…*"? Does it matter whether the person made the misrepresentation as opposed to someone else making the misrepresentation? (Under the former *Immigration Act*, the jurisprudence shows it did not matter.) Does this include giving untruthful or partial answers, or omitting reference to material facts (even if the person does not know what is material or was not asked)?

"directly or indirectly"

---

[2] Section 40(2)(a) reads as follows:

> the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced;

[3] Reg. 225(3) reads as follows:

> A foreign national who is issued an exclusion order as a result of the application of paragraph 40(2)(a) of the Act must obtain a written authorization in order to return to Canada within the two-year period after the exclusion order was enforced.

In *Wang*[4] the IAD adopted the Immigration Division member's analysis and conclusion on indirect misrepresentation. He noted that under *IRPA* there was no longer a reference to a misrepresentation "by any other person". The new language is "directly or indirectly". The member held that "it is not immediately apparent by this language that "indirectly" means a misrepresentation by another person. Nonetheless I can find no other logical interpretation." The Federal Court approved this approach. The word "indirectly" can be interpreted to cover the situation such as the present one where the applicant relied on being included in her husband's application, even though she did not know of his previous marriage.

"indirect misrepresentation"

An agent for the appellant obtained for him and submitted to CIC false or fraudulent documents relating to his education. This constitutes an indirect misrepresentation.[5]

Similarly, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "… *material facts relating to a relevant matter that induces or could induce an error in the administration of this Act"*? How might we interpret "*an error in the administration of this Act*"? [Note: There is a difference in the wording in the French version which could influence interpretation – rather than saying *that induces* it says, *as this induces*.] Is there a timing element in this provision – does it catch persons who misrepresent any immigration related circumstances at any time? What might be included in this provision? For example, does this include an applicant or sponsor making misrepresentations, partial answers, omissions, etc.; applicants on humanitarian and compassionate considerations who became permanent residents; or applicants withholding information from the examining designated physician?

"could induce an error"

The Immigration Appeal Division found the words "could induce an error" as referring to the potential of causing an error at any time, not the actual causing of the error. It was meant to catch those who caused an error or misrepresented or withheld material (an attempt to deceive) that had a potential of causing an error. It does not speak from the time of the "catching" of the misdeed, but at the time of the misdeed itself.[6]

Two factors must be present for a finding of inadmissibility under s. 40(1). There must be misrepresentations by the applicant and those misrepresentations must be material in that they could have induced an error in the administration of the *IRPA.* There is no requirement in s. 40(1)(a) that the misrepresentations must be intentional, deliberate or negligent.[7]

---

[4] *Wang, Xiao Qiang* v. *M.C.I.* (F.C., no. IMM-5815-04), O'Keefe, August 3, 2005; 2005 FC 1059. A question was certified but not answered on appeal: (F.C.A., no. A-420-05), Noel, Evans, Malone, October 24, 2006; 2006 FCA 345.

[5] *M.P.S.E.P.* v. *Zhai, Ning* (IAD VA6-02206), Ostrowski, March 6, 2007; application for leave and judicial review dismissed: (F.C., no. IMM-2035-07), Harrington, August 13, 2007.

[6] *Zhai, supra,* footnote 5.

[7] *Bellido,Patricia Zevallous* v. *M.C.I.* (F.C., no. IMM-2380-04), Snider, April 6, 2005; 2005 FC 452.

In *Pierre-Louis*[8] the applicant married the appellant in 2001. He applied for a visitor's visa in Haiti and was refused. On that application he disclosed a child born in 1996. In 2002 he applied for permanent residence in Canada. At that time he said he had no dependent children. The visa officer rejected this application because of misrepresentations made during the interview. The applicant was inadmissible because of the misrepresentation about the child he had previously declared.

Finally, what is the meaning in s. 40(1)(b) of the *IRPA* of the phrase "*…for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation.*"? Does this put the sponsor at risk of removal for making misrepresentations? If yes, how far back may it go?

Asuncion[9] partly answers the first question. The appellant was sponsored to Canada by his mother as a dependent in 1998. Prior to leaving the Philippines he married his spouse in a civil ceremony, and knew that there would be some sort of reprimand if he failed to declare his new status. After he was landed in Canada he returned to the Philippines and he and his wife had a church wedding. In 2001 he applied to sponsor his wife and two children, which application was refused since they had not been examined at the time he became a permanent resident. An admissibility hearing led to a removal order, the appeal of which was dismissed. A result of the misrepresentation was that he made it impossible for him to sponsor his loved ones and also prohibited him from seeking to come back to Canada for a period of two years following the enforcement of the removal order.

Legislative Framework

Section 44 of the *IRPA*, reproduced in part below, sets out the procedure to be followed under section 40:

> 44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.
>
> (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

[8] *Pierre-Louis, Cynthia* v. *M.C.I.* (F.C., no. IMM-7627-04), Beaudry, March17, 2005; 2005 FC 377.

[9] *Asuncion, Aristar Mallare* v. *M.C.I.*. (F.C., no. IMM-10231-04), Rouleau, July 20, 2005; 2005 FC 1002.

An inadmissibility report prepared with respect to a permanent resident may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. The effect of s.44(2) of the *IRPA* is that a removal order made against a permanent resident for misrepresentation must be made by the Immigration Division, not by the Minister (except in the case of not complying with the residency obligation). Therefore, the IAD will have a full record for an appeal against a removal order for misrepresentation.

Jurisdiction – Legislative Appeal Rights to the IAD

Parts of sections 63 to 65 of the *IRPA* are set out below:

> 63. (1) 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.
>
> 63. (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.
>
> 63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.
>
> 63. (4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.
>
> 63. (5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.
>
> 64. (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.
>
> 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.

Note that the effect of s.64(3) of the *IRPA* is that a spouse, common-law partner or child **does** have an appeal to the IAD, but other members of the family class, such as parents, **do not**

have an appeal to the IAD if found inadmissible for misrepresentation. In decisions[10] of the IAD where the applicant was **not** the sponsor's spouse, common-law partner or child, the IAD has dismissed the appeals for lack of jurisdiction. In none of these cases has the appellant sought judicial review.

In *Mathew*[11] the IAD allowed the appeal under s. 65 of the *IRPA* on humanitarian and compassionate grounds and then found the marriage to be genuine, overcoming the inadmissibility for misrepresentation. The Court held that Parliament's intent was clear that before waiving a breach of the Act (the misrepresentation) on H&C factors, the marriage, if challenged, as it was here, had to be determined to be genuine before applying the H&C factors. The Minister's application was allowed.

The requirements to sponsor a member of the family class are found in Regulation 130.

[10] *Warrich, Ghazananfar* v. *M.C.I.* (IAD TA3-20264), D'Ignazio, July 11, 2005; *Nazmus, Masoma* v. *M.C.I.* (IAD TA6-03843), Whist, September 18, 2006; *Anis, Kamran* v. *M.C.I.* (IAD TA7-01595), Waters, August 31, 2007.

[11] *M.C.I.* v. *Mathew, Marjorie Ellen* (F.C., no. IMM-6049-06), Lemieux, June 29, 2007; 2007 FC 685.

Transitional Issues

Section 192 of the *IRPA* provides as follows:

> 192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.

The *IRPA* came into force on June 28, 2002. In *Manzanares*[12] the refusal letter pre-dated the implementation date of the *IRPA* and was, therefore, a refusal under the *Immigration Act*. The Notice of Appeal, however, was dated and was thus filed after the *IRPA* was proclaimed. Pursuant to section 192 of the *IRPA*, the panel proceeded with the appeal under the *IRPA*.

At the outset of the hearing, the Minister raised a preliminary issue. He asked the panel to treat the refusal based on the ground of misrepresentation under section 40(1)(a) of the *IRPA*. The panel rejected this argument by the Minister. There had been a misrepresentation by the applicant (by filing false documents with the visa post) but it was not a refusal based on the ground of misrepresentation (such as a refusal under section 9(3) of the *Immigration Act*). Further, there was no application by the Minister to amend the ground of refusal and, therefore, there was no legal basis to treat the refusal as one based on misrepresentation.

General Offences

It should be noted that there are criminal sanctions in respect of misrepresentations in the *IRPA*. Because these offences are beyond the scope of this paper they are merely reproduced below for ease of reference.

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

127. No person shall knowingly

(a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.

[12] *Manzanares, Ma Christina* v. *M.C.I.* (IAD TA2-15088, Stein, June 9, 2003.

CASES

Chapter Nine

Non-compliance with the Act or the Regulations

Introduction

Under IRPA a sponsored member of the family class may be refused a permanent resident visa if that person does not meet the requirements of the Act or the Regulations (IRPR). Generally speaking a person must be eligible to be sponsored and they must be admissible to Canada.

As well, the Act and Regulations prescribe many additional requirements those persons seeking to become permanent residents through sponsorship must meet. Section 41 of IRPA establishes a general inadmissibility provision to cover these requirements:

> s. 41 A person is inadmissible for failing to comply with this Act
> (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act;

Note as well that s. 2(2) of IRPA states that unless otherwise indicated, references in this Act to "this Act" include Regulations made under it.

A refusal letter[1] must set out with sufficient detail the basis of the refusal. It is necessary therefore that s. 41(a) is also accompanied by a statutory reference to the specific requirement which it is alleged the applicant cannot meet.

Some requirements that are commonly not met and are likely to lead to a refusal under subsection 41(a) will be discussed below but this list is not exhaustive.

Not an Immigrant

In the case of parents who are sponsored to Canada for the purpose of settling their dependent children in Canada and who do not intend to remain permanently in Canada, so called "courier parents", the applicable requirement is set out in s. 20(1)(a) of the Act, reproduced below:

> s. 20(1) Every foreign national, … who seeks to enter or remain in Canada must establish,

[1] S. 21(1) IRPA.

> (a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence;…[emphasis added]

It should be noted that although the scheme of the Act suggests that this provision may properly ground a refusal for such an applicant, IRPA no longer contains the words "immigrant" and "landing" which figured heavily in the reasoning in cases under the former Act.

Does the language of s. 20(1)(a) give rise to a requirement on the part of applicants to intend to reside in Canada permanently? The IAD has held that the concept of “courier parent” survives in IRPA in s. 20(1)(a). The panel distinguished between the obligation to maintain permanent residence in Canada under s. 28 from the requirement of an intent to establish permanent residence in Canada under s. 20(1)(a)[2].

The balance of this subtopic is based on cases decided under the Immigration Act as they may provide useful guidance for members.

Intention

An applicant for permanent residence must have the requisite intention to reside permanently in Canada. The visa officer will undertake an examination of all of the surrounding circumstances to determine whether or not such intention exists.

Intention can be demonstrated in one of two ways. “It [intention] can be revealed by speech or conduct.”[3] Generally, the intention of the applicant will become evident during the visa officer's interview with the applicant in the statements made by the applicant in answer to the visa officer's questioning. Other times, the finding of no intention will be based on the applicant's failure to pursue all of the steps involved in the application process.[4] The visa officer's decision may also be founded on evidence of the applicant's past behaviour when he or she had previously been granted permanent resident status, but subsequently lost it.[5]

---

[2] *Daliri, Farshid Hafezi v. M.C.I.*, (IAD TA3-01591), MacDonald, May 6, 2004; [2004] I.A.D.D. No. 210 (QL).

[3] *Kan, Chak Pan v. M.E.I.* (F.C.T.D., no. T-2977-91), Muldoon, March 19, 1992. Reported: *Kan v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 206 (F.C.T.D.).

[4] See *Villanueva, Antonio Ordonez v. M.E.I.* (I.A.B. 85-9741), Benedetti, Weisdorf, Bell, November 12, 1986, where the applicant's failure to respond to the visa officer's request for documentation regarding his separation from his wife led the Immigration Appeal Board to conclude that he was not an immigrant. In *Saroya, Kuljeet Kaur v. M.E.I.* (IAD V92-01880), Verma, September 21, 1993, one of the bases for the refusal was that the applicant disregarded instructions given to her during the processing of the application, as she did not show up for three scheduled interviews and did not respond to some communications. See also *Goindi, Surendra Singh v. M.C.I.* (IAD T93-10856), Aterman, December 13, 1994, where the applicants had ignored requests for them to undergo medical examinations as was required.

[5] In *Shergill, Sohan Singh v. M.E.I.* (IAD T92-05406), Weisdorf, Chu, Ahara, February 8, 1993, the applicant was landed in 1981, but returned to India shortly thereafter, leaving the sponsor and a daughter behind. In her present application, statements had been made to the visa officer that she wished to remain in Canada for only six or seven months, for the purpose of bringing her alleged adopted son to Canada. The applicant's declared

Meaning of "permanently"

The ordinary definition of "permanently" connotes something lasting indefinitely. However, this ordinary definition is not applicable within the context of permanent residence. "Permanently" does not mean immutably or forever, or for the applicant's lifetime or anyone else's. An intention to leave Canada at some time in the immediate future is not inconsistent with an intention to reside permanently in Canada until then.[6] Nevertheless, "permanently" has the opposite meaning of "temporarily", and an applicant must not be seeking admission to Canada for a short, fixed period of time for a temporary purpose.[7]

There are several examples in the case-law of what have come to be known as "courier parents". In such cases, the panel finds that the purpose of the applicant's immigration to Canada is to facilitate the immigration to Canada of the applicant's accompanying dependent son or

---

intentions were "strikingly similar" to her behaviour in 1981, and therefore it was reasonable to conclude that she had no intention to reside permanently in Canada. See also: *Patel, Mohamed v. M.E.I.* (IAD T91-03124), Weisdorf, Ahara, Fatsis, April 15, 1993, where the panel considered the applicants' past actions as one of the factors in assessing their intentions in the current applications; *Saroya, supra*, footnote 4; and *Sidhu, Gurdev Singh v. M.E.I.* (IAD V92-01678), Singh, November 17, 1993. In *Gill, Jagjit Singh v. M.C.I.* (IAD V95-00365), McIsaac, May 8, 1997, the applicant lost his permanent residence status after residing in Canada for only seven months in a 12-year period. For each request for a returning resident permit he gave a different reason, none of which appeared to be the real reason for his extended stay in India. It was not established on a balance of probabilities that he intended to reside permanently in Canada.

[6] *Toor, Joginder Singh v. M.E.I.* (F.C.A., no. A-310-82), Thurlow, Heald, Verchere, February 15, 1983. Reported: *Re Toor and Canada (Minister of Employment and Immigration)* (1983), 144 D.L.R. (3d) 554, QL [1983] F.C.J. 114 (F.C.A.). In *Dhaul, Paramjit Kaur v. M.E.I.* (I.A.B. 86-6004), Chambers, March 5, 1987, the Immigration Appeal Board held that a person may still be an "immigrant" for the purposes of the *Immigration Act* even though the person is undecided as to whether or not he or she will wish to remain in Canada after admission. In *Sarwar, Abida Shaheen v. M.C.I.* (IAD T93-11195), Ariemma, Leousis, Muzzi, April 24, 1995, the panel agreed that establishing permanent residence in Canada does not imply that the applicant is barred from returning to his or her homeland. In this case, if the appellant had established that the applicant genuinely required to return to Pakistan to attend to personal or family matters, the panel would have had no difficulty in finding that he was a genuine immigrant, "irrespective of how many times or when he intended to travel to his country". In *Sanghera, Rajwinder Kular v. M.C.I.* (IAD V96-01527), Clark, February 17, 1998, the panel accepted the applicants' testimony at the hearing that they always intended to reside permanently in Canada but did plan to visit India sometimes. In response to the visa officer's question about when he would return to India, the principal applicant said a year or two. He was asked whether he intended to be a permanent resident of Canada, to which he replied in the negative. The CAIPS notes revealed that the officer did not explain what it meant to be a "permanent resident". The answers given to the officer's questions were consistent with the applicants not knowing whether or not permanent residents are allowed to leave Canada for any reason.

[7] In *Mirza, Shahid Parvez v. M.E.I.* (I.A.B. 86-9081), Teitelbaum, Weisdorf, Townshend, December 1, 1986, the Immigration Appeal Board held that an applicant who intended to come to Canada for only a temporary period of time was not an immigrant. In *Gill, Shivinder Kaur v. M.C.I.* (IAD T94-06519), Wright, May 16, 1995, the panel held that the applicant's statement that he would return to India if he did not like Canada was not unreasonable and did not negate his intention to establish permanent residence in Canada. In *Wiredu, Alex v. M.C.I.* (IAD T97-00727), Muzzi, December 8, 1997, the panel found that the family members desired a reunion, but for a fixed period of time on the part of the principal applicant. The immigration officer's handwritten notes revealed that the applicant's intention was to visit her sons in Canada. As such, she was not making an applicant for permanent residence.

daughter and that the applicant does not have the requisite intention to reside permanently in Canada as the applicant intends to return to his or her homeland after spending a period of time in Canada.[8] The possibility that the applicant might have the requisite intention to reside permanently in Canada at a later time is not sufficient as "[t]his form of deferred intent […] is not contemplated in the Immigration Act."[9]

Other factors which have been considered by panels in the determination of whether or not an intention to reside permanently in Canada exists include the preservation of a family base in the homeland[10] and the retention of assets abroad.[11]

Motivation

The relevant issue is whether or not the applicant has the requisite intention to reside permanently in Canada. The motivation behind the applicant's intention is not of itself relevant.[12] For example, the Immigration Appeal Division held that an applicant's desire to facilitate the entry into Canada of her two unmarried sons did not, in that case, preclude a finding of an intention on the part of the applicant to reside permanently in Canada; therefore, the applicant was found not to be a "courier parent."[13]

---

[8] See for example: *Shergill, supra,* footnote 7; *Patel, Mohamed, supra,* footnote 15; *Kala, Bhupinder Kaur v. M.E.I.* (IAD T92-09579), Arpin, Townshend, Fatsis, May 18, 1993; *Mahil, Tarlochan v. M.E.I.* (IAD T92-08178), Weisdorf, Townshend, Ahara, May 18, 1993; *Kamara, Abass Bai Mohamed v. M.E.I.* (IAD W91-00092), Arpin, February 24, 1994; *Brown, Earlyn v. M.C.I.* (IAD T93-09712), Ramnarine, August 17, 1994; *Gill, Harbans Kaur v. M.C.I.* (IAD V92-00694), Lam, March 27, 1996; and *Dhandwar, Jatinder Kaur v. M.C.I.* (IAD T96-01977), Bartley, June 6, 1997. In *Molice, Antoine Anel v. M.E.I.* (IAD M93-07976), Durand, March 22, 1994, one of the factors which the panel considered was the sponsor's statement that he did not sponsor his parents in the early 1980s when he could have, as he was waiting until the law would allow him to also sponsor his siblings, his parents' accompanying dependants. The panel held that if the applicants were not "courier parents", there would have been no reason for the sponsor to have waited for the law to change before sponsoring them; as well, the sponsor could not have known or predicted that the law would be changed in the future. *Cherfaoui, Azzedine Dino v. M.C.I.*, (IAD MA1-01747), Beauchemin, February 11, 2002 (reasons signed February 13, 2002).

[9] *Sarwar, supra,* footnote 6. *Ha, Byung Joon v. M.C.I.* (IAD TA0-04969), Sangmuah, October 3, 2001 (reasons signed January 8, 2002).

[10] *Deol, Dilbag Singh v. M.E.I.* (I.A.B. 80-6012), Campbell, Hlady, Howard, February 11, 1981.

[11] *Pacampara, Enrique Pandong v. M.E.I.* (I.A.B. 85-9684), Ariemma, Arkin, De Morais, April 10, 1987; *Ruhani, Zahida v. M.C.I.* (IAD T92-07177), Teitelbaum, Muzzi, Band, March 8, 1995; and *Lalli, Kulwinder v. M.C.I.* (IAD V94-01439), Lam, November 20, 1995. See however *Gill, Shivinder Kaur, supra,* footnote 7, where there was evidence that the retention of the family home was a cultural norm and that in any event, the applicant offered a plausible explanation when he said that he didn't want to sell the home so that the family could have accommodation when they returned to India to visit relatives. In *Dhiman, Jasvir Kaur v. M.C.I.* (IAD V95-00675), McIsaac, May 27, 1996, one basis for the refusal was that the applicants' societal traditions were such that parents lived with their sons (married or not), and not with their married daughters; the applicants applied to go and live with their married daughter in Canada, while their eldest son remained in India. This basis was not accepted, however, and the refusal was found to be invalid in law.

[12] *Aquino, Edmar v. M.E.I.* (I.A.B. 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986.

[13] *Ruhani, supra,* footnote 11.

Timing

In appeals where the issue is whether or not the applicant is an immigrant, the question of timing arises: that is, at what point in time must the applicant have had the requisite intention to reside permanently in Canada? In *Kahlon*[14], the Federal Court of Appeal held that the Immigration Appeal Board (the predecessor to the Immigration Appeal Division) had to decide the appeal on the basis of the law as it stood at the time of the hearing of the appeal because the hearing before the Board was a hearing de novo. If one applies *Kahlon*, where the refusal is based on the applicant's not being an immigrant, the panel would determine the applicant's intention as of the date of the hearing. However, there has been some conflicting case-law in this area.

In *Patel, Manjulaben*, it was held that a determination should be made of the applicant's intention at the time that the applicant made his or her application for permanent residence since it is a jurisdictional question.[15] However, more recently, Immigration Appeal Division panels have not followed Patel on the timing issue, and have instead relied on *Kahlon* and held that the applicant's intention to establish permanent residence in Canada must be determined as of the time of the hearing.[16] In *Ampoma*[17], the majority applied *Kahlon* and held that intention must be assessed at the time of the hearing. The dissenting member specifically refused to follow the decision in *Patel*.[18]

In *Quadri*, the Immigration Appeal Division stated that the burden of proof on a sponsor is to prove that either the visa officer erred in finding that there was no intention to immigrate at

---

[14] *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.).

[15] *Patel, Manjulaben v. M.E.I.* (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1990 (leave to appeal refused July 16, 1990); see *infra*, for a discussion on jurisdiction. *Patel* was applied by the majority in *Uddin, Mohammed Moin v. M.E.I.* (IAD T91-02394), Chu, Ahara, Fatsis (dissenting), August 28, 1992.

[16] *Gnanapragasam, Dominic Gnanase v. M.C.I.* (IAD T99-11000), Whist, December 4, 2000.

[17] *Ampoma, Eric Sackey v. M.E.I.* (IAD W91-00008), Gillanders, Verma, Wlodyka (dissenting), February 10, 1992. Reported: *Ampoma v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 219 (IAD).

[18] See also *Dhandwar, supra*, footnote 8; *Randhawa, Baljeet Singh v. M.C.I.* (IAD V95-01361), Lam, July 23, 1996; and the dissenting reasons in *Uddin, supra*, footnote 15. In *Sanghera, Charan Singh v. M.E.I.* (IAD V93-00595), Verma, December 9, 1993, the panel held that at the time of the hearing, the applicant wanted to live permanently in Canada; his contrary intention at the time of the interview was due to stress and shock on account of his mother's death and his brother's recent suicide in Canada. Similarly, in *Sidhu, supra*, footnote 5, the panel held that any statements that the father may have made about returning to India were due to his emotional stress at the time. In *Mallik, Azim v. M.C.I.* (IAD T94-04692), Aterman, September 8, 1995, the applicant's responses at the interview suggested that she did not intend to reside permanently in Canada; the Appeal Division accepted the appellant's explanation that the applicant was under stress as a result of the way in which the interview was conducted, and that she had become flustered; it also accepted the explanation that the applicant was not sophisticated. See also *Sanghera, Avtar Singh v. M.C.I.* (IAD V93-02360), Singh, July 22, 1994 and *Khanna, Sadhana Kumari v. M.C.I.* (IAD T96-01555), Wright, June 3, 1996. But see *Gill, Harbans Kaur, supra*, footnote 8, where the panel considered the applicants' statements at the time of their interview to be more credible and trustworthy than their affidavits made subsequent to the refusal, finding that the affidavits were "clearly a self-serving attempt to correct earlier statements".

the time of the interview, or alternatively, that the intention to immigrate arose after the interview and was present at the time of the hearing of the appeal.[19]

Fairness

There is a general duty of procedural fairness which governs visa officers in their processing of sponsored applications for landing. The issue has sometimes arisen with respect to an applicant's intention to reside permanently in Canada. A sponsor may challenge the validity of a refusal on the basis that there was a breach of the principles of natural justice, namely the denial of a fair hearing; such an argument is based on the decision in *Pangli*[20]. In that case, the Court held that the immigration officer had a duty to clear up conflicting statements made by the applicant on the same day. In both *Rahman* and *Dory*[21], the Immigration Appeal Division held that the applicant was never given an opportunity to answer supplementary questions allowing her to clarify contradictory statements regarding her intention to reside permanently in Canada.

Furthermore, the immigration officer who interviewed the applicant should have been the one who actually refused the application;[22] this principle was satisfied where one immigration officer interviewed and made a recommendation to refuse the application, and another officer countersigned the recommendation and signed the refusal letter.

Pangli has also been applied to support the principle that a visa officer has the duty to explain to the applicant the difference between permanent resident and visitor status, and to explain the possible negative impact of any statutory declaration signed by the applicant which attests to the applicant's intention not to reside permanently in Canada.[23]

---

[19] *Quadri, Fatai Abiodun v. S.S.C.* (IAD T93-12576), Hopkins, September 30, 1994.

[20] *Pangi v. Canada (Minister of Employment and Immigration)* [1987] F.C.J. No. 1022. For a fuller discussion of fairness, see Chapter 11, "Fairness and Natural Justice under IRPA".

[21] *Rahman, Mohibur v. M.C.I.* (IAD M94-05434), Angé, March 3, 1995; *Dory, Roosevelt v. M.C.I.* (IAD M94-03745), Angé, December 19, 1995. In *Sian, Malkit Kaur v. M.C.I.* (IAD V95-00955), McIsaac, January 20, 1997, the panel stated that the visa officer had a duty to clear up the conflict between her conclusion that the applicants did not intend to reside permanently in Canada and their contrary intention inherent in their application for permanent residence. The visa officer had arrived at her conclusion based on the applicant's responses at the interview; what was needed was "a further questioning…thereby affording him the opportunity to state finally, and unequivocally, what his intention was insofar as coming to Canada was concerned".

[22] This principle was applied in *Gill, Rajwinder Kaur v. M.E.I.* (IAD V91-00898), Arpin, July 26, 1993.

[23] See, for example, *Rodriguez, Meliton v. M.E.I.* (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991, where the panel applied *Pangli* and held that if at the interview the applicant indicated a desire to come to Canada as a visitor, the choice of a visitor visa rather than a permanent resident visa should have been put to her; there was no evidence that such a choice had been given to the applicant; *Merius, Ronald v. M.E.I.* (IAD M93-05810), Angé, June 13, 1994; and *Quadri, supra,* footnote 19 and *M.C.I. v. Gough, Glen Patrick* (IAD TA0-1561), MacAdam, March 26, 2001 where the respondent had signed a voluntary declaration of abandonment of Canadian permanent resident status and handed over his Canadian record of landing in unexpected circumstances and at a moment of intense sleep deprivation. The panel held that he could not be faulted for having singed it without an actual intention to abandon Canada as his place of permanent residence.

Failure to answer truthfully or provide documents

Under the Regulations to the Immigration Act, s. 9(3) provided a basis for a visa officer to refuse a visa for failure to provide information needed to assess both eligibility and admissibility of an applicant. At a de novo Immigration Appeal Division hearing the applicant may have provided a reasonable explanation or lawful excuse for the default and the refusal would no longer be lawful. If an appeal was allowed in law or on a discretionary basis, care was to be taken that the visa officer had the information needed to determine eligibility and admissibility when processing of the application re-commenced after the appeal. A similar scheme has been enacted in IRPA.

Where an applicant has answered questions in the application or at an interview which answers have turned out to be false, a refusal has been tied to the duty to answer questions truthfully. In IRPA this requirement is set out in those provisions that govern the making an application of any kind:

> s. 16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

An applicant for permanent residence would seem to be covered by the duty in this provision. They must provide adequate proof of both eligibility (e.g. relationship to sponsor) and admissibility

The failure to answer questions truthfully may also give rise to a separate inadmissibility finding under s. 40(1)(a) of IRPA, i.e. misrepresentation, which may have the effect of barring the foreign national from Canada for two years. This is dealt with in more detail in Chapter 8.

Failure to undergo a medical examination

This has been dealt with in Chapter 3 on medical inadmissibility. See comments above as to continuing obligation to provide proof of admissibility.

Discretionary Jurisdiction

The general category of inadmissibility described in s. 41(a) is designed to ensure all applicants undergo a thorough and detailed process of examination to ensure they meet the requirements of the Act and regulations. A refusal may be challenged as unlawful or a sponsor may seek special relief from the requirement and produce a sufficient evidentiary basis for the applicant to be relieved of the challenged requirement. The integrity of the immigration system must be examined against the particular circumstances supporting the request for special relief.

CASES

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

Chapter Eleven

Fairness and Natural Justice under the IRPA

Context for the Immigration Appeal Division

The Immigration Appeal Division (IAD) may allow an appeal if it is satisfied that "a principle of natural justice has not been observed". This ground of appeal is expressly set out in the *Immigration and Refugee Protection Act* (*IRPA*).[1]

In a sponsorship appeal, it may be argued that the officer who denied a foreign national's permanent resident visa application breached natural justice in some respect while processing the application and that the appeal should be allowed on that basis. Although the *IRPA* contemplates such a scenario in providing a legislative basis for the IAD to overturn an officer's decision on this ground, in actual practice it is seldom argued or used as a basis for allowing an appeal. It is nevertheless useful to examine what the duty of fairness entails for officers administering the *IRPA* in a sponsorship context as there may be reason to advance a breach of fairness or natural justice as a ground of appeal.

Duty of Fairness for Officers under IRPA

Introduction

Under the *IRPA*, the Minister designates officers to carry out the purposes of the Act.[2] The officers perform their functions in accordance with any instructions that the Minister may give.[3]

Officers must comply with the duty of procedural fairness in the administration of the Act because their decisions affect the rights, privileges or interests of individuals.[4]

---

1 *IRPA*, s. 67(1)(b).

2 *IRPA*, s. 6(1).

3 For example, *IRPA*, s. 15(4), on conducting examinations.

4 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

Content of the Duty of Fairness

General

The duty of fairness requires an officer to act with an open mind without unduly fettering their discretion and to give an applicant an opportunity to respond to the officer's concerns with respect to the processing of an application.[5] Essentially, the question is whether, considering all the circumstances, a person whose interests are affected has a meaningful opportunity to present their case fully and fairly.

The requirements of fairness vary according to the circumstances. Some relevant factors are:[6]

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme in question and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the decision-maker, particularly when the statute leaves to the decision-maker the ability to choose its own procedures or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

Knowing Case to be Met and Opportunity to Respond

An officer must provide an applicant with an opportunity to refute evidence in the officer's possession which is relied on by the officer,[7] and the officer must advise the applicant of any concerns and provide an opportunity to respond before making a decision,[8] although an oral hearing is not essential for that purpose.[9]

---

5 The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 held that a full and fair consideration of the issues was required and the applicant must have a meaningful opportunity to present relevant evidence and have it fully and fairly considered

6 *Baker, supra,* footnote 5.

7 *Gill, Jhanda Singh v. M.E.I.* (F.C.T.D., no. T-501-90), Jerome, March 20, 1990.

8 *Begum, Shamsun Naher v. M.C.I.* (F.C., no. IMM-1947-02), Lemieux, January 30, 2004; 2004 FC 165.

9 *Yue, Zhao v. M.C.I.* (F.C.T.D., no. IMM-2015-01), Kelen, September 25, 2002; 2002 FCT 1004.

Use of Extrinsic Evidence

Extrinsic evidence means evidence that comes from an outside source.[10] An applicant may be unaware of it. An officer should provide an applicant with an opportunity to comment upon extrinsic evidence.[11] Failure to share a document with an applicant may deny the applicant a meaningful opportunity to present the case fully and fairly.[12] Readily accessible public domain information (such as from the Internet) if novel and significant may as a matter of fairness need to be disclosed.[13]

Legitimate Expectations

The doctrine of legitimate expectations means that if an officer expressly or impliedly undertakes to follow a certain procedure, the officer may be held to their undertaking as a matter of procedural fairness.[14] There is nothing unfair about a visa officer's request for DNA testing in circumstances where the documentary evidence falls short of establishing the claimed relationship.[15]

Bias

Bad faith, abuse of discretion or improper conduct on the part of an officer may amount to bias so as to invalidate the officer's decision for breach of fairness or natural justice. A reasonable apprehension of bias does not arise merely because the same officer has made the decision on the different processes whereby an applicant seeks legal status in Canada.[16]

---

[10] *Dasent, Maria Jackie v. M.C.I.* (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.

[11] *Ngo, Tu Van v. M.C.I.* (F.C., no. IMM-5340-01), Dawson, November 7, 2002; 2002 FCT 1150.

[12] *Singh, Amarjit v. M.C.I.* (F.C., no. IMM-6526-02), Mactavish, February 4, 2004; 2004 FC 187 (applicant on "h&c" application should have been provided with negative PRRA report).

[13] *Ali, Mohammed Elsheikh v. M.C.I.* (F.C., no. IMM-8683-04), Mosley, February 23, 2006; 2006 FC 248.

[14] A legitimate expectation was created when an applicant was advised his supplementary information would be considered and it was a breach of natural justice for the officer to decide without having considered it: *Pramauntanyath, Teeradech v. M.C.I.* (F.C., no. IMM-1622-03), Mactavish, February 2, 2004; 2004 FC 174. On the other hand, an officer was under no obligation to advise of the future consequences of not having a dependant examined: *Jankovic, Milos v. M.C.I.* (F.C., no. IMM-567-02), Russell, December 17, 2003; 2003 F.C. 1482 nor of the avenue of redress in s. 25 of the *IRPA* (humanitarian and compassionate relief): *Mustapha, Javed v. M.C.I.* (F.C., no. IMM-7286-05), von Finckenstein, September 13, 2006; 2006 FC 1092.

[15] *Obeng, Addo Kwadwo v. M.C.I.* (IAD VA5-01112), Workun, August 14, 2006.

[16] *Kouka, Serge v. M.C.I.* (F.C., no. IMM-1823-06), Harrington, October 17, 2006; 2006 FC 1236.

Delay

In order for delay in processing an application to be unreasonable and to constitute a breach of the duty of fairness, the delay must be unacceptable to the point of being so oppressive as to taint the proceedings.[17]

Providing Reasons for Decision

An officer's failure to give reasons may be a breach of fairness depending on the consequences of the decision to the person affected.[18] Before the IAD, the CAIPS notes in conjunction with the refusal letter may adequately set out the reasons for refusal and satisfy the requirements of natural justice.[19]

Interview

The duty of fairness includes the right to have counsel attend and observe an applicant's interview with the officer.[20] The initiative to have counsel present must come from the applicant as the officer is under no duty to inform the applicant of this right.[21] The duty of fairness does not necessarily require an officer to conduct an oral interview before reaching a decision.[22] It may not be unfair to conduct an interview without prior notice to the individual.[23] There is no duty to interview third parties identified in the context of any given application.[24] The procedure whereby an interview is conducted by one officer and the decision made by a different officer is not a breach of fairness.[25]

---

[17] *Malhi, Kalmajit Singh v. M.C.I.* (F.C., no. IMM-8368-03), Martineau, June 2, 2004; 2004 FC 802.

[18] *Figueroa, Sandra Toscano v. M.C.I.* (F.C., no. IMM-69-03), Heneghan, December 18, 2003; 2003 FC 1339. See also *Baker, supra,* footnote 5 (officer's notes were held to constitute sufficient reasons).

[19] *Lee, Dip Gai v. M.C.I.* (IAD WA5-00010), Rozdilsky, January 4, 2006.

[20] *Ha, Mai v. M.C.I.* (F.C.A., no. A-38-03), Sexton, Linden, Malone, January 30, 2004; 2004 FCA 49. The Court did not decide whether in other circumstances a more active or limited role for counsel would be required.

[21] *MPSEP v. Cha, Jung Woo* (F.C.A., no. A-688-04), Décary, Noël, Pelletier, March 29, 2006; 2006 FCA 126.

[22] *Aigbirior, Doris v. M.C.I.* (F.C.T.D., no. IMM-2833-01), Blais, August 13, 2002; 2002 FCT 854.

[23] *Bhandal, Tej Kaur v. M.C.I.* (F.C., no. IMM-4679-05), Blais, April 3, 2006; 2006 FC 427.

[24] *Obeng, Addo Kwadwo v. M.C.I.* (IAD VA5-01112), Workun, August 14, 2006.

[25] *Ngo, supra,* footnote 11. The Court held that the content of the duty of fairness was limited by the context of an "h & c" decision, for example, it does not require an oral interview. See *Aujla (Sidhu), Jagwinder Kaur v. M.C.I.* (IAD VA5-02812), Shahriari, April 17, 2007 where in the context of a spousal refusal it was not a breach of natural justice for one visa officer to conduct the interview and another officer to make the decision.

Revisiting a Decision

The doctrine of *functus officio* does not apply to prevent an officer from refusing a visa after another officer had initially offered a visa,[26] nor is it contrary to natural justice or fairness.

Remedies for Breach of Fairness/Natural Justice

The usual consequence of a denial of fairness or natural justice is to render the resulting decision invalid.[27] The Supreme Court of Canada has introduced an exception to this principle,[28] and where it is certain that even if a fair hearing is held, the applicant cannot as a matter of law succeed, the remedy may be withheld.[29]

The IAD may allow an appeal from an officer's decision not to issue a foreign national a permanent resident visa if the IAD is satisfied that a principle of natural justice has not been observed by the officer in the processing of the application.[30] Failure of Canadian officials to apply their policy may amount to a breach of natural justice.[31]

The *de novo* nature of appeal proceedings in the IAD may remedy a breach of natural justice at the officer level.

The IAD must first decide the issue of an applicant's membership in the family class before it can address any allegation that the officer breached the rules of natural justice or fairness in connection with the processing of a sponsorship application.[32]

Reopening in the IAD for Breach of Natural Justice

Under the *IRPA*, the IAD may reopen an appeal if it failed to observe a principle of natural justice in the case of a foreign national under a removal order.[33] Since the *IRPA* only

---

[26] *Lo, Kin Ching v. M.C.I.* (F.C.T.D., no. IMM-4927-01), Beaudry, November 7, 2002; 2002 FCT 1155.

[27] *Cardinal, supra*, footnote 4.

[28] *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[29] *Bermido, Marites Hugo v. M.C.I.* (F.C., no. IMM-2866-03), von Finckenstein, January 14, 2004; 2004 FC 58.

[30] *IRPA*, s. 67(1)(b).

[31] *Balla, Bradley Dale v. M.C.I.* (IAD VA6-00305), Lamont, July 4, 2007.

[32] *M.C.I. v. Petrea, Marian* (F.C.T.D., no. IMM-4395-00), Blanchard, December 13, 2001; 2001 FCT 1373; *Sertovic, Safeta v. M.C.I.* (IAD TA2-16898), Collins, September 10, 2003. Where a sponsor argued that the visa officer ought to have considered humanitarian and compassionate factors for an applicant excluded from the family class which allegedly resulted in a breach of natural justice, the IAD held that the avenue of redress should be to the Federal Court not to the IAD: *Patel, Amit Krishnakant v. M.C.I.* (IAD TA5-11490), Collins, March 14, 2006.

[33] *IRPA*, s. 71.

addresses reopening in a removal order situation, a sponsor who alleges a breach of natural justice in a sponsorship appeal may not apply to reopen under section 71 of the Act.[34] However, a sponsor may apply to reopen for breach of natural justice under common law.

The principles of natural justice in the IAD generally relate to procedural matters such as notice, opportunity to be heard and knowledge of the case to be met.[35] The incompetence of counsel may constitute a breach of natural justice.[36] A change in the law is not a basis for reopening for denial of natural justice.[37] There must have been a breach of natural justice in the first proceeding as a basis for reopening.[38]

[34] *Mustafa, Ahmad v. M.C.I.* (IAD VA1-02962), Wiebe, February 13, 2003.

[35] *Huezo Tenorio, Alex Ernesto v. M.C.I.* (IAD VA2-01982), Wiebe, March 31, 2003.

[36] *Ye, Ai Hua v. M.C.I.* (IAD VA1-01247), Wiebe, August 5, 2003. Counsel's incompetence must be egregious in order to result in a denial of natural justice.

[37] *Clarke, Lloyd Charles v. M.C.I.* (IAD T97-01824), MacAdam, January 9, 2003.

[38] *Johal, Gurwinder Kaur v. M.C.I.* (IAD VA2-02295), Workun, October 3, 2006.

CASES

Chapter Twelve

Consent to Return to Canada

Introduction

In the *Immigration Act* (the former Act) there existed inadmissible classes of persons described in s. 19(1)(i) and s. 27(2) (h) who sought to come into or entered Canada without the consent of the Minister when it was required by s. 55 of that Act. It followed that if a person being sponsored had been issued one of the three removal orders that person may be found by a visa officer to be inadmissible to Canada and form the basis of a lawful refusal of the sponsored application.

Under IRPA a similar scheme is enacted by s. 41 of IRPA:

> s. 41 A person is inadmissible for failing to comply with this Act
> (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act;

Note that s. 2(2) of IRPA states that unless otherwise indicated, references in this Act to "this Act" include regulations made under it.

What then is the "act or omission" giving rise to inadmissibility? Simply put, it is the return to Canada without written authorization as required under each type of removal order.

S. 223 of the IRP Regulations continues the three types of removal orders, namely departure orders, exclusion orders, and deportation orders. Each type of order has attached conditions as to its duration and effect on admissibility.

S. 52(1) of IRPA says that if a removal order has been enforced the foreign national shall not return to Canada unless authorized by an officer or in other prescribed circumstances.

As well, s. 25 of the IRP Regulations prohibits a visa officer from issuing a visa to a foreign national who is subject to an unenforced removal order.

Departure Orders - no time period if enforced in compliance with requirements

S. 224(1) IRP Regulations relieves a person subject to an enforced **departure order** from the requirement to obtain authorization to return to Canada provided they had met the departure requirements in s. 240(a) to (c) within 30 days of the order becoming enforceable. If the person failed to meet those requirements the order is deemed to be a deportation order.

This means a person is admissible who complied with the procedure for executing a departure order within the timeframes in the regulations. If the person did not comply they are inadmissible and require written authorization to return.

Exclusion Orders - One year or Two years for Misrepresentation

S. 225(1) IRP Regulations requires a person subject to an **exclusion order** to obtain the written authorization of an officer to return to Canada during the **one-year period** after the order was enforced. If the order was based on **misrepresentation** s. 225(3) a **two-year period** applies. An exception for accompanying family members of a foreign national found to be inadmissible and given an exclusion order is provided in s. 225(4) of IRP Regulations.

Deportation Order - requires Written Authorization

S. 226(1) of IRP Regulations makes it a requirement of those who were issued a **deportation order** to obtain the written authorization to return to return to Canada **at any time** after the order was enforced. An exception for accompanying family members of a foreign national found to be inadmissible and given a deportation order is provided in s. 226(2) of IRP Regulations.

Who shall provide the written authorization?

The IRPA in s. 52(1) specifies an officer may grant the written authorization to return to Canada. The Regulations do not appear to prescribe the criteria for issuing an authorization. In an application to return to Canada there is a duty of fairness on the officer assessing the application to provide an opportunity to address the officer's concerns. Of particular relevance should be the reasons why the person delayed in leaving Canada after a departure order and thus converting it to a deportation order and the reasons for first coming to Canada.[1]

Removal Costs are to be Reimbursed

The Regulations[2] specify certain removal costs must be paid before a person is allowed to return to Canada if that person was removed at government expense and was not reimbursed by a transporter. These costs are fixed at $750 for removal to contiguous territory or $1500 for any other country of removal.

Discretionary relief

[1] *Sahakyan, Sergey v. M.C.I.* (F.C., no. IMM-9934-03), Harrington, November 2, 2004; 2004 FC 1542.

[2] S. 243 IRP Regulations.

The IRPA in s. 63(1) provides an appeal to sponsors whose family class relatives are refused an immigrant visa. It is a condition precedent before considering special relief on humanitarian and compassionate grounds that the applicant is found a member of the family class and the sponsor meets the definition of "sponsor" found in s. 130 of the Regulations. Once those findings have been made, or are not in issue at the appeal, the IAD may apply s. 67(1) and take into account the best interests of a child directly effected by the decision and determine if sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

CASES

Transitional Provisions

Introduction

This chapter examines various transitional situations provided in the *Immigration and Refugee Protection Act*[1] (IRPA) and the *Immigration and Refugee Protection Regulations*[2] (IRP Regulations) as specifically concerns sponsorship appeals before the Immigration Appeal Division (IAD). Since the coming into force of IRPA on June 28, 2002, the Courts have now settled many issues raised by some of the transitional provisions.

Transitional Situations

Although there are very few transitional cases left, discussed below are likely transitional situations which the IAD has had to deal with and, in some cases, may yet be faced with in the course of management of sponsorship appeal cases since the coming into force of the IRPA.

a) Appeals filed prior to the coming into force of the IRPA

Where a notice of appeal from the refusal of a sponsored application for a permanent resident visa has been filed with the IAD prior to the coming into force of the IRPA, the general transitional rule in section 192 provides that the appeal shall be continued under the *Immigration Act*[3] (old Act).

There is one exception to this general rule: section 196 of the IRPA, which provides for the discontinuance of appeals filed under the old Act where "[…] the appeal could not have been made because of section 64 of this Act". It is clear from section 64(1) that no appeal from the refusal of an application for a permanent resident visa may be made to the IAD by a sponsor where the foreign national being sponsored has been found to be inadmissible on corresponding grounds of security, violating human or international rights, serious criminality (as described in section 64(2)[4] of the IRPA) or organized criminality.

---

1 S.C. 2001, c. 27.

2 SOR/2002-227.

3 R.S.C. 1985, c. I-2.

4 In *M.C.I. v. Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004, the Federal Court ruled that pre-sentence custody which is expressly factored into a person's criminal sentence forms part of the term of imprisonment under section 64(2) of the IRPA and as such, must be considered. See also *Allen, Deon Aladin v. M.C.I.* (F.C.T.D., no. IMM-2439-02), Snider, May 5, 2003; *M.C.I. v. Smith, Dwight Anthony* (F.C., no. IMM-2139-03), Campbell, January 16, 2004; 2004 FC 63; *M.C.I. v. Gomes, Ronald* (F.C. no. IMM-6689-03), O'Keefe, January 27 2006; 2005 FC 299; *Cheddesingh (Jones), Nadine Karen v. M.C.I.* (F.C. no. IMM-2453-05, Beaudry, February 3, 2006; 2006 FC 124.

Section 196 of IRPA applies to sponsorship appeals as well as to removal appeals. In a number of cases, it was argued that section 196, as a transitional provision, was limited to removal orders because it refers specifically to appellants who have not been granted a stay under the old Act. The prevailing jurisprudence of the Federal Court is to the effect that section 196 applies to sponsorship appeals and therefore, operates to discontinue removal and sponsorship appeals[5]. In interpreting this transitional provision, the Court noted that sections 196 and 197 refer in particular to section 64 and that section 64 refers specifically to sponsors. Therefore, sections 196 and 64 of IRPA were intended to affect the rights of appellants who are sponsors.

b) Appeals filed after the coming into force of the IRPA which stem from sponsorship applications refused before the IRPA came into force

As the Federal Court of Appeal said in *Medovarski*[6], section 192 creates an exception to the general rule set out in section 190 which provides that cases pending or in progress on the day of the coming into force of IRPA are governed by IRPA. Therefore, sponsorship appeals filed on or after the coming into force of the IRPA which stem from refusals made prior to June 28, 2002 are governed by the provisions of the IRPA and IRP Regulations[7]. This means that the IAD will assess the facts presented at the time of the appeal hearing against the corresponding IRPA grounds of inadmissibility set out in section 320 of the IRP Regulations. It is important to note that section 320 of the IRP Regulations does not as such set out corresponding grounds from the *Immigration Regulations, 1978* to the IRP Regulations which would lead to an inadmissibility finding under the IRPA. For example, there is no specific corresponding ground for section 4(3) of the *Immigration Regulations, 1978.* However, section 320(10) provides in particular that a person who had been determined to be inadmissible pursuant to section 19(2)(d) of the old Act becomes inadmissible under section 41(a) of the IRPA for failure to comply with the IRPA. Failure to comply with the IRPA includes the IRP Regulations by virtue of section 2(2) of the IRPA. The IAD will also decide these appeals taking into account sections 63(1), 64, 65 and 67 of the IRPA. This entails numerous consequences. Below is a discussion of particular transitional situations, jurisdictional **b) 1-** and non-jurisdictional **b) 2-**, which are likely to arise.

b) 1- Matters in which the IAD has no jurisdiction, no jurisdiction in law or no discretionary jurisdiction

---

5 *Touita, Wafa El Jaji v. M.C.I.* (F.C., No. IMM-6351-04), De Montigny, April 21, 2005; 2005 FC 543; *Alleg, Sahila v. M.C.I.* (F.C., No. IMM- 6278-04), Martineau, March 11, 2005; 2005 FC 348; *Kang, Sarabjeet Kaur v. M.C.I.* (F.C., No. IMM-2445-04), Mactavish, February 25, 2005; 2005 FC 297; *M.C.I. v. Bhalrhu, Mandeep Kaur* (F.C., No. IMM-2228-03), Gauthier, September 9, 2004; 2004 FC 1236; *Williams, Sophia Laverne v. M.C.I.* (F.C. No. IMM-6479-02), Phelan, May 6 2004; 2004 FC 662; see also, *M.C.I. v. Seydoun, Saber Hussain* (F.C., No. IMM-8407-04), Lutfy, February 2, 2006; 2006 FC 121; *M.C.I. v. Sohal, Manjit Kaur* (F.C., No. IMM-6292-02), Lutfy, May 6 2004; 2004 FC 660, where, on the contrary, the Federal Court decided that section 196 did not apply to sponsorship appeals. The fact that a stay was never contemplated for a sponsor is indicative of Parliament's intent to remove the right of appeal for removal order appellants only.

6 *Medovarski: M.C.I. v. Medovarski, Olga* (F.C.A., No. A-249-03), Evans, Rothstein, Pelletier (dissenting), March 3, 2004, par. 50; 2004 FCA 85 (upheld by the SCC, [2005] 2 S.C.R. 539

7 Section 2(2) of IRPA provides that references to "this Act" include regulations made under it.

- Inland applications and sponsorship refusals

  Section 63(1) of the IRPA provides for an appeal from a decision not to issue a foreign national a permanent resident visa. Inland applicants are never issued or refused visas. Rather, they are given or refused permanent resident status. Thus, it may be seen that appeals from inland sponsorship refusals should be dismissed for lack of jurisdiction because they were not contemplated by section 63(1) of the IRPA and as such, there appears to be no right of appeal to the IAD[8].

- Sponsorship refusals based on corresponding grounds of security, violating human or international rights, serious criminality or organized criminality

  The consequence of section 320 of the IRP Regulations will be that an appellant will have no right to appeal from the refusal of a sponsored application for a permanent resident visa if the foreign national was determined to be inadmissible on grounds which correspond to section 64(1) of the IRPA. As such, foreign nationals who had been determined to be inadmissible under sections 19(l)(e), (f), (g) or (k) of the old Act are inadmissible under the IRPA on security grounds (section 320(l) of the IRP Regulations). There will be no appeal for foreign nationals determined to be inadmissible under sections l9(1)(j) or (l) of the old Act because they are inadmissible on grounds of violating human or international rights under the IRPA (section 320(2) of the IRP Regulations). The same consequence will follow for foreign nationals determined to be inadmissible under sections 19(1)(c.2) or 19(1)(d)(ii) of the old Act as they are inadmissible on grounds of organized criminality under the IRPA (section 320(6) of the IRP Regulations).

  Sections 320(3) and 320(5)(a) of the IRP Regulations indicate which inadmissible classes under the old Act correspond to the inadmissible class of serious criminality under the IRPA. However, appellants in those cases will not be deprived of a right of appeal unless the foreign national comes within the specific criteria of serious criminality provided for in section 64(2) of the IRPA, which indicates that serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years[9].

  Section 326(2) of the IRP Regulations also stipulates that persons in respect of whom section 77(3.01)(b) of the old Act applied on the coming into force of the IRPA are subject to section 64(1) of the IRPA.

- Sponsorship application not filed in the *prescribed manner*

---

8 *Dargan v. M.C.I.* (IAD TA4-09872), Boire, November 18, 2004; *Marish v. M.C.I.* (IAD TA4-03526), Boire, January 28, 2005.

9 On the interpretation of *term of imprisonment*, see *supra*, footnote 4.

Refusals based on the sponsor's failure to fulfill basic requirements in the filing of a sponsorship application were generally uncommon before the IAD under the old Act. It should be noted that section 10(6) of the IRP Regulations now specifically provides that a sponsorship application which does not meet the requirements of section 10(1) is not an application filed in a *prescribed manner* for the purpose of section 63(1) of the IRPA. Hence, in such cases, there may be no right of appeal if the sponsor's application is refused on the ground that it was not filed in a *prescribed manner*. The IAD would likely dismiss the appeal for lack of jurisdiction if it so concludes. It appears that in such cases the IAD would not be in a position to allow the sponsor to remedy any non-compliance with section 10(1) of the IRP Regulations.

- Refusals based on the sponsor's inability to fulfill the undertaking or failure to comply with a previous undertaking as determined by the Province of Quebec

  Sponsored applications destined to the Province of Quebec may not be approved by an officer where the competent authority of the Province determines that the sponsor is unable to fulfill the undertaking as *per* section 137 of the IRP Regulations.

  As was the case under the old Act, section 9(2) of the IRPA provides that there is no appeal in law where the refusal is based on the determination of provincial officials that the sponsor either fails to meet financial criteria or does not comply with a previous undertaking. Thus, the IAD may only hear the appeal on the basis of humanitarian and compassionate grounds.

- No discretionary jurisdiction where the IAD determines that the foreign national is not a member of the family class or that the sponsor is not a sponsor within the meaning of the IRP Regulations

  Section 65 of IRPA provides that the IAD has no jurisdiction to consider humanitarian and compassionate grounds (H&C) if it has decided that the foreign national is not a member of the family class pursuant to section 117(1) of the IRP Regulations[10] or that the appellant is not a sponsor as defined in section 130 of the IRP Regulations.

  Section 117(9) of the IRP Regulations lists a number of situations where the foreign national is not considered a member of the family class. The Federal Court upheld a number of decisions where the IAD concluded that it had no jurisdiction to consider H&C because the foreign national was excluded from the family class pursuant to section 117(9)*(d)* in that the sponsor had not disclosed the existence of a dependent child. In so doing, the Federal Court confirmed that sections 352 and 355 of the IRP Regulations applied to applications made under the old Act and were meant to exclude from the application of section 117(9)*(d)* those children between the ages of 19 and 22 who were not considered a *"dependent daughter"*

[10] For spouses, common-law and conjugal partners, see more specifically sections 4, 5 and 117(9) of the IRP Regulations.

or "*dependent son*" under the old Act, but were a "*dependent child*" under IRPA and IRP Regulations[11].

b) 2- Matters in which the IAD has jurisdiction in law and discretionary jurisdiction

- Refusals based on medical grounds

Section 320(7) of the IRP Regulations provides that sponsored applicants for a permanent resident visa who were found to be inadmissible under section 19(1)(a) of the old Act are inadmissible under the IRPA on health grounds.

Danger to public health or public safety does not pose any difficulty. However, appeals from refusals based on excessive demands on health or social services has to be considered in light of section 38 of the IRPA and the definition of *excessive demand* contained in section 1(1) of the IRP Regulations.

Section 38(2)(a) of the IRPA provides that a foreign national who is expected to cause excessive demand on health or social services is not inadmissible on health grounds if it has been determined that the foreign national is a member of the family class and is the spouse, common-law partner[12] or child of a sponsor within the meaning of the regulations. This represents a substantial change from the old Act provisions which permitted such refusals. Such refusals made under the old Act and appealed on or after June 28, 2002 would appear to be invalid in law under the IRPA. To our knowledge, none of these cases have proceeded to a hearing before the IAD.

Medical refusals based on excessive demand on health or social services concerning foreign nationals other than the spouse, common-law partner, conjugal partner or child of a sponsor will have to be assessed by the IAD against the definition of *excessive demand* contained in section 1(1) of the IRP Regulations. Failure of the Minister to clearly justify the refusal against the new definition of *excessive demand* could result in the IAD allowing the appeal and referring the matter back for reconsideration based on the IRPA and IRP Regulations (section 67(2) of the IRPA).

---

[11] *Dumornay, Jean-Bernard v. M.C.I.* (F.C. No. IMM-2596-05), Pinard, May 11, 2006; 2006 FC 541; *Le, Van Dung v. M.C.I.* (F.C. No. IMM-8951-04) Blanchard, May 2, 2005; 2005 FC 600; *Collier, Amelia v. M.C.I.* (F.C. No. IMM-8635-03), Snider, September 2, 2004; 2004 FC 1209.

[12] Conjugal partners are also specifically exempted, not in IRPA, but by section 24 of the IRP Regulations.

- Refusals based on financial grounds

  Section 320(8) of the IRP Regulations provides that persons who had been determined to be inadmissible pursuant to section 19(1)(b) of the old Act are inadmissible under section 39 of the IRPA. It is to be noted that the wording of both sections is similar. As a result, these transition cases do not raise any particular problem.

- Refusals based on sponsor's inability to meet the financial criteria or failure to comply with a previous undertaking

  Refusals made on the basis of the sponsor's failure to meet settlement arrangements under the old Act and section 5(2)(f) of the *Immigration Regulations, 1978* require a reassessment based on section 134 and the definition of *minimum necessary income* in section 2 of the IRP Regulations. For cases destined to the Province of Quebec, there are jurisdictional implications as discussed above.

  As for refusals to comply with a previous undertaking (section 133(1)*(g)* of IRP Regulations), it should be noted that the duration of an undertaking has been reduced under IRP Regulations. Section 132 provides an undertaking of 3 years for spouses, common law partners and conjugal partners and from 3 to 10 years for a dependent child, depending on the age of the child at the time of landing. However, section 351(3) of the IRP Regulations provides that the duration of an undertaking under the old Act is not affected by IRP Regulations. It flows that the duration of sponsorship undertakings signed prior to June 28, 2002 remain at 10 years[13].

- Misrepresentation

  Section 320(9) of the IRP Regulations provides that persons determined to be inadmissible on the basis of sections 27(1)(e) or (2)(g) or (i) of the old Act will become inadmissible for misrepresentation under section 40 of the IRPA. There is no such equivalent for foreign nationals whose application for permanent residence may have been refused on the basis of sections 9(3) and 19(2)(d) of the old Act. In these cases the foreign national becomes inadmissible for failure to comply with the IRPA, as provided by sections 320(10) of the IRP Regulations and 41 of the IRPA. This distinction is important in view of section 64(3) of the IRPA which denies a right of appeal against a refusal of a sponsored application for a permanent resident visa made by a foreign national found to be inadmissible on the ground of misrepresentation unless the foreign national is the sponsor's spouse, common-law partner or child.

[13] *M.C.I. v. Sharma, Ashok Kumar* (F.C., no. IMM-6517-03), von Finckenstein, August 18, 2004; 2004 FC 1144.

c) Appeals which stem from sponsorship applications refused after the IRPA came into force

Sponsored applications for permanent residence which had not been finalized by a visa officer prior to June 28, 2002 will continue to be processed under the IRPA and the IRP Regulations *per* section 190 of the IRPA[14]. As such, any decisions, positive or negative, will be based on the IRPA[15]. One exception to the above concerns fiancés who are no longer members of the family class under section 117(1) of the IRP Regulations. As permitted by section 201 of the IRPA, section 356 of the IRP Regulations specifically deals with fiancé applications made prior to June 28, 2002. These applications will continue to be processed as fiancé applications under the old Act and Regulations until they are finally disposed of.

d) Court ordered rehearings

In cases where the IAD is directed by the Federal Court or the Supreme Court to reconsider an appeal which had been filed prior to the coming into force of the IRPA, section 350(5) of the IRP Regulations stipulates that *the Immigration Appeal Division shall dispose of the matter in accordance with the former Act*[16]. This is consistent with section 192 of the IRPA which directs that if the filing of the notice of appeal predates the coming into force of the IRPA, the appeal shall be continued under the old Act. This represents one of the underlying consequences of a *de novo* hearing, which is to place the parties in the position they were in when the litigation began.

In the case of Court ordered rehearings, the Federal Court determined in *Denton-James*[17] that the application of sections 196 and 64 of the IRPA may not be considered. The language of section 350(5) of the IRP Regulations is unambiguous.

Conclusion

A number of problems raised by the transitional provisions have been settled by the Courts. In view of the fact that there are very few transitional cases left, the transitional provisions are not likely to generate additional litigation.

---

[14] Note that sections 352 to 355 of the IRP Regulations facilitate timely processing of pending sponsored applications by not requiring applicants to update their file if they do not so desire, for instance, in the case of children who did not qualify under the former *Immigration Regulations, 1978.*

[15] *Siewattee, Door v. M.C.I.* (IAD TA2-24492), Whist, September 4, 2003; *Noun, Pho v. M.C.I.* (IAD TA3-03260), MacPherson, August 27, 2003. See also, *M.C.I. v. Fuente, Cleotilde Dela* (F.C.A., no. A-446-05), Noël, Sharlow, Malone, May 18 2006; CAF 186, where the F.C.A. answered in the negative the certified question as to whether the doctrine of legitimate expectations could be relied upon to avoid the application of section 190 of the IRPA.

[16] *Fani, Ahmad v. M.C.I.* (IAD TA0-08820), MacPherson, July 10, 2003.

[17] *Denton-James, Lucy Eastwood v. M.C.I.* (F.C., no. IMM-1819-02), Snider, June 24, 2004; 2004 FC 911.

CASES